BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014055:

LISA KRUCKENBERG,	)	Case No. 1972-2010
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
ARLEAH SHECHTMAN,	)	
	)	
Respondent.	)	

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I. INTRODUCTION

Lisa Kruckenberg filed a complaint with the Department of Labor and Industry on October 22, 2009. She alleged that Arleah Shechtman, discriminated against her in employment because of her marital status by discharging her on September 11, 2009, because Jeff Kruckenberg, her husband, was pursuing a civil lawsuit against Shechtman and her husband, Morris Shechtman. On May 21, 2009, the department gave notice that Kruckenberg's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing convened on February 1, 2011, in Kalispell, Montana, concluding the same day. Kruckenberg attended with her counsel, Shelly F. Brander, Kaufman, Vidal, Hileman, P.C. Shechtman attended with her counsel, Stephanie M. Breck, Kaplan & Breck, P.C. The transcript, filed with the Hearings Bureau, reflects the witnesses who testified and the exhibits offered. After Shechtman timely filed her proposed decision, the time within which Kruckenberg could file a reply brief (which was optional) expired without any such filing and this case was deemed submitted for decision.

II. ISSUES

The issues in this case are (a) whether Kruckenberg was an employee or an independent contractor; (b) whether Shechtman illegally discriminated against Kruckenberg in employment because of marital status; and (c) what harm Kruckenberg suffered as a result, what reasonable measures should be ordered to rectify it, and whether, in addition to an order to refrain from such conduct, the

department should require further reasonable measures to correct and prevent similar discriminatory practices.

III. FINDINGS OF FACT

1. At all pertinent times, Charging Party Lisa Kruckenberg and Respondent Arleah Shechtman have both been residents of Flathead County, Montana.

2. Shechtman hired Kruckenberg as an employee in November 1999. Kruckenberg's initial position was as the assistant for Shechtman's personal assistant, Mary Krager.

3. In 1999, Shechtman and her husband Morris (Morrie) Shechtman operated several businesses that provided business consultations, motivational speaking engagements, counseling and other services to various businesses and individuals.

4. In January or February 2000, Shechtman offered and Kruckenberg accepted the job of doing housecleaning and other tasks as assigned. Shechtman paid Kruckenberg $1,050.00 per month to clean the home and office once a week (on Fridays), and an additional $12.50 per hour for any additional hours spent performing other tasks offered to her during the week. Kruckenberg continued to work this schedule until Shechtman reduced it to every other week in the spring of 2009. During her first day, Kruckenberg worked with the previous housekeeper, Cary Krager (who was now taking over for Mary Krager as Shechtman's personal assistant). Krager familiarized Kruckenberg with the cleaning work in the Shechtman home.

5. Shechtman paid Kruckenberg for her work from a variety of businesses, including Shechtman d.b.a. The Life Skills Institute, Morris R. Shechtman & Associates, LTD, Fifth Wave Leadership, LLC, and a personal account.

6. When Kruckenberg arrived for work on Friday, she would gather the supplies and start cleaning in the kitchen area, unless it was being used. She routinely checked with both Shechtman and Shechtman's spouse about when she could clean their offices that day, because her cleaning had to be scheduled around their activities. Kruckenberg occasionally received directions from Shechtman about any changes in her cleaning duties, but more frequently any specific directions came from either Shechtman's personal assistant or her spouse's personal assistant. Much of the time, Kruckenberg was free to do the cleaning in whatever sequence of tasks she chose.

7. Although Kruckenberg's Friday work day lasted until she completed the necessary cleaning, she was not free to set her own hours. If she needed either to

take a day off or to reschedule her work, she asked and obtained approval from Shechtman.

8. Shechtman supplied the cleaning supplies and equipment for Kruckenberg to do her job. After a few months on the job, Kruckenberg, on her own initiative, purchased a vacuum cleaner that was easier on her back, to use at the Shechtmans' home. Shechtman offered to reimburse her for the vacuum, but Kruckenberg declined. She left the vacuum at Shechtman's house. If it needed repairs, Shechtman was responsible for repairing it. Shechtman supplied another vacuum for Kruckenberg to use on the wood floors.

9. Kruckenberg initially did all of the shopping (at Shechtman's expense) for the cleaning supplies and was paid $12.50 per hour for the time she spent shopping. Shechtman provided a vehicle for her to use whenever she ran errands or did any other extra tasks outside of the home. Shechtman's second personal assistant, Marilyn Kun, took over shopping for cleaning supplies at some point after being hired to replace Krager.

10. Kruckenberg's extra tasks included caring for the dogs, airport runs, replacing light bulbs in the house, hanging art work, repairing odds and ends, staining, brush work and other yard work outside. Kruckenberg was free to call her husband, Jeff Kruckenberg, to assist her with these tasks. The Shechtmans occasionally called Jeff directly. Kruckenberg would submit an invoice to the Shechtmans for the extra work, for herself and for her husband.

11. At some point, the Shechtmans approved Kruckenberg's request to allow her sons to care for the dogs. Kruckenberg usually supervised them. Kruckenberg ran other errands for Shechtmans, including taking the dogs to the groomers, picking up dry cleaning and watering plants. She helped to set up tables and chairs for events such as retreats at the Shechtmans' home. She also assisted carrying boxes and other heavy items up and down the stairs if the need arose.

12. Kruckenberg helped Shechtman's personal assistant, when asked, during Friday housekeeping. If the personal assistant was not working and Kruckenberg was at the home for housekeeping, she was asked to do personal tasks like prepare Shechtman's spouse's favorite snack, or carry his cases of water up to his master suite. Kruckenberg also filled in for the personal assistant once or twice.

13. Kruckenberg rarely, if ever, turned down any extra tasks from Shechtman, both to protect her job with them, and because she genuinely liked them.

14. Kruckenberg cleaned other homes and some businesses over the years. When required (usually by a business), she has signed written contracts defining her legal relationship with that customer.

15. In August 2004, Kruckenberg's spouse, Jeff, suffered an injury while doing some work on the Shechtmans' property. Jeff was unable to settle his claim with the Shechtmans' insurance company and eventually hired an attorney.

16. From 2007 until the end of Kruckenberg's work for Shechtman (in 2009), she performed fewer odd jobs or tasks for the Shechtmans than during earlier years. In 2007, she submitted two invoices for hauling Christmas décor to the basement. In 2008, she performed only cleaning, and submitted no invoices for performing other tasks or errands for the Shechtmans. In 2009, she submitted one invoice to the Shechtmans for an odd job she performed outside of her cleaning services.

17. In 2007, a new customer required Kruckenberg to apply for an Independent Contractor certificate from the Department of Labor's Independent Contractor Central Unit ("ICCU"), as a condition of providing cleaning services to premises described as a "government-related" building. Kruckenberg applied for and received the certification. As part of that application, she verified to the State of Montana that she had an independently established business and that the occupation for which she was applying for the Independent Contractor certificate was a janitorial/cleaning service.

18. In 2009, Kruckenberg applied for and was granted a renewal of her Independent Contractor certificate by the ICCU. She again made the same verification to the state regarding her status as the owner of a business that provided janitorial/cleaning services. As of the date of the hearing in this matter, her Independent Contractor certificate was in full effect.

19. As of the date of the hearing in this matter, Kruckenberg regularly cleaned two homes and five business premises. She had a written contract with one of those seven customers. The contract's term of the contract was continuing "from year to year unless either party gives written 30-day notice to the other to terminate the contract." Kruckenberg understood this language to mean that the contract relationship was ongoing, until either she or her customer decided to end it by giving the requisite written notice. Kruckenberg also believed that she had the same agreement (although not written) with each of her other cleaning customers – she would continue to provide cleaning services until she or that customer decided to end the relationship.

20. For each of her current clients, Kruckenberg has an agreed day on which she cleans. She is paid a flat amount for her services, no matter how long the

cleaning takes. She uses her own vacuum at every one of her cleaning services jobs. For her home clients, she uses the cleaning products that are available in the home.

21. All of the income that Kruckenberg earned from her janitorial and cleaning customers, including the Shechtmans while she cleaned their home, was reported on her joint tax returns in a Schedule C business income. Each Schedule C referred to Kruckenberg as the business proprietor and the principal business as janitorial services.

22. In March 2009, Shechtman came to Kruckenberg and explained that they were reducing her employment by half, and that she would only be required to come in every other Friday and her wages would be reduced to $525.00 per month in wages. The reason given, and repeated in testimony at hearing, was the declining income of the Shechtmans. The testimony of declining income from the Shechtmans was substantial and credible.

23. On September 4, 2009, Kruckenberg informed the Shechtmans that her husband was proceeding with litigation against them because of his 2004 injury. Kruckenberg felt an obligation to let them know in advance that they would be receiving something from Jeff's lawyer regarding the lawsuit.

24. On September 9, 2009, the Shechtmans were served with the summons and complaint regarding Jeff Kruckenberg's personal injury lawsuit.

25. Kruckenberg's next scheduled day for work was on September 11, 2009. When Kruckenberg started getting out her supplies to start her day, Shechtman approached her, visibly upset and said, "It's getting really awkward having you around here." Kruckenberg asked why. Shechtman responded that the previous day they had been served with the litigation papers. Kruckenberg told her that it wasn't against them personally. Shechtman replied that it was. Kruckenberg said, "Well, it's up to you as to whether you want me here or not." Shechtman responded, "We don't." Kruckenberg left, very upset, and considered herself fired. She called her husband on the way down the hill and told him that she had been fired.

26. Before Kruckenberg arrived for work on September 11, 2009, Shechtman had prepared Kruckenberg's check and had left it on the washer. Shechtman and her husband had decided the night before that they were going to "lay off" Kruckenberg. After the conclusion of her conversation with Kruckenberg, Shechtman picked up the check and left the room.

27. After September 11, 2009, neither Kruckenberg, Jeff nor her children were asked to do any type of work for the Shechtmans. Shechtman and her spouse have hired other people to do the work previously done by Kruckenberg and her family.

Shechtman admitted that her decision regarding whether she could continue to work with Kruckenberg was based on being served with the papers from Jeff's lawsuit. She also admitted that the awkwardness she referred to was not caused by anything Kruckenberg had done. As a matter of fact, the substantial and credible evidence of record establishes that, more likely than not, Shechtman terminated her agreement with Kruckenberg for performance of janitorial and other services because of her marital status, i.e., because her husband had sued the Shechtmans.

28. Kruckenberg's working relationship with her other customers is different in some respects from the working relationship she had with the Shechtmans. With her other cleaning customers, Kruckenberg's tasks are restricted to providing cleaning services, at times that she sets herself, supplying some supplies and equipment, providing cleaning services as a declared independent contractor and doing the work without direction and/or supervision of the customers. She sets her own price with these customers, who are aware that she does business as an independent contractor and that she provides the same or similar cleaning services to other customers.

29. In contrast, Shechtman set the price when she hired Kruckenberg to clean her house. Shechtman did not provide Kruckenberg with either a W-2 or a 1099 at the end of each year. There is no credible evidence that Shechtman and Kruckenberg ever discussed whether their relationship was that of a client and an independent contractor or that of an employer and employee. There was never any mutual understanding that Kruckenberg was an independent contractor. There is no substantial and credible evidence that Shechtman ever knew, during Kruckenberg's employment, that Kruckenberg had an Independent Contractor certification. Shechtman and her husband exercised some control and direction over Kruckenberg's work, even more control over the tasks paid at an hourly rate, and provided some of the equipment and essentially all of the supplies for Kruckenberg's work. Although they were aware that Kruckenberg also provided cleaning services to others, the Shechtmans did not prove any awareness of whether Kruckenberg provided the same or similar services to those others, of whether the others exercised the degree of control over her work that they did, or of whether the others provided supplies to Kruckenberg like they did.

30. During the period of employment from 1999 through 2004, Kruckenberg was never reprimanded by Shechtman or asked to correct a deficiency in her work. Their working relationship was "very good."

31. From the evidence adduced at hearing, the Shechtmans have unilaterally characterized the people they hire as employees or independent contractors, without much regard for which status those people may actually have. Morris Shechtman's former assistant (Pam) was paid as an employee, as was Marilyn Kun, one of

Shechtman's personal assistants. However, when Marilyn and Pam were replaced by Susie Ray, Susie Ray was paid as an independent contractor, even though she was doing the same job.

32. Although it is a close and difficult question, the substantial and credible evidence of record supports a finding that, more likely than not, Kruckenberg was, in fact, an employee of Shechtman rather than an independent contractor.

33. The substantial and credible evidence of record established that it is more likely than not (although it is another close question) that Shechtmans would have ended their employment of Kruckenberg within six months after the date of her discharge, to save money. They would then have found someone else who was willing to do some of the work for a lower price, as they did after terminating Kruckenberg's employment (adding cleaning to the other duties of Shechtman's personal assistant, at $75.00 per week).[1]

34. At the time of her termination, Kruckenberg was earning $525.00 per month from the Shechtmans for her housekeeping duties. She has been unable to replace those wages. Kruckenberg also suffered emotional distress following her termination. Both Kruckenberg and her husband testified credibly that she was tearful, had sleepless nights and that the situation caused problems with their marriage, as she blamed Jeff's decision to proceed with his personal injury lawsuit as the cause of losing her job with Shechtmans. Kruckenberg had never been fired from a job in her life and was distressed that she was fired when she had done nothing wrong. Much of this emotional distress would have occurred less than a year later, had Shechtman continued to employ Kruckenberg until she was replaced for financial reasons. Kruckenberg still would have felt that she was being replaced because of her husband's suit, but not with the intensity that came because she had fairly direct evidence of that causal connection under the peculiar circumstances of her discharge. The reasonable sum proper to remedy her emotional distress resulting from those more intense feelings is $2,000.00.

35. But for the termination of her employment because of her marital status on September 11, 2009, Kruckenberg would have continued to work for approximately six months thereafter, until at least the end of February 2010. She was paid every two weeks (each time she came to clean, at the end when she was coming every other week). Her lost wages total $3,150.00.

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[1] Kruckenberg presented evidence that, when Shechtman's personal assistant was unavailable, a commercial cleaning service cleaned the house, either once or twice, at a higher price than Kruckenberg. The use of the personal assistant as the regular housekeeper was otherwise uncontroverted.

36. For purposes of calculating Kruckenberg's lost wages, it is reasonable to find that she received $525.00 every 4 weeks, for two Fridays of cleaning. Interest on her lost wages, commencing September 25, 2009 (her first projected payday) through March 25, 2010 (her last payday and her last projected working day for Shechtman), totals $42.29 ($525.00 times .1 divided by 365, gives the daily interest, multiplied by 14 days times 21 {6+5+4+3+2+1} two week periods of interest). Beginning March 26, 2010, to June 24, 2011, the date of this decision, her interest accrued is $392.67 ($3,150 times .1 divided by 365 gives the daily interest times 455 days). Her total prejudgment interest is $434.96.

37. Kruckenberg's total recovery is thus $5,584.96.

38. Affirmative relief is necessary to prevent recurrence of this kind of employment discrimination by Shechtman. In addition to an order prohibiting future marital status discrimination, the department should require Shechtman to attend a department approved training presentation addressing illegal marital discrimination. It is not appropriate to require Shechtman to adopt written policies regarding marital status discrimination, in a work environment that customarily does not involve written policies or posted notices.

IV. DISCUSSION[2]

Montana's Human Rights Act prohibits employment discrimination because of marital status. Mont. Code Ann. §49-2-303(1)(a). Marital status employment discrimination in violation of this law includes disparate treatment by the employer because of the spouse's identity. Thompson v. Harlem School District (1981), 192 Mont. 266, 627 P.2d 1229, 1231; see, European Health Spa v. HRC (1984), 212 Mont. 319, 687 P.2d 1029 (1984) (affirming marital status discrimination award for discharge due to spouse's identity and conduct); Matteson v. Prince, Inc., HRA 9901008658 (Sept. 27, 1999); Perez v. Lionshead Resort, HRA 9801008270 (May 5, 1999); Van Haele v. Hysham School District No. 40, HRC 9301005671 (April 1, 1996). To come within the reach of this prohibition against employment discrimination because of marital status, Kruckenberg had to be an employee of Shechtman.

1. The Hearings Bureau Can Decide Independent Contractor Issues in Discrimination Cases.

Mont. Code Ann. §39-71-415(2)(a) provides, "A dispute involving an employer, a worker or the department and involving the issue of whether the worker

[2] 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.

is an independent contractor or an employee, but not involving workers' compensation benefits, must be brought before the independent contractor central unit of the department for resolution." Appeal of an Independent Contractor Central Unit (ICCU) determination, after failure of required department mediation, is to the Worker's Compensation Court. Kruckenberg's charge of illegal employment discrimination because of marital status, to which Shechtman interposed a defense that Kruckenberg was not her employee, squarely raised the issue of whether Kruckenberg was an independent contractor or an employee. It did not involve workers' compensation benefits. In fact and law, it did not involve workers' compensation law. Mont. Code Ann. §39-71-415(2)(b)(I) through (d).

The question of Kruckenberg's status was presented to the ICCU, and the ICCU viewed her as an employee. Shechtman sought to appeal the ICCU letter to that effect, but the department told her attorney that the ICCU had provided a purely "advisory" opinion, for consideration of the Human Rights investigator, and that Kruckenberg's status, should there be a cause finding on the discrimination claims of Kruckenberg, would be a potential issue for the contested case proceedings. The department did not mediate the independent contractor defense. Any appeal from the "advisory" opinion was forestalled by department insistence that this forum was the appropriate one.

The basis of that insistence appears to be the exclusive remedy provision of the Montana Human Rights Act, at Mont. Code Ann. §49-2-512(1) (enacted by Laws of Montana 2007, Ch. 28, Sec. 8) :

> The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

The thrust of this statute is to retain the exclusive remedy provision from prior versions of the Human Rights Act. The express context of "exclusive" appears to address the department's quasi-judicial jurisdiction in contradistinction to district court jurisdiction. However, "exclusive" means "excluding or having power to exclude" and "limiting or limited to possession, control, or use by a single individual or group." Merriam-Webster on-line dictionary at www.merriam-webster.com. Thus, adjudication of issues necessary to resolve a discrimination complaint are reserved to the entities within the department that adjudicate Human Rights and the Governmental Code of Fair Practices Acts disputes.

On the other hand, as already quoted, Mont. Code Ann. §39-71-415(2)(a) of the Montana Workers' Compensation Act provides that independent contractor disputes that do not involve the benefit entitlement of an worker must be resolved by the ICCU. This provision appears to conflict with the exclusive remedy provision of the anti-discrimination acts, but the two provisions can be read in harmony. The Workers' Compensation Act governs industrial injuries and statuses relevant to legal issues in that arena. The Human Rights Act, together with the GCFPA, govern the scope of prohibited discrimination and the remedies available to victims of such discrimination. All three Acts, in application, provide exclusive remedies for the rights they create and vindicate.

Thus, §39-71-415(2)(a) has the intent and meaning, "A dispute about independent contractor status in the context of workers' compensation law but not involving workers' compensation benefits must be brought before the independent contractor central unit of the department for resolution."

The department's regulations expressly make ICCU decisions binding on the department (Admin. R. Mont. 24.35.204(7)), and expressly note that such decisions "may" affect a party's liability in matters related to the Human Rights Commission. Admin. R. Mont. 24.35.205(1). There is even a separate department regulation (Admin. R. Mont. 24.35.206) that provides an appeal to the Workers' Compensation Court after department mediation, for cases not involving workers' compensation benefits. These regulations certainly seem to contemplate that the ICCU will decide independent contractor issues in Human Rights cases, with appeals from such determinations going to the Workers' Compensation Court.

However, the ICCU itself issued its determination to the Human Rights Bureau. When the respondent attempted to appeal the ICCU determination, the ICCU never did respond. Instead, counsel for the Human Rights Bureau responded. The Human Rights Bureau then treated the ICCU determination as an advisory opinion, and proceeded to find reasonable cause to believe there had been illegal marital status discrimination in employment against Kruckenberg. If the regulations mean what they seem to say, the ICCU should have issued a decision with appeal rights, and when Shechtman attempted to appeal, the department should, through one of the involved entities, have sent the ICCU determination to the Workers' Compensation Court for an appeal, while the Human Rights Bureau should have stayed the investigation.

None of those things happened. Thus, it appears that the relevant bureaus in the department are reading and have read the regulations (as they must) to honor the statute that provides that the Human Rights Act establishes "the exclusive remedy

for acts constituting an alleged violation of chapter 3 [the Governmental Code of Fair Practices] or this chapter [the Human Rights Act]." Mont. Code Ann. §49-2-512(1).

The Hearings Bureau is bound by both statutes and department rules. This case came to the Hearings Bureau because two other department bureaus, by their actions on this case, indicated that they do not interpret the department's independent contractor rules to require that an independent contractor dispute in a Human Rights case be decided by the ICCU. Instead, their handling of the ICCU determination indicates that the Human Rights Bureau (with at least the tacit approval of the ICCU) reads the law and the department's regulations to mean that a dispute about independent contractor status in the context of Human Rights issues must be decided by the Hearings Bureau (when the HRA claims have probable merit), with the ICCU providing an advisory opinion during the investigation.

This case has now proceeded beyond the cause finding of the Human Rights Bureau, and a hearing has been held by the Hearings Bureau. The efficacious and just way to proceed is to address and decide the question here. That allows the case to move forward, while giving any aggrieved party the opportunity to seek judicial review of both the decision herein and the propriety of channeling the case into this forum. Remanding it and awaiting mediation, probably followed by an appeal to the Workers' Compensation Court, will slow the process enormously. In addition, either the department or the Workers' Compensation Court might now rule that any appeal is too late, and that the ICCU "advisory" opinion was a decision that is now final and binding, thereby effectively denying Shechtman any forum in which to get a ruling upon her arguments that Kruckenberg was an independent contractor in their working arrangement, after she obtained an independent contractor certification.

Admin. R. Mont. 24.35.202(1), defines the test the department uses in evaluating whether an individual's employment status is that of an independent contractor. The test applies whenever "the ICCU or another unit of the department" undertakes the evaluation. Clearly, the ICCU is not the only entity within the department that can decide the employment status of an individual who holds independent contractor certification.

There are department rules and perhaps other statutes that suggest otherwise, even though there are also other department rules that support the premise that department units other than the ICCU can make independent contractor determinations. Because this case has already proceeded through the Human Rights process to the point of adjudication, and in reliance upon the statutory interpretation set forth above, the Hearing Officer will proceed to adjudicate the independent contractor issue in this case.

2. In Deciding a Dispute about Independent Contractor Status in the Human Rights Context, the Statutory Presumption that an Independent Contractor Exemption Certificate Establishes Independent Contractor Status is Rebuttable and not Conclusive, and Shechtman's Independent Contractor Defense Fails.

Mont. Code Ann. §39-71-417(7)(a) through (c) provide:

> (a) When the department approves an application for an independent contractor exemption certification and the person is working under the independent contractor exemption certificate, the person's status is conclusively presumed to be that of an independent contractor.
> (b) A person working under an approved independent contractor exemption certificate has waived all rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.
> (c) For the purposes of the Workers' Compensation Act, a person is working under an independent contractor exemption certificate if:
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> (I) the person is performing work in the trade, business, occupation, or profession listed on the person's independent contractor exemption certificate; and
> (ii) the hiring agent and the person holding the independent contractor exemption certificate do not have a written or an oral agreement that the independent contractor exemption certificate holder's status with respect to that hiring agent is that of an employee.

"Conclusive" presumptions include any presumption expressly made conclusive by statute. Mont. Code Ann. §26-1-601(4). "Conclusive" presumptions are contrasted to "disputable" presumptions, those presumptions which may be controverted by other evidence. Mont. Code Ann. §26-1-602. Presumptions that are conclusive cannot be controverted by other evidence. The language of Mont. §39-71-417(a) establishes a conclusive presumption.

The Montana Supreme Court has interpreted and applied the independent contractor "conclusive" presumption, as amended numerous times over the years. A prior version of the independent contractor statutory presumption decreed that "When an application [for independent contractor certification] is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter [the Workers' Compensation Act]." Mont. Code Ann. §39-71-401(3)(c) (1999).

In 2002, the Montana Supreme Court found that despite the statute, an ICCU certification was not conclusive (for Workers' Compensation benefits claims) as to the status of an independent contractor when the certification was obtained by fraud. Gonzalez v. Walchuk, ¶26, 2002 MT 262, 312 Mont. 240, 59 P.3d 377 (" . . . [T]he presumption set forth . . . that issuance of a Certificate of Independent Contractor Exemption is conclusive as to the status of an independent contractor, presupposes that the applicant knowingly and voluntarily completes and submits the application. We further hold that this presumption does not survive in the face of proof that the Certificate was obtained by fraud.").

The following year, the Court essentially struck the word "conclusive" from the statute, to harmonize the independent contractor statutory presumption with other existing statutes:

> . . . . While § 39-71-401(3)(c), MCA, provides that an application for exemption approved by the Department is conclusive as to the status of an IC, § 39-71-120, MCA (1999), provides that an individual performing services for remuneration is considered to be an employee unless the individual "is engaged in an independently established trade, occupation, profession, or business" and "has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact." Additionally, § 39-71-401(1), MCA (1999), requires that an employer who "has any employee in service under any appointment or contract of hire . . . shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3." And, § 39-71-409, MCA (1999), prohibits workers from waiving their rights under the Act.

Wild v. Fregein Const., ¶21, 2003 MT 115, 315 Mont. 425, 68 P.3d 855.

The Court reversed summary judgment that Wild was an independent contractor instead of an employee, finding two "crucial and determinative" points that rendered the certification less than "conclusive":

> . . . . Those being that the State Fund's argument assumes that there actually was a before-the-fact determination of IC status, which was not the case here, and that the exemption itself expressly requires the employer to determine that a worker actually meets the test for IC status.

Wild at ¶24.

In particular, the Court noted that:

> The State Fund contends that it is the IC who controls the working relationship because the IC chooses to obtain the exemption and opt out of the workers' compensation system and because the IC chooses if and when he will revoke his exemption and again be eligible to claim workers' compensation benefits. We disagree. It is the employer who determines how much control to place on the worker and if the worker objects to the way the employer wants to do business, then very likely the worker will not have a job.
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> . . . Wild chose to obtain an exemption and worked as an IC for many years and . . . it was within his control to revoke his exemption. [I]t was not within his control that Fregein treated him as an employee in every respect. Montana public policy cannot favor applying an exemption when the employer abuses the exemption for his own economic benefit and fails to comply with the requirements of the exemption.

Wild at ¶44.

Thus, Wild eliminated the "conclusive" qualify of the certification for Workers' Compensation claims, the only kinds of claims specified in the statute.

In an explicit reaction to the Wild decision, the Montana Legislature revived the "conclusive" presumption in 2005, with Senate Bill 108. See, Laws of Montana, 59th Legislature, 2005, Vol. II, Chapter 448, pp. 1545-46. The introductory paragraphs to that legislation expressly cite Wild, note that the case held that the independent contractor "exemption certificate" did not raise a conclusive presumption, and state that the purpose of the amendment is "to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate . . . to waive the benefits of the workers' compensation and occupational disease laws" (emphasis added).

Section 1 of Senate Bill 108, as adopted, subsections 7(a) through 7(c), Laws of Montana 2005, Chapter 448, are identical to §39-71-417(7)(a) through (c). Clearly, the statute reflects the intent of the legislature to restore the conclusive presumption of independent contractor status arising out of the certification, for workers' compensation and occupational disease issues.

The only power the department has to determine independent contractor status is set by the statute. The department cannot legitimately apply the conclusive nature of the presumption more broadly than the scope of the statute itself.

The Hearing Officer concludes that for employment questions that arise in Human Rights cases rather than in the workers' compensation/occupational disease context, the presumption that arises from the certification is not binding upon either the department or the parties, and a determination of a party's employment status, pertinent to the controversy in a Human Rights case, can and should be made by the Hearings Bureau when a case in which the issue arises is transferred to the Hearings Bureau for contested case proceedings. The department's treatment of the ICCU determination as advisory is consistent with this conclusion.

Also consistent with this interpretation of the law is the provision of the 2005 amendments that authorized the department to suspend or revoke an independent contractor certification as it applied to a particular employer who exerted control over or retained a right to control the certificate holder, that was inconsistent with the statutory independent contractor definition. Admin. R. Mont. 24.35.131 and Mont. Code Ann. §39-71-714(8). Thus, the "conclusive" presumption as to workers' compensation and occupational disease laws does not protect a "hiring agent" (defined as an entity that hires individuals to perform services, i.e., an employer) who treats the certificate holder as an employee from a determination that the certificate holder actually is an employee of that hiring agent, even though the certificate holder may still be an independent contractor in working for other hiring agents. In other words, the department is empowered to strike the "conclusive" presumption created by the issuance of the certificate when it is a sham and the certificate holder is actually an employee of a particular hiring agent.

Thus, the conclusive presumption can be overcome, even within the workers' compensation/occupational disease context, by a department determination that it is inapplicable to a particular employment relationship. Thus, even if the "conclusive presumption" could be applicable outside of the scope of its explicit application, and somehow applied to Montana law antidiscrimination cases, the department entities administering the exclusive remedy provided for discrimination would exercise the power to find the presumption inapplicable to a particular employment relationship.

The fact that Kruckenberg held the certification established a prima facie affirmative defense that Kruckenberg was not an employee. However, in this administrative arena, Kruckenberg could (and did) present evidence to rebut that affirmative defense.

The judicial definition of an independent contractor is very clear. An independent contractor is one who renders service in the course of an occupation and both (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact and (b) is engaged in an independently established trade, occupation, profession, or business. Wild at ¶32.

To qualify as an independent contractor, the party attempting to prove independent contractor status must demonstrate by a convincing accumulation of undisputed evidence that both prongs of the two part test have been satisfied. Wild at ¶34; Northwest Publishing v. Montana Dep't of Labor & Indus. (1993), 256 Mont. 360, 846 P.2d 1030, 1032; Sharp v. Hoerner Waldorf Corp. (1978), 178 Mont. 419, 584 P.2d 1298, 1301.

There is four-part control test: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire in determining independent contractor status. Spain v. Mont. Dep't of Revenue, 2002 MT 146, & 23, 310 Mont. 282, & 23, 49 P.3d 615, & 23 (citing Walling v. Hardy Constr. (1991), 247 Mont. 441, 447, 807 P.2d 1335, 1338).

Under the department's rules, at Admin. R. Mont. 24.35.202(2) and (3), 24.35.302 and 24.35.303, essentially the same test applies, although it is framed differently.

Applying these factors, which are substantively the same in both the judicial and administrative arenas even though expressed in slightly different words, Kruckenberg presented substantial and credible evidence of Shechtman's control over her duties as her housekeeper. Shechtman, directly and through her assistants, controlled Kruckenberg's daily activities, which included many tasks beyond simply cleaning the house. Shechtman's spouse would direct Kruckenberg to do things like cook his "broccoflower" or deliver his bottled water to his room. Shechtman's personal assistants often directed Kruckenberg to help set up for retreats or parties, make airport runs, take care of the dogs or water plants. In addition, Kruckenberg was asked to do additional duties such as lawn work, staining, brush piling, plumbing, repairing, dog sitting and other errands for Shechtman.

If Kruckenberg was asked to perform additional tasks on a Friday when she was at the house for her housekeeping duties, she would perform the tasks, and was not paid any additional compensation for them. When she performed any tasks at times other than during her Friday housekeeping, she was paid for the additional time spent working. She was paid for all of the work she did for Shechtman, on Fridays and at other times, and she was always subject to direction.

With regard to method of payment, Kruckenberg was initially paid an ongoing, monthly salary of $1,050.00. In 2009, her housekeeping time was reduced to every other Friday, and her monthly salary for that work was reduced to $525.00 per month. She was not paid by the piece nor on a completed contract basis, which would be evidence of independent contractor status. Wild, ¶34. Kruckenberg received hourly compensation of $12.50 per hour for tasks she performed at times other than during her Friday housekeeping hours.

With regard to furnishing of equipment, Shechtman supplied all of the supplies and equipment necessary for Kruckenberg to do her job, including cleaning supplies, mops, brooms, vacuums and even a vehicle for her if necessary. Kruckenberg supplied her own vacuum, but at her own initiative, and Shechtman offered to reimburse her for it.

Regarding the right to fire the worker, although Shechtman disputed it, the preponderance of the evidence supporting the finding that, indeed, Shechtman fired Kruckenberg. Termination at will or for failure to perform certain details unrelated to the purpose of the employment strongly indicates employee status. Walling, op. cit., 807 P.2d at 1340.

Sharp, op. cit., involved a cleaning woman. In that case, the employer was free to change the details of the cleaning jobs whenever it wished, without any indication that it was changing the overall agreement, by telling her what to clean, what not to clean, where to clean and by requiring duties not associated with cleaning. Like Kruckenberg, the cleaning woman also paid on a time basis (monthly) rather than on a completed contract basis, another strong indication of her status as an employee. Additionally, it was apparent from the record that the right existed in either party to terminate the relationship at any time without liability. The Montana Supreme Court reversed a decision of the Workers' Compensation Court (which had jurisdiction over that dispute, which involved the workers' compensation benefits to which Sharp would be entitled if she was an employee rather than an independent contractor), ruling that Sharp was, indeed, an employee. Sharp, 584 P.2d at 1302.

Even though Kruckenberg operated an independent business and was an independent contractor for at least one of her other customers, Shechtman clearly employed Kruckenberg, and the independent contractor defense failed.

3. Shechtman Fired Kruckenberg Because of Her Spouse's Conduct, Which is Illegal Marital Discrimination in Employment, for Which Kruckenberg Proved Her Entitlement to Damages.

As already noted on page 8 of this decision, adverse action against an employee because of the spouse's identity and conduct is illegal discrimination in employment

because of marital status. The evidence is clear and convincing that Shechtman fired Kruckenberg because her husband was suing Shechtman and Morrie Shechtman. The only reason Kruckenberg lost her job was that she was married to the man who brought that lawsuit. Kruckenberg's discharge was illegal employment discrimination because of marital status, in violation of Mont. Code Ann. §49-2-303(1).

This hearing officer may order any reasonable measures to rectify any harm suffered as a result of illegal discrimination. Mont. Code Ann. §49-2-506(1)(b). The purpose of this remedial statute is to restore an employee who is victim to illegal discrimination to the position that they would have occupied had that discrimination never occurred. E.g., Mercer v. McGee, ¶25, 2008 MT 374, 346 Mont. 484, 197 P.3d 961, citing Vortex Fishing Sys. v. Foss, ¶27, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

By proving discrimination, Kruckenberg established a presumptive entitlement to lost wages. Albermarle Paper Co. v. Moody, (1975), 422 U.S. 405, 417-23. She must prove the amount of wages she lost, but not with unrealistic exactitude. Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc., 755 F.2d 599, 607 (7th Cir. 1985); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3rd Cir. 1984); Rasimas v. Mich. Dept. of Mental Health, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award).

Prejudgment interest on lost wages and fringe benefits is a proper part of Kruckenberg's award of damages. P. W. Berry Co., Inc. v. Freese (1989), 239 Mont. 183, 779 P.2d 521, 523 523; see also, Foss v. J.B. Junk (1987), HRC Case No. SE84-2345. Calculation of prejudgement interest is proper based on the elapsed time without the lost income for each pay period times the appropriate rate of interest applied over the elapsed time. E.g., Reed v. Mineta (10th Cir. 2006), 438 F.3d 1063. Ten percent (10%) per annum simple interest is appropriate, the rate for tort losses capable of being made certain by calculation. Mont. Code Ann. § 27-1-210(1).

Emotional distress is compensable under the Montana Human Rights Act, Vortex at ¶33, but only for emotional distress caused by the illegal discrimination. The amount awarded is the reasonable remedy for Kruckenberg's emotional distress caused by the method and circumstances of her discharge, which came perhaps six months before she would otherwise have been let go for legitimate financial reasons, at which time she would have suffered much of the same emotional distress, for which she would have had no right of recovery.

Injunctive affirmative relief is required, and training for Shechtman is appropriate. Mont. Code Ann. §49-2-506(1) and (1)(a). The Human Rights Bureau

shall approve the training it deems sufficient and proper to prevent recurrence of the illegal discrimination.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this contested case proceeding. Mont. Code Ann. §49-2-512(1).

2. Kruckenberg was an employee of Shechtman, and not an independent contractor.

3. Shechtman illegally discriminated against Kruckenberg by discharging her from employment on September 11, 2009, because of her marital status, approximately six months before Shechtman would otherwise have discharged her for legitimate nondiscriminatory financial reasons. Mont. Code Ann. §49-2-303(1)(a).

4. Kruckenberg is entitled to a monetary recovery to remedy the damages she suffered as a result of the illegal discrimination, as determined in Findings 34-37.

5. Appropriate affirmative relief is necessary. Mont. Code Ann. §49-71-506.

VI. ORDER

1. Judgment is found in favor of Lisa Kruckenberg and against Arleah Shechtman, on the charge of illegal marital status discrimination in employment.

2. Kruckenberg is awarded the sum of $5,584.96, immediately payable to her by Shechtman. Interest accrues on this award as a matter of law.

3. Within 60 days after issuance of this judgment, Shechtman must arrange attendance at a marital discrimination training, approved by the Human Rights Bureau in advance, of a duration deemed appropriate by the Human Rights Bureau.

Dated: June 29, 2011.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Shelly Brander, attorney for Lisa Kruckenberg; and Stephanie Breck, attorney for Arleah Shechtman:

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. The original transcript is in the contested case file.

Kruckenberg.HOD.tsp