BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0109014622:

MARTI FRAZIER,	)	Case No. 1809-2011
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	
YELLOWSTONE MINE RESTAURANT,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Marti Sue Frazier filed this complaint alleging that her employer, Yellowstone Mine Restaurant, discriminated against her on the basis of age when the owner, James Kemp, refused to let her resume waitressing duties because of her age and retaliated against her by discharging her shortly thereafter for complaining about Kemp's conduct.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on September 13, 2011 in Livingston, Montana. Alex Rate, attorney at law, represented Frazier. Michael Anderson, attorney at law, represented Yellowstone Mine Restaurant.

At the hearing, Frazier, Kemp, Michael Gus, Suzanne Cumbow, Stella Ziegler, Deborah Mackey, Joyce Sperano, Leslie Pletcher and Patrick Rose testified under oath. The parties stipulated to the admission of Charging Party's Exhibits 1 through 4, 7, and 12 through 14. The parties further stipulated to the admission of Respondent's Exhibits C,D,E,F,G,H and I.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Hearings Bureau on November 2, 2011. Based on the evidence adduced at

hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

A complete statement of issues appears in the final pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. FINDINGS OF FACT

1. Marti Frazier was 42 years old at the time the events in this matter unfolded. She has over twenty years of experience as a waitress, bar manager, and prep cook.

2. James Kemp is the sole owner of the Yellowstone Mine. While Kemp does not generally make day-to-day hiring decisions, he does weigh-in with his managers when he is concerned about an employee. Kemp is unfamiliar with Montana's anti-discrimination laws.

3. At all material times, Patrick Rose has worked as the head morning cook/manager.

4. During the material times in this proceeding, Yellowstone Mine employed other female employees as waitresses ranging in age from the late teens all the way up to Joyce Sperano, the head waitress, who is 63 years old. See respondent's Exhibit F. Other waitresses working at the time Frazier worked, who were as old or older than Frazier, included Bev Goss, who was over 50 years old, Ann Peck, who was over 40, the late Gaylon Lowery, who was over 40 years old when she worked at the Yellowstone, and Alana Sabo, who also was over 40 years old when she was working. Id.

5. Frazier was employed by the restaurant on two separate occasions. Her first tenure was from August 2009 until April, 2010 when she worked as a waitress. Rose made the decision to hire Frazier and did so without Kemp's approval. Testimony of Frazier, testimony of Rose. Frazier eventually became the head waitress. During this tenure, Sperano was hired and also worked as a waitress in the restaurant. At the time of hearing, Sperano was still employed as a waitress.

6. Frazier's first tenure with the restaurant ended when she came into the restaurant one day in April, 2010, and found out that a Bulgarian worker (who had

worked seasonally for the restaurant for a few years) had been added to the schedule. Testimony of Joyce Sperrano. Frazier apparently did not like that fact that the Bulgarian worker had been placed on the waitressing schedule. Apparently, the inclusion of the Bulgarian worker in the schedule upset Frazier. Frazier told Sperano that she "wasn't happy with the situation, and she was going to go talk with Patrick and give her two weeks notice." RT page 238, lines 11 through 13.

7. Within a few months after leaving the restaurant, Frazier began to inquire about getting rehired at the restaurant. In July, 2010, Frazier saw Sperano at the post office and asked Sperano about working again at the restaurant.

8. Sperano mentioned to Rose that Frazier was looking to work at the restaurant again. Rose agreed to hire her as a part time prep cook. At the time she was hired for her second tenure, Frazier was aware that no waitressing positions were available. RT P. 173, lines 15 through 21.

9. As a prep cook, Frazier spent approximately two hours per day finishing her duties.

10. At one point during her second tenure, Frazier asked Sperano, who did the waitress scheduling, if she could work back into the waitressing schedule. Sperano told her that the girls (seasonal employees who left work to return to school) were going to be leaving "in August, perhaps, you know, you would be able to get back on but you would have to ask Patrick." RT page 240, lines 10 through 14.

11. Based on Sperrano's comment and discussions Frazier had with Rose, Frazier believed that she would be placed back on the waitress schedule. Sperano heard about this and talked to Frazier about it. Sperano told Frazier that Frazier would "need to talk to Patrick because I don't think Jim [Kemp]–you know, I don't think they're going to hire you back" as a waitress. RT page 243, lines 14 through 16.

12. After hearing this, Frazier went and spoke to Rose. Frazier asked Rose "So I am not going to be on the floor?" Rose told Frazier that it was out of his hands and that she would have to talk to Kemp about it.

13. Afer speaking to Rose, Frazier went up to Kemp's office to discuss with Kemp his decision not to permit Frazier to be placed on the waitressing rotation. Kemp told Frazier that he could not speak to her that day because he was busy and he asked her to return the following day to discuss her concern.

14. As Kemp had requested, Frazier came back to talk to him on August 19th . Frazier told Kemp that she had heard that he was not going to allow her to waitress. In response, Kemp said that he could put on the floor whomever he wanted to put on the floor. Later during the conversation, Kemp reiterated "Listen to me. I can hire who I want to hire. I'll hire young, good looking girls to put on the floor if I want to." RT page 149 lines 21 through 24.

15. The discussion continued and Frazier told Kemp that she still wanted to work for him. Kemp offered Frazier additional work as a prep cook, telling her that she could fill in for Rose as the prep cook on the days that Rose was not working. This was done because the person who filed in for Rose on his days off, Justin, was contemplating leaving due to family problems. RT page 309, lines 21 through 25.

16. After her conversation with Kemp, Frazier felt degraded. She was upset that she was not being permitted to go back into the waitressing schedule because of her age. Through the time of hearing, Frazier has continued to feel disgraced and ashamed because of the way Kemp treated her. Frazier experienced emotional distress as a result of Kemp's refusal to let her waitress anymore.

17. It takes about two to three hours for a prep cook to complete his or her duties. This was true of Frazier's work when she occupied that position.

18. On August 21, 2010, Frazier came into work. She was upset because of what Kemp had told her. She told Rose about what had happened during her discussion with Kemp. Kemp just shrugged his shoulders and reiterated there was nothing he could do about it. Frazier told Rose that he should "grow some balls" and that he should stick up for the people who worked under him. Frazier was obviously upset that Rose would not confront Kemp about not allowing Frazier to waitress.

19. Frazier worked about one half hour and then left. She left without completing a substantial portion of her work, specifically, laying out the bacon for the subsequent day's breakfasts in cooking pans as Rose had asked her to do. As result, Rose had to call in additional help, dishwasher Branson Mace, to complete her work.

20. Later that afternoon, Rose sent a text message to Frazier telling her "I guess your (sic) done with this job. I had to call some one (sic) to finish prep today." Exhibit 14.

21. As of January, 2011, Frazier has found new employment that has alleviated any loss of income that she experienced as a result of her employer's refusal to let her work as a waitress.

22. While waitressing, Frazier made approximately $1,200.00 per month between her regular hourly wage and her tips. Record transcript, page 145, lines 8 through 16. As a prep cook, she appears to have been bringing home $72.00 every two weeks, or a total of $144.00 per month, making $8.00 per hour in regular hourly wages but making no tip money. Had she not left her employment, she could have filled in for Rose on his days off, providing her with an additional four hours per week of income (working two additional days per week for two additional hours for each of those additional days equals 4 hours per week) or an additional 16 hours per month of income. This would have raised her income $128.00 per month, ($8.00 x 16 hours=$128.00) bringing her total monthly income to $272.00 per month as a prep cook. Subtracting the amount she would have made as a prep cook from the amount she would have made as a waitress leaves a net monthly loss in income due to Yellowstone's refusal to let her waitress of $928.00 per month ($1,200.00 - $272.00=$928.00).

23. Frazier has not sought any damages other than lost wages and emotional distress damages. Frazier's post hearing brief in support of judgment, page 17.

IV. OPINION[1]

A. Frazier Has Proven Age Discrimination.

Montana law bans discrimination on the basis of age. The Montana Human Rights Act prohibits an employer from taking adverse action against an employee because of age. Mont. Code Ann. § 49-2-303; § 49-3-201.

To establish a prima facie case of discrimination, Frazier must show that: 1) she is a member of a protected class; 2) she was performing her job satisfactorily; 3) she requested to be assigned to a position for which the Mine was seeking applicants; 4) she was rejected; and 5) the position was filled with a person not in her protected class, or if the position remained open, the Mine continued to seek applicants from persons with qualifications similar to Frazier's. Admin. R. Mont. 24.9.610,

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

Stevenson v. Felco Industries, Inc., 2009 MT 299, 352 Mont. 303, 216 P.3d 763, Carr v. Ibex Group, Inc., HRC Case No. 0001009220 (January 25, 2002).

Discrimination can be proved by either direct or circumstantial evidence. Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. Black's Law Dictionary, p. 413 (5th Ed. 1979); e.g., Laudert v. Richland County Sheriff's Department, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. In Human Rights Act employment cases, direct evidence relates both to the employer's adverse action and to the employer's discriminatory intention. Elliot v. City of Helena, HRC Case No. 8701003108 (June 14, 1989) (age discrimination).

Where the charging party presents evidence of statements of a decision maker which in themselves reflect unlawful discrimination and which are related to the challenged action, then the case is a "direct evidence" case. Laudert ,¶25. Where a prima facie claim is made out by direct evidence, the employer 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 v. Dairy Queen, 1998 MT 13,¶17, 287 Mont. 196, 953 P. 2d 703. However, the charging party at all times retains the burden of ultimately persuading the trier of fact that she has been the victim of discrimination. Heiat v. Eastern Montana College,275 Mont. 322, 912 P.2d 787, 792, (1996), citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

The respondent has not challenged the fact that Frazier is within a protected class as she is over 40 years old. Frazier has also demonstrated that she sought and was qualified for the waitress position. She has further shown that both prior to her request to be moved into the waitress position and after her discussion with Kemp on August 19, 2010 that the restaurant continued to seek applications for morning shift waitresses. Finally, she has presented direct evidence that Kemp denied her request to work as a waitress because of her age. Specifically, Kemp told Frazier, in the context of a discussion about her age and working as a waitress that he could hire whom he wanted to and that he could "hire young, good looking girls to put on the floor" if he wanted to do so. Frazier has established a prima facie case of age discrimination through direct evidence.[2]

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[2] In her post hearing brief, Frazier has relied on McDonnell -Douglas v. Green, 411 U.S. 792 (1973), the benchmark for discrimination cases in which the charging party relies upon indirect or circumstantial evidence to make out a prima facie case. Kemp's comment to Frazier that he could hire

Because Frazier has established her case by direct evidence, Yellowstone must prove by a preponderance of the evidence that an unlawful motive played no part in the decision not to permit Frazier to work as a waitress during the morning shift. The employer has attempted to do this by making essentially three arguments. First, the employer contends that Frazier was not allowed to go back to waitressing because she might leave as she had earlier. Second, the employer contends that Kemp had no say in the hiring of waitresses and such decisions were left up to Rose. Third, the employer has also sought to lessen the force of Frazier's evidence by pointing out that persons older that Frazier were waitressing. None of these arguments is persuasive.

As to the first argument, it is undercut by the fact that at no time during his conversation with Frazier did Kemp ever articulate a concern that Frazier might up and quit as she had during her earlier stint which ended in April, 2010. Rather, the August 19 discussion focused on the fact that Kemp felt he could hire "younger" waitresses than Frazier if he wanted to because he could hire anyone he wanted for the waitress positions. Indeed, had Kemp really been concerned that Frazier might leave her employment again, he would not have offered her additional hours as a prep cook.

As to the employer's second argument, that argument is flatly contradicted by the employer's statement to the Human Rights Bureau during the investigation phase of this case. As the employer's response to the Human Rights Bureau establishes, "No one other than James Kemp had the authority to hire Marti Sue [Frazier] for a waitress position." Exhibit 10, page 1053. It was Kemp's decision not to permit Frazier to go back to waitressing that was the genesis of her age discrimination complaint. Kemp had the sole authority to make that decision, not Rose.

The employers comparator evidence of other persons over the age of 50 working does nothing to diffuse the force of Frazier's direct evidence of discrimination in this case. Kemp unequivocally told Frazier that he could hire who he wanted and that if he wanted to hire "young good looking girls" for waitressing, he would do that. The fact that Kemp may have hired older workers to waitress, in the context of this case, is of no import since he clearly told Frazier that he could hire younger girls if he wanted to. Thus, regardless of how he might have

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"young, good looking girls" to waitress if he wanted to, made in direct response to Frazier's inquiry as to why she was not being allowed to waitress, is a prototypical direct evidence case in that Kemp's discriminatory intent was made plain in his words. Therefore, the proper analysis is the direct evidence method of analysis.

treated other employees, Kemp clearly discriminated against Frazier on the basis of age in this case.

Likewise, the hearing officer finds that the restaurant's continued recruiting of waitresses for the "a.m. shift" in the local periodical substantially undercuts any argument that Kemp did not intend to keep Frazier off the waitress rotation because of her age. The restaurant's continued efforts to hire other waitresses substantiates Frazier's testimony that Kemp refused to permit Frazier to work as a waitress because of her age.

Yellowstone Mine Restaurant has failed to demonstrate preponderantly that no unlawful motive played a part in Kemp's decision not to permit Frazier to waitress again. Because Yellowstone has failed to carry its burden in the face of Frazier's direct evidence of discrimination, Frazier has proven that Yellowstone discriminated against her on the basis of age.

B. Frazier Has Not Proven Retaliation.

Frazier also claims that Yellowstone Mine retaliated against her for opposing discrimination when she claims that Rose fired her from her position. She claims that Rose discharged her shortly after her conversation with Kemp. Yellowstone Mine argues that Frazier quit and was never discharged. The evidence in this case substantiates the respondent's claim that Frazier quit and was not fired.

The Montana Human Rights Act prohibits retaliation against an individual who has "opposed any practices forbidden under this chapter . . ." Mont. Code Ann. §49-2-301. Where the only evidence of retaliation is circumstantial, the burden shifting protocol of McDonnell -Douglas v. Green, 411 U.S. 792 (1973) applies. Heiat v. Eastern Montana College, 275 Mont. 322, 912 P.2d 787 (1996). Frazier relies exclusively on circumstantial evidence of retaliation. Hence, the indirect evidence analysis of McDonnell-Douglas and Heiat applies to this case.

A charging party presents a prima facie case of retaliation when he shows that (1) she engaged in statutorily protected activity, (2) she was subjected to adverse action, and (3) that a causal link exists between the protected activity and the adverse action. Beaver v. Dpt. of Natural Resources and Cons., 2003 MT 287, ¶ 71, 318 Mont. 35, 78 P.3d 857; Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994). Protected activity includes opposing any act or practice made unlawful by the Montana Human Rights Act. Admin. R. Mont. 24.9.603 (1)(b).

To make out a prima facie case, a charging party must present evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a prima facie case exist. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); Baker v. American Airlines, Inc., 430 F.3d 750, 753 (5th Cir. 2005). If the charging party succeeds in making a prima facie case, the burden of production shifts to the respondent to show a legitimate, non-retaliatory reason for the action. Id. at 754-55. If the respondent meets its burden, the presumption of discrimination created by the prima facie case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. Id. Frazier at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of retaliation. St. Mary's Honor Center at 507; Heiat, 912 P.2d at792.

"[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason" for the adverse action. Heiat, 275 Mont. at 328, 912 P.2d at 791 (quoting St. Mary's Honor Center, 509 U.S. at 515) (emphasis added). See also Vortex Fishing Sys, Inc. v. Foss, 2001 MT 312, ¶ 15, 308 Mont. 8, 38 P.3d 836. "[T]o establish pretext [the charging party] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the respondent's] proffered legitimate reasons for its actions that a reasonable [fact-finder] could rationally find them unworthy of credence.'" Mageno v. Penske Truck Leasing, Inc., 213 F.3d 642 (9th Cir. 2000) (quoting Horn v. Cushman & Wakefield Western, Inc., 72 Cal. App. 4th 807 (1999)).

Frazier has met the first criterion. Her opposition to Kemp's conduct was related to Rose in no uncertain terms. Soon after her discussion with Kemp on the 19th, Frazier returned to the kitchen and told Rose about Kemp's illegal conduct and further admonished Rose that he should "grow some balls" and stick up for his charges. Articulating to Rose (Frazier's direct supervisor) that Kemp's conduct was illegal is protected activity under the Montana Human Rights Act. Mont. Code Ann. §49-2-301.

Frazier's evidence of the second and third criteria are weak, but nonetheless sufficient for purposes of establishing a prima facie case. The entirety of her contention that she was discharged rests on her perception that Rose's text to her on August 21st is more than a simple observation that it appeared to Rose that Frazier had walked off the job. Frazier argues that Rose in fact intended to discharge Frazier when he sent her the text. The causal connection exists by virtue of the proximity of the perceived adverse action to Frazier's complaint to Rose. Temporal proximity between a complaint of discrimination and adverse action can be sufficient to make

out a prima facie case. See, e.g., Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st cir. 1988). Frazier's perception of the portent of Rose's text message, coupled with the proximity of the text message to Frazier's complaint to Rose, is sufficient to establish the second and third prong of Frazier's prima facie case of retaliation.

Frazier's prima facie case, based upon circumstantial evidence, shifts the burden to Yellowstone Mine to show a legitimate non-discriminatory basis for Rose's conduct. If Yellowstone Mine can do this, Frazier must then prove that the restaurant's reasons for its actions were merely pretextual. And Frazier has the burden of ultimately persuading the fact finder that the reasons for the employment action were at least in part motivated by unlawful discrimination, in this instance, by retaliatory animus. Hearing Aid Institute v. Rasmussen (1993), 258 Mont. 367, 852 P.2d 628, 632.

Yellowstone Mine has presented credible evidence that there was no discharge but rather that Frazier quit. First, it was not out of character for Frazier to have quit once she perceived the injustice of Kemp's refusing to allow her to waitress because of her age. She had left her employment the preceding April because she was upset with the scheduling of the Bulgarian workers. Yellowstone has presented compelling evidence to show that Frazier walked out after one half hour of work on August 21st because she had become upset with Rose because he would not stand up to Kemp. Rose was compelled to have another worker complete Frazier's work. Given the fact that Frazier had previously left her employment as a waitress when she had gotten upset, Rose reasonably interpreted her leaving on August 21st as her walking off the job. Seen in this light, Rose's text was not a discharge but rather Rose communicating his perception to Frazier that she must have walked off the job again because she was upset. Yellowstone Mine has met its burden to show that the employer's conduct was not retaliatory because it took no adverse action against her.

Because Yellowstone Mine has met its burden, the burden swings back to Frazier to show that Yellowstone's arguments are merely pretext. Frazier has failed to convince the trier of fact that she was discharged. In light of her previous quit in April, combined with the fact that she left her job on April 21st without completing her work, she almost certainly walked off the job in anger over Rose's refusal to intercede on her behalf with Kemp. Rose reasonably perceived that she quit and not surprisingly, being fully aware of her earlier quit, sent a text message to Frazier which articulated his conclusion that she must have quit her job. Rose did not intend to and in fact did not discharge Frazier. This conclusion is buttressed by the fact that Kemp himself never took steps to discharge Frazier and in fact he did just the opposite by offering to give her more hours as a prep cook by telling her that she

could take over Rose's prep cook duties on Rose's days off. Frazier has failed to prove by a preponderance of the evidence that her employer took any adverse action against her with respect to her retaliation claim. Her retaliation claim, therefore, fails.

C. Damages

The department may order any reasonable measure to rectify any harm Frazier suffered as a result of illegal discrimination or retaliation. 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).

Damage awards must include compensation for emotional distress suffered as a result of the illegal discrimination when the facts show that the charging party has suffered from emotional distress. The value of this distress can be established by testimony or inferred from the circumstances. Vortex Fishing Systems, ¶ 33. As the charging party correctly points out, compensable emotional distress can include such things as sleep disturbances, apathy, guilt, shame, a lack of self confidence and anxiety. Vortex, supra; Benjamin v. Anderson, 2005 Mon 123, ¶67, 327 Mont. 173, 112 P.3d 1039.

Frazier has proven that Yellowstone Mine discriminated against her when Kemp refused to allow her to waitress because of her age. However, she failed to prove that the employer retaliated against her. Frazier's damages must flow from illegal conduct in order to be compensable. Therefore, in order to recover damages from lost income, she must prove that the lost income and any inability to pay rent or other bills flows from Kemp's discriminatory conduct in refusing to let her go back to waitressing. Mont. Code Ann. §§ 49-2-506(1)(b).

Frazier seeks $6,000.00 in compensation for lost wages. Her argument for this flows from her retaliation claim. However, because her employer did not retaliate against her, she must prove that Kemp's refusal to permit her to go back to waitressing caused these damages.

As a waitress, Frazier made approximately $928.00 more per month than she would have if she had stayed on as a prep cook at the Yellowstone Mine. Over the four months prior to finding new work in January, 2011, this amounts to lost wages of $3,712.00 ($928.00 per month net loss in wages x four months =$3,712.00) flowing from Kemp's refusal to permit Frazier to waitress. These lost wages are compensable in this proceeding. 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 $855.25[3]

Frazier unquestionably suffered emotional distress from the illegal discrimination she suffered. She was subjected to the humiliation, stress and degradation of being denied the job opportunity of waitressing based solely upon her age. She felt anxiety and was upset and these feelings continue to this day. Her testimony on this regard plainly establishes her emotional distress.

In Raiha v. Butte Silver Bow Local Government, HRB No. 0061011911 (September, 2008), the Montana Human Rights Commission affirmed an emotional distress award of $5,000.00 for a county employee who was not promoted to a higher paying position because of her age. In that case, the charging party was not directly told that she was denied the position because of her age. In Johnson v. Hale 13 F.3d 1351 (9th Cir. 1994), two African-American men responded to an advertisement to rent an apartment. When they met with the landlord's wife to see the apartment, she told them "that her husband would not allow her to rent to 'Negro men.' Id. The district court awarded the plaintiffs $125.00 each. The court of appeals set aside the district court order and awarded $3,500.00 to each man, noting that "sum would appear to be the minimum that finds support in recent cases . . ." Id. at 1354.

Like the plaintiffs in Johnson, and more so than the charging party in Raiha, Frazier was directly confronted with the employer's illegal basis for discrimination, the fact that he could "hire younger girls" to waitress if he wanted to do so. As Frazier testified, this caused her a great deal of anguish and humiliation. The impact

[3]The hearing 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 date she would accrued her first full month of lost income, September 30, 2010, and the date of the judgment in this matter, December 15, 2011. This process was applied to each of the months of lost income, and then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income. The daily interest value for the period of lost income following her discharge is $.25 per day (10% per annum divided by 365 days =.00027% x $800.00 (the monthly lost income) =$.25 per day). The interest due on this lost income through December 15, 2011 is $855.25.

of the discrimination, more so than in Johnson, was not short lived. It continued to upset and humiliate Frazier over one year later at the time of the hearing. In light of the evidence adduced at hearing, Frazier is entitled to an award of $10,000.00 in order to fairly and reasonably compensate her for the emotional distress she suffered as a result of the illegal discrimination.

D. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). Affirmative relief in the form of both injunctive relief and training to ensure that the conduct does not reoccur in the future is necessary to rectify the harm in this case.

E. This Tribunal Has No Power to Award Attorney's Fees and Costs.

The charging party's counsel also asks this tribunal to award her attorney's fees and costs. This administrative tribunal has no power to do so as that power is specifically reserved to a district court. Mont. Code Ann. § 49-2-505(8).

V. CONCLUSIONS OF LAW

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

2. Yellowstone Mine violated the Montana Human Rights Act when its owner, James Kemp refused to permit Frazier to waitress because of her age.

3. Yellowstone Mine did not retaliate against Frazier.

4. Frazier is entitled to be compensated for lost wages in the amount of $3,712.00, interest on those lost wages in the amount of $855.25, and emotional distress damages in the amount of $10,000.00.

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

VI. ORDER

1. Judgment is found in favor of Marti Sue Frazier against Yellowstone Mine Restaurant for discriminating against Frazier based on her age in violation of the Montana Human Rights Act.

2. Yellowstone Mine Restaurant is enjoined from discriminating against any employee on the basis of age.

3. Within 30 days of the date that the order in this matter becomes final, Yellowstone Mine Restaurant must pay Frazier $14,567.25, representing $3,712.00 in lost wages, $855.25 in interest on those lost wages, and $10,000.00 in emotional distress damages.

4. Within 90 days of the date that the order in this matter becomes final, Yellowstone Mine Restaurant must develop and implement a specific plan to train all employees and the owner about the requirements of The Montana Human Rights Act and about methods to prevent and timely remedy age discrimination. In developing and implementing this plan, Yellowstone Mine Restaurant shall work with the Montana Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau. In addition, Yellowstone Mine Restaurant shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: December 15, 2011

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Alex Rate, attorney for Marti Sue Frazier; and Michael B. Anderson, attorney for Yellowstone Mine Restaurant:

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 Kathy Helland
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 original transcript is not in the contested case file, however, an original transcript has been prepared at the request of the parties and is in the possession of the parties. Contact Tamara Newby, (406) 444-3870 immediately to confirm that the original and six copies of the transcript can be provided to the Commission.

FRAZIER.HOD.GHP