BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013747:

LORI ANDERS, Charging Party, vs. ROCKING J RANCH, Respondent.	) Case No. 1210-2010))) HEARINGS OFFICER DECISION) AND NOTICE OF ISSUANCE OF) ADMINISTRATIVE DECISION)))

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I. PROCEDURE AND PRELIMINARY MATTERS

Lori Anders filed a human rights complaint alleging that Rocking J Ranch discriminated against her on the basis of her marital status (married) when Rocking J Ranch discharged her from her employment with the Rocking J Ranch. The contested case hearing in this matter was held on July 1, 2010 in Missoula, Montana. Michael Milodragovich and Elizabeth O'Halloran, attorneys at law, represented Lori. Robert Lukes and Malin Stearns Johnson, attorneys at law, represented Rocking J Ranch. Lori, Warren Anders, James Manley, Terri Buhr, Sonja Gustin and Cory Lawrence testified under oath. Charging Party's Exhibits 1 and 2, Respondent's Exhibits A and C and the deposition of Max Watson were admitted into evidence.

Counsel for each party requested time to submit post-hearing briefs. These requests were granted and each party's responsive brief was received on November 10, 2010, at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearings officer makes the following hearings officer decision.

II. ISSUES

A complete statement of issues is found in the final prehearing order which issued in this matter on June 25, 2010. That statement of issues is hereby incorporated into this decision.

III. FINDINGS OF FACT:

1. The Rocking J Ranch is located in Granite County, Montana. Prior to August, 2007, the Rocking J Ranch was known as the Rocking K Ranch and was owned by Max Watson.

2. The ranch is located on over 6000 acres of land. It is comprised of a main ranch house, several guest cabins, various work shops and other out buildings. The ranch also maintains various vehicles which have included at one time an Isuzu, a Lexus car, a Jeep and other trucks. There are also various ranch implements.

3. At all times material to this matter, Warren Anders was married to Lori Anders. In 2006, Watson hired Warren Anders to act as general manager of the ranch. As part of Warren's compensation, Watson provided Warren and his family a three bedroom, two bathroom home on the ranch property.

4. On one occasion while working for Watson, Lori had borrowed some red cushion covers that belonged to another building on the ranch and began to use them in the Ander's house. Watson became aware of this and reprimanded Anders accordingly. Other than this instance, there were no other instances of ranch items being improperly used by employees while Watson owned the ranch.

5. Sometime after hiring Warren, Watson hired Lori to supervise the domestic staff that the ranch employed. As part of her job, she scheduled the domestic staff, scheduled cleaners, and retained chefs when needed for visitors at the ranch. Warren was her direct supervisor. Lori's job was not a full time job. She was compensated at the rate of $1,100.00 per month for her work.

6. In her dealings with ranch staff and ranch visitors, Lori could be curt and at times rude. She would at times seem put out by the need to perform her duties. On one occasion, when she was asked to provide a trail ride for visitors at the ranch, she threw a horseshoe and then grudgingly lead the trail ride

7. On occasion, Lori would take food purchased for but unused by ranch guests that might otherwise spoil or not be used. However, other employees on the ranch would also do this. Indeed, it was not unusual at the ranch for the cooks to provide leftovers to ranch employees.

8. The ranch has its own gasoline fueling pump which the ranch filled with fuel purchased by the ranch. The fuel was to be used for ranch vehicles and could be used for personal vehicles when those personal vehicles were being used for ranch errands. Testimony of Max Watson. Use of gasoline from the pump was to be kept in a log provided by the ranch for that purpose.

9. Lori would use ranch gasoline for her personal vehicle. Lori did not log in this fuel use. However, other employees also used ranch fuel for their own vehicles without logging in such use. In addition, ranch personnel were permitted to use ranch fuel in their own vehicles if they were running ranch errands.

10. In August, 2007, Watson sold the ranch to Jim Manley. The name of the ranch was changed to the Rocking J Ranch. When Manley bought the ranch, Warren entered into an employment agreement with him whereby Warren would continue to be the ranch manager. Warren's compensation agreement with Manley included the term that Manley would receive the benefit of continuing to use the house he and Lori had lived in. This is a typical employment benefit for a ranch foreman.

11. After Manley purchased the ranch, Lori continued on in her duties as supervisor of the domestic staff. She continued to hire on chefs and make arrangements for food delivery and supplies of the ranch.

12. Manley is the CEO of an investment firm. When he bought the ranch, he and his family used the ranch more often than Watson did when he owned it. Manley also decided that he wanted to convert the ranch into a luxury guest ranch. This would involve the building of new structures and a capital input of approximately $20,000,000.00.

13. Manley also used the ranch for corporate retreats for his investment firm. The upshot of Manley's increased usage of the ranch was an increase in work load for Lori. She would more frequently have to make arrangements for extra personnel and spend more time ordering supplies. In addition, she would have to undertake extra work in preparing trail rides for Manley's family and guests.

14. Lori's increased work load did not sit well with her. Manley began to notice that Lori was not making his family feel welcome at the ranch. On one occasion, Manley's assistant, Michelle, contacted Lori to advise her that Manley and his family would be out to visit the ranch in approximately three weeks time. At the time, Lori was upset about a death in her extended family. Because she was upset, she acted curtly with Michelle on the phone.

15. On another occasion, Lori provided directions to the ranch to Cory Lawrence over the phone. When Lawrence went to visit the ranch, he found the directions to be confusing and as a result, he over shot the turn off to the ranch by about 6 miles. He called Lori to indicate that he was lost. In telling her this, he also mentioned in a very constructive and cordial manner that the directions were confusing. Lori took offense to Lawrence's comment and became very upset with him. Eventually, she calmed down and told Lawrence to stay where he was at and that she would come get him. Lori explained to Lawrence that she was very upset over the plans that Manley had for changing the ranch into a commercial guest ranch. She then gave Lawrence a ride to the main ranch house where he was to meet Manley. As Lawrence was getting out of the car, Anders again apologized and gave him a hug.

16. Terri Buhr and Sonja Gustin both worked at the ranch. Lori directly supervised them in their duties. Buhr worked at the ranch until she was laid off sometime in 2008. She never discussed any concerns about Lori's conduct with Manley until October, 2008. Gustin worked at the ranch until she was laid off in 2006. She made observations about Lori's attitude while she worked there. Manley spoke to Gustin about Lori's attitude in October, 2008.

17. Warren and Lori rented a house in Drummond so that their two children could attend school there. The ranch paid for DSL at the Drummond house so that Lori could perform some of her ranch tasks while she was in Drummond. At the end of the school year in the spring of 2008, Lori directed two ranch staff members to go to the Drummond house and clean it out. Lori instructed the employees to note on their time cards that they had been working at the Drummond rental unit.

18. Manley never complained to Lori that she was not performing satisfactorily. In addition, on one occasion, Manley gave Lori and Warren a $1,500.00 bonus for work they had done in entertaining guests at the ranch. On another occasion, Manley purchased beaver felt 100x custom hats for both Warren and Lori.

19. Between August 2007 and December, 2008, Manley and Warren's working relationship became strained to the point that Manley no longer wanted Warren working as the ranch foreman. He had lost confidence in Warren's ability to manage the ranch.

20. On December 8, 2008, Manley, who was on premises at the ranch, met with Warren in a building on the ranch known as the Snoring Dog Saloon. During the meeting, Manley fired Warren. Manley presented Warren with two documents, one for him and one for Lori, and was told that he and Lori needed to sign them and "get out of here. The trucks were on the way." Record transcript, page 7, lines 16 through 18. Manley also told Warren that he and Lori needed to vacate the premises immediately.

21. After meeting with Manley, Warren immediately went back to the house he and Lori occupied and told Lori that they had been fired. He also told Lori that Manley had told them that they had two days to get off the ranch.

22. Upon hearing the news that they had been terminated, Lori became very upset and started crying.

23. Two days later, under the watchful eye of two armed security personnel and Manley, Warren and Lori were escorted off the ranch. At no time did Manley or anyone else inform Lori that she had not been discharged.

24. Shortly after Lori and Warren had moved off the ranch, Manley presented each of them with a severance package.

25. On January 22, 2009, Manley wrote a response letter to Lori's attorney explaining why he had discharged Lori. In the letter, he stated that Lori was separated from the ranch for unsatisfactory job performance. The specific reasons given were that Anders treatment of guests and other employees was not appropriate, that she had made statements to members of Manley's company to discourage them from visiting the ranch, that she took food from the ranch for personal use and that she had used ranch staff to clean her and Warren's rental in Drummond. Exhibit1, Manley's January 22, 2009 letter to Attorney Milodragovich.

26. At no time after Lori left the ranch did anyone from the ranch contact her and inquire as to why she was not showing up at work or if she planned on returning to work.

27. Lori moved back to Texas in May, 2009 and presently resides there.

28. On January 7, 2010, the Rocking J Ranch through counsel offered to reinstate Lori in her position at the same rate of pay and with the benefit of staff housing. Lori rejected this offer because she feared a hostile working environment because of the animosity between her, Manley and other ranch staff.

29. While there is no evidence that demonstrates that Lori was ever harassed by ranch employees prior to her termination, it is clear that relations between her and Manley were strained beyond repair. This is evidenced by the fact that Manley did not simply have the Anders leave the ranch after their discharge. Instead, he had them forcibly removed, employing armed private security guards to make sure the Anders did not dally on the day they were ordered to be off the ranch. Thus, Lori's concerns that she had been harassed at the ranch were reasonable because she was effectively removed from the ranch under armed guard.

30. Upon receiving Lori's rejection of the offer for reinstatement, counsel for Rocking J wrote back to Lori's counsel that the ranch staff was essentially new and she would encounter no hostility in the working environment. Despite this, Lori declined to take her job back.

31. The evidence in this case shows that the employer discharged Lori. The circumstances surrounding her and her family being escorted off the property, the employer's efforts to get Lori to take a severance package, Manley's January, 2009 letter to Lori's attorney and the failure of anyone at the ranch after December 8, 2008 to contact Lori and find out what her intentions were all show that the employer discharged Lori.

32. Rocking J discharged Lori because she was married to Warren. It did not discharge her for inappropriate use of ranch resources nor did it discharge her because of her deteriorating attitude toward ranch guests.

33. After being discharged, Lori searched for comparable work while she was living here in Montana and after the time she moved to Texas. In Montana, she continued to be listed as a substitute teacher in the Drummond School District but got no work in that regard. Other school districts were so far away as to make working as a substitute in those districts implausible. Moreover, in that rural area of Montana, other jobs were not readily available. Likewise, she has continued to apply for work in Texas but has been unsuccessful.

34. At the time Lori was fired, she earned $1,100.00 per month in her position at Rocking J Ranch. Back pay in the amount of $20,900.00 is due her, plus interest on that amount of $2,825.70. Use of the main ranch house was a employment benefit provided to Warren's job (the ranch manager), not Lori's job.

35. Lori suffered emotional distress as a result of her discharge. She was upset that she had been discharged with no apparent reason and she was understandably upset with the way she was escorted off the ranch. She has had to move back to Texas in order to provide for herself and find comparable employment. Under the facts of this case, an award of $10,000.00 is appropriate to compensate her for her emotional distress.

36. Given Lori's training and background, she should be able to restore her rightful status in the workplace within one year. Because reinstatement is not possible and because Lori should be able to restore her rightful place in the work force within one year, Lori is entitled to one year of front pay in the amount of $12,200.00 ($1,100.00 x 12 months = $12,200.00).

37. Rocking J has no written policies regarding prohibitions against discrimination.

38. Affirmative relief in the form of injunctive relief prohibiting future conduct and requiring Rocking J to develop reasonable policies against discrimination, procedures for reporting such discrimination and providing training to Rocking J managers on preventing discrimination in the workplace is necessary in order to eliminate the discrimination in this case.

IV. OPINION[1]

A. Rocking J Discharged Lori.

Rocking J argues that it never discharged Lori. Rather, it argues that Lori only assumed she was discharged and left her employment when her husband was fired. The credible evidence here demonstrates that Rocking J fired Lori.

Proof that an employee was discharged can be proven by direct evidence (such as a comment that the person is fired) as well as by circumstantial evidence. The test

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

of whether an employee quit or was discharged is whether the employer's statements or actions at the time would reasonably lead the employee to believe that he had been terminated and that a formal discharge notice is unnecessary.
48 Am. Jur.2d 750, Labor, § 922.

The facts in this case demonstrate unequivocally that Rocking J fired Lori on December 8, 2008. No one on the Rocking J staff made any effort to tell Lori that she had not been terminated. When Manley discharged Warren, he gave Warren documents for both himself and Lori to sign. Armed guards watched to make sure that not only Warren but also Lori left the house and got off of the ranch. Manley offered Lori a severance package shortly after she and Warren left the ranch. Finally, in his letter to Lori's attorney in January, 2009, Manley stated his reasons for discharging Lori but did nothing to indicate that Lori was mistaken about the fact that she had been discharged. Furthermore, at no time in the weeks following Lori's end of employment did anyone at Rocking J ever contact Lori and ask her why she was not at work or if she planned on returning to work. Certainly, in light of her position of management over the ranch, Manley or someone else on staff would have done this. Under these circumstances, the employer's actions demonstrate that Rocking J discharged Lori on December 8, 2008.

B. Lori Has Proven Marital Discrimination.

Having found that the employer discharged Lori, the question now turns to whether the employer discharged Lori because of her marital status and thus unlawfully discriminated against her. Montana law prohibits discrimination in employment based upon marital status. Mont. Code Ann. §49-2-303(1)(a). See also, Mercer v. McGee, 2008 MT 374, 346 Mont. 484, 197 P.3d 961. Discrimination in employment based on marital status includes employment discrimination based upon the identity of the spouse. E.g., Thompson v. Bd. of Trustees, 192 Mont. 266, 269-70, 627 P.2d 1229, 1231 (1981); and Van Haele v. Hysham School District, No. 9301005671 (4/1/96). Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, et seq., mirrors the Montana Human Rights Act prohibitions against discrimination. E.g., Has The Pipe v. Park County, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

The parties in their post hearing briefs have agreed that this case is an indirect evidence case. When there is no direct evidence of discrimination, the indirect evidence standard articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies. Heiat v. Eastern Montana College, 275 Mont. 322, 912 P.2d 787

(1996). McDonnell Douglas applies a 3-tier burden-shifting analysis to each case. Laudert v. Richland County Sheriff's Off., 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386.

Under the McDonnell Douglas test, Lori must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a prima facie case exist in this matter. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). She must show (1) that she is a member of a protected class; (2) that she was qualified for continued employment; and (3) that she was denied continued employment in circumstances which give rise to a reasonable inference that she was treated differently because of her membership in the protected class. Mercer, ¶20; Vortex Fishing Systems v. Foss, 2001 MT 312, ¶ 17, 308 Mont. 8, 38 P.3d 836. See also, Admin. R. Mont. 24.9.610(2)(a).

In this case, there is a reasonable inference that Lori was discharged from her employment with Rocking J solely because of her marriage to Warren. That inference exists from the facts that (1) No one complained to Lori about her work prior to her discharge, (2) Warren was fired and told that he and Lori must immediately vacate the ranch, (3) Warren and Lori were shortly thereafter forced off the premises under the watchful eye of armed guards, (4) at no time prior to the discharge were either Lori or Warren told why Lori was being discharged. These facts alone demonstrate Lori's prima facie case.

Since Lori proved her prima facie case of discrimination, the burden shifts to Rocking J to present evidence that is sufficient, if believed, to support a finding that it discharged Lori on factors not related to her marriage to Warren. St. Mary's, op. cit. at 506-07; Heiat , 275 Mont. at 328, 912 P.2d at 791 (quoting Tx. Dpt. Comm. Aff. v. Burdine, 450 U.S. 248, 252-53 (1981)).

Rocking J has suggested several reasons why its discharge was motivated by legitimate business decisions. These reasons are that Lori utilized ranch resources for her own personal use, Lori was not friendly toward and in fact mistreated ranch guests and that Lori's use of ranch employees to clean her Drummond rental home was inappropriate. These concerns, if believed, present a legitimate non-discriminatory basis for the discharge and are adequate to meet the respondent's burden of production.

As Rocking J has carried its burden of offering evidence of legitimate business reasons for his adverse action against Lori, the burden of production now falls back to Lori to show that Rocking J's proffered legitimate reasons were not its true reasons,

but were a pretext for discrimination. Admin. R. Mont. 24.9.610(3). Her burden of production then merges with her ultimate burden of persuasion to show that she has been the object of intentional discrimination. Burdine, supra, 450 U.S. at 254-55. Pretext can be proven by showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the discharge, or (3) that the proffered reasons were insufficient to motivate the discharge. Manzer v. Diamond Shamrock Chemicals Co., 29 F.3fd 1078, 1084 (6h Cir. 1994). "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir. 1986) (quoting Kouba v. Allstate Ins., 691 F.2d 873, 876-77 (9th Cir. 1982)).

Lori argues that the employer's basis for discharge was mere pretext because the employer never complained to Lori about her conduct, that Lori never inappropriately took ranch property, food or materials for her own use, that she treated ranch guests appropriately, and that while she did use two ranch employees to clean her apartment in Drummond, she had them note on their time cards that they were working at her property. She further argues that the respondent's shifting argument (arguing first that Lori was discharged for legitimate business purposes and later arguing that Lori was not discharged but quit) casts substantial doubt on the legitimacy of the proffered business reasons.

The respondent's proffered reasons for terminating Lori will be considered individually and collectively to determine whether they amount to pretext. As to the use of ranch food, that complaint is not credible. It is apparent that it was a common occurrence that leftover food was shared among employees. It is also apparent that if ranch fuel was used, all employees did that. At no time did Manley take action against Lori or any ranch employee to stop the use of food or fuel. Certainly, had such use of resources been an issue, Manley would have brought it to either Lori's or Warren's attention at some point in the two months that elapsed between his October discussions with Buhr and Gustin and the date that Lori was discharged. Furthermore, the deposition testimony of Max Watson shows that ranch personnel were permitted to fill their own vehicles with fuel if they had used their vehicles for ranch errands. Record transcript, page 16, lines 1 through 9. These alleged factors for firing Lori, either taken individually or collectively, are pretextual.

As to the use of two employees to clean the Drummond house, that complaint is also not credible. Lori's credible testimony is that she had the employees note on their time sheets the fact that they were working at the Drummond House and the hours that they worked there. The employees were not being taken away from ranch

work. In addition, this happened in August, 2008, almost four months prior to her discharge. Had this been a cause of the discharge, Manley most certainly would have raised it before the discharge. He did not do so until after the discharge which demonstrates further that this alleged basis was merely pretext.

It is apparent, however, that Lori's attitude toward guests was problematic from some time before Watson sold the ranch to Manley all the way through to the time Lori was fired. Manley was aware of the problems that Lori's behavior presented as he called Watson, Gustin and Buhr in October, 2008 and all three persons consistently reported her erratic behavior toward guests. This corroborates the complaints he received about Lori's conduct toward guests and ranch staff. Her erratic behavior was further corroborated by Cory Lawrence. Whatever happened to cause Lori to act so poorly toward guests, it is apparent that her behavior affected both ranch guests and ranch employees and that her behavior was a legitimate cause for concern for her employer.

Balanced against this concern, however, is Manley's failure to communicate to Lori or Warren that Lori had to be discharged because of her conduct toward guests and staff. At hearing, Manley testified that he raised his concerns about Lori's behavior with Warren. However, all he told Warren was "that I hope you'll take care of this." RT p. 60, line 19. Had this been the actual basis for discharging Lori, Manley certainly would have discharged Lori himself or would have directed Warren to discharge her or at least would have mentioned it as a basis for Lori's discharge at some point. Manley's failure to say anything about this or any other basis for discharging Lori until one month after the discharge (in his January 22, 2009 letter), persuades the hearings officer that Manley's concern about Lori's demeanor toward guests did not actually motivate the discharge. Lori has, therefore, proven that the employer's proffered legitimate reasons were mere pretext. Lori has proven that Rocking J discriminated against by discharging her on the basis of her marriage to Warren in violation of Mont. Code Ann. §49-2-303(1)(a).

Rocking J also argues that in any event no damages are due because this is a "mixed motive" case. A mixed motive case arises when the charging party proves illegal discrimination "but the respondent proves that the same action would have been taken in the absence of the unlawful discrimination . . ." Admin. R. Mont. 24.9.611. See also, Laudert, supra, ¶ 25. The burden of proof and persuasion on this issue rests upon the defendant. Id. Lori argues that mixed motive does not lie here because the respondent did not raise it as an affirmative defense and because the respondent has failed to carry its burden of proof on this issue. Whether or not there

is a requirement to affirmatively plead the matter,[2] the hearings officer does not find that the respondent has carried its burden of proof in this matter for the same reason that it failed to prove pretext: Manley never mentioned any legitimate reason for firing Lori at the time he discharged her and Warren. Indeed, he did not mention any legitimate basis at all for firing Lori until over 1½ months later in his January 22, 2009 letter. His failure to mention any problem or a desire to fire Lori at any time during the discharge process makes it almost certain that Manley did not at all rely on Lori's demeanor or other alleged shortcomings in deciding to discharge her. He discharged her because she was married to Warren and he wanted to fire Warren. The respondent has failed to persuade the hearings officer that the mixed motive defense lies in this case.

C. Damages.

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

A charging party who has proved a human rights violation has a presumptive entitlement to an award of back pay. Dolan, supra. Back pay awards should redress the full economic injury the charging party suffered to date because of the unlawful conduct. Rasimas v. Mich. Dpt. Ment. Health, 714 F.2d 614, 626, (6th Cir. 1983). Back pay is computed from the date of the discriminatory act until the date of the final judgment. EEOC v. Monarch Tool Co., 737 F.2d 1444, 1451-53 (6th Cir. 1980). Once discrimination has been established, the burden of proof is on the respondent to show that the charging party did not diligently seek employment. Martinell v. Montana Public Power Co., 268 Mont. 292, 322, 886 P.2d 421, 440 (1994).

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[2]The charging party argues that a mixed motive defense must be affirmatively pled or it is waived, citing Meadow Lake Estates Homeowner's Assn. V. Shoemaker, 2008 MT 41, 341 Mont. 345, 178 P.3d 8. The charging party's reliance on that case is misplaced. There is no requirement for an answer from a defendant in the administrative scheme for adjudication under the Montana Human Rights Act. See generally, Admin. R. Mont. 24.8.734. Moreover, it is difficult to see how the charging party would be unfairly prejudiced by the respondent's argument such that preclusion of a mixed motive defense would be merited.

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

Lori testified that she continued to search for comparable work while she was living here in Montana and after the time she moved to Texas. In Montana, she continued to be listed as a substitute teacher in the Drummond School District, but got no work in that regard. Other school districts were so far away as to make working as a substitute in those districts implausible. Moreover, Lori was in a rural area of Montana where other jobs were readily available. She has continued to apply for work in Texas but has been unsuccessful in finding work.

Efforts to demonstrate that Lori has failed to mitigate her losses by looking for paralegal work are unpersuasive. Lori had not been certified as a paralegal since 1981. Moreover, there has been no evidence presented to show that any paralegal jobs were available to her in the Drummond area or in the place where she lives in Texas.

Lori's testimony is credible and has not been rebutted by the respondent's cross-examination of her. The respondent has thus failed to prove that Lori failed to mitigate her damages. Lori is entitled to damages amounting to at least $1,100.00 per month in lost wages since the time of the discharge. Martinell, supra. She is entitled lost past earnings of $20,900.00 in lost wages from the date of her discharge to the time of the hearing in this matter ($1,100.00 per month x 19 months= $20,900.00). She is also entitled to interest on the lost wages through the date of decision at the rate of 10% per annum. That interest amounts to $2,825.70.[3]

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[3]The hearings officer calculated interest on the amount of lost wages by determining the daily value of interest on the monthly income lost by the unlawful discharge and then calculating the number of days that have elapsed between the month of lost income and the date of the judgment in this matter, February 10, 2011. This process was applied to each of the months of lost income, and

The respondent has argued both in post-hearing briefing and in a motion in limine prior to hearing that damages should be limited in this case to those damages accruing prior to January 20, 2010, the date upon which the respondent offered to reemploy Lori. The Montana Supreme Court has clearly held that an unconditional offer of reemployment can cut off the accrual of damages. Martinell, supra, citing Ford Motor Co. V. EEOC, 458 U.S. 219, 241 (1982). The respondent has also argued that Lori's damages should be cut off in any event because she would not have stayed at the ranch in any event once Warren was gone. The charging party argues strenuously that Lori's damages should not be cut off and she should be awarded front pay because Lori was justified in not returning after the offer of re-employment because of the way she was treated at the ranch.

The respondent has pointed out that it offered to reinstate Lori in her same position at the ranch at her same rate of pay in January, 2010. At the time she rejected the offer, Lori did so on the basis that the ranch presented a threatening environment to her. The respondent has countered that at the time of the offer, ranch personnel had changed substantially. While this may be true, one thing had not changed at all: ownership of the ranch. Manley still owned it. In light of the fact that it was at Manley's direction with Manley present that Warren and Lori were escorted off the ranch under armed guard, Lori's apprehension was justified. As the charging party correctly points out, "in determining whether the right to relief extends beyond that date of the offer of reinstatement, a trial court must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal." Graefenhain v. Pabst Brewing Co., 870 F. 2d 1198, 1202-03 (7th Cir, 1989). Her refusal to return to the ranch after the passage of one year was not unreasonable in light of the fact that the same person who had discharged her with armed guards standing by still had control over the ranch. Under these circumstances, cutting off damages based on the offer of reinstatement is not warranted.

The respondent also argues that in any event Lori would not have stayed on the ranch once Warren was gone and therefore damages should be cut-off. As evidence for this, the respondent points to Lori's trial testimony when asked if she would stay on the ranch without Warren there to which she answered ""probably

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then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income. The daily interest value for the period of lost income following her discharge is $.30 per day (10% per annum divided by 365 days =.00027% x $1,100.00 (the monthly lost income) =$.30 per day). The interest due on this lost income through February 10, 2011 is $2,825.00.

not." Record transcript, page 43, lines13 through 15. This argument does not persuade the hearings officer that damages should be cut off. As matter of fact, her equivocal answer does not present a fact basis for finding that she would necessarily have left her job even if she had not been able to stay at the ranch with Warren.

The respondent further points out that Lori received unemployment compensation. Presumably, this argument is meant to help bolster the respondent's argument that Lori has not diligently sought work by pointing out that her unemployment benefits exceeded the value of the monthly pay she received at the ranch.[4] In light of Lori's testimony that she has looked for work (which includes specific instances of searching for work in Texas and Montana), the hearings officer does not find that the respondent has proven this point.

Lori has argued that she should be awarded front pay for a period of two years so that she can reclaim her place in the workforce and bears the burden of showing she is entitled to such pay. It is plain that because of the circumstances surrounding the discharge, reinstatement is not appropriate. It is also clear that despite efforts to do so, Lori has been unable to reestablish herself in the job market as of the date of hearing. Given her rate of pay at the ranch, however, it would seem that with even a minimum wage job she could reestablish her place in the job market within at least one year. Accordingly, front pay in the amount of one years' wages, $12,200.00 ($1,100.00 x 12 = $12,200.00), is appropriate.

Lori also seeks damages for emotional distress. The Montana Supreme Court has recognized that compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. Vortex Fishing Systems, ¶ 33. The severity of the harm governs the amount of recovery. Id. As she testified, Lori suffered emotional distress as a result of the discharge. $10,000.00 is adequate to compensate her for this harm.

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[4]The hearings officer presumes that the respondent is not attempting to argue that the unemployment insurance benefits that Lori received can be used to offset an award of back pay. In Montana, unemployment insurance compensation may not be used to offset an award of back pay in a human rights claim. Vortex Fishing Systems v. Foss, 2001 MT 312, ¶ 26, 308 Mont. 8, 8 P.2d 836. Therefore, though the respondent's argument is not entirely clear on this point, the hearings officer presumes that the respondent's argument regarding unemployment insurance benefits is limited to attempting to show that Lori did not diligently search for work.

V. CONCLUSIONS OF LAW

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

2. Rocking J discharged Lori from her employment at the ranch.

3 Rocking J Ranch unlawfully discriminated against Lori by discharging him from her employment with the ranch solely because she was married to Warren in violation of Mont. Code Ann. § 49-2-301(1)(a).

4 Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Rocking J must pay Lori Anders the sum of $20,900.00 in damages, $2,825.70 in pre-judgment interest on those damages through February 10, 2011, emotional distress damages in the amount of $10,000.00 and front pay in the amount of $12,200.00.

5 The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Lori Anders and against Rocking J Ranch as Rocking J Ranch illegally discriminated against Lori Anders because of her martial status.

2. Within 120 days of this order, management and staff of Rocking J Ranch must attend four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of discrimination and terms and conditions of employment, with prior approval of the training by the Human Rights Bureau. Rocking J Ranch must also develop and implement specific policies to prohibit discrimination in the work place and to ensure that both employees and management are properly trained about preventing discrimination in the work place. In developing and implementing this plan, Rocking J Ranch shall work with the Montana Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau.

3. Rocking J Ranch is enjoined from taking any adverse employment action against any employee based on marital status.

4. Rocking J Ranch must within 30 days of the date that this order becomes final pay Lori Anders the sum of $45,925.70, representing $20,900.00 in damages, $2,825.70 in pre-judgment interest on those damages, front pay in the amount of $12,200.00, and emotional distress damages in the amount of $10,000.00.

DATED this 10th day of February, 2011.

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings officer
Hearings Bureau

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Michael Milodragovich and Elizabeth O'Halloran, attorneys for Lori Anders; and Robert Lukes and Malin Stearns Johnson, attorneys for Rocking J Ranch:

The decision of the Hearings 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 Hearings 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. The transcript is in the contested case file.

ANDERS.HOD.GHP