BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO.0061011773:

HEATHER MASON-WATSON,	)	Case No. 2416-2006
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
NANCY'S HALLMARK, INC.,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Charging party Heather Mason-Watson filed a complaint with the Montana Department of Labor and Industry on November 14, 2005. As amended by agreement of counsel in this proceeding and reflected in the final prehearing order herein, the complaint charged that Nancy's Hallmark, Inc., successor to employer Gary Growney and Nancy Growney, d.b.a. Nancy's Hallmark, discriminated against Mason-Watson in employment because of sex (pregnant female) and retaliated against her for resisting the pregnancy discrimination. On June 14, 2006, the department gave notice Mason-Watson's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties stipulated that the department could hold the contested case hearing more than 12 months after complaint filing.

The contested case hearing proceeded on March 5-7, 2007 in Livingston, Park County, Montana. Mason-Watson attended with her counsel, Timothy C. Kelly, Kelly Law Office. The corporation attended through Nancy Growney, its designated representative, with its counsel, Karl Knuchel, Knuchel Law Offices. Gary Growney, Patricia Mason, Kevin Watson, Mason-Watson, Rebecca Michie, Nancy Growney and Kevin Brown testified. The hearing examiner admitted Exhibits 1, 3, 14 (with page 1 redacted and page 2 provisionally sealed pursuant to the protective order), 15 through 18, 102, 105 through 107 and 109 through 111. Exhibits A and B were retained as part of the hearings files, not as part of the evidentiary record, with Exhibit A unsealed and Exhibit B sealed. A final protective order accompanies this decision. Mason-Watson filed the last post-hearing brief by telefax on June 18, 2007. A copy of the hearing examiner's docket accompanies this decision.

II. ISSUES

The key issues in this case involve liability and damage questions. First, did the corporation, as successor to Gary and Nancy Growney (doing business as Nancy's Hallmark), treat Mason-Watson differently and less favorably after the Growneys learned she was pregnant, and fail and refuse to reinstate her to her same employment position after the pregnancy ended? Second, did the corporation, again as successor to Gary and Nancy Growney, then doing business as Nancy's Hallmark, retaliate against Mason-Watson by firing her for resisting the discrimination by protesting it to the employer and reporting it to the Human Rights Bureau? If so, what recovery is necessary to remedy any resulting harm, and what affirmative relief is proper and reasonable? A full statement of issues appears in the Final Prehearing Order.

III. FINDINGS OF FACT

1. Charging party Heather Mason-Watson worked for Nancy and Gary Growney, a married couple who were doing business as Nancy's Hallmark, from February 7, 2005, through June 1, 2005, in Livingston, Montana. Nancy's Hallmark is a gift shop that provides various cards, balloons, crystalline figures, fudge, candies and other sundries. In January 2006, with this case already pending, the Growneys incorporated the gift shop business as Nancy's Hallmark, Inc., the successor to their unincorporated business, the employer of Mason-Watson, including being successor to any liability in this matter.

2. Nancy Growney was the manager and operator of the gift shop, both before and after its incorporation. Gary Growney made the fudge sold in the gift shop, filled in for Nancy during the tax season, and otherwise assisted as needed. Nancy made the business decisions and ran the gift shop.[1] The busiest and most profitable season of the year for the gift shop ran from after Thanksgiving through the first of the year.

3. In January 2005, before hiring Mason-Watson, Nancy Growney hired Rebecca Michie to work part time at Nancy Growney's tax service and part time at the gift shop. On January 21, 2005, the employment of a long-term gift shop employee named Allison suddenly ended. The gift shop sought a replacement for Allison through both the Job Service office and a newspaper advertisement. The Growneys interviewed three applicants, including Mason-Watson. At the interview for the job, Gary Growney–who came in at the end of the interview–asked Mason-Watson questions about how she would be able to work and handle the care of her young daughter, and about her intentions to have a larger family. The Growneys hired one of the other two applicants, a woman named Julie. Julie worked for three days but was unable to handle the basic responsibilities of the job, including operating the register. Nancy Growney met with Julie and suggested her employment was "not working out," ending that employment by "mutual" agreement.

[1] The evidence fully supports one of Mason-Watson's proposed findings in this regard: "Gary stood by Nancy's statements and agreed with Nancy's decisions."

4. After ending Julie's employment, Nancy Growney called Mason-Watson and offered her a full-time job at the gift shop.

5. Mason-Watson worked without problems during the period from her hire date on February 7 through April 15, 2005. During this time, Mason-Watson's regular practice was to fill in her time cards with a start time of 8:45 and an end time of 3:30 p.m. for Tuesday through Friday, and start and end times of 8:45 through 5:45 p.m. for Monday when Mason-Watson was there all day. The entries on the time cards reflected her expected starting and ending times. The recorded time on the register tape in the gift shop reflected a range of as much as twenty minutes earlier to twenty minutes later than the time card arrival and departure times. The register tape did not reflect the actual time that Mason-Watson started working, but the time when she opened the register. Before opening the register, Mason-Watson had gone to the bank, opened the gift shop, and put her things away. No one advised Mason-Watson that the recorded time had to be absolutely accurate rather than uniform, or that the practice Mason-Watson was following was incorrect. No one questioned Mason-Watson about any of the time cards. Mason-Watson did not claim additional time for coming in early, nor was she told that time would be deducted if she came in late.

6. On April 15, 2005, Mason-Watson came in late.[2] The register tape indicated the register was open at 9:07. Mason-Watson had already been to the bank, as usual. Gary Growney was already in the gift shop when she arrived.

7. In the course of her conversation with Gary Growney on April 15, Mason-Watson told him that she was pregnant. She had some apprehension about telling her employers about her condition. At her job interview, she got the impression, from Gary Growney's questions, that the Growneys would not welcome having a pregnant employee. However, Growney responded by congratulating Mason-Watson.

8. On April 18, 2005, Mason-Watson spoke to Nancy Growney about the pregnancy. Nancy asked about the due date. Mason-Watson had not yet been to her doctor and was uncertain about when the baby was due. Mason-Watson said that she would just quit in November to make it easier on the Growneys. The gift store could not afford to be short an employee during its busiest time of year. The Growneys began looking for a replacement for Mason-Watson.

9. Mason-Watson learned, at her next appointment with her doctor, on April 20, 2005, that her estimated due date was December 5, 2005. When she relayed that information to Nancy Growney, Nancy responded that "it would not work." Mason-Watson was not yet

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[2] On her next time sheet, for the period April 18-May 1, 2005, Mason-Watson noted that "On the 15th I did not get here at 8:45 so please deduct the time according to what you believe." The Growneys deducted 1/4 hour from her pay.

married to the father of her unborn child. She could not afford to give up her job so soon in her pregnancy.

10. On April 21, 2005, Nancy Growney wrote a note on Mason-Watson's time sheet that Mason-Watson was speaking to an attorney. Mason-Watson had no contact with an attorney on that date.

11. On April 26, 2005, Nancy Growney told Mason-Watson that there were job applications in the drawer and she should give them out if anyone asked. She told Mason-Watson that there was no job opening at present, but that there might be a future one. Mason-Watson took Nancy's instructions as an indication that the gift shop would be looking for someone to replace her. After Nancy left, she went directly to Gary Growney and asked if she was being fired. Mason-Watson told him that she believed she had a right to work even if she was pregnant. Gary responded by saying it would take a long time to find someone to fill in for her while she was on maternity leave. He told her not to worry, that she was not being fired.

12. After the encounter with Mason-Watson, Gary went across the street to Nancy Growney's tax office and told his wife what had happened. He was upset. Nancy and Gary immediately returned to the gift shop, Nancy told Mason-Watson that applications were being offered to find a fill-in employee during Mason-Watson's maternity leave and that there was no present job opening.

13. Mason-Watson did not believe the explanation. She told the Growneys that she believed she had a right to work even if she was pregnant. Mason-Watson continued to believe that her job was in jeopardy because she was pregnant.

14. Nancy Growney reacted negatively to Mason-Watson's statements indicating that she had rights. Nancy expected her employees to do what she told them to do, without question. She did not expect an employee to go to Gary with questions after she had given that employee directions.

15. Mason-Watson and her mother, Pat Mason, contacted the Job Service office to get information about maternity rights during employment. They obtained a pamphlet explaining those rights. Pat Mason asked that a copy be sent to the Growneys at the gift shop. The Growneys recall obtaining one of the pamphlets but were uncertain whether they had asked for one or had received one without making a request. The pamphlet arrived sometime on or before April 30, 2005.

16. On April 29, 2005, Mason-Watson requested a raise from Nancy Growney. Mason-Watson had been working for less than 3 months. She was originally going to be hired at $7.00 per hour, with a dollar per hour raise if she "worked out." Instead, the Growneys decided to pay her at $8.00 per hour from the beginning. Mason-Watson felt she needed more money. Although she should reasonably have understood that she had been given the "dollar per hour

raise" at the beginning, she now asked for another dollar per hour increase. She tried to justify her request by arguing that she had been doing more of the bookkeeping and banking work than she had anticipated when she was hired. Nancy refused to give her another raise. The discussion became an argument.

17. On Sunday, May 1, 2005, Nancy Growney wrote up policies for the gift shop. The Growneys also wrote up terms and conditions for Mason-Watson's employment while pregnant. Concerned that Mason-Watson might quit without notice during or soon before the busy season, Nancy Growney completed, signed and dated the "maternity leave form" to present to Mason-Watson.

18. On May 2, 2005, Nancy Growney met with Mason-Watson and told her no longer to go to the bank before opening the gift shop and told her not to do the books or deposits any longer. She also presented Mason-Watson with the written policies for the gift shop.

19. During that same meeting, Growney gave Mason-Watson the "maternity leave form" to sign. The "maternity leave form" specified Mason-Watson's to begin on November 27, 2005 and end on January 9, 2006. The form did indicate that Mason-Watson could request other preferred leave dates. On May 2, 2005, seven months before the anticipated birth of the child, Mason-Watson had no practical ability to say that her maternity leave should begin exactly two weeks before the estimated due date or end exactly four weeks after the estimated due date. She told Nancy Growney that she wanted to speak to an attorney about it and would not sign it until she did so. Nancy expected Mason-Watson to sign the agreement that day, was annoyed with her for declining to sign it and thought that having a lawyer look at it was "strange."[3]

20. The evening of May 2, 2005, the Growneys came into the gift shop at 8:00 p.m., after closing. Gary Growney wanted to see if the gift shop needed fudge. He had decided he would start coming in very early specifically to avoid having contact with Mason-Watson. He considered contacts with her–which involved questions about rights and attorneys and related matters–unpleasant.

21. While the Growneys were in the gift shop on the evening of May 2, 2005, Nancy Growney checked the register tapes to see if Mason-Watson had come in late or left early on any occasions since she was hired. She prepared notes circling all the times that Nancy considered Mason-Watson late for February 21-April 20, 2005. There were 13 times circled, at least one on a date (April 2, 2005) Mason-Watson did not work. Nancy did not circle any of the dates when Mason-Watson came in early, sometimes as much as 10-20 minutes earlier than recorded. Nancy wrote in her notes and on Mason-Watson's time sheet that on March 5, 2005, Mason-Watson "closed store" at 5:18 p.m. but "recorded 6 p.m. to make 40 hours for week."

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[3] Growney testified that in her own professional work, she would not advise any client to sign a contract without first checking with an attorney.

That notation was not true. Growney misread her own notes. The 5:18 p.m. entry was actually for March 7, 2005, and none of the entries reflected the actual gift shop closing but only when the register was closed.

22. By May 2, 2005, the Growneys were hostile toward Mason-Watson, for reasons unrelated to her work or time-keeping habits. The Growneys' animus came from the problems that Mason-Watson's pregnancy, with a due date and maternity leave during their busiest season, presented for the business, and from her insistence that she had the right to keep her job, after she had initially indicated that she would quit in the beginning of November. The conflict between Mason-Watson and Nancy Growney, which began when Nancy became the active manager of the store after the end of tax season, exacerbated the animus. The performance problems that Nancy painstakingly found with Mason-Watson would not have caused the animus toward Mason-Watson but for the pregnancy, the due date and Mason-Watson's insistence that she had a right to continue to work for the gift shop. Mason-Watson's increasingly combative attitude toward Nancy Growney contributed to the animus. However, but for her pregnancy and due date, Mason-Watson would not have received the treatment that generated her increasingly combative attitude.

23. On May 3, 2005, the day after Mason-Watson declined to sign the "maternity leave" form prepared by Nancy Growney, Nancy wrote up Mason-Watson for failing to close the gift shop on time the previous day (based upon Nancy's review of the register tapes during the late evening of May 2, 2005). It was the first write up Mason-Watson had received. The personality conflict between the two intensified.

24. When Nancy Growney analyzed Mason-Watson's time record, she did not analyze the time record of Rebecca Michie. Michie was not pregnant. Michie did not speak about her rights. Michie was never written up even though, using the same standards applied to Mason-Watson over the same period of 2005, Michie came in late on February 26, February 28, March 12, March 19, and April 16 and closed early on April 2, 2005.

25. On May 4, 2005, Nancy Growney was not at the gift shop. Gary Growney and Mason-Watson worked on setting up graduation cards. Gary gave Mason-Watson instructions, which she followed, on how to do the set up.

26. On May 5, 2005, Nancy Growney was at the gift shop and Gary Growney was not. Nancy saw the graduation card set-up and told Mason-Watson it was done wrong. Nancy instructed Mason-Watson to put the cards on the rack differently than Gary had told her the day before. Mason-Watson resisted, telling Nancy how Gary had said to do it. There was an argument between Nancy and Mason-Watson, with Nancy finally ordering Mason-Watson to follow the new instructions.

27. On May 6, 2005, Mason-Watson came to work but had been sick the whole morning. Just after 10:00 a.m., she approached Nancy and told her she was sick and could not stop vomiting. Nancy told her to go home and take care of herself.

28. On May 9, 2005, the Growneys put in a time clock for employees to record when they would come in and when they would leave work.

29. On May 10, 2005, Mason-Watson came to work with a note indicating that she had a doctor's appointment on Monday, May 23, 2005. Mason-Watson had been having serious problems and difficulties with this pregnancy unlike her first pregnancy. After receiving the note about the doctor's appointment, Nancy Growney approached Mason-Watson and interrogated her about when her doctor was available and why she had scheduled an appointment for a Monday, Mason-Watson's usual day covering the gift shop by herself. There was another argument. Nancy told Mason-Watson that she had to follow the gift shop policies. Mason-Watson argued that the gift shop policies had been put in place only after she was hired. The argument grew heated, with both women raising their voices. Mason-Watson called the treatment she was receiving "crap," saying she had reported the Growneys already. Nancy Growney accused Mason-Watson of insubordination. Just before Mason-Watson left work, Nancy gave her a second write-up. After she left work, Mason-Watson called Nancy to explain again what had happened the prior Thursday. She told Nancy, "Gary told me to do it one way and I didn't know any better." Nancy told her, "That's why you need to listen to me." Mason-Watson asked her to put things in writing to make things clear, and Nancy told her, "That's not how this will work."

30. On the morning of May 11, 2005, Mason-Watson became very ill in the early morning hours and began hemorrhaging. She was taken to the emergency ward of the hospital. Pat Mason called the Growneys just before 8:00 a.m. that morning, and told them that Mason-Watson was having problems with her pregnancy and had gone to the hospital. Mason asked Nancy Growney to be nicer to Mason-Watson, saying that she had caused Mason-Watson a lot of stress. Nancy said it was not her fault. Mason said it was and Growney hung up.

31. On May 11, 2005, Mason-Watson miscarried. She remained in the hospital until later in the day when she was released to go home. She stopped at the gift shop and left a handwritten note for Nancy along with a copy of the "Aftercare Instructions" she had received at the hospital. Mason-Watson's note explained that she would be unable to return to work until May 23, 2005.

32. On May 16, 2005, the Growneys wrote up Mason-Watson for a third time while she still was on leave due to the miscarriage. This write-up accused Mason-Watson of insubordination in the after-work phone call on May 10, 2005, and said that the Growneys would give her "one more chance" when she came back.

33. Mason-Watson returned to work on May 23, 2005. She wrote a note to Nancy Growney asking that she be returned to her original work schedule. At Mason-Watson's request, her original work schedule had been modified to make Mondays longer days and Tuesdays through Fridays shorter. In March through early May, Mason-Watson's mother's illness, her appointments, illness, and other family concerns, had prevented her from 40 full hours in any one week. Nancy said the schedule was already set for that week and that she "would let [Heather] know her schedule later."

34. On June 1, 2005, Nancy Growney told Mason-Watson that, effective immediately, she would only work 20 hours per week. Mason-Watson told Nancy that she could not cut her hours in half for "no reason." Nancy replied that she had "economic reasons." While at work, Mason-Watson called the Human Rights Bureau to ask about her rights and to report that Nancy's Hallmark had taken adverse action against her because of her pregnancy. After the call, Mason-Watson told Nancy Growney that she had called Human Rights to file a complaint and that she was entitled to return to work full-time because she had been hired as a full-time employee. Nancy told Mason-Watson that she was not going to argue with her. Mason-Watson told Nancy that she could fire her, but that Human Rights would be investigating the business. Nancy Growney then fired Mason-Watson.

35. Mason-Watson filed for unemployment against the gift shop. Nancy Growney opposed the application for benefits. By the time Mason-Watson received Nancy's objection, Mason-Watson had already found other work. She did not pursue her UI claim, in which the department determined her to be disqualified to receive biweekly benefits.

36. Nancy Growney expected her employees to do what she told them to do, not to assert that they had rights. She expected employees to be "meek and humble." The Growneys did not believe they would have or could have an amiable or productive relationship with Mason-Watson if she was pregnant. Nancy acknowledged she thought she only could return to having an amiable relationship with Mason-Watson once the charging party had miscarried and was no longer pregnant.

37. From April 18, 2005, through June 1, 2005, the Growneys treated Mason-Watson differently and unfavorably because of her pregnancy. They developed an animus against her because of her due date, her reference to her "rights," her reference to an attorney and her references to Human Rights and investigation of the gift shop. That animus motivated unfair and inadequately supported assertions of falsified time-keeping, unreasonable insistence upon deciding details of maternity leave months in advance, unbending resistence to an absence for a necessary doctor's appointment on a Monday, escalating efforts to get Mason-Watson to leave her employment well in advance of the busy season, and ultimately a unilateral decision to cut Mason-Watson's hours in half for "business reasons" that did not involve any present business necessity. These were all material changes of the terms and conditions of Mason-Watson's employment.

38. From May 10 to May 31, 2005, there were no material changes in the conditions at the gift shop that warranted cutting Mason-Watson's work time at the gift shop in half, a reduction in hours that would likely force Mason-Watson to find other work. Nancy Growney's method of informing Mason-Watson of the decision to cut her hours in half was meant to provoke Mason-Watson into immediately quitting her job. Instead of quitting, Mason-Watson confronted Growney about the unfairness of the cut in hours and told her that she had complained to Human Rights and that an investigation would result. Growney fired her instead of waiting to see if she would quit.

39. The adverse actions taken by Growneys after they learned Mason-Watson was pregnant caused Mason-Watson sleeplessness, anxiety, fearfulness, a desire to avoid going to the gift shop, anger, and stress. The stress aggravated the difficulties she was already having with the pregnancy. When she became pregnant again months after Nancy Growney fired her, she experienced again the fear and stress to which she was subjected by the Growneys during her prior pregnancy. The emotional distress caused to Mason-Watson by the discriminatory and retaliatory acts of the Growneys amounted to harm of a value of $15,000.

40. Watson lost two weeks of wages after being terminated by the Growneys on June 1, 2005, at $8.00 per hour, for a total of $640.00. Prejudgment interest at 10% simple per annum on that wage loss, for 2 years and one month from the first two weeks of June through the date of this decision, at 10% per annum simple interest, totals $130.45.

41. Both Growneys have been and remain unfamiliar with their duties as employers under state nondiscrimination laws. The circumstances of the Growneys' violations of Mason-Watson's rights under the Human Rights Act require that they receive training in their duties as employers. Nancy's Hallmark, Inc., is the successor to Mason-Watson's employer, liable for the harm done to the Mason-Watson, as well as responsible for the training of the Growneys as a condition of their continued operation of the corporation and employment of workers in that or any other business in which they may be engaged. The appropriate affirmative relief required under these facts appears in the conclusions and order.

IV. OPINION[4]

1. THE UI DIVISION DETERMINATION IS NOT CONTROLLING

The corporation presented evidence that the department's Unemployment Insurance Division disqualified Mason-Watson from eligibility for unemployment benefits because it found the Growneys had discharged her for misconduct. It argued that the UI determination barred this case. A misconduct determination on a UI claim is not a bar against discrimination claims against the same employer by the same employee in a Human Rights case. In *Niles v.*

[4] Fact statements are hereby incorporated by reference as fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Carl Weissman & Sons, Inc. (1990), 241 Mont. 230, 786 P.2d 662, 663, the Montana Supreme Court held that a final administrative decision (affirmed by a district court) disqualifying an employee from unemployment compensation was not *res judicata* as to the employee's separate action in District Court for wrongful discharge and breach of the covenant of good faith and fair dealing. The reasoning in *Niles* is directly on point here:

> [F]rom the viewpoint of res judicata, or from collateral estoppel, Niles' action for wrongful discharge and breach of the covenant of good faith and fair dealing is not barred because of the agency determination. The issues determined before the agency, and to be determined before the District Court are not the same.
>
> We leave aside without discussion whether the administrative proceedings in this case complied with judicial standards of substantive and procedural due process. It appears from the record that there were telephonic hearings which may not have afforded Niles the full right of cross-examination. It is unnecessary for us to determine this issue, however, because we hold otherwise in this case that neither res judicata nor collateral estoppel applies since the legal issues decided by the agency are not the same as the legal issues facing the District Court in Niles' case.

Id. at 666-67; *Majerus v. Skaggs Alpha Beta, Inc.* (1990), 245 Mont. 58, 799 P.2d 1053, 1055 (citing and applying *Niles*).

If the issues in a wrongful discharge claim are not the same as the issues in a UI misconduct determination, sustained through both a final administrative decision and a district court review, then the issues in discrimination claims are likewise not the same as the issues in a misconduct determination by the department on the documents in its file, without any hearing, issued after the claimant and charging party decided not to pursue the UI claim and did not reply to the employer's opposition to her claim.

Setting aside considerations of procedural due process and fairness, the limited legal scope of UI benefits hearings precludes *res judicata* or collateral estoppel use of a final UI decision in a case addressing issues beyond the scope or authority of the UI proceedings. A Human Rights Act claim cannot be barred by a UI final decision, for those very reasons.

Even if *Niles* were not determinative, the corporation has not established a right to rely upon the UI decision. Neither the Montana Rules of Evidence nor other "technical rules or procedure" govern proceedings in UI administrative proceedings. Mont. Code Ann. § 39-51-2407(1). Mason-Watson's UI claim never got as far as an actual hearing, for which telephonic hearings are the rule before both department appeals referees and the Board of Labor Appeals.[5] Mont. Code Ann. §§ 39-51-2403 and 2407(2). Procedures at this level, up to and including

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[5] Absent special circumstances or the parties' consent, telephonic testimony generally is not allowed in court trials. *Marriage of Bonamarte* (1994), 263 Mont. 170, 866 P.2d 1132, 1136.

BOLA review, are informal and relatively unstructured. ***See, gen.***, *Bean v. Board of Labor Appeals* (1994), 270 Mont. 253, 891 P.2d 516**.**

This informality is appropriate (and authorized by statute) for UI benefits cases, as the Court in *Bean* generally held. It is not appropriate under Montana's common law and statutory rules of evidence, that apply to discrimination claims. ***See***, Mont. Code Ann. §§ 2-4-612(2) and 49-2-505(2). In *Bean*, Justice Nelson's dissent raised the due process concerns in some detail. Although those concerns were inapplicable to UI proceedings (according to the holdings in *Bean*), those concerns are clearly applicable here. For all of these reasons, standards, the UI determination against Mason-Watson does not bar this proceeding.

2. THE EMPLOYER DID DISCRIMINATE AGAINST MASON-WATSON BECAUSE OF SEX AND DID RETALIATE AGAINST HER FOR RESISTING THE ILLEGAL DISCRIMINATION

Montana law prohibits discrimination by an employer against an employee because of sex. Mont. Code Ann. §49-2-303(1)(a). Only women get pregnant. Employment discrimination because of pregnancy is discrimination based on sex. *Bankers Life & Casualty Co. v. Peterson* (1993), 263 Mont. 156, 866 P.2d 241; *Miller-Wohl Co., Inc. v. Commissioner* (1984), 214 Mont. 238; 692 P.2d 1243; *Mountain States Te&T Co. v. Commissioner* (1980), 187 Mont. 22, 608 P.2d 1047.

The Montana Maternity Leave Act, part 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 and 49-2-311, it is an unlawful practice for an employer or its agent to terminate a woman's employment or to fail or refuse to reinstate her to her original job or to an equivalent position with equivalent pay and benefits unless (for a private employer like the corporation), the employer's circumstances have changed so that it is impossible or unreasonable to do so.

Likewise, Montana law prohibits retaliation against an individual who has engaged in protected activity, which includes opposing or resisting discrimination the Human Rights Act prohibits. Mont. Code Ann. § 49-2-301; *Mahan v. CENEX, Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 857-58. Admin. R. Mont. 24.9.603(1) states that "a significant adverse act against a person because the person has engaged in protected activity . . . is illegal retaliation."

In evaluating whether a mandatory leave or a new job assignment upon return from maternity leave was discriminatory, the <u>employer</u> must prove that its acts were both reasonable and nondiscriminatory. Admin. R. Mont., Rules 24.9.1204 and 1207; ***cf.***, *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 248. The fact that the employee was pregnant, had a miscarriage (or a normal delivery) and within a week of returning to work has her hours cut almost in half establishes a *prima facie* case to which the employer must respond.

"'Employers are rarely so cooperative as to include a notation in the personnel files' that their decisions were expressly forbidden by law."[6] Claimants often lack direct evidence of unlawful discrimination that speaks directly to the issue, requires no other evidentiary support and proves it without inference or presumption. BLACK'S LAW DICTIONARY 413 (5th Ed. 1979). That is the reason for the various *prima facie* cases that do not require direct evidence of discriminatory intent, ***e.g.***, *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792.

In this case, in addition to the *prima facie* case established pursuant to the regulations, Mason-Watson has also established discriminatory animus. For a professional accountant, Nancy Growney did a very unconvincing job of explaining how she reached a reasonable conclusion that Mason-Watson, but not Rebecca Michie, was abusing the time reporting system. The escalating hostility between Nancy and Mason-Watson was not satisfactorily explained by labeling it "insubordination" on Mason-Watson's part. Ultimately, when Mason-Watson returned to work on May 23, 2007, Growney delayed a week before slashing Mason-Watson's hours to nearly half what she had actually been working before her brief leave for her miscarriage, and offered an incredible explanation, unsupported by any financial documentation, that having two full-time employees hadn't "worked out." The corporation did not successfully rebut either the *prima facie* case or the evidence of actual discriminatory animus toward Mason-Watson.[7]

It seems clear that one of the reasons why Mason-Watson's employment was without problems until April 15, 2005, was because Nancy Growney, the store manager, was not in the store until after tax season. For the first few months of Mason-Watson's employment, Nancy was busy with her tax preparation business and Gary Growney and Mason-Watson got along without any problems. After the tax season, Nancy returned to the store and made her evaluations of Mason-Watson. However, the evidence does not support the arguments of the corporation about why Nancy found Mason-Watson's work so unsatisfactory.

The corporation argued that Mason-Watson was upset that she became pregnant before her marriage and took her anger out on the Growneys, with essentially no credible evidence to support the argument. The corporation argued that much of the emotional stress experienced by Mason-Watson was the result of ongoing litigation with the father of her first child, Regan,

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[6] *Ramseur v. Chase Manhattan Bank* (2nd Cir. 1989), 865 F.2d 460, ***quoting*** *Thornbough v. Columbus and Greenville Ry.* (5th Cir. 1985), 760 F.2d 633, 638.

[7] Nancy Growney testified that during the entire week of May 23, 2005, she "analyzed the hours and the overlapping shifts and watched how much work was accomplished compared to customer counts." She did not explain in any detail what her "analysis" involved and she shared virtually no credible details of the "analysis." Indeed, the only direct evidence indicating why the employer cut Mason-Watson's hours was Nancy's curt and angry testimony that she could perform Mason-Watson's work in half of the time when covering for Mason-Watson while she was off work due to her miscarriage. If true, this testimony indicated that Nancy, who had run the shop for years, could do the work to her own specifications much faster than an employee. Whether true or false, the testimony demonstrated that the reduction in employee hours was the result of hostility toward Mason-Watson rather than a substantial change in the employer's circumstances.

but Mason-Watson convincingly rebutted this argument with solid testimony of how little was happening in that so-called "ongoing litigation" at the pertinent time. The corporation argued that it needed to start offering applications in April for an opening in November because there would be fewer applicants for a temporary as opposed to a permanent position, but when the applications were first offered the Growneys had reason to believe that Mason-Watson might be quitting for good in November, so the opening was not for a "temporary" position.

The corporation even argued that it was at least partly Mason-Watson's fault that the gift shop could not support two full-time employees. The theory for this argument apparently was that if only Mason-Watson had opened and closed on time and worked harder while she worked, the revenue would have been so much higher that cutting employee hours might not have been a "business necessity." There was no evidence at all of any loss in business resulting from Mason-Watson's exaggerated and largely unproved short working hours. There was, again, complete disregard of similar discrepancies in the hours reported by Michie. There was, in short, naked hostility toward Mason-Watson, with no evidence except conclusory accusations to support a reasonable business basis for that hostility.

This is not to say that Mason-Watson was an easy employee. She clearly was not. She was argumentative, and she did resist the increased supervision and control that Nancy Growney brought to the gift store after tax season. Nonetheless, the substantial and credible evidence of record supports the finding that the gift shop discriminated against Mason-Watson because of her pregnancy, changing the conditions of her employment in an ongoing effort to make her quit. When that effort failed, the gift shop ultimately fired Mason-Watson for resisting having her hours cut virtually in half soon after she returned to work after her miscarriage. Although Nancy Growney characterized Mason-Watson's conduct in this instance, as in so many others, as "insubordination," a fair appraisal of the interaction between the two women on June 1, 2005, led to a finding that Mason-Watson was protesting an illegal reduction in her hours rather than being insubordinate to her supervisor.

3. REASONABLE DAMAGES AND AFFIRMATIVE RELIEF

The purpose of a damage award 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 521, 523; *Dolan v. S.D. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.[8] The harm that Mason-Watson suffered includes lost wages (back pay), loss of use of the back pay (prejudgment interest) and emotional distress, all resulting from illegal discrimination by the respondents.

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 based on

[8] 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.

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.3d 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.

Montana law is clear that reasonable measures to rectify the harm suffered because of illegal discrimination can include a monetary award for emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. Freedom from unlawful discrimination is statutorily recognized as 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.2d 1192; ***cited in*** *Vortex* ***at*** ¶33 ***and*** *Vainio*; *Campbell v. Choteau B&S House* (1993), HR No. 8901003828. Mason-Watson's emotional distress is reasonably compensated by the award herein.[9]

Upon a finding of illegal discrimination, the law requires an order imposing affirmative relief that enjoins any further discriminatory acts and also empowers the department to prescribe any appropriate conditions on the corporation's 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 and retaliation established in this case.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. The corporation, a business owned and operated by the Growneys, succeeded to the liability of the employer, who illegally discriminated against Mason-Watson in employment because of her sex (pregnant female) by adversely and materially altering her terms and conditions of employment and by substantially reducing her hours within a week after her return to work after the conclusion of her pregnancy. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-2-311.

3. The corporation, a business owned and operated by the Growneys, succeeded to the liability of the employer, who also illegally retaliated against Mason-Watson by firing her when

[9] Mason-Watson did not present substantial and credible evidence that the miscarriage itself resulted from the stress caused by the adverse treatment due to her pregnancy. Thus, the amount proposed by Mason-Watson is reasonable given the evidence of the emotional distress proximately caused by the sex discrimination and retaliation.

she resisted the discriminatory reduction in her hours by reporting it to the Montana Human Rights Bureau and by pointing out its illegality to the employer. Mont. Code Ann. § 49-2-301.

4. As a result of discrimination because of sex and retaliation, Mason-Watson suffered harm. To rectify that harm, the reasonable measure that should be required of the corporation is payment to Mason-Watson of $15,770.45, being $640.00 for lost wages, prejudgment interest of $130.45 on the lost wages and $15,000 for emotional distress. Mont. Code Ann. § 49-2-506(1)(b).

5. The corporation must be permanently enjoined from further discriminatory acts of the kinds involved herein. Mont. Code Ann. § 49-2-506(1). The corporation must submit to the Human Rights Bureau proposed employment policies and employee notices that it will not engage in such conduct in the future, that it will consider and act upon employee complaints of such practices in the future, and that it will give notice to each employee of how to contact the Human Rights Bureau with complaints of such practices in the future. It must then adopt and implement the policies and notices with any modifications directed by the Human Rights Bureau, as soon as said Bureau approves them. Mont. Code Ann. § 49-2-506(1)(a).

6. The corporation must arrange and finance for Nancy Growney and Gary Growney successful completion, as a condition of continuing to do business in Montana through the corporation and continuing to have employees, of 6 hours of training in following the Montana Maternity Leave Act and in avoiding prohibited retaliatory practices under the Human Rights Act, approved in advance and verified after completion by the Human Rights Bureau. Mont. Code Ann. § 49-2-506(1)(b).

VI. ORDER

1. Judgment is found in favor of charging party **Heather Mason-Watson** and against respondent **Nancy's Hallmark, Inc.**, on the charge that the corporation's predecessor in interest illegally discriminated in employment and retaliated against Mason-Watson.

2. The department orders respondent **Nancy's Hallmark, Inc.**, to make immediate payment to charging party **Heather Mason-Watson** of $15,770.45, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past wages of $640.00. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondent **Nancy's Hallmark, Inc.**, from (A) illegally discriminating against pregnant employees by (i) treating them less favorably than employees who are not pregnant and (ii) failing and refusing to reinstate employees who return to work after the end of their pregnancies to their original jobs or to equivalent positions with equivalent pay and benefits unless the corporation's circumstances have actually changed so that it is impossible or unreasonable to do so; and from (B) retaliating against persons who resist illegal pregnancy discrimination against its employees.

4. The department orders respondent **Nancy's Hallmark, Inc.**, within 60 days after this decision becomes final:

(A) to submit to the Human Rights Bureau proposed policies and employee notices expressly stating that it will not engage in the specific conduct prohibited by the permanent injunction; the policies shall include the means of publishing the notices to present and future employees; the notices shall include instructions for employees believing they may have been subjected to either pregnancy discrimination or retaliation to contact the Bureau; respondent must adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them; and

(B) to arrange, finance and document Bureau approved training of Gary Growney and Nancy Growney, on illegal employment discrimination in violation of the Montana Maternity Leave Act and illegal retaliation for resisting illegal discrimination, of 6 hours for each.

Dated: July 13, 2007.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner

Heather Mason-Watson FAD tsp