

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011788:

KATHY CHEBUL,)	Case No. 114-2007
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
MONTANA STANDARD/ LEE ENTERPRISES,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Kathy Chebul filed a human rights complaint alleging that Montana Standard/Lee Newspapers (Lee) discriminated against her when it discharged her from employment in the sales department as a result of her pregnancy. Prior to hearing, Lee conceded that it had unlawfully discriminated against Chebul by discharging her due to her pregnancy. The matter then proceeded to contested case hearing on the issue of what damages were due to Chebul as a result of being subjected to the unlawful discrimination.

The contested case hearing in this matter was held on November 8, 2006 in Butte, Montana. Tom Singer, attorney at law, represented Chebul. Cynthia Cate, attorney at law, represented Lee. Steven Whitney, Jr., Chris Chebul, Kathy Chebul, Georgia Evankovich, Amy Serich, Dave Johnson, Brenda Kotka, Doug Mulvaney and Lynn Lloyd all testified under oath. The parties stipulated to the admission of Chebul’s Exhibits 1 through 9, 12, 14, 19, and 20 through 23 and Lee’s Exhibits 120 through 124. In addition, the parties stipulated to enter into evidence the transcribed depositions of Ronald Sironi, M.D. and Jennifer Kueffler.

Counsel for each party submitted post-hearing briefs. 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

What damages are due to Chebul as a result of Lee’s unlawful discrimination against her?

III. Findings of Fact

1. Lee employed Chebul as an account sales representative in Butte, Montana. Chebul began her employment in that position in October, 1994. She continued in that position until Lee unlawfully discriminated against her by discharging her from her position because of her pregnancy on August 30, 2005.

2. Chebul thoroughly enjoyed her job with Lee and was quite successful at it. Chebul particularly enjoyed the fact that because the job was a straight commission from sales (she was paid a percentage of the advertising she sold) because she could "make as much money as she wanted to." Testimony of Kathy Chebul. Chebul averaged approximately \$5,000.00 each month(\$60,000.00 per year) in income from commissions.

3. Upon learning of her discharge, Chebul cried and felt as though she could not breathe. She experienced a substantial loss of self esteem. She was her family's major wage earner and, upon losing her job, was forced to endure the tremendously unnerving effect of losing a major portion of the family's monthly income.

4. Chebul suffered from some depression prior to losing her employment. The loss of Chebul's job caused her depression to deepen. Chebul would be unable to get out of bed. Chebul's husband had to take on additional duties to ensure that their two children were properly cared for due to Chebul's worsening depression. None of these conditions existed prior to her discharge.

5. Prior to losing her job, Chebul hosted many of her extended family's holiday gatherings (e.g., Christmas and Easter get togethers). After Chebul lost her job, she discontinued holding these gatherings. She had difficulty keeping her house clean, a problem which she had never experienced prior to the loss of her job. Chebul also began to exhibit problems in caring for herself after the loss of her job.

6. As a result of her worsening depression, in April, 2006 Chebul and her husband began treating with Steven Whitney, Jr., a Montana licensed clinical professional counselor. Whitney determined (and the hearing examiner finds) that Chebul had developed a personal identification of herself with the job. When she lost the job, the change was problematic for her and was one of the causes of her worsening depression. To help correct the problem, Whitney advised Dr. Sironi that increased doses of Wellbutrin (an anti-depressant that Chebul had been on prior to the loss of her job) and additional medications should be prescribed for her. With these additional doses of medication, Chebul has responded and her depression has been somewhat lessened. After losing her job, Chebul had to take more than twice the dosage of Wellbutrin than she had been taking prior to the loss of her job in order to alleviate her depression symptoms.

7. In order to deal with the loss of her income created by the loss of her job, Chebul had to cash out her 401 K savings plan that she had been building while employed at Lee. She incurred \$12,000.00 in early withdrawal penalties on her income taxes as a result of the early withdrawal of her 401 K plan. Chebul is entitled to prejudgment interest on this amount which totals \$1,078.92.

8. Although Chebul has responded favorably to the treatment of her depression, she still has residual symptoms that were not present prior to the loss of her job. For example, she still is not as motivated as she was to get up and get going each day. She is much more tense and is more impatient with her family than she was prior to losing her job. This continued adverse symptomology has been caused by the loss of Chebul's job.

9. After treating with Whitney for six sessions, Chebul stopped seeing Whitney. The reason for doing so was that Chebul's husband's medical insurance had been exhausted and Chebul would have had to pay for any further sessions with Whitney. The Chebuls could not afford Whitney's services on their own and they had to stop seeing Whitney. In addition, Chebul continued to treat with Dr. Sironi who was capable of prescribing the Wellbutrin that has helped Chebul overcome the more severe side effects of the depression brought on by the loss of her job.

10. In order to apply for unemployment insurance benefits, Chebul had to contact her employer to ask for her old job back. Lee refused to give her old job back, but indicated that a sales position was available in Dillon for which she could apply (but which she would not be assured of getting). That position would have required travel that Chebul's first job did not require and would not have paid as well as Chebul's first job. Since that job was not the equivalent of the position that Chebul originally had, she declined that offer of work.

11. After losing her job, Chebul also registered with Montana Job service in Butte and made sure that her resume was available on-line to any prospective employers. This avenue of looking for new work proved unfruitful. There simply were no jobs in the Butte area for which she was suited that had similar pay and benefits as that offered by her Lee sales job. Indeed, as Chebul testified (and the hearings examiner finds), there were no other advertising jobs that came up between the time of Chebul's discharge and the time of the hearing in this matter except for one radio advertising job. There is no evidence to suggest that the radio advertising job had even the potential to pay the same level of commissions that Chebul had enjoyed before she was discharged.

12. While working for Lee, Chebul and her husband had successfully begun a daycare business. The business had gotten to the point where they had to turn away clients. Chebul and her husband had been able to realize approximately \$1,500.00 each month in income from the daycare business.

13. After her discharge, and having carefully reviewed the scant likelihood that she could obtain a job similar in both pay and benefits, Chebul and her husband decided in November, 2005 that they would open a second daycare. Chebul arrived at this conclusion after figuring that she could likely pull an addition \$1,500.00 per month income out of a second daycare business. Given the job market in Butte and Chebul's inability to find a job comparable in benefits to the job she had with Lee, her decision to pursue opening a second daycare was reasonable.

14. In order to open a second daycare, Chebul and her husband purchased a home from Chebul's husband's parents which had previously been a rental. Over a period of months, Chebul's husband and his father fixed up the house to bring it into conformity with state regulations applicable to daycare centers. Chebul's second daycare opened for business in July, 2006.

15. Lee made a second offer of employment to Chebul in February, 2006. This job offer involved replacing sales representative Lisa Hendrixson in a sales position in the Butte office. Like Chebul's original job, this new sales position was located in Butte and did not involve travel. Chebul investigated the possibility of taking the position. She met with then editor Rona Rahlf and Sales Manager Doug Mulvaney to discuss the position. Chebul reviewed with Rahlf and Mulvaney the accounts associated with the position and the potential for income from the position. After reviewing the accounts, the income generated from the accounts, and the potential for commission from the accounts, Chebul reasonably concluded that the new position only had the potential to generate approximately \$40,000.00 per year in income for her. This amount was some \$20,000.00 less than the approximately \$60,000.00 per year income she had been steadily making before she was discharged.

16. The sales position included what Lee called two "elephant accounts (accounts with the potential for producing large amounts of income because the account is with a large advertiser). These two elephant accounts were with Bert Mooney airport and Chinook Wireless. Chebul had heard that these two accounts would not continue producing income because the advertiser's plans were changing. When she reviewed these two accounts, her suspicions were confirmed. The Chinook account generated no revenue in September, 2005 nor in January or February, 2006.

17. Chebul did not automatically reject Lee's offer because of the reduced income. Instead, she requested that Lee agree to guarantee her the amount of income she had prior to her discharge. Lee refused to do this. Chebul reasonably concluded that the account position being offered to her was not the substantial equivalent of the position she had lost. Not unreasonably, Chebul refused to take the second offer of employment because Lee would not agree to guarantee her income and the income then being generated was not the substantial equivalent of the position from which she had been discharged.

18. On August 8, 2006, Lee again contacted Chebul to offer her the position of a sales representative who had decided to leave. The sales representative handled several of Chebul's former accounts, however, the position did not have the same accounts that Chebul had prior to her discharge.

19. As of the time of the judgment in this matter (March 12, 2007), almost 18 months have passed since Chebul was discharged. Between August 30, 2005 and October 21, 2005, Lee paid Chebul at 75% of her previously earned pay. For this time period (51 days), Chebul lost approximately \$2,132.00. From October 21, 2005 to July 1, 2006 (the approximate date that Chebul's second daycare came on line, Chebul lost another \$29,143.80. Between July 1, 2006 and March 15, 2007, (the date of judgment in this case), Chebul will have lost another \$17,000.00. She will have lost a total \$48,275.80. This is a reasonable approximation of her back pay damages attributable to the wrongful discharge. Interest through the date of judgment on the amount of lost back wages equals \$3,460.19.

20. Chebul will continue to lose approximately \$2,000.00 per month in income as a result of Lee's unlawful conduct. Chebul should be awarded front pay in the amount of \$2,000.00 per month each month through the fourth anniversary of her discharge (August 30, 2009).

21. Chebul should recover \$20,000.00 for the emotional distress she incurred as a result of Lee's unlawful conduct in discharging her from her sales position.

IV. Opinion¹

A. Damages Generally

The relief the department may award to a charging party subjected to illegal discrimination includes any reasonable measure to rectify any resulting harm she 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.2d 521²

B. Back Pay

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.

² The Montana Supreme Court has approved the use of analogous federal cases in interpreting application of the Montana Human Rights Act. *See, e.g., Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

Because Lee conceded that it unlawfully discriminated against Chebul in discharging her, Chebul has established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, at 417-23. Chebul must prove the amount of wages she lost, but not with unrealistic exactitude. *Horn v. Duke Homes*, 755 F.2d 599, 607, (7th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889, (3rd Cir. 1984); see also *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award)

Refusing an offer from the employer of a job offering substantially equivalent pay and benefits, can be a basis for cutting off back pay. The employer bears the burden of proving that the charging party has failed to mitigate damages such that back pay should be cut off. See, e.g., *Mertig v. Milliken and Michaels of Delaware, Inc.* 923 F. Supp. 636, 648 D. Del. 1996). To be substantially equivalent, the new job must have virtually “identical promotional opportunities, compensation, job responsibilities, and working conditions” as the job from which the charging party has been terminated. *Sellers v. Delgado Community College*, 839 F.2d 1132, 1138 (5th Cir. 1988).

Lee argues that back pay should be cut off in this case from the date of the February, 2006 offer which Lee contends was substantially equivalent to her former job. Lee has failed to carry its burden on this point. Chebul’s testimony, as well as the corroborating evidence (for example, Exhibit 122) show that the Chinook account was not performing as well as Lee now claims. There was no income generated from that account in September, 2005 and January and February, 2006. Chebul was deciding in February, 2006 whether the job being offered to her was substantially equivalent and she reasonably concluded at that time the income from the job was not substantially equivalent to that in the job from which she had been discharged. The job Lee offered Chebul was not substantially equivalent to the job from which she was discharged.

Lee also contends that Chebul’s decision to proceed with her daycare business venture was unreasonable. Self employment is a reasonable and permissible means to mitigate damages. *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988). Furthermore, as the Washington Court of Appeals has recognized, the doctrine of mitigation of damages “prevents a recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed.” “If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other was chosen.” *Kloss v. Honeywell, Inc.*, 890 P.2d 480, 485 (Wash. Ct App. 1995), citing *Gillespie v. Seattle First Nat’l Bank*, 70 Wn. App. 150, 174, 855 P.2d 680 (1993).

Though these latter two cases dealt with wrongful discharge, the reasoning is persuasive in Chebul’s case. Here, Lee is engaging in the very same “Monday Morning quarter-backing” that the Washington court warned against. At the time Chebul made her decision to forge ahead with expansion of her daycare business, Lee had not offered any type of employment comparable to her previous job with them. Chebul had been told by the Butte Job Service that

it was unlikely that she would find a job with income substantially equivalent to her previous job with Lee. She opted for what at the time seemed reasonably calculated to result in her eventually meeting and/or exceeding the income she lost as a result of Lee's illegal conduct. In February, 2006, when Chebul was already well under way in her course toward being a business owner, Lee finally offered Chebul a position. This position, however, was not comparable to the position Chebul had lost and Chebul was not unreasonable in opting instead to pursue her own business. Lee has failed to show that Chebul's decision to build her own business was unreasonable and there has been no showing that the business is failing or that Chebul has acted unreasonably in continuing to pursue that business. Therefore, there is no factual or legal basis for cutting off back pay in this case.

Between August 30, 2005 and October 21, 2005, Lee paid Chebul at 75% of her previously earned pay. For this time period (51 days), Chebul lost approximately \$2,132.00.³ The difference between Chebul's income from her daycare business and her job with Lee between October 21, 2005 and July 1, 2006 (the time that her second daycare business came on line) is \$29,150.60.⁴ Between July 1, 2006 and March 15, 2007 (the date of the entry of judgment) Chebul will have lost an additional \$17,000.00.⁵ Chebul's total lost income at the time judgment is entered in this matter will total \$48,282.60 (\$2,132.00+\$29,150.60+\$17,000.00 = \$48,282.60).

C. Front Pay

A 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

³ This number was derived by ascertaining the daily value of Chebul's approximately \$60,000 per year salary (\$60,000.00 divided by 365 = \$164.38 per day), reducing that daily value by 75% (\$164.38 x .75=\$123.28) to account for the severance pay she received during that time period, and then multiplying this daily value by 52 days, the number of days during which she received severance pay(\$164.38 - \$123.38=\$41.00 x 52 days= \$2,132.00).

⁴ This number was arrived at by figuring the difference between Chebul's monthly income from her job with Lee (\$5,000.00 per month) and the monthly amount that Chebul testified she made from her first daycare business (approximately \$1,500.00), a total monthly loss of \$3,500.00 between November 1, 2005 and June 30, 2006 which equates to an 8 month loss of income totaling \$28,000 (\$3,500.00 x 8=\$28,000.00). Added to this amount was the daily loss of income during the ten days that elapsed between October 21, 2005 and October 31, 2005, \$1,150.600 (which is the daily value of the \$5,000.00 per month annualized(\$164.38 per day) less the daily value of \$1,500.00 per month annualized (\$1500.00 x 12 divided 365 = \$49.32 per day)(\$164.38-\$49.32=\$115.06 x 10=\$1,150.60). Thus, the total loss of income between October 21, 2005 and July 1, 2006 is \$29,150.60.

⁵ This amount results from taking into consideration the difference between Chebul's \$5,000.00 monthly income from Lee and the \$3,000.00 per month income she has generated since her second child care business opened (a loss of \$2,000.00 per month) for a period of 8 ½ months (\$2,000.00 x 8.5 = \$17,000.00).

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.

Here, Chebul has made a reasonable decision to pursue her daycare business. This choice was in part foisted upon her by Lee's illegal conduct. Furthermore, Lee has not offered her a substantially equivalent position. Because of this, the awarding of front pay until Chebul has established her rightful place in the market (which in this case means has established a roughly similar stream of income from her newly chosen profession of daycare proprietor) is appropriate.

Chebul has sought compensation based on present value of lost earnings until she is 62 years old. The hearings examiner, however, believes that damages out to that date are far too speculative in light of the evidence adduced in this case. Ascertaining future lost wages is necessarily an exercise in reasoned speculation. While the hearing examiner cannot hold Chebul to an unrealistic standard of proof (*see Horn, supra*), there would nevertheless have to be substantial and credible evidence to support a finding that her lost wages will extend that far into the future.

Such evidence is not apparent in this case. Chebul herself stated at hearing that the income potential from the daycare business "will get there," indicating that she expects sooner rather than later that her daycare business will replace the income she lost. She further opined that she thinks the income potential in the daycare "is there and could be unlimited." Moreover, as demonstrated by the account lists themselves, the sales position commission in the job from which she was discharged can go up and down. Indeed, Chebul conceded at hearing that a person in the sales position could have up years and down years.⁶ The uncertainty of future employment security grows as the proposed continued employment recedes further into the future. Chebul is obviously an enterprising individual whose entrepreneurial abilities will undoubtedly permit her at some point (the hearings examiner believes in the not too distant future) to exceed any income she might have hoped to have made with Lee. And she obviously has employable skills which should not be ignored in determining the extent of front pay that should be awarded.

Montana law gives weight to these kinds of concerns about long-range prognostication of future wage loss. In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights complaints, but clearly the legislature wants future lost wages awards to be carefully

⁶ While these two facts affect the determination of the amount of front pay to be awarded, they do not adversely affect the hearings examiner's decision as to whether back pay should have been cut off because Chebul refused the February and August, 2006 offers of employment. Chebul's decision to not accept either of the two job offers was reasonable in light of existing circumstances at the time she had to make the decision.

considered before extending them far into the future. The Human Rights Act empowers the department to require any *reasonable* measure to rectify harm resulting from illegal retaliation. Mont. Code Ann. § 49-2-506(1)(b). Four years of lost wages after separation from employment is reasonable and supported by the credible and substantial evidence in this case. More front pay beyond the four years awarded is not sufficiently supported and would be both unreasonably speculative and unreasonably contrary to the temporary nature of front pay.

The present differential between Chebul's income from her daycare business (approximately \$3,000.00 per month) and her job with Lee (approximately \$5,000.00 per month) is \$2,000.00 per month. This can reasonably be foreseen to continue until August 30, 2009 (four years after the date of her discharge). The appropriate way to insure that Chebul is compensated for her future losses is to order Lee to pay the monthly lost income to Chebul each month over the four year period. In this way, Chebul will be made whole as she will receive the lost wages in the month they would have been received had she continued to work for Lee. She will not then have what would ostensibly be a windfall by getting all of her future lost earnings up front. It is thus appropriate to order Lee to pay \$1,000.00 dollars in front pay to Chebul on April 1, 2007 (in order to cover front pay due between March 15, 2007 (the date of judgment) and March 31, 2007 and to further order Lee to thereafter pay Chebul \$2,000.00 monthly through the fourth anniversary of her unlawful discharge (August 30, 2009).

Moreover, Chebul's expert witness' testimony and calculations almost certainly overstate the present and future lost earnings that Chebul will face under the facts of this case. A trier of fact is not required to accept the testimony of an expert witness if the facts of the case do not support the witness's testimony. Accordingly, the hearings examiner rejects the expert's testimony and finds that a more appropriate measure of the lost past and future wages in this case are values set forth in the findings of fact.

D. Damages Associated With Early Withdrawal Penalties

Chebul also seeks an award of the damages she incurred from the early withdrawal of her 401 K, approximately \$12,000.00. Lee's only counter to this is that the 401 K money was used to pay bills incurred before the discharge. Lee's argument is not persuasive. Chebul was capable of paying her monthly debts prior to her discharge because she had the income from her job. It was Lee's illegal discharge, not the debts themselves, that caused Chebul to become unable to pay her debts and necessitated the early withdrawal of the 401 K. Again, the purpose of the remedial provisions of the Human Rights Act is to make the charging party whole where she has been aggrieved by illegal conduct. Ordering Lee to pay Chebul the penalties she incurred is wholly consistent and indeed integral to purpose of the protections accorded by the act. Chebul is thus entitled to be compensated for the penalties she incurred in the early withdrawal of her 401 K plan since the cause of the early withdrawal is Lee's illegal conduct.

E. Prejudgment Interest

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, 779 P.2d at 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times the appropriate rate of interest. See, e.g., *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. 10% annual simple interest is appropriate, as is applicable to tort losses capable of being made certain by calculation (Mont. Code Ann. § 27-1-210). The amount due for prejudgment interest on the lost earnings is \$3,460.19.⁷ Chebul is also entitled to prejudgment interest on the penalties she incurred in the early withdrawal of her 401 K which amount is \$1,078.92.⁸

F. Emotional Distress

Reasonable measures to rectify the harm Chebul suffered because of the retaliation includes an award to compensate her for emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. 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 a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir.1991); cited in *Vainio*; see also *Campbell v. Choteau Bar & Steak Hse.* (1993), HR No. 8901003828. The severity of the harm governs the amount of recovery. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, ¶ 33, 38 P.2d 836, ¶ 33.

⁷The hearings 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 the monthly value of lost income) and then calculating the number of days that have elapsed between the end of the first full month of those time periods and the date of the judgment in this matter. 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, \$3,460.19. This formula was applied to each of the three time periods (August 30, 2005 to October 20, 2005 (10% per annum divided by 365 days = .00027% x \$1,500.00=\$.41 per day), October 21, 2005 through July 1, 2006 (10% per annum divided by 365 days = .00027% x \$3,500.00=\$.94 per day), and July 1, 2006 through the date of judgment, March 15, 2007 (365 days = .00027% x \$2,000.00= \$.54 per day) to arrive at the daily value for each time period.

⁸The hearings examiner calculated interest on the penalty amount due to Chebul by determining the daily value of interest on the penalty (10% per annum divided by 365 days = .00027% x \$12,000.00=\$3.24 per day) and then calculating the number of days between the date the penalty was paid (April 15, 2006) and the date of judgment (March 15, 2007). This amount totals \$1,078.92 (333 days between April 15, 2006 and March 15, 2007 x \$3.24 per day = \$1,078.92).

The violation involved in this case caused substantial harm to Chebul. Her depression worsened substantially and this affected both her ability to function on a day to day basis and her relationship with her family. Her emotional distress, as revealed by the evidence, was severe. The severity of the harm inflicted upon Chebul as a result of Lee's conduct supports an award of \$20,000.00 to Chebul under the legal standard set forth in *Vortex Fishing Systems, supra*.

G. Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondents' future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). The circumstances of the discharge in this case mandate imposition of particularized affirmative relief to eliminate the risk of any further violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1). This relief should include injunctive relief against Lee and appropriate training to ensure that no further acts of unlawful discrimination based on pregnancy occur.

V. Conclusions of Law

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

2. Chebul is entitled to be compensated for damages due to loss of back pay and the withdrawal of her 401 K plan. She is also entitled to emotional distress damages and to front pay through August 30, 2009.

3. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Lee must pay Chebul the sum of \$48,282.60 in damages for lost wages and \$3,460.19 in prejudgment interest on those lost wages. Lee must also pay Chebul \$12,000.00 as compensation for penalties paid on the early withdrawal of Chebul's 401 K plan and prejudgment interest due on those damages amounting to \$1,078.92. In addition, Lee must pay \$20,000.00 in damages for emotional distress. Finally, Lee must pay Chebul \$1,000.00 on April 1, 2007 (to cover the first one-half month of front pay that will be lost between March 15, 2007 and April 1, 2007) and thereafter, beginning on April 30, 2007 and continuing each month until August 30, 2007, (the fourth anniversary of Chebul's unlawful discharge), Lee shall pay \$2,000.00 each month to Chebul as front pay.

4. The circumstances of the retaliation in this case 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 Kathy Chebul and against Montana Standard/Lee Newspapers as Lee illegally discriminated against Chebul by discharging her from employment in violation of the Montana Human Rights Act.

2. Within 180 days of this order, Montana Standard/Lee Newspapers must provide 4 hours of training, to all management, staff and employees of the Montana Standard 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.

3. Montana Standard/ Lee Newspapers is enjoined from taking any adverse employment action based on pregnancy.

4. Montana Standard/ Lee Newspapers must within 30 days of the date this decision becomes final pay Chebul \$60,282.60 in damages, reflecting \$48,282.60 in past lost earnings and \$12,000.00 in damages due to penalties paid on early withdrawal of a 401 K plan. Lee may make appropriate employer deductions, contributions and tax payments from the \$48,282.60 amount to reflect that this payment includes payment of past lost earnings from August 30, 2005 through the date of the judgment in this case. Lee must also pay Chebul \$4,539.11 in prejudgment interest on the \$60,282.60 amount and \$20,000.00 for emotional distress. In addition, on April 1, 2007, Lee shall pay \$1,000.00 in front pay damages, making appropriate employer deductions, contributions and tax payments to reflect that this payment is for lost earnings. Beginning on April 30, 2007 and continuing each month thereafter until August 30, 2009, Montana Standard/ Lee Newspapers shall pay to Chebul the monthly amount of \$2,000.00, making appropriate employer deductions, contributions and tax payments to reflect that this payment is for lost earnings.

Dated: March 15, 2007.

/s/ GREGORY L. HANCHETT

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

Chebul FAD ghp