BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0055011515 & 0055011516:

KRISTEN BARNETT,	)	Case No. 1210-2006 & 1211-2006
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
BEACHES BEAUTY SUPPLIES AKA CK ONE, LLC., AND CAL FUSS,	)	
	)	
Respondents.	)	

* * * * * * * * * *

Kristen Barnett filed a discrimination complaint with the Department of Labor and Industry on April 28, 2005. She alleged that Beaches Beauty Supplies, aka CK One LLC, and Cal Fuss, discriminated against her because of sex by terminating her employment when she was on maternity leave (denying her a reasonable maternity leave) and failing to reinstate her as manager of the CK One Garfield Street store, all in violation of Mont. Code Ann. §§ 49-2-303, 49-2-310, and 49-2-311. Barnett sought an award of damages, reinstatement and equitable relief. The department's Human Rights Bureau assigned two case numbers to the charges, one for each named respondent. On December 6, 2005, the department gave notice that Barnett's charges, consolidated as to both case numbers, would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties stipulated that the department could retain the proceedings for longer than 12 months after complaint filing.

The contested case hearing proceeded on July 10-12, 2006, in Missoula, Montana. Kristen Barnett attended with counsel Timothy C. Kelly, Kelly Law Office. CK One attended through managing partner Cal Fuss, who also attended on his own behalf, with counsel for respondents, David B. Cotner and Erika R. Peterman, Datsopoulos, Macdonald & Lind, P.C. Cal Fuss, Kristen Barnett, Dr. Mark Garnaas, Cody McFadden, Krista Clawson and Stacie Huether attended and testified.

The hearing examiner also admitted the deposition of Kristen Barnett and designated portions of the Rule 30(b)(6) deposition of CK One. Exhibits 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 22A, 23, 24, 25, 25A, 26, 27, 28, 29, 30, 31, 32, 110 and 112, with redactions, exclusions, sealings to protect confidentiality and (in one instance) physical

possession of the exhibit by counsel for Barnett. Copies of the hearing examiner's docket and exhibit table accompany this decision.

Barnett moved to amend her complaint to conform to the evidence at hearing and to add a claim of retaliation charging that CK One and Fuss together retaliated against her, in violation of Mont. Code Ann. § 49-2-301, by withdrawing an offer of employment and refusing to negotiate in good faith with her about that employment opportunity because she had filed and intended to go forward with her human rights complaint. On the retaliation complaint, Barnett sought only injunctive and affirmative relief. The hearing examiner deferred ruling on the motion and now grants it for the reasons stated herein.

With filing of the last post-hearing brief, the matter was submitted for this decision, which is based upon the evidence of record and the applicable law, having considered the arguments and authorities presented by the parties.

II. ISSUES

The significant issues in this case are as follows. A full statement of the issues appears in the final prehearing order.

Did the respondents unreasonably terminate Barnett's employment during her maternity leave?

Was there retaliation as alleged?

If there was any illegal discrimination, what reasonable measures are appropriate to rectify any harm to Barnett and to correct the discriminatory practice(s) found and what conditions should be prescribed upon the future conduct of one or both respondents (depending upon whether Fuss is individually liable)?

III. FINDINGS OF FACT

1. Respondent Beaches Beauty Supplies, also known as CK One, a limited liability company, began business in 2002. CK One's principal offices are in Missoula, Montana. Respondent Cal Fuss owns 50% of the business. The other 50% is owned by a partnership of two persons who are not parties to this action. Fuss had recently sold a beauty supply business in Missoula to West Coast Beauty Supply, a large California corporation, before CK One was started. The sale to West Coast included a covenant not to compete. Fuss waited until the non-competition covenant expired. Then he started CK One in close proximity to the store he had sold to West Coast Beauty Supply, becoming the managing partner of CK One. Fuss is not unsophisticated in business.

2. In 2004-2005, CK One had between 21-31 employees, including its sales staff. The company's central offices and warehouse were located on Expressway Road in Missoula. It also had a store on Garfield Street in Missoula and another store on Overland Avenue in

Billings. Since March 2005, it has also opened a third store in Bozeman. The stores and sales staff sell beauty supplies and products to over 1200 professional cosmetologists located in Montana and Wyoming.

3. CK One hired charging party Kristen Barnett, a resident of Missoula, Montana, in late November 2003 as the manager of the Garfield Street store. After less than a month, CK One assigned her responsibility for operating and managing the store by herself. She was a valued and trusted employee. She handled sales, accounts, deposits, inventory, stocking deliveries, and customer relations. In addition to managing the Garfield store, Barnett also helped train CK One personnel in product lines and also handled sales, as a sales representative, for a territory not otherwise covered by the sales staff. She regularly exceeded expectations. Her work was profitable to the company.

4. The day to day operations of the Garfield store involved a number of different tasks. Customers were professional cosmetologists from the Missoula and surrounding market, including many from outlying areas. Many of the customers from outside Missoula came into the store to purchase beauty supplies for their salons. The Garfield store was laid out to include a series of shelves, as high or higher than 6 feet, where product is located in the store. There was a higher-than-average counter, where customers and personnel would place product that the employee (Barnett, the store manager and often the only employee in the store) would bag after the sale. A cash register and computer were on the counter. The seat behind the counter was a high stool with wheels, that required sitting down upon it for it to be stable.

5. There was a storage area in the back of the Garfield store. Deliveries of product were made at regular intervals during the week from CK One's central warehouse. The average delivery involved a large number of boxes of assorted products left inside the door of the store. The deliveries usually filled a van. An employee at the Garfield store would move, lift or carry 10 pounds or more regularly through the day. One customer's purchases could weigh more than 10 pounds. It would have been difficult, but not impossible, for CK One to provide for other employees to assist Barnett whenever she need to lift more than 10 pounds of product.

6. CK One paid Barnett $8.00 per hour. Barnett received a 3% commissions on her outside sales, which averaged $300.00 to $350.00 per month. She earned a $100.00 per month bonus regularly for exceeding sales goals. She had employee discount benefits averaging $25.00 to $50.00 a month. As of December 2004, her schedule provided she would work 35 hours a week, not including her outside sales work.

7. In early 2004, CK One developed and distributed an employee handbook setting out its personnel policies. In preparing its employment policies, CK One did not rely upon the Montana Maternity Act or any other Montana statutes, utilizing forms and policies from other companies, including West Coast Beauty Supplies, which is based in California. The policies included provisions allowing for six weeks of "non-paid" maternity leave after giving birth, a sick leave policy that advised that "the company, at its discretion, may require an employee to submit a physician's statement for any illness that caused the employee to be absent from work,"

a three step progressive disciplinary policy (verbal warning, written corrective action, final action) and an "anti-discrimination policy."

8. Krista Clawson was CK One's assistant manager. She was responsible for personnel and human resource policies and was the primary author of the employee handbook. Fuss deferred to her on human resource matters.

9. In the spring of 2004, Barnett advised CK One of her pregnancy. In the fall of 2004, Barnett knew that CK One ordinarily provided six weeks of maternity leave.

10. In January 2005, Barnett and Clawson spoke about Barnett's upcoming maternity leave. They agreed to six weeks for the leave.

11. Barnett and Fuss discussed how the Garfield store would be covered while she was on maternity leave. CK One planned to hire Melissa Monbarren as Barnett's temporary replacement. Monbarren had worked at CK One more than a year earlier and had left when her husband, a member of the armed services, had been assigned to a post in Colorado. Monbarren had returned to Missoula and was available to cover for Barnett. She and Barnett worked well together, and Fuss believed that Monbarren would be able to handle the responsibilities, with some help from Barnett.

12. Barnett worked for CK One through February 4, 2005. Barnett began labor on February 5, 2005. Her son, Jasper, was born on February 6, 2005. She began her maternity leave on February 7, 2005.

13. CK One assigned Monbarren to a full-time position as the manager of the Garfield Street store, to cover for Barnett during Barnett's maternity leave.

14. On February 10, Barnett went to CK One's central offices with her new baby. She met with Fuss. At the meeting, they discussed when Barnett expected she would be able to return. Barnett and Fuss did not set a firm return-to-work date for Barnett to return. Fuss advised Barnett that she should check with Monbarren, her replacement as manager of the Garfield store, to work out acceptable arrangements for returning to work. Fuss and Barnett agreed that the to work date would be "open ended" and that CK One would be "flexible."

15. Fuss and Barnett had different understandings of their agreement, but did not know it. Fuss understood that CK One would be flexible within the limits of Monbarren's ability to cover for Barnett. He thought the "open ended" leave might be either slightly longer or shorter than the full six weeks. Barnett understood that "open-ended" did not mean forever. She also understood or reasonably should have understood that Fuss agreed to an "open ended" leave because he expected Monbarren's to cover for Barnett.

16. While on her maternity leave, Barnett went to the Garfield store at least once a week to check accounts, make deposits and check in with Monbarren. Barnett frequently spoke

with personnel at CK One. She consistently said, and CK One understood or reasonably should have understood, that she intended to return to her job after her maternity leave.

17. During the process of giving birth to Jasper, Barnett's perineum tore. Within a month after giving birth, Barnett realized that the tear in her perineum had not healed as she expected. The physical effects of that tear bothered her a great deal and prevented her resumption of her normal major life activities. After discussions with her mid-wife and her domestic partner, Cody McFadden (Jasper's father), she sought medical attention and corrective treatment.

18. Barnett made an appointment with Dr. Mark Garnaas, a Missoula Ob/Gyn specialist, to be seen on March 16, 2005. That appointment date was five weeks and two days after Barnett commenced her maternity leave. Barnett did not advise CK One about this appointment.

19. On March 16, 2005, Barnett and McFadden, met with Dr. Garnaas to discuss the perineal tear and subsequent scarring and the surgery available to correct it. Dr. Garnaas explained the options available to Barnett, ranging from the surgery (perineoplasty) to doing nothing. She reasonably elected to have the perineoplasty.

20. The perineal tear and subsequent scarring that Barnett sustained resulted from her delivery of her son. It resulted in a substantial impairment of her major life activities. The diagnosis, surgery and other services rendered to repair that condition were medically necessary.

21. Dr. Garnaas, in accord with his customary practice, explained that full recovery after the surgery would likely take six weeks, but that Barnett could return to work after two weeks, with certain limitations (limit lifting to 10 pounds and do not sit for prolonged periods). Dr. Garnaas asked Barnett if the surgery would pose a problem for her work and she indicated that it would not. Barnett reasonably believed that Monbarren could cover for her at CK One for the remainder of an 8-12 week maternity leave.

22. On March 17, 2005, CK One made Stacie Huether manager of all of its retail stores. Huether had replaced Clawson as Barnett's supervisor, although Barnett was still on maternity leave. Huether had not received any training in personnel policies or procedures. As of the dates of hearing, she still had not received any such training.

23. On March 18, 2005, Barnett contacted Clawson and informed her that she would be having an outpatient procedure on March 22, 2005, six weeks and one day after the commencement of Barnett's maternity leave. Barnett did not tell Clawson either that the procedure would interfere with Barnett's return to work or that she was having the procedure to correct a problem resulting from child birth.

24. During the hearing, Barnett was very uncomfortable talking about her condition, her medical corrective treatment and her recovery from the surgery. Through her counsel, she attempted to keep all the details regarding these matters out of the public record. Barnett was

similarly uncomfortable talking with the respondents about these matters from March 2005 through the present. She reasonably believed that these were private matters regarding her health, her female anatomy, her body image and her sexuality. This reasonable reticence contributed to poor communication about her condition and her possible return to work.

25. On March 19, 2005, Huether issued a written corrective action for attendance to Monbarren. The written corrective action was part of the disciplinary procedures of CK One. That same day, Monbarren unexpectedly resigned, effective April 8, 2005.

26. Clawson contacted Barnett on March 21, 2005, asking when Barnett would return to work. Barnett knew of Monbarren's resignation, but was unwilling to commit to a return date. Barnett did not tell CK One that she would be off work for at least two weeks and perhaps as much as six weeks after the next day's outpatient procedure. She did not tell CK One that the procedure was to correct a problem caused by child birth.

27. Barnett had the surgery on March 22, 2005. The hospital kept her much later into the evening than she had expected. She experienced far greater pain after the surgery than she had expected, remaining in bed for several days.

28. On March 23, 2005, Huether called Barnett regarding her anticipated day of return. Barnett, in pain, refused to commit to a return date and was generally uncommunicative about her situation, except to emphasize her pain from the surgery and her unwillingness to stay on the phone. Based upon the telephone conversation, CK One placed Barnett on sick leave from March 21, 2005, through March 23, 2005.

29. In the next contact between Barnett and CK One on March 25, 2005, Huether called Barnett and told her that because Monbarren's last day of work would be April 8, 2005, CK One needed Barnett to return to work by April 11, 2005, or she would be replaced. Barnett replied that due to her surgery she could not return to work until the beginning of May 2005.

30. Huether did not ask any questions regarding whether Barnett could return to work sooner with an accommodation or whether the surgery was related to child birth and Barnett did not provide any information about either matter. She did not explain that according to her doctor she could return to work with some restrictions on or about April 5, 2005 (two weeks after her surgery). She did not explain that her surgery was to correct a problem resulting from child birth. Huether informed Barnett that a part-time position would be held for her but that her current position must be filled.

31. Barnett asked if Huether was terminating her because she would not return early from her maternity leave. Huether responded that yes, she guessed she was, and "not to take it personal, but business was business."

32. Barnett's maternity leave started on February 7, 2005. CK One asked Barnett to return to work on April 11, 2005, nine weeks after her maternity leave began. There was nothing unreasonable about CK One seeking Barnett's return to work at that time, since Barnett's replacement was leaving and CK One had no express information about the medical complications requiring that Barnett delay a full return to work until early May. However, CK One made no reasonable effort to ascertain if Barnett's refusal to return to work until early May was the result of a medical condition resulting from her pregnancy. Had CK One made that effort, it could then have considered whether a further extension of the leave, and/or a temporary accommodation, were possible.

33. Huether terminated Barnett's employment on March 25, 2005, during her maternity leave. Barnett did not receive written notice that CK One would be taking disciplinary action against her for refusing to return on April 11, 2005. Huether did not expressly offer Barnett an opportunity to explain the reasons for the her refusal to return to work, although the company's disciplinary policy required the worker have such an opportunity.

34. Barnett never received written confirmation from CK One that she had been terminated from employment on March 25, 2005. CK One never told her she was also being terminated from her position as a sales representative as well as the manager of the Garfield store. Barnett learned she had been terminated from the sales position when the company terminated her cell phone privileges on or after March 25, 2005.

35. When a CK One employee already on leave requested a medically related extension, CK One's practice was to ask for a note from the doctor and to consider reasonable accommodation based upon the medical information received from the physician. CK One would consider an extension request without medical justification on a "case by case" basis. Had Huether been properly trained for her new job, she would have known, as she should have known, that these practices applied to Barnett. CK One did not follow these practices with Barnett.

36. Barnett did not provide CK One with verification, in the form of a medical certification, that Barnett was unable to perform her employment duties due to her disability as a result of pregnancy. She was never asked to provide such a verification.

37. Huether never took any other disciplinary action against an employee without following CK One's disciplinary procedures. Huether's failure to give Barnett notice of the disciplinary action before firing her and her failure to follow the company's disciplinary procedures were contrary to CK One's disciplinary policies.

38. Huether and Clawson both thought in March 2005 that Barnett was not willing to return to work before early May and that she was evasive about why. Since they did not ask Barnett why she would not return to work sooner, her "evasiveness" could only have resulted from her failure to volunteer the information. CK One had never fired anyone else based on similar impressions.

39. On April 3, 2005, Barnett filed for unemployment. She had been the only wage earner in her family. McFadden had been enrolled part-time at the University of Montana since 2003, hoping to finish his B.A. degree in English Education before 2010. He also assisted with child and home care in the family and had not sought outside employment before or during the events involved in this case. Barnett's older son was finishing middle school. With Barnett's firing, her immediate family had no earnings coming in and was totally reliant on loans and help from extended family. With the new baby, the immediate family was under severe financial stress.

40. In her April 3, 2005, statement applying for UI benefits (which CK One received in early April), Barnett indicated that her surgery resulted from her pregnancy, that she could return to work by the beginning of May and that CK One knew both facts.

41. On April 6 or 7, 2005, CK One received a copy of Barnett's statement applying for UI benefits. Upon that receipt, CK One knew or reasonably should have known that Barnett would be able, willing and available for work at the beginning of May. CK One made no effort to contact Barnett, to ask for any further information about what they knew was a "medically related" and "pregnancy related" condition. CK One did not request a note from Barnett's doctor indicating the need for an extended leave beyond April 11, 2005.

42. CK One could also have arranged to reinstate Barnett, offering her back her job in accord with the May return time. Instead, CK One apparently decided that Barnett's application for UI benefits confirmed its impression that she did not want to come back to work.

43. On April 6, 2005, Dr. Garnaas completed a post-operative check-up of Barnett. He found that she was doing well post-operatively, that her perineum looked well-healed and advised her that she could gradually resume full activities except to observe "pelvic rest" for a full six weeks.

44. On April 11, 2005, Barnett wrote to Dr. Garnaas, asking him to complete an unemployment form for the Unemployment Division, giving a medical opinion about her appropriate return to work. This was the first time Barnett had asked her doctor when she could return to work.

45. On April 14, 2005, Dr. Garnaas confirmed that Barnett could already return to work, limiting her lifting to not more than 10 pounds and avoiding sitting for prolonged periods. She would no longer need to observe the restrictions beginning on May 3, 2005.

46. If CK One had provided an appropriate accommodation for Barnett's medical restrictions, she could have returned to work on April 11, 2005. Barnett, according to her physician, could return to work then but could neither sit for prolonged periods of time nor lift more than 10 pounds. If CK One had followed its usual practices and asked Barnett to explain her need for an extended leave, Barnett would have asked Dr. Garnaas sooner to confirm her return to work status (having heard about return to work timing and restrictions from Dr.

Garnaas during her initial and presurgical consultations with him) and would have provided the information to CK One.

47. With a reasonable accommodation, Barnett could have performed her work duties starting on April 11, 2005. She had been a valued employee that CK One and Fuss wanted back. Had they asked and had she informed them of her situation, limitations and needs, it is more likely than not that CK One could and would have promptly determined whether it could provide Barnett with a reasonable accommodation and either would have provided such an accommodation or extended Barnett's leave until early May. CK One was unaware of the possibility of Barnett returning to work sooner than early May and unaware of the medical basis for her surgery. As a result, CK One had no awareness of the possibility of providing Barnett with an accommodation and did not consider extending Barnett's leave to early May.

48. CK One assigned Penny Mumper to replace Barnett as manager of the store on or before April 11, 2005. CK One could have assigned Mumper temporarily as the store manager until May 3, 2005.

49. CK One's decision to fire Barnett and its refusal to consider extending her leave were initially made by Huether and then ratified by Fuss and CK One. The decisions were in conflict with CK One's usual business practices and policies and resulted from the appointment of Huether to a position of responsibility for which she had inadequate training and experience to understand the company's duties and responsibilities under state human rights laws (including the Montana Maternity Leave Act). Fuss, acting individually and on behalf of CK One, relied upon Huether in ratifying the decisions despite the conflict with CK One's usual business practices and policies. Fuss alone had the power to inquire further into those decisions and require changes in those decisions. He has admitted that had he known what further inquiry would have revealed, CK One would not have fired Barnett.

50. If respondents had followed the company's procedures and requested that Barnett provide medical confirmation of her need for an extended maternity leave until May 2005, Barnett could and would have provided that information. The information that they needed was essentially the information than Dr. Garnaas furnished to the UI Bureau in the doctor's signed statement dated May 18, 2005.

51. Huether, Clawson (to the extent she was involved in the decisions) and Fuss all were influenced in their decision-making about Barnett by an unfounded assumption that Barnett no longer wanted, or at least no longer sufficiently valued, her job, but instead had decided to stay home with her new baby.

52. On April 28, 2005, Barnett filed her discrimination complaint against Fuss and CK One.

53. On May 1, 2005, CK One received a copy of the complaint, with a cover letter, from the Human Rights Bureau.

54. In July 2005, Barnett was offered an internship position at KECI television in Missoula for $5.15/hour. Barnett refused to accept this position, which was not comparable to her position with CK One. From April through October 2005, Barnett sought but could not find similar work. Her efforts to find other comparable employment were reasonable.

55. On September 15, 2005, CK One sent Barnett a letter offering her a full time position as a customer service representative at its main offices in Missoula. CK One did so during the mediation process required by the Department of Labor and Industry regarding Barnett's discrimination complaint.

56. On October 3, 2005, Barnett responded by letter, asking for clarification whether the company intended the position offered as reinstatement to her original position. She also asked for clarification on when the position was available, how she would be supervised and whether there had been any changes in compensation since she had been fired. She also advised that she would be proceeding with her discrimination complaint and that she had engaged an attorney to represent her in that case, asking that all further communications be copied to her attorney.

57. Respondents did not respond to Barnett's October 3, 2005, letter. They decided not to maintain their offer of an employment opportunity because Barnett intended to continue to prosecute her charges of discrimination against them.

58. Respondents did not intend to retaliate against her for her protected activity. Respondents had not told Barnett in their letter that their offer was a proposal to settle her pending complaint, however, they made the offer during mediation of the discrimination complaint. Respondents reasonably treated the offer as a settlement proposal when Barnett indicated she was continuing to pursue her claims against them, and essentially took that indication as a rejection of the offer.

59. Barnett's unsuccessful search for comparable work with managerial and professional duties and responsibilities revealed that her lack of a college degree was a serious impediment. In October 2005, she decided to return to college to get a degree, so she might qualify for substantially similar or equivalent employment opportunities to the managerial position she held with CK One.

60. In October 2005, Barnett applied to the University of Montana and was accepted for the term beginning in January (orientation) and February 2006 (classes). She enrolled as a full time student and continued her college education through the time of hearing. She obtained student loans as well as loans and help from her family to finance her schooling. She hopes to earn a B.A. in Anthropology by 2008.

61. Barnett has a very generous extended family and a life partner who has chosen not to seek employment, in part to care for children and in part to pursue his education. Barnett is resourceful, and with the help of family is pursuing a different career path now. With her degree, she will have at least as strong an opportunity to support herself and her family as

she would have had with continued employment with CK One, thereby ultimately mitigating her losses from CK's firing of her.

62. Barnett had been injured in a car accident several years before the events in this case, before she came to Montana. The injury left her unable to work as a stylist in the beauty industry, which led to her job with CK One in beauty supply.

63. At the end of 2005, Barnett settled her lawsuit arising from the car accident. She received a total $30,000 net payment from the settlement. Receipt of those settlement proceeds in January 2006 alleviated some of the financial stress that she and her family had experienced since CK One fired her. Much of the settlement proceeds went to pay past medical bills resulting from the car accident. Had CK One returned her to work in May 2005, she would still have received the same settlement.

64. Barnett accepted a job offer for part time employment with the Missoula Athletic Club while in school. This job, not comparable to her work with CK One, has provided some income while in school. She has substituted for other personnel in running the facility's child care program. She has worked occasionally and infrequently when asked by the athletic club. Her total earnings for employment other than with CK One in 2005 was $65.76. Her total earnings in 2006 from other employment by the time of the hearing was $435.72.

65. Actual work obtained can be a reasonable indicator of the earning ability of a person who is not independently wealthy and has a family to support. However, the first job found and accepted after unexpectedly losing regular employment may not represent the full earning capacity of the person. Barnett, with her intelligence, diligence, work history and abilities, can reasonably work, while maintaining her student status and caring for her family, an average of 40 hours a month at $6.00 per hour, for a monthly earning potential of $240.00. This average takes into account that Barnett was more available for work (albeit not working) prior to her decision to go to school, and thereafter is and will be less available. This average also takes into account the raises in minimum wage for the present and near future–by keeping the hourly rate slightly above the current minimum wage and below the likely future minimum wages, the average balances hourly wages with hours available, keeping the former at the low end of probable wages and the latter at the high end of the realistic number of hours Barnett can work.

66. Had Barnett not been terminated by CK One in March 2005 and had she instead been reinstated to her position on May 3, 2005, she would have worked an average 35 hours per week at the wage rate of $8 per hour. She would also have continued to earn $300-$350 per month in sales commissions, received $25 per month in the value of employee discounts and earned $100 per month in bonuses. She would not have been able to commence her work toward a degree at the university. She would therefore have earned and be earning $1,570.00 per month.

67. CK One might have been able to accommodate Barnett's restrictions in April 2005, returning her to work at that time. CK One's failure to inquire about the reasons for the

extended leave request effectively prevented any such possible accommodation. CK One could have accommodated Barnett by extending her leave, reasonably would have, in accord with its actual practice, had inquiry into the reasons for her extended leave request confirmed the medical reasons for extending the leave, and the causal connection between her pregnancy and the medical need for the extended leave.[1] Had this occurred, Barnett would have continued on leave without pay until early May 2005, when she would have returned to work.

68. CK One fired Barnett. The facts demonstrate that there is no prospect that Barnett can return to work for CK One without an unreasonable risk of further problems. The breakdown in trust and communication between these parties is well demonstrated by CK One's good faith but clumsy efforts to resolve this matter, in whole or in part, by its September 2005 job offer to Barnett, without expressly conditioning that offer as a settlement proposal. As is often the case, the litigation itself has contributed to increased tension and mistrust between these parties.

69. Barnett has lost and will lose income as a result of CK One's discharge of her because of its failure to inquire about her reasons for refusing to return to work until early May 2005. Her income losses between May 2005 and the time by which she will be able again to command a market value as a worker that equals or exceeds her value as a CK One employee in 2005 total $1,330.00 per month ($1,570.00 per month, less her monthly earning potential of $240.00 per month during her schooling). Calendar months, beginning with May 2005, are reasonably accurate, using half of the current month as part of the time of loss.

70. By 2009, Barnett reasonably should be able to resume her rightful place in the market, barring factors unrelated to the wrongful conduct of the respondents.

71. Barnett's economic losses are $1,330.00 per month for 22.5 months, for a total of $29,925.00.

72. Simple interest at 10% per year is reasonable for loss of use of the money, commencing at the end of each month for that month's lost income. The interest accrued to date is $2,443.87 ($1,330.00 times .1 divided by 12, times 220.5 months [20.5 plus 19.5 plus 18.5 . . . plus 3.5 plus 2.5 plus 1.5 plus .5]), with no interest accruing on the current half-month of lost income.

73. For each month from the date of this decision, commencing on April 15, 2007 and continuing through the middle of January 2009, Barnett will suffer a further economic loss of $1,330.00 per month.

74. Barnett also suffered emotional distress as a direct result of the loss of her job, and as the consequential result of that loss, with the financial problems she and her family then

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[1] Had CK One's written policy regarding maternity leave reflected its actual practice regarding maternity leave, Barnett would have been on notice of the actual policy and had a burden to disclose to the employer the medical reason for the requested extended leave, and its connection with her pregnancy.

experienced. She suffered substantial anxiety and worry about the security of herself and her family, as well as serious financial stress for at least the next eight months. The actions of CK One in terminating Barnett's employment in March 2005 and the manner in which they did so also resulted in emotional distress by casting a cloud of an anticipated time of joy after the birth of Jasper and by increasing the difficulties faced by Barnett as an integral part of a family with a new father (McFadden) of a new child (Jasper), when she herself had experienced unexpected and serious physical difficulties after the birth. The value of the emotional distress sustained by Barnett as a result of the actions of CK One in terminating her employment and refusing to reinstate her is $25,000.00.

75. CK One's illegal discrimination because of Barnett's sex (child bearing female) caused all of these losses.

76. Fuss, acting as an agent of CK One, caused and contributed to Barnett's losses. As the managing partner of CK One, he could have prevented the illegal discrimination, and therefore the losses, had he made certain that CK One followed its standard practice in dealing with Barnett's refusal to return to work in April 2005. Although he unreasonably and recklessly relied upon Huether, he did not delegate his management authority to her, even th ough he did not take steps to assure that she was following CK One's standard practice in dealing with Barnett.

77. The department must enjoin further violations of the Montana Maternity Leave Act by the respondents.

78. To correct the discriminatory practice and prescribe conditions upon the respondents future conduct, the department reasonably must require that CK One adopt a written maternity leave policy that accurately reflects their actual maternal leave practice, including therein an express provision that it does not discriminate against women who seek extensions of their maternity leaves for pregnancy related medical problems, and obtain training for Huether, Fuss and Clawson regarding Montana law against maternity leave discrimination as a condition to their further activity as supervisors, managers and/or Human Resource persons. In all these matters, CK One and Fuss must comply with the directions of the Human Rights Bureau regarding how to implement these requirements.

IV. OPINION[2]

A. Discriminatory Termination of Employment During Maternity Leave

Montana law prohibits discrimination by an employer against an employee because of sex. Mont. Code Ann. §49-2-303(a). Only women get pregnant. Employment discrimination because of pregnancy is discrimination based on sex. *Bankers Life & Casuality Co. v. Peterson*

[2] 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.2nd 661.

(1993), 263 Mont. 156, 866 P.2nd 241; *Miller-Wohl Co., Inc. v. Commissioner* (1984), 214 Mont. 238; 692 P.2nd 1243; *Mntn. States Tele. v. Commissioner* (1980), 187 Mont. 22, 608 P.2nd 1047.

The Montana Maternity Leave Act, part of of the Montana Human Rights Act, expressly provides specific protection of the employment rights of pregnant workers. Pursuant to Mont. Code Ann. § 49-2-310 (1) and (2), it is an unlawful practice for an employer or its agent to terminate a woman's employment or to refuse to grant to her a reasonable leave of absence because of her pregnancy.

In evaluating whether a mandatory leave was unreasonably long and therefore unlawful, if the employer makes a decision at odds with the medical opinion of the employee's treating physician, the employer bears the burden of persuasion to show reasonability:

> [T]he employer shall have the burden of proving that a maternity leave for a period of time other than that prescribed by the employee's medical doctor is reasonable, and in no case shall an employee be required to take an uncompensated maternity leave for a longer period of time than a medical doctor who has actually examined the employee shall certify that the employee is unable to perform her employment duties.
>
> Rule 24.9.1204, A.R.M.

Similarly, if the employee presents proof that she was not returned to the job she held before her maternity leave, the employer bears the burden of proving that any new assignment is "equivalent" to the old position or, alternatively, that objective circumstances have so changed that reinstatement to the pre-leave job is impossible or unreasonable. The employer must establish these affirmative defenses by the preponderance of the evidence. *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228.[3] In exactly the same fashion, when the employer discharges the employee while she is on medical leave because she requests additional leave time for pregnancy related reasons, the employer bears the burden of persuading the fact-finder that it was reasonably necessary for the business to fire the employee at that time. Unless the fact-finder agrees it was reasonably necessary for the business to fire the employee at that time, the employer again has both terminated the woman's employment and has refused to grant to her a reasonable (longer, in this situation, rather than shorter) leave of absence because of her pregnancy.

CK One did not meet its burden of persuading the fact-finder that it was reasonably necessary to fire Barnett in March 2005, while she was still on maternity leave. Indeed, CK One's own evidence at hearing established that its own actual practice dictated that <u>before firing her</u> it explore the reasons for Barnett's requested leave extension, obtain pertinent

[3] In the Civil Rights Act of 1991, Congress changed the federal law to supercede various rulings in *Price Waterhouse*. The requirement that the employer must prove its affirmative defenses by a preponderance of the evidence remains the law in Montana. *Laudert v. Richland County Sh. Off.*, ¶ 27, 218 MT 2000, 301 Mont. 114, 125, 7 P.3rd 386.

medical documentation of her limitations, engage in an interactive dialogue regarding possible accommodation should she return in April as requested, and ascertain whether CK One could cover her absence until early May if no reasonable accommodation was possible. As already noted, had CK One told its employees (including Barnett) of this actual practice, Barnett would then have had the responsibility to provide more information about the reasons for her extended leave request, to initiate this process.

CK One also argued that the extended leave was not necessary. According to CK One, Barnett could have returned to work in April with her assigned limitations because CK One could have provided Barnett with an accommodation. The evidence is divided on whether CK One could have arranged for sufficient assistance in lifting so that Barnett could have returned to work in April. However, it was CK One that gave Barnett an ultimatum to return or be fired, without exploring the reasons for her requested leave extension, asking for pertinent medical documentation of her limitations or engaging in an interactive dialogue regarding possible accommodation should she return in April as requested. Because CK One failed to inquire, it cannot defend based upon what it might have been able to do had it inquired.

CK One's practice was to inform its employees that medical documentation was necessary for additional medical leave, whether for pregnancy related conditions or other conditions, and that a request for additional leave without medical documentation would be treated on a case by case basis. CK One replaced Barnett without following that practice. CK One did not tell Barnett either that she needed to submit medical documentation if her surgery was necessary and related to her pregnancy or that it would try to accommodate any limitations she had that might be delaying her return. CK One did not tell Barnett that absent medical documentation an *ad hoc* analysis of whether her leave could be extended would be undertaken. CK One, in a further departure from its usual practice by skipping the *ad hoc* analysis altogether because it assumed without any factual basis that Barnett did not intend to come back to work at all.

CK One also argued that if Barnett could not have returned to work, CK One would have been willing to extend Barnett's leave until early May had it learned that her surgery was needed as a result of giving birth to her child.[4] Barnett did not know this, CK One did not tell her this, and CK One did not ask her if her surgery was the result of her pregnancy.

Barnett was operating in the dark, unaware that CK One was about to insist that she return to work in two weeks. Barnett did not want to disclose very personal information about her medical condition. She was not told the importance of that medical information. She was offered no options except returning by April 11 or being fired.

[4] Being exceedingly thorough in its defenses, CK One also argued that the surgery was not actually necessary. Since the preponderance of the substantial and credible evidence of record proved that Barnett reasonably decided to undergo the surgery to correct a medical condition resulting from the child birth that had a substantial impact upon her life, this argument failed on the facts.

According to the evidence presented by respondents in their defense, CK One and Fuss, its managing partner, threw out the normal practices, did not talk to Barnett about what the normal practices would be, and gave Barnett an ultimatum. By failing and refusing to provide Barnett with the details of normal practice regarding leave extensions, CK One and Fuss (who relied primarily upon an untrained new Human Resources person) gave Barnett no reason to provide more information, and effectively prevented her from learning and taking advantage of the opportunities they now claim were available to her in March and April 2005.

In short, CK One treated Barnett less favorably than it treated other employees seeking extended leaves for medical reasons (other than pregnancy). CK One also treated Barnett less favorably than it treated employees who sought extended pregnancy-related leaves, because Barnett did not tell CK One the extension was pregnancy-related.

The record offers only one feasible reason why CK One failed and refused to follow its own practices or even disclose those practices, only partially revealed in its written personnel materials, to Barnett. CK One and Fuss assumed that Barnett did not want to leave her new baby at home and come back to work. Neither respondent had any basis for this assumption, which was contrary to what Barnett had told them both. Making and relying upon this unsupported assumption was unreasonable.

Respondents failed to prove that it was reasonably necessary to fire Barnett in March 2005. Respondents remain liable for terminating Barnett's employment and also are not entitled to any offset against lost wages for the wages Barnett could likely have earned had she been given the accommodation.

B. Illegal Retaliation Claim

Although it is ultimately a side-issue, the facts also reflect that CK One's offer of a new job for Barnett in October 2005 was a settlement offer, even though it was not expressly presented on such terms. Respondents were entitled to offer to settle Barnett's claims, and considering the offer of the new job conditonal upon release of her claims was not retaliatory. Finding it retaliatory merely because respondents did not expressly condition the job offer upon release of the discrimination claims would exult form over substance. It was not an illicit retaliatory motive that caused CK One to drop the offer, it was realization that Barnett might accept the offer (depending upon the answers to her additional inquiries) but only if she could still pursue her discrimination claims. She was certainly entitled to propose such an arrangement, but CK One was entitled to refuse it.

To spare the parties the necessity of litigating this entire issue in some other proceeding, the hearing examiner has granted the motion to amend the complaint to include the retaliation claim, which Barnett did not prove.

C. Personal Liability of Fuss

"Employer" is defined as an employer of one or more persons or an agent of an employer. Mont. Code Ann. § 49-2-101(11). The prohibition against violating the employent rights of pregnant workers thus extends to agents of CK One as well as to CK One itself. The question is whether treating Cal Fuss as an agent of CK One establishes his personal liability despite the provisions of the Montana Limited Liability Company Act.

"[A] member or manager, or both, of a limited liability company is not liable, solely by reason of being a member or manager, or both, under a judgment, decree or order of a court, or in any other manner, for a . . . liability of the limited liability company, whether arising in contract, tort, or otherwise or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company." Mont. Code Ann. § 35-8-304(1) (emphasis added). The Montana Limited Liability Company Act also provides that a member or manager (if the company is managed by one or more managers) "is an agent of the limited liability company for the purpose of its business or affairs" and the member or manager's acts "for apparently carrying on in the usual way the business or affairs of the limited liability company binds the limited liability company." Mont. Code Ann. § 35-8-301(1) and (2).

The same session of the Montana Legislature that adopted the Montana Limited Liability Company Act also amended the Montana Human Rights Act to add the "agent" provision to the definition of "employer." The express purpose of that amendment is instructive:

> WHEREAS, the employment discrimination provision of Montana law, commonly called the Montana Human Rights Act, Title 49, chapter 2, MCA, prohibits discriminatory acts by an employer; and
>
> WHEREAS, the Montana Human Rights Act does not include an agent of an employer in the definition of employer; and
>
> WHEREAS, certain discriminatory employment acts, including sexual harassment, may be committed by an agent of the employer, such as a supervisor; and
>
> WHEREAS, under the present Montana Human Rights Act, a complainant has no remedy against an agent of an employer; and
>
> WHEREAS, the federal counterpart of the employment discrimination provision of the Montana Human Rights Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), does make the agent of an employer responsible for discriminatory acts committed by that agent.

> THEREFORE, it is appropriate for the Legislature to amend the Montana Human Rights Act to make an agent of an employer responsible for discriminatory acts committed by that agent.
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> Laws of Montana, Chap. 235, Laws, 1993, Preamble.

When a member or manager of a limited liability company, acting as an agent of the company, engages in illegal discriminatory acts, he is not liable for that act solely by reason of being a member or manager, or both. His illegal discriminatory act, as an agent of the company, renders him an employer pursuant to the 1993 amendment to Mont. Code Ann. § 49-2-101(11), and as an employer he is personally liable.

The official comments to Mont. Code Ann. § 35-8-304 state, in pertinent part:

> A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.

As the comments go on to note, had Fuss delegated his authority to make personnel decisions to Huether, exercising appropriate care that she was capable of making the proper decisions, he would ordinarily not be personally liable for her conduct. However, he did neither. He retained oversight over her actions, reviewing what she did and what she proposed to do and ratifying what she did and approving what she proposed to do, thereby becoming personally liable. Even if he had delegated his authority, doing so without assuring that Huether had the training and experience to understand and to follow CK One's actual standard practicees in this kind of situation was reckless, to say the least, and thus he would still be personally liable. Fuss is jointly and severally liable with CK One for the harm to Barnett.

D. Reasonable Measures Appropriate to Rectify Barnett's Harm

The relief the department may award to a charging party subjected to illegal discrimination include any reasonable measure to rectify any resulting harm he suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2nd 521, 523; *Dolan v. S.D. 10* (1981), 195 Mont. 340, 636 P.2nd 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.[5] The harm that Barnett suffered includes lost wages and benefits (back pay), prejudgment interest on those losses, future lost wages and benefits (front pay) and emotional distress, all resulting from illegal discrimination by the respondents.

[5] Analogous federal cases can help interpret the Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200; *Snell v. MDU* (1982), 198 Mont. 56, 643 P.2d 841.

By proving that respondents' discrimination prevented her from returning to her employment in May 2005, Barnett established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, ***at*** 417-23. She must prove the amount of wages that she lost, but not with unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2nd 599, 607; *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984), 747 F.2nd 885, 889; *Rasimas v. Mich. Dept. Mental Health*, 714 F.2nd 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award). In this instance, the evidence establishes the amounts of wages and benefits lost to the present because respondents failed and refused to extend Barnett's maternity leave even though they could have and would have extended her leave had they only made inquiry to establish that it was extended maternity leave that she sought.[6]

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, 779 P.2nd ***at*** 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times an appropriate rate of interest. ***E.g.***, *Reed v. Mineta* (10th Cir. 2006), 438 F.3rd 1063. The appropriate rate is 10% annual simple interest, as is applicable to tort losses capable of being made certain by calculation, only without the requirement of a written demand to trigger commencement of the interest accrual, which has not been required in Human Rights Act cases. Mont. Code Ann. § 27-1-210. The appropriate calculations are described in the findings.

Barnett reasonably decided to pursue higher education, to reestablish her ability to earn the wages she commanded at CK One. As a result, she will suffer some lost wages, although she certainly has a residual earning capacity while in school, until she completes school in a timely fashion. Thus, she is entitled to front pay, 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 Community College*, 839 F.2nd 1132 (5th Cir. 1988), *Shore v. Federal Express Company*, 777 F.2nd 1155, 1158 (6th Cir. 1985); *Rasmussen v. Hearing Aid Inst.*, HRC Case #8801003988 (March 1992).

Front pay is appropriate because Barnett was fired and reinstatement is neither possible nor appropriate because there clearly is hostility or antagonism between the parties in this case. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2nd 1338, 1347 (9th Cir. 1987) (upholding front pay award because of evidence of "some hostility" although plaintiff and defendant were "still friends"); *Thorne v. City of El Segundo*, 802 F.2nd 1131, 1137 (9th Cir. 1986); *E.E.O.C. v. Pac. Press Publ. Assoc.* (N.D. Cal.), 482 F.Supp. 1291, 1320 (when effective employment relationship cannot be reestablished, front pay is appropriate), *affirmed*, 676 F.2nd 1272 (9th Cir. 1982).

Reasonable measures to rectify the harm Barnett suffered because of disability discrimination includes an award for her emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2nd 596, 601. The evidence supports an award of $20,000.00, under

[6] Because Barnett was fired, the federal cases, ***e.g.***, *Marrero v. Goya of P.R., Inc.* (1st Cir. 2002), 304 F.3rd 7, that require proof of constructive discharge to award back pay are inapplicable.

the legal standard in*Vortex Fishing Sys. v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3rd 836, for all the reasons stated in the findings.

The freedom from unlawful discrimination is a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect any person to endure harm, including emotional distress, resulting from the violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1991), 940 F.2nd 1192; ***cited in*** *Vortex* ***at*** ¶33 ***and*** *Vainio*; *Campbell v. Choteau B&S House* (1993), HR No. 8901003828. For all of the reasons stated in the findings, that emotional distress is reasonably compensated with the award herein.

E. Reasonable Measures to Correct Discrimination and Prescribe Future Conduct

Upon a finding of illegal discrimination, the law requires an order imposing affirmative relief that enjoins any further discriminatory acts and the department may further prescribe any appropriate conditions on the respondents' future conduct relevant to the discrimination found. Mont. Code Ann. § 49-2-506(1)(a). On these facts, the affirmative relief imposed is reasonable, appropriate and necessary to correct and prevent any recurrence of the pregnancy discrimination directed against the charging party in this case.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. CK One and Fuss unlawfully discriminated against Barnett in employment because of sex by terminating Barnett's employment during her maternity leave, treating her (1) less favorably than its standard practice for employees similarly situated who sought extended leave for medical reasons other than pregnancy and (2) less favorably than its standard practice for employees similarly situated who sought extended leave for medical reasons related to pregnancy and disclosed that relation, without disclosure of its actual standard practice to her and without inquiry into whether her specific request was for medical reasons related to pregnancy. Mont. Code Ann. §§ 49-2-303(1)(a), 49-2-310 and 49-2-311.

3. The harm Barnett suffered as a result of the unlawful discrimination, which she is entitled to recover from CK One and Fuss consists of lost earnings (including benefits), less the offset for earning capacity while in school, valued at $1,330.00 per month for 22.5 months, from May 2005 through the date of this decision, for a total of $34,925.00, with prejudgment interest in the amount of $2,443.87 to the date of this decision, and emotional distress valued at $25,000.00. Mont. Code Ann. § 49-2-506(1)(b).

4. The future harm Barnett will suffer is reasonably rectified by awarding her the sum of $1,330.00 per month (as per Conclusion 3), from April 15, 2007 and thereafter upon the first business day on or after the 15th of each succeeding calendar month through January 2009, after which payment the respondents will have fully satisfied, by payment of the amounts stated

in this Conclusion and Conclusion 3 herein, the award to Barnett for harm suffered. Mont. Code Ann. § 49-2-506(1)(b).

5. The department must order CK One and Fuss to refrain from engaging in such discriminatory conduct and should prescribe conditions on their future conduct relevant to this discriminatory practice. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

6. CK One and Fuss did not illegally retaliate against Barnett by not maintaining a subsequent job offer after Barnett indicated that she required more information about the terms and conditions of the job and would pursue her discrimination claims even if she did accept the offer. Mont. Code Ann. § 49-2-301.

VI. ORDER

1. Judgment is in favor of charging party **Kristen Barnett** and against respondents **Beaches Beauty Supplies also known as CK One, LLC, and Cal Fuss** on the charges that the respondents discriminated against her in employment because of sex (pregnancy).

2. The department orders respondents **Beaches Beauty Supplies also known as CK One, LLC, and Cal Fuss**, as the jointly and severally liable parties, to make immediate payment to charging party **Kristen Barnett** of the sum of $57,368.87, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past lost earnings of $29,925.00 for May 2005 through the date of this decision. Interest accrues on this judgment as a matter of law.

3. The department further orders respondents **Beaches Beauty Supplies also known as CK One, LLC, and Cal Fuss**, as the jointly and severally liable parties, hereafter to make payment to charging party **Kristen Barnett** of the sum of $1,330.00 on the first business day on or after the 15th of each month, beginning April 2007 and concluding in January 2009, making appropriate employer deductions, contributions and tax payments to reflect that this payment is for lost earnings.

4. The department permanently enjoins respondents **Beaches Beauty Supplies also known as CK One, LLC, and Cal Fuss** from illegally discriminating against pregnant employees by treating them (1) less favorably than its standard practice for employees similarly situated who seek extended leave for medical reasons other than pregnancy and (2) less favorably than its standard practice for employees similarly situated who seek extended leave for medical reasons expressly related to pregnancy, without first disclosing their actual standard practice for such extensions and inquiring whether the current request is for medical reasons related to pregnancy.

5. The department orders respondents **Beaches Beauty Supplies also known as CK One, LLC, and Cal Fuss**, within 60 days after this decision becomes final:

(A) to submit to the Human Rights Bureau proposed policies that expressly state that will not engage in the specific conduct prohibited by the permanent injunction, including the means of publishing the policies to present and future employees and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them and

(B) to arrange and finance training of Krista Clawson and Stacie Huether (unless either or both are no longer employed by CK One) and of Fuss, regarding illegal employment discrimination in violation of the Montana Maternity Leave Act, of 4-6 hours for each person trained, with the prior approval of the Human Rights Bureau for the particular trainings, and document to the Bureau the completion of the trainings.

6. Judgment is in favor of respondents **Beaches Beauty Supplies also known as CK One, LLC, and Cal Fuss** and against charging party **Kristen Barnett** on the charges that the respondents retaliated against her because of her protected activity in pursuing her sex discrimination charges.

Dated: March 15, 2007.

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Terry Spear, Hearing Examiner

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Certificate of Service

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, or State of Montana interdepartmental mail service, addressed as follows:

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Certified this ____ day of _____, 2007.

_____
Legal Secretary, Hearings Bureau
Department of Labor and Industry

P\Data\HRC\Kristen Barnett\Barnett FOF.wpd