BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0093013356 & 0093013758:

FRITZ BEHR, Charging Party, vs. CROSSROADS FITNESS CENTER, Respondent.	Case Nos. 386-2010 & 1035-2010 HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

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I. PROCEDURE AND PRELIMINARY MATTERS:

Fritz Behr filed a complaint of discrimination in the provision of public accommodations against Crossroads Fitness Center (Crossroads). He subsequently filed a retaliation complaint against Crossroads after his membership at the club was terminated. The complaints were consolidated pursuant to the agreement of the parties and tried before hearings Officer Gregory L. Hanchett on May 3, 2010.

At hearing, Charging Party's exhibits 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 24, 25 and 26, and Crossroads Exhibits 101 and 105 through 123 were admitted into evidence. Behr's Exhibits 27, 28 and 29 and respondent's exhibit 124 were excluded as a discovery sanction for untimely disclosure to the opposing party. Fritz Behr, Mike Swingley, former health club member, Bill Beaman, health club member, Rhonda Schlosser, manager, Dennis Wright, Crossroads owner, Karl Roston, health club member, Jerry Burrows, health club member, Leif Watkins, former health club member, Kim Schultz, Crossroads employee, Theresa White, Crossroads employee, Denise Gleason, Crossroads employee and Leanne Simendinger, Crossroads employee, all testified under oath.

After the evidence was taken, the parties filed post-hearing briefs, after the receipt of which the matter was deemed submitted for decision. Based on the evidence adduced at hearing and the arguments of counsel in post-hearing briefing,

the following findings of fact, conclusions of law and hearing officer decision are made.[1]

II. ISSUES:

The issues in this matter are fully set forth in the April 29, 2010 final pre-hearing order.

III. FINDINGS OF FACT:

1. Behr joined Crossroads in 2000. Behr and his wife joined together and, as result, Behr received a discounted membership rate. At the time his membership was terminated, Behr's wife paid $35.00 per month for her primary membership and Behr paid $20.00 per month for his account. The difference in monthly amounts is due solely to the fact that Behr's wife joined as the primary member of the household and Behr was therefore permitted to join at a reduced rate.

2. Prior to joining Crossroads, Behr, had been a member of the Helena, Montana YMCA. He left the YMCA because he was dissatisfied with the sanitation at the YMCA.

3. Dr. Dennis Wright is the owner of Crossroads. Rhonda Schlosser began working at Crossroads in 1992. In January, 2006, she was promoted to club manager. Kim Schultz is the membership director. Theresa White is the front desk director. Denise Gleason is a group fitness instructor at Crossroads. Leanne Simendinger provides accounting oversight and provides business advice to Wright and Crossroads in its day to day operations.

4. Crossroads is a member of the International Health, Resort and Spa Association (IHRSA). Among other things, IHRSA provides members with different types of marketing plans to help develop club membership. Beginning some time before 2005, the health club industry began promoting private areas to permit members who desired more privacy a quieter place to conduct workouts. Clubs that

[1]The parties in their respective briefs have cited to a transcript which the parties prepared from the recordings of the hearing recorded by the hearings officer. The parties did not specifically stipulate to using the transcript that they prepared in lieu of the official record in this matter (the recording is at present the official record). However, both parties relied upon that transcript during their post hearing briefing and the hearings officer presumes, therefore, that the parties intend to utilize that transcript in any appeal to the Human Rights Commission.

provided these private areas were in demand among pregnant women, nursing women, and men and women who were out of condition and were self conscious about their bodies.

5. In 2005, Crossroads membership was stagnating if not declining. In order to add members and thereby increase operating income, Crossroads worked with a health club marketing company to develop new ideas for increasing membership. At the time, on of the biggest trends in health club marketing was to develop areas designated as Women's Centers.

6. The purpose behind Women's Centers was to target women to join the health club by providing them a more private place to work out. The testimony in this case convinces the hearings officer that women clients of health clubs have a legitimate and non-discriminatory basis for desiring a more private workout area in certain circumstances. For example, women who are stretching can find it genuinely embarrassing to have to stretch out in front of members of the opposite sex and thereby put themselves in genuinely embarrassing positions in front of members of the opposite sex. In addition, pregnant women can be self conscious about the bodily changes they are experiencing and for legitimate and non-discriminatory reasons desire more private work outs where they are not exposed to on-looking members of the opposite sex. These concerns are wholly non-discriminatory and driven by reasonable concerns of maintaining modesty.

7. Based on the marketing company's recommendations and driven by a desire to increase women's membership, Crossroads decided to create a small space known as the Womens' Center. To implement this area, Crossroads built out an approximately 1400 to 1600 square foot space to be the Womens' Center. Crossroads' facility totals 30,000 square feet. The Women's Center comprises approximately 4% to 5% of the total square footage of Crossroads.

8. The Women's Center contains a rack of small dumb bells, 4 treadmills, 3 elliptical machines, 2 stair steppers and 2 recumbent bicycles. The same type of equipment in greater numbers is available throughout the fitness center. While there were undoubtedly times that the equipment was in such demand that a member had to wait to use a piece of equipment, it is clear that the equipment identical to that in the Women's Center was available throughout the club.

9. A sign painted on the wall outside the center identified the area as "The Women's Center." Until February, 2009, a smaller sign mounted in a black picture frame on the wall outside the center near the entrance stated "Women Only, Please."

10. The "Women Only, Please" sign on the outside of the Women's Center had the effect of deterring Swingley, Behr and Beaman from using the exercise area. It was not until after Behr filed his complaint that he asked to use the center and was permitted to do.

11. There are over 30 other health clubs in Montana that provide programs or exclusive areas for women. Some of these clubs offer memberships only to women. Some of these clubs also offer programs that are restricted to women, such as "Pink Gloves Kick Boxing."

12. The Women's Center was popular. The opening of the center increased membership at Crossroads. When tours were conducted for prospective members, both men and women were shown the Women's Center.

13. Crossroads has more than 100 members. Crossroad's Final Prehearing statement, page 3.

14. Crossroads requires persons to purchase a membership in order to use any of the workout facilities. These memberships can be year long, month to month, or day long memberships. In order to use the workout facilities, a member is required to scan his membership card on a card reader in order to check-in. In addition, there are vending machines in the building available for the use of members and non-members. Other than these vending machines, the facility does not provide food or beverages.

15. Non-members can receive massages at Crossroads. Crossroads does not employ any of the masseuses. The masseuses rent space from Crossroads. Nonmembers can purchase gift certificates for massages from Crossroads.

16. Crossroads maintains a sign outside its facility known as a rolling billboard sign. It flashes momentary signs in lights advertising various services available at Crossroads. Among the various signs that are displayed is one single frame that says "Massages." Immediately following that sign is a sign indicating "Non-members Welcome."

17. Crossroads advertises to the public at large in order to attract new members.

18. Crossroads has a running track on the third level of its facility. Adjacent to this track is the exercise room. Schlosser offers a "Zumba" dance exercise class in the room. Music is played to which participants exercise. There are no doors on the room, so the sound carries out to the running track .

19. On January 2, 2009, Behr, Bill Beaman and a third Crossroads member were walking outside on the track while Schlosser was conducting her Zumba class. Behr was very upset by how loud the music was and confronted Schlosser in her office about the music being too loud. He was standing over Schlosser's desk while Schlosser was seated there and yelling at her. Schlosser advised Behr that he didn't need to attack her over the issue and that she would turn down the music. Despite this, Behr became more upset and continued to argue with Schlosser.

20. Crossroads advertised the Women's Center in a local newspaper, the Helena Independent Record, on six occasions between January 6, 2009 and February 1, 2009. The advertisement (Exhibit 3) states "Women's Only Center is the perfect place to start your New Years resolution."

21. Behr then turned the conversation toward the Women's Center and told Schlosser that it was illegal to have a Women's Center. Schlosser disagreed with him, and this infuriated Behr all the more. Behr finally told Schlosser that he would file a discrimination complaint. Schlosser responded that was his prerogative. Prior to January 2, 2009 Behr had never complained to Crossroads about the Women's Center.

22. After confronting Schlosser, Behr sent a letter to Dennis Wright on January 14, 2009 complaining about the Women's Center and the loudness of the music emanating form Schlosser's Zumba class. On January 21, 2009, Behr filed his discrimination complaint based on the Women's Center.

23. In response to Behr's complaint, Crossroads in February, 2009 changed the name of the Women's Center to the "Private Center." They also removed the "Women Only, Please" sign."

24. On February 23, 2009, Behr used the Women's Center for the first time. From that time until the termination of his membership, Behr used the Women's Center at least 20 times.

25. After filing his complaint, Behr's behavior toward staff and members of Crossroads changed dramatically. Prior to the January 2, 2009 incident in Schlosser's office, Behr and the staff maintained a cordial relationship. After he filed his complaint, he became very aggressive and rude toward staff, making many demands and acting in very bizarre ways. As one witness noted, and the hearings officer agrees, Behr acted as though he could get away with anything in the club and could not be taken to task for it because Behr could then file a retaliation claim.

26. On one occasion, Behr was working out in the Women's Center. He stopped and began yelling at another male member, telling him "You can come in here, its against Montana state code."

27. On another occasion, Behr became enraged when he noticed that a bench in front of his locker had what appeared to be feces on it. Behr dragged the bench out of the locker room into the main hallway of Crossroads and began yelling "there's shit on the bench." He told staff that whoever had done this "was an animal" and that person's membership should be terminated. His yelling was so loud that it disrupted other members who were working out at the time.

28. Behr would also yell things at Schlosser as he walked by her office door. He would mock her in front of other staff and club members. Behr's mocking of Schlosser was so extensive that it caused her to change her work schedule or to refrain from offering classes in order to avoid Behr's slights. Behr was very boisterous, yelling throughout the club. On one occasion, he yelled 'Happy Birthday" to a member who was celebrating 20 years of sobriety.

29. White also noticed that Behr began engaging in "flippant, bizarre behavior." On one occasion, White was talking to a member in the lobby about a concern the member had about the club. Behr, who was across the lobby and not part of the conversation, began yelling across the room to the member that the member shouldn't even ask the management about the problem because it would do nothing about it.

30. Simendinger had witnessed Behr's conduct toward staff and members and was concerned both for the safety of the staff and the well being of the business. She in fact recommended that Wright terminate Behr's membership.

31. On February 26, 2009, Crossroads' attorney, Amy D. Christensen, wrote to Behr that Crossroads was concerned about complaints it had received from other

members. The letter admonished him that Crossroads expected “all members to be courteous and respectful when speaking to staff and other members.”

32. Christensen’s letter had no affect on Behr and his behavior continued. During March, 2009, Gleason was giving a tour of the Women’s Center to a prospective member. Upon seeing Gleason and the prospective member enter, Behr got up from where he was and followed them in. He began walking a straight line, arms extended, less than two feet behind the prospective member. Behr had no basis to do this except for the purpose of harassing Gleason and the prospective member. The prospective member did not join the club.

33. On another occasion, club member Karl Roston observed Behr acting very indiscretely placing a rectal suppository in himself in an open area of the Men’s locker room. Behr’s conduct so concerned Roston that he complained to Crossroads’ management.

34. Behr also bragged to other members about his discrimination suit against Crossroads. He told other members that he was going to “push this as far as he could out of the principle of the thing.” His efforts to garner support caused member Leif Watkins to complain to management about Behr’s conduct.

35. Other members, both male and female also complained about Behr’s erratic behavior. Because of the complaints about Behr’s behavior, on April 28, 2009, Schlosser prepared a letter of warning to Behr. Respondent’s Exhibit #121. Schlosser gave the letter to Behr in her office on the same day it was prepared. Behr was upset by the letter. As Behr left Schlosser’s office, he glared at her.

36. Despite the April 28, 2009 letter, Behr’s inappropriate conduct did not cease. He continued to mimic and belittle staff and act loud and boisterous in front of other members of the club. The staff were understandably afraid of and greatly stressed by Behr’s erratic behavior.

37. On May 19, 2009, Schlossser, Schultz, Gleason, White and another staff member, Ann Seifert, wrote a letter to Wright telling him that they were “scared and intimidated “ by Behr’s actions. They also indicated that they no longer looked forward to coming to work. They noted that he continued to disrupt member workouts and to make noises and mimic employees. They requested that “action be taken to alleviate the situation.” Respondent’s Exhibit #106.

38. During this time, Crossroads lost dozens of members at least in part due to Behr's conduct. Income fell about 10%. Despite the warnings, Behr's disruptive conduct only seemed to escalate.

39. Behr's escalating rude and abusive behavior toward staff and members, even in the face of warnings, his behavior's negative impact on business, and staff fears over Behr's behavior caused Wright to terminate Behr's membership. On May 15, 2009, Wright sent Behr a letter advising him that his membership had been terminated. Exhibit #120.

IV. OPINION[2]

A. Behr's Complaint Is Timely.

Crossroads argues that Behr's discrimination complaint based on denial of access to the Women's Center is not timely. The respondent reaches this conclusion by arguing that the sign which was posted until February, 2009 (which stated "Women Only, Please") was first placed on the wall at the Women's Center in 2005. From this, the respondent concludes that the cause of action in this matter arose in 2005 and is therefore barred. In response, Behr contends that each day the sign remained on the wall and each time that Crossroads advertised its Women's Only Center in the newspaper gives rise to a separate claim.

Behr's complaint is timely. Mont. Code Ann. § 49-2-501(4)(a) requires a person filing a complaint of discrimination to do so "within 180 days after the alleged discrimination." There is no dispute that until February, 2009, Crossroads maintained a workout room designated as "Women's Center" and further maintained a sign on the outside of that room stating "Women Only, Please." Furthermore, there is no dispute that in January, 2009 and even after January, 2009, Crossroads published newspaper advertisement that promoted the "Women's Only Center." As the Montana Supreme Court has noted, "a complainant may only file a charge to cover 'discrete acts' that occur within the actionable time period." Benjamin v. Anderson, 2005 MT 123, ¶43, 327 Mont. 173, 112 P.3d 1039, citing National Railroad Passenger Corp. V. Morgan, 536 U.S. 101 (2002).

Here, Behr complains of Crossroads' maintaining of the Women's Only Center and advertising the Women's Only Center , conduct that continued until at least

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

February, 2009, a date after the filing of Behr's discrimination complaint. He has thus alleged a discrete act which occurred during the 180 days preceding the filing of his complaint. His complaint, therefore, is timely.

B. Crossroads Is A Public Accommodation Under the Human Rights Act.

Crossroads contends that Behr has failed to demonstrate that Crossroads is a public accommodation. Crossroads also argues that it has in any event proven that it is a distinctly private club. The hearings officer does not agree. There is substantial evidence here that demonstrates Crossroads is a public accommodation within the meaning of the Act.

The Montana Human Rights Act's anti-discrimination provisions are very broad prohibitions, indicating a legislative intent to eliminate discrimination except under very limited circumstances. Taylor v. Dept. of F.W.P. 205 Mont. 85, 666 P.2d 1228 (1983). They are to be read broadly in order to effectuate the purposes of the act. Id. Mont. Code Ann. §49-1-101(20) describes a public accommodation as;

> "a place that caters or offers its services, goods or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, resthouse, theater, swimming pool, skating rink, golf course, café, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments."

Mont. Code Ann. §49-1-101(20)(b) excepts from the term "public accommodation:"

> "an institution, club, or place of accommodation that proves that it is by its nature distinctly private. An institution, club, or place of accommodation may not be considered distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment of dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business."

The question of whether a particular entity is a public accommodation is a question of fact. The burden of proving that an entity is exempted from the statute by virtue of being distantly private falls on the entity asserting that defense. Mont. Code Ann. §49-1-101(20)(b). While there is no Montana case on point, the federal case law interpreting Title II of the 1964 Civil Rights Act (which is the federal counterpart of the Montana public accommodations statute) has consistently and for at least 30 years recognized that health clubs are public accommodations under Title II. See, e.g., Rousseve v. Shape Spa for Health And Beauty, Inc., 516 F.2d 64, 67(5th Cir. 1975) (holding that a health club was a "place of entertainment " within the meaning of 42 USC §2000 and noting that new members are solicited through television and newspaper advertisements, through random telephone solicitation and through offers of complimentary visits and special introductory programs")." Other states have also held that health clubs are public accommodations. See, e.g., Vidrich v. Vic Tanney International, Inc., 102 Mich App. 230, 301 N.W.2d 482 (1980) (holding that a health club was a public accommodation under Michigan's public accommodation statute). The Michigan statute at issue in Tanney is similar to the Montana public accommodation law. That state's statute indicates that "all persons . . . shall be entitled to full and equal accommodations, advantages, facilities, and privileges of inns, hotels, motels, government housing, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theaters, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, subject only to the conditions and limitations established by law . . ."

In finding that the health club in Tanney was a public accommodation, the court noted that the catchall phrase " all other places of public accommodation, amusement and recreation" was broad enough to include a health club that advertised for membership to the general public, existed for the purposes of profits, and exhibited none of the exclusivity of private clubs. Id. at 235, 301 N.W. 2d at 484. Like the Michigan statute, Montana's statute specifically includes all places of public amusement and business establishments. The Tanney court also found the defendant's commercial nature to be a significant factor, finding that the membership criteria focused primarily on an applicants' financial wherewithal, issues of bodily hygiene, emotional stability and medical problems but did not focus on concerns for selectivity of association. Id. The court further noted that the club engaged in broad based advertising, that the club members had no control over club operations, owned no equity in the club and had no say in the selection of members. Id.

Crossroads is a business establishment in the sense that it solicits membership from the public by advertising memberships to the public. It is a place of amusement as much as and in a similar vein as the clubs in Rousseve and Tanney were. It is a "for profit" entity. It further specifically advertises that non-members are welcome to buy passes for and partake of massage services which are offered in its facility. Crossroads members have no say in the selection of members. That decision is made by Crossroads management. There does not appear to be any concern with selectivity in association other than perhaps the fact that the member must have the financial ability to pay for membership. Crossroads permits non-members to purchase massages for their own use and to come into the facility to receive those massages.

Moreover, Crossroads has failed to prove that it is a distinctly private organization. Most tellingly, it has presented no evidence to show that its membership requirements are deigned to promote any associational right. The only thing that it has proven is that it has an interest in ensuring that members can afford to pay their membership dues. This is not sufficient to prove that Crossroads was distinctly private any more than the health club in Tanney was distinctly private. Crossroads is a public accommodation within the purview of Montana's public accommodations statute.

C. Crossroads Discriminated In Excluding Men From A Portion of the Club.

The first issue in this case that must be resolved is the issue of whether the posting of the sign that said 'Women Only, Please" and the placement of the advertisements in the newspaper touting a "Women's Only Center" are actionable even though Behr was never denied access to the Women's Center whenever he asked for such access. Crossroads appears to argue that their conduct is not actionable because Behr and other males were in fact permitted such access despite the signs. Behr argues that the posting of the sign and the advertisements is in itself discriminatory and actionable, arguing that Crossroads' conduct is no different than posting a sign that said "White's Only, Please." The parties do not dispute that Behr was permitted access to the Women's Center each and every time he asked for it. He never asked for access to the Center, however, until after he had filed his discrimination complaint.

A person who has been aggrieved by any discriminatory practice may file a complaint with the Department. Mont. Code Ann. §49-2-501. An aggrieved party includes anyone who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been or is likely to be specially

and injuriously affected by a violation of the Title 49, Chapter 2. Mont. Code Ann. §49-2-101(2). The Montana Human Rights Act specifically prohibits the posting of any communication or advertisement that states or implies that privileges will be refused to any person on the basis of sex. Mont. Code Ann. § 49-2-304 (1)(b).

In a Title VII race discrimination case, the Fifth Circuit court of appeals has held that even if a governmental entity (which is prohibited from discriminating on the basis of race under Title VII) did not strictly enforce the directives contained in signs at a bus station that directed blacks and whites to wait in separate places for city buses, the mere posting of the signs was in itself discrimination such that issuance of an injunction against the use of such signs was required. ICC v. City of Jackson, 318 F.2d 1, 8 (1963). In reaching its conclusion, the court reasoned:" the vice . . . is not the impermissible distinction between inter and intrastate commerce or even the absence of an explicit purpose coercively to compel segregated occupancy . . . What is forbidden is the state action in which color is the determinant. It is simply beyond the constitutional competence of the state to command that any facility shall be labeled as or reserved for the exclusive use of one rather than the other race." Id.

While the instant case involves only questions of statutory interpretation and not constitutional issues, the principles noted in City of Jackson are nonetheless useful. The Montana Human Rights Act plainly outlaws the posting of printed communications or advertisements that state that the privileges of a public accommodation will be refused to a person on the basis of sex. Mont. Code Ann. §49-2-304 (1)(b). Like the constitutional principals at issue in City of Jackson, the statutory considerations in the case before this hearings officer prohibit a public accommodation from using sex as a determinant (unless the matter relates to an issue of modesty, which, for the reasons stated below, the hearings officer does not find in this case).

Applying the above principles, even though there has been no actual enforcement of the exclusionary command contained in the sign that stated 'Women Only, Please," Behr nonetheless can challenge the posting of the sign. Behr filed his complaint based on the existence of the sign before he ever thought to ask whether he could use the Women's Center. He is male, a class that is protected from discrimination based on gender. The language of the sign and the advertisements purported to exclude him from the use of a public accommodation. The sign and the advertisements were posted both before and at the time Behr filed his complaint and even after Behr filed his complaint. The fact that such segregation was not specifically enforced against Behr after he filed his complaint does not diminish the

discrimination expressed through the language of the sign and the advertisements. Behr, having been subjected to the language of the sign, is an aggrieved person under the Montana Human Rights Act who can pursue a claim under the Act.

The next question to be answered is whether Behr has made out a prima facie case of discrimination. A charging party can prove his claim of discrimination in a public accommodation by proving (1) that he is a member of a protected class, (2) that he was qualified for a service or opportunity made available by the public accommodation, and (3) that he was denied the opportunity by the respondent under circumstances raising a reasonable inference that the charging party was treated differently based on his membership in the protected class. Admin. R. Mont. 24.9.610 (2). Direct or circumstantial evidence can provide the basis for making out a prima facie case. Direct evidence cases are cases where the parties do not dispute the reason for the respondent's action, but only whether such action is illegal. Reeves v. Dairy Queen, 1998 MT 13, ¶16, 287 Mont. 196, 953 P.2d 703. Where a prima facie claim is made out by direct evidence, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(5); Reeves, ¶17.

Behr's complaint is a direct evidence case. He complains of language in the sign on the Women's Center and in advertisements that on their face discriminated against men in a public accommodation by restricting them from a portion of Crossroads' fitness center. Therefore, the instant case must be analyzed under the direct evidence template.

Mont. Code Ann. §49-1-102 provides that "The right to be free from discrimination because of . . . sex . . . is recognized as and declared to be a civil right. This right must include but not be limited to:

* * *

(b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement. (Emphasis added).

Montana Code Annotated §49-2-304, the Montana Public Accommodation statute, states: "Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner . . . of a public accommodation: (1) (a) to refuse , withhold from, or deny any of its services, goods, facilities, advantages, or privileges because of . . .sex . . . "(Emphasis added). Any grounds

urged as a reasonable basis for exemption must be strictly construed. Mont. Code Ann. §49-2-402.

The Human Rights Act permits establishments to maintain separate lavatory, bathing and dressing facilities based on gender for the purpose of modesty. Mont. Code Ann. §49-2-404. Mont. Code Ann. §49-2-403 (1) provides that distinctions based upon sex may not comprise justification for discrimination "except for the legally demonstrable purpose of correcting a previous discriminatory practice."

In construing a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-201. "Statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." Infinity Ins. Co. v. Dodson, 2000 MT 287, ¶46, 302 Mont. 209, ¶46, 14 P.3d 487, ¶46. Moreover, all parts of a statute must be construed together, giving effect to each part.

It is apparent from the language of Mont. Code Ann. §49-1-102 that unless a distinction is based upon reasonable grounds, a person may not be excluded from any part of any public accommodation facility on the basis of gender. Reasonableness is to be strictly construed. The exceptions to this rule permit separate lavatory, bathing or dressing facilities for the purpose of modesty. The exceptions also indicate that under no circumstance may gender be a basis for justifying discrimination "except for the legally demonstrable purpose of correcting a previous discriminatory practice."

Having determined that Crossroads is a public accommodation, Crossroads in its provision of services is prohibited from denying any member access to the full enjoyment of any of its facilities or services on the basis of gender unless it can demonstrate that such a distinction is reasonable. Any basis urged as being reasonable must be strictly construed to effectuate the purposes of the Act.

Behr has made out a prima facie case of discrimination with respect to the signage that limited use of the Women's Center to "Women Only, Please." The sign refused admission to males to a part of a public accommodation facility on the sole basis of gender. The intent to discriminate based upon gender is found in the language of the sign and demonstrates Behr's prima facie case of sex discrimination. The same holds true for the advertisements for the "Women's Only Center." Under the present language of the public accommodations statute, such advertising is on its face discriminatory and violative of the statute prohibiting such conduct.

As Behr has presented a prima facie case of discrimination, the burden now shifts to Crossroads to prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action. In order to do this, Crossroads has presented two arguments. First, it contends that the distinction is reasonable based on privacy considerations. Second, Crossroads argues that it was justified in setting off a small portion of the facility for the exclusive use of women in order to rectify past discrimination against women, i.e., that it was in effect implementing a voluntary affirmative action plan. These arguments will be considered in reverse order.[3]

Mont. Code Ann. §49-2-403 does not permit sex to be used as a justification for discrimination except for the "legally demonstrable purpose of correcting past discriminatory practice." This statutory provision exists to ensure that legally cognizable affirmative action programs can be utilized in Montana to remedy the effects of past discrimination. Under this statute, a showing that a program was undertaken in an effort to remedy previous unlawful discrimination may be considered as a legitimate business reason for undertaking what might otherwise be construed to be unlawful discriminatory action. The hearings officer has not been directed to any Montana case law that explains the statute and has been unable to find any Montana cases on the issue. There are, however, federal cases in the context of Title VII discrimination cases that describe the parameters of showing the propriety of voluntary affirmative action with respect to gender quotas and how such evidence may be utilized to defend against a charge that an affirmative action program constitutes unlawful discrimination. See, e.g., United Steelworkers v. Weber, 443 U.S. 193 (1979), Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Johnston v. Transportation Agency, 480 U.S. 616 (1987)(unlawful gender discrimination claimed as a result of an affirmative action plan to promote women). Under these cases, after the charging party has made out a prima facie case of discrimination, the burden shifts to the respondent to demonstrate a nondiscriminatory basis for its conduct. The existence of an affirmative action plan may provide such a legitimate basis. Johnson, supra, 480 U.S. at 629.

In order to prove that an affirmative action plan is not discriminatory, a respondent must show that its plan (1)responds to a manifest or conspicuous

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[3]Out of an abundance of caution, the respondent moved to amend the pleadings in this matter to allege its justification defense as an affirmative defense. The hearings officer agrees with the respondent that it is not necessary to do so as the justification defense is simply part of proving legitimate reasons for its conduct. See, e.g., Johnston, supra, 480 U.S. at 626-27. Accordingly, the charging party's objection to the amendment is moot.

imbalance in a traditionally segregated category, (2) does not unnecessarily trammel on the rights of the non-preferred class, and (3) does no more than is necessary to attain a balance. Doe v. Kamahamaha Schools, 470 F.3d 827, 840-41 (9th Cir. 2006); Frost v. Chrysler Motor Corp., 826 F. Supp. 1290 (W.D. Oklahoma 1993). Proof of the imbalance need not show that the entity implementing the plan has itself engaged in a past practice of discrimination. Johnson, supra. It must, however, consist of proof of a clear imbalance in a traditionally segregated category. Frost, supra,826 F. Supp at 1296.

Crossroads contends that there is ample evidence to show that it needed to implement its plan in order to rectify past discrimination against women in sports. However, it presented no evidence of any past practice of discrimination in health clubs that would show at all, much less demonstrate manifestly, an imbalance in participation generated out of gender discrimination against women. The only evidence presented at hearing concerned the need for privacy that many of the women testifying felt they needed because of various health issues or because they were self conscious about exercising in front of men. While that information bears on the issue of a reasonable distinction, it does not show a material imbalance in health club participation based on impermissible gender discrimination. The hearings officer thus agrees with the charging party that Crossroads has not made a sufficient evidentiary showing to demonstrate that the exclusion of men from a portion of the club based on gender is justifiable to eradicate a past practice of excluding women based on gender.

Crossroads' other contention is that a woman's need for privacy creates reasonable grounds for sectioning off a small area of the health club to permit women to exercise. Behr responds to this by arguing that the Human Rights Act must be strictly construed and doing so does not permit such a distinction.

In support of its argument, Crossroads has cited Livingwell v. Pennsylvania Human Relations Commission, 147 Pa. Cmwlth. 116, 606 A.2d 1287 (1992) and argues strenuously that a woman's privacy rights constitute reasonable grounds for excluding men from the Women's Center. In Livingwell, a Pennsylvania court held that exclusion of males because of their gender from an all women health club did not violate anti-discrimination laws in that state because the health club could invoke an implied "customer gender privacy defense" in the statutes, akin to the bona fide occupational qualification defense in employment discrimination, that would justify excluding males from the all women health club. In doing so, the court recognized a privacy right for women to exercise in a single sex health club because when they exercise, women "expose parts of the body about which they are most sensitive,

assume awkward and compromising positions, and move themselves in a way which would embarrass them if men were present." Id. at 1292.

Aside from the Livingwell case, the hearings officer's research has disclosed only one other case, Foster v. Back Bay Spas, 1997 Mass. Super. LEXIS194 (Sup. Crt. 1997), which bears any resemblance to the one at bar. The Foster court reached an opposite result from the Livingwell court and concluded that there was no right to privacy involved in exercising while fully clothed that would excuse the discriminatory exclusion of males from a health club that was a public accommodation. The Massachusetts public accommodation statute at issue in Foster, like ours in Montana, indicates "that all persons shall have the right to full and equal accommodations, advantages, facilities and privileges of any place of public accommodation. . ., subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right." Massachusetts General Laws, c 272, 98. The health club argued, like the respondents in Livingwell, that the public accommodation statute had to be read in light of a woman's right to privacy and that by doing so, a women's right to privacy created an exception to the prohibition against exclusion from public accommodation. The Massachusetts Court distinguished the Livingwell case on the basis that there was no recognized privacy right in exercising in public while wearing full exercise attire. In doing so, the Massachusetts Court noted that the exercising involved did not involve the exposure or touching of intimate body parts. The Massachusetts Court further noted that no Massachusetts privacy cases had ever found a right to privacy while exercising even with the awkward and compromising positions that women may encounter while exercising. Id.

As noted above, the Montana Human Rights Act's anti-discrimination provisions are very broad prohibitions, indicating a legislative intent to eliminate discrimination except under very limited circumstances. Taylor v. Dept. of F.,W.P., 205 Mont. 85, 666 P.2d 1228 (1983). In light of the strong public policy in eradicating discrimination of all types in Montana, and considering the very broad language of the public accommodation statute (which extends the prohibition of discrimination to all parts of a public accommodation), the hearings officer cannot find that a concern for exercising privately while fully clothed in a place that is a public accommodation amounts to reasonable grounds for discriminating. The hearings officer is not unsympathetic to the concerns of privacy and modesty which are sincerely held by the people who testified in this case; however, there is no Montana case that stands for the proposition that there is a privacy right implicated when exercising while fully clothed in a place that is a public accommodation.

In Armstrong v. State, 1999 MT 261, ¶34, 296 Mont. 361, 989 P.2d 364, the court broadly outlined the parameters of the Article II, Section 10 right of privacy noting "it is clear from their debates that the delegates [to the 1972 Constitutional Convention] intended this right of privacy to be expansive--that it should encompass more than traditional search and seizure. The right of privacy should also address information gathering and protect citizens from illegal private action and from legislation . . . that interfere[s] with the autonomy of each individual to make decisions in matters generally considered private." Crossroads has failed to demonstrate that prohibiting segregation based upon gender in a public accommodation where all sexes exercise while fully clothed is the type of law that interferes with the autonomy of an individual to make decisions generally considered to be private. The right of privacy in Montana has not been extended so far. In Montana, the Supreme Court has found that search and seizure (e.g., State v. Siegal, 281 Mont. 250, 934 P.2d 176 (1997)), abortion (e.g., Armstrong, supra), medical information (e.g., State v. Bilant, 2001 MT 249, 307 Mont. 113, 36 P.3d 883), and private employment records (e.g., Mont. Human Rights Div. V. Billings, 199 Mont. 434, 649 P.2d 1283 (1982) can implicate privacy considerations that must be considered and protected. Privacy rights are also generally recognized in situations involving disrobing, sleeping, or performing bodily functions in the presence of the opposite sex (see e.g., United States EEOC v. Sedita, 816 F. Supp. 1291, 1296 (N.D. Ill. 1993). None supports Crossroads argument for the expansion of a privacy right to exercising while fully clothed.

Moreover, the statutory exceptions for modesty listed in the Human Rights Act fall in line with traditional notions of modesty and decency which society, concerned though it is with eliminating discrimination in all forms, nonetheless recognizes as well delineated societal norms the enforcement of which does not implicate unlawful discrimination. Crossroads has not shown that a right to exercise outside the presence of the opposite sex while fully clothed is a similarly valued societal norm such that the gender discrimination that would ensue from such segregation is permissible in the face of human rights statutes which declare the right to be free from gender discrimination as a civil right and which are geared toward eradicating discrimination based upon gender.

Crossroads also places a great deal of emphasis on the decision of Kalinyaprak v. Polson Country Club, HRB Nos. 0063011928 and 0079012064. Kalinyaprak, however, is distinguishable for two reasons. First, that case did not involve restricting the charging party from the use of any part of the golf course based on the charging party's status. In contrast, here, at least until the time that the "Women Only, Please" sign was removed from the wall, a portion of the facilities was off limits to certain club members based solely on the club member's gender. Second, unlike the instant case,

the conduct in Kalinyaprak involved offering a very minimal discount to married couples. In light of the extensive legislative enactments that provided benefits to married persons and the specific exception under the Human Rights Act for discounts for elderly and the young, it would have been incongruous to hold that the Human Rights Act would prohibit discounts for married couples while it condoned discounts based on age. Crossroads has provided no such similar justification for the gender discrimination that occurred here and, in the face of the very clear prohibition against gender discrimination, it is not within the hearings officer's prerogative to read such an exception into the statute.

As noted above, the hearings officer is not unsympathetic to the privacy concerns articulated by Crossroads in this case. It may well be that the legislature may wish to revisit this issue at some point and add an exception to the anti-discrimination statutes for health clubs.[4] That is something, however, that the legislature must do. At present, the statutes do not provide either in spirit or letter for such an exception and the hearings officer does not believe he is at liberty to read such an exception into the public accommodation statute. Accordingly, the hearings officer finds that exclusion of men from the Women's Center by placing a sign that stated "Women Only, Please" constitutes discrimination in violation of the Montana Human Rights Act.[5]

D. Crossroads Did Not Retaliate Against Behr In Terminating His Membership

Behr also argues that Crossroad retaliated against him in terminating his membership. In light of Behr's patently disruptive conduct and Crossroads' legitimate business reasons for terminating his membership, Behr has failed to carry his burden of persuasion to demonstrate retaliation.

Montana law prohibits retaliation in employment practices for protected conduct. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in a protected practice, (2) that thereafter her employer took an adverse employment

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[4] Indeed, after the Foster decision, the Massachusetts legislature amended the Massachusetts anti-discrimination provisions to exempt health clubs from their purview.

[5] At least one commentator has noted that the plain meaning of Montana's and 28 other states' anti-discrimination laws "would clearly bar single-sex health clubs." Cherry, Miriam A., Exercising the Right to Public Accommodations: the Debate over Single Sex Health Clubs; 52 Me. L. Rev.p7 (2000), p. 119.

action against her, and (3) a causal link existed between protected activities and the employer's actions. Beaver v. Dpt. of Natural Resources and Cons., 2003 MT 287, ¶ 71, 318 Mont. 35, 78 P.3d 857. See also, Admin. R. Mont. 24.9.610 (2). Admin. R. Mont. 24.9.603 (3) specifically provides that when significant adverse actions are taken against a charging party during the pendency of a human rights proceeding by arespondent who has actual or constructive knowledge of the proceeding, a rebuttable presumption arises that the action was in retaliation for engaging in protected conduct.

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. Where the prima facie claim is made out by circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, then the charging party may demonstrate that the reason offered was mere pretext. The charging party can do this by showing that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); Strother v. Southern Cal. Permanente Med. Group, Group,, 79 F.3d 859, 868 (9th Cir. 1996).

In this case, Behr has made a prima facie case of discrimination by virtue of the rebuttable presumption that the conduct which occurred while Behr's human rights case was pending was retaliatory. Behr filed a human rights complaint against Crossroads based on sex discrimination. While that matter was pending, Behr's membership was terminated. This prima facie case, based upon circumstantial evidence, shifts the focus of the inquiry to Crossroads to show a legitimate non-discriminatory basis for undertaking its action. If Crossroads carries that burden, Behr must then "prove by a preponderance of the evidence that the legitimate reasons offered by [Crossroads] were not its true reasons, but were a pretext for discrimination." Id.; Admin. R. Mont. 24.9.610(3). If Crossroads can do this, Behr may then prove that Crossroads reasons for terminating his membership were merely pretextual. Behr, however, carries the ultimate burden of persuasion to demonstrate that the reasons for the complained of action were at least in part motivated by retaliatory animus. Hearing Aid Institute v. Rasmussen 258 Mont. 367, 852 P.2d 628, 632 (1993).

Crossroads has met it burden in this case. The testimony of all its witnesses regarding Behr's conduct, which the hearings officer finds highly credible, demonstrates that Behr's behavior was so inappropriate that it forced Crossroads to take action in order to protect not only other members but also its own personnel. Behr's behavior of yelling at and intimidating employees, mimicking employees and potential customers and throwing a conniption fit with regards to cleanliness of the bench created such an

untenable situation that Crossroads was forced to ask him to leave. His behavior only escalated over time, it never subsided. His behavior was costing Crossroads both customers and money. Under the facts of this case, Crossroads has carried its burden.

As Crossroads has carried its burden, Behr must prove that Crossroads' justification for its actions was mere pretext. Behr has failed in his effort to do so. The primary basis urged for finding pretext is that the persons testifying about Behr's conduct were either "employees, managers or owners" of Crossroads and, therefore, their testimony is suspect. Behr's opening brief, page 20. The hearings officer does not agree. The witnesses who testified for Crossroads presented highly consistent testimony about Behr's conduct. Moreover, it was not just employees, owners and managers of Crossroads that testified as to Behr's outrageous conduct. Three Crossroads customers, Karl Roston, Jerry Burrows and Leif Watson also testified about Behr's "over the top" actions and how that conduct continued to escalate to the point that Behr's membership had to be terminated. The overwhelming proof in this case shows that Crossroads terminated Behr's membership for legitimate business reasons and not for the purpose of retaliating against Behr. Accordingly, Behr's retaliation claim fails.

E. Affirmative Relief

Behr does not seek damages in this matter. He seeks only judgment and affirmative relief. Affirmative relief must be imposed where there is a finding of discriminatory conduct. Mont. Code Ann. § 49-2-506(1)(a). Affirmative relief in the form of injunctive relief to ensure that such discrimination does not occur in the future is appropriate here.

Affirmative relief beyond the above injunction is unnecessary. Crossroads long ago removed the 'Women Only, Please" sign to the Women's Center and in fact changed the name to the Private Center. It has never excluded men from the Center and no longer advertises for a Women's Only Center. The injunction alone is sufficient to ensure that no unlawful discrimination in public accommodation is undertaken in the future.

V. CONCLUSIONS OF LAW

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

2. Crossroads violated Mont. Code Ann. §49-2-304 (1)(a) by placing and maintaining a sign on the Women's Center that said 'Women Only, Please" and by advertising for a "Womens Only Center."

3. Crossroads did not retaliate against Behr by terminating his membership.

4. The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief in the form of an injunction 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 Behr on his discrimination complaint, but not his retaliation complaint.

2. Crossroads is enjoined from discriminating against persons in the provision of public accommodations on the basis of sex.

Dated: November 15, 2010

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Michael Strand, attorney for Fritz Behr, and Monica Tranel, attorney for Crossroads Fitness Center:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. {REQUEST FOR TRANSCRIPT} The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Kimberly Howell, (406) 444-4341 immediately to arrange for transcription of the record.

BEHR.HOD.GHP