BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014523:

KELLY MARTINEZ,	) Case No. 1404-2011
	)
Charging Party,	) HEARINGS OFFICER DECISION
	) AND NOTICE OF ISSUANCE OF
vs.	) ADMINISTRATIVE DECISION
	)
MIDWEST MOTOR EXPRESS,	)
	)
Respondent.	)

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I. INTRODUCTION

Kelly Martinez filed a human rights complaint alleging that Midwest Motor Express (MME) discriminated against her when it terminated her cleaning contract after discharging her common law husband from his duties as MME's terminal manager in Helena, Montana. Hearings Officer Gregory L. Hanchett held a contested case hearing in this matter on July 6, 2011 in Helena, Montana. Kelly Martinez appeared on her own behalf. Bruce Fain, attorney at law, appeared on behalf of MME. Martinez, Rick Farmer and Mike Osterich all testified under oath.

The parties stipulated to the admission of Charging Party's Exhibit 5 and Respondent's Exhibits 101 to 119 and 122. Based on the arguments and evidence adduced at hearing, the Hearings Officer makes the following findings of fact, conclusions of law, and final agency decision.

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. Martinez has shared a common law marriage with Rick Farmer for over twenty years. They have two children by their relationship. At various times, the two have separated. Most recently, they separated in 2004 at about the time that Farmer was hired.

2. MME is a trucking company that moves freight. In 2004, MME hired Farmer to manage its freight terminal in Helena. Mike Osterich is MME's regional manager for the multi-state area which includes the Helena terminal. Osterich hired Farmer.

3. In 2007, MME contracted with a vendor to clean the Helena terminal. When the vendor discontinued its cleaning service, Martinez and Farmer approached Osterich about the possibility of Martinez taking over the cleaning duties. Martinez and Farmer determined at a price per weekly cleaning, $100.00, which they would charge MME for Martinez' cleaning services.

4. Farmer presented the idea to Osterich in an e-mail dated November 2, 2007. Exhibit 101. In the e-mail, Farmer stated:

> I also wanted to inquire about the cleaning position that Jerry's wife left. I have been trying to keep it up myself, however help would be appreciated. I also would like to ask that the wage be increased to $100.00 per week since we are in a larger facility and there is a lot more area to be cleaned. My wife would not mind helping out and taking it over for us.

5. Osterich agreed to the arrangement in an e-mail dated November 2, 2007. In the e-mail, Osterich told Farmer "Cleaning. I don't have a problem with your wife doing the cleaning or the price per week, it will have to be done on a contract basis in other words Bismarck will need her social security number for tax purposes, however, nothing will be held out of the payment since it will done as a vendor service." Farmer had the authority to hire drivers but had no authority to hire vendors. Osterich and MME corporate headquarters, not Farmer, had to approve using Martinez' cleaning service in order for Martinez to start cleaning the Helena terminal.

6. In conformity with Osterich's and Farmer's understanding, Martinez provided a Form W-9 which contained her social security number. Exhibit 102.

7. When Martinez began providing cleaning services, Farmer told her what areas needed to be cleaned. Neither Farmer nor anyone at MME directed her on how specifically she should do the cleaning, but Farmer would tell her what areas needed to be cleaned. Other than to be told that she must clean when the terminal was closed, Martinez was not told what time she had to arrive or leave or how long she needed to stay on the job. Martinez, however, did not have keys to the terminal nor did she know the access code required in order to gain access to the terminal.

8. Martinez hired her teenage children to work in her cleaning business and paid them for their work. MME had no agreement with the children to clean and had no control or concern over who Martinez did or did not hire for the cleaning.

9. Each week, Martinez would invoice MME in order to be paid as a vendor. See generally, Exhibit 108. All invoices indicate that they were submitted by Kelly's Cleaning Service located at 538 Hollins Avenue in Helena. Martinez would provide the invoice to Farmer who would then forward it on to Osterich for approval and payment. This method of submission and approval was typical for payment for all of MME's vendor supplied services.

10. At the end of each tax year for calendar tax years 2007, 2008, 2009 and 2010, MME provided Martinez a Form 1099 showing the amounts her cleaning service had been paid. The 1099 forms all showed that they were being paid to Kelly Martinez d/b/a Kelly's Cleaning Service.

11. Martinez filed a separate Schedule C on her federal tax returns for purposes of reporting the income from the cleaning services provided to MME during calendar tax years 2007, 2008, 2009 and 2010. The Schedule Cs show that the business name was Kelly's Cleaning Services just like the Form 1099. On the Schedule C for each year, she reported gross receipts and claimed total expenses to arrive at a net profit. Her expenses included deductions for mileage driving to and from the terminal to clean and paying her teenage children to help her clean.

12. MME had an credit account at Rock Hand Hardware in Helena on which Martinez would charge squeegees, mops and shop vacuum cleaners in order to carry out the cleaning of the terminal. These supplies would also be used at other MME terminals such as the terminal in Bozeman, Montana. In 2010, Martinez used her own funds to purchase a shop vacuum which she used to clean MME's Helena terminal.

13. In April, 2010, MME management informed Osterich that some vendor provided services had to be reduced, including terminal cleaning services. Osterich informed Farmer and Martinez that the cost of cleaning services had to be reduced and that this could be accomplished by either (1) continuing the same frequency of cleaning but reducing the payment by 50% or (2) by reducing the frequency of cleaning to two times per month with the same payment of $100.00 per service. Martinez opted for the latter, resulting in a monthly reduction in payment from $400.00 to $200.00 per month.

14. On June 22, 2010, MME discharged Farmer from his position as terminal manager. Martinez contacted Osterich on June 30, 2010 to ask if she, too, was terminated as a vendor because of Farmer's discharge. Exhibit 5. Osterich stated that for security reasons, with Farmer's discharge MME could no longer utilize Martinez's cleaning service.

IV. OPINION[1]

Martinez contends that she was discriminated against in her employment when her cleaning services for MME were discontinued because her common law husband, Rick Farmer, was discharged from his position as terminal manager for MME. To this end, she relies heavily on the fact that she never obtained nor was she asked to obtain an Independent Contractor Exemption for the cleaning work performed for MME. MME contends primarily that Martinez was not an employee of MME and, therefore, there can be no violation of the Montana Human Rights Act as the Act does not provide protection against employment discrimination when there is no employment relationship.

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. See, 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

[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.

applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

In order to prove marital discrimination, Martinez must, among other things, prove that she is a member of a 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). By its own terms, the provisions of the Montana Human Rights Act do not protect non-employees from employment discrimination. The Act defines an "employee" as an individual employed by an employer. Mont. Code Ann. §49-2-101(10). An employer is defined as "an employer of one or more persons." Mont. Code Ann. §49-2-101(11). The Montana Act's definition of employee and employer is identical to its Federal Counterpart under Title VII. See generally, 42 USC 2000e(f). The federal courts have recognized that with the statutory definitions of employee and employer not being defined with precision, courts should presume that Congress had in mind "the conventional master-servant relationship as understood by the common-law agency doctrine." O'Connor v. Davis, 126 F.3d 112, 115 (2nd Cir. 1997), citing EEOC v. Johnson &Higgins, 91 F.3d 1529, 1538 (2nd Cir. 1996).

In the context of workers' compensation issues, the Montana Supreme Court has applied common law principles of master-servant relationships (the "control test") in the context of determining whether a person is an employee or an entity is an employer. See, e.g., Sharp v. Hoerner Waldorf Corp., 178 Mont. 419, 584 P.2d 1298 (1978) (finding that an entity that exercised control over the manner and method of cleaning of a person hired as a janitor and which had some say in whom the janitor hired to help her perform her duties was an employer for purposes of the Worker's Compensation Act) and Carlson v. Cain, 204 Mont. 311, 320, 664 P.2d 913, 917 (1983)(noting that the control test can be used "to determine not only whether a person is an independent contractor but also who the employer is . . .").

Neither party has cited applicable administrative rules regarding the determination of whether a person is an employee or an independent contractor. Admin. R. Mont. 24.35.202 provides that when a unit of the Department of Labor and Industry evaluates an individual's employment status, the department must apply a two-part test. Under the test, the department must evaluate:

(a) whether the individual is and shall continue to be free from control or direction over the performance of services, both under contract and in fact; and

(b) :whether the individual is engaged in an independently established trade, occupation, profession, or business.

Factors to evaluate in determining whether an employer exerts control over an individual include:

(a) direct evidence of right or exercise of control;

(b) method of payment

(c) furnishing of equipment; and

(d) right to fire.

Admin. R. Mont. 24.35.202(2). These factors are merely the administrative embodiment of the common law test. See, e.g., Sharp, supra, 178 Mont. 424, 584 P.2d at 1302 (noting these factors as the factors to be utilized in determining the control test, citing Larsen, Workman's Compensation Law, Vol. 1A, 44.10

In determining the employment status of an individual, the department may, among other things, consider written contracts between the individual and the hiring agent and review filing status on income tax records. Admin. R. Mont. 24.35.202 (3).

Taking the two main considerations in reverse order, a cleaning business is an established business. Sharp, supra, 178 Mont. at 424, 584 P.2d at 1301. Therefore, Martinez meets the definition of an independent contractor under 24.35.202(1)(b).

As to the question of control, the Sharp court noted that "the vital test in determining whether a person employed to do a certain piece of work is a contractor or a mere servant is the control over the work which is reserved by the employer." 178 Mont. At 424, 584 P.2d at 1301. Comparison of the facts in Sharp to the facts in this case is instructive as to how to analyze Martinez' work relationship with MME.

In Sharp, the claimant had previously worked for a janitorial company. The employer discontinued the services of the janitorial company but asked the claimant to do the cleaning. Initially, the employer provided no details to the claimant about how the cleaning was to be done since the claimant was familiar with the cleaning routine due to her previous employment with the janitorial company. There was no written agreement. The claimant and the employer felt that the claimant could be terminated at anytime and no duration was ever established for her job. The claimant was initially paid $450.00 per month, but the employer made no payroll deductions.

As duties were added to the claimant's job, she negotiated raises so that by the time she quit her job, she was making $685.00 per month. Eventually, the claimant felt that she needed more help and the company gave its permission for her to hire additional persons. The claimant was to pay the additional help herself and the employer "accordingly increased the amount paid to her." 178 Mont. 421, 584 P.2d at 1299. The claimant was generally free to hire and fire the additional help on her own; however, on two occasions, the company told the claimant that it did not want her to hire certain employees. The employer felt that it could give directions to the appellant's employees. In addition to being told what to clean and what not to clean, the claimant was also given tasks not associated with general cleaning, such as cleaning and repair of curtains, painting a room and checking the operational status of a furnace. Both the claimant and the employer felt the employer had the right to make such additional work demands of the claimant. In addition, the claimant had her own set of keys to the building and on occasion, was asked to come down to the office outside of working hours to unlock the building for others. Id. Reviewing these facts under the criteria listed above, the court found that the claimant was an employee. 178 Mont. 425, 584 P.2d at 1302.

The factors pointing toward Martinez' independent contractor status are far stronger than those in Sharp. Martinez hired whomever she wanted and was not at all constrained in hiring by MME. Indeed, the initiative to hire others to help her came from Martinez. There is no evidence that Osterich or MME was even aware that Martinez hired anyone to assist her with the cleaning and certainly no evidence that MME had any say in whether or whom to hire. Martinez paid her workers out of the same $100.00 per week that she received for cleaning services. By contrast, in Sharp, the claimant's pay was raised accordingly when she brought on workers to assist.

Other than direction as to what to clean, there is no evidence that Martinez was directed in how to clean. As the Montana Supreme Court has recognized, these type of instructions are "nothing more than control over those few matters necessary to ensure a satisfactory end result." See, e.g, Doig v. Gravelly, 248 Mont. 59, 62, 809 P.2d 12, 14 (1991) (noting that the mere fact that a rancher could tell a farrier how the rancher wanted his horses shod did not establish that rancher controlled the farrier's work such that the rancher was the farrier's employer for purposed of worker's compensation). The mere fact that Farmer or MME could tell Martinez to do a better job of cleaning or could direct her to clean specific areas was nothing more than control over those few matters necessary to ensure a satisfactory result. At no time did MME impose any time limits or hours requirements on Martinez. At no

time did MME tell Martinez when she had to be at work or when she could leave work.

In Sharp, both the claimant and the employer felt that the employer could instruct the claimant and her helpers to carry out duties in addition to her cleaning duties. Martinez and her hired help did nothing but clean and they were not expected to nor were they asked to carry out additional duties. In Sharp, the employer also felt that it could instruct the claimant's hires as to their duties. Here there is no evidence that the parties ever perceived that MME had such authority over Martinez' hires. Considering all the circumstances surrounding this case, the first factor points toward Martinez' independent contractor status.

The method of payment and circumstances surrounding payment in this case also point to Martinez' independent contractor status. Martinez was provided a set amount per week regardless of how long or how little she worked. She had to invoice MME each time in order to receive payment. Each unit of cleaning was paid for through invoicing which strongly implies that each unit of cleaning (the week's cleaning was paid on a per unit basis. See, e.g., Doig, supra, 248 Mont. At 63, 809 P.2d at 14 (payment on a per unit basis supported a finding that the farrier was an independent contractor). In Sharp, the evidence showed only that the claimant was paid each month. There was no evidence of separate invoicing by the claimant in order to receive payment.

As to the furnishing of equipment, at most this factor is ambiguous since Martinez did at one point purchase her own equipment, a shop vacuum, to carry out her duties. Under the circumstances of this case, the equipment that was furnished does not by itself demonstrate employment in light of the other factors.

Another compelling factor that supports a finding of independent contractor status is the method in which Martinez filed her income tax return. She unabashedly identified her profits and losses and claimed to be a business d/b/a Kelly's Cleaning. In order to reduce her gross income, she deducted expenses which purported to include cleaning supplies and payments in wages to her hires. She received a Form 1099 every year that she cleaned. She also supplied vendor information as requested by MME when she began cleaning, which included her Social Security Number.

Lastly, as to the issue of the right to fire, it is true that each side could terminate the cleaning arrangement at will. However, that would be no different than any other cleaning vendor who agreed to undertake the cleaning work for a set amount per unit of cleaning delivered. It is almost a certainty that a janitorial service

could lose an account under the per unit method of delivery of service and payment as existed in this case if the janitorial company failed to comply with the company's expectations for cleaning. Thus, the fact that either side could terminate the agreement under the facts of this case does not undercut the other strong factors demonstrating an independent contractor status in this case. See, e.g., Doig, supra, 248 Mont. At 64, 809 P.2d at 15 (affirming the worker's compensation court's determination that the fact that an independent contractor could be terminated if the services he was performing were not being performed to an accepted standard did not show an employment relationship existed under the facts of that case).

Considering all of the facts in this case in light of the applicable factors, and taking into account Martinez' relative freedom from control in cleaning, setting her hours, hiring and her filing of income taxes where she declared her cleaning service to be a business and deducted all expenses as though she were a business, the hearings officer concludes that Martinez was not in an employment relationship with MME.

Martinez places great emphasis on the fact that she never obtained an Independent Contractors certificate nor did MME ever direct her to obtain one. In Doig, the claimant made a similar argument. The court, adopting the holding of the Worker's Compensation Court below, noted that "Nowhere in the statutes or Division rules is the independent contractor exemption from workers' compensation coverage made specifically mandatory in order for independent contractor status to exist. No court has held that any independent contractor without such a certificate is automatically an employee and such an interpretation is not warranted from a reading of the statute or its history since enactment." Id. at 65-66, 809 P.2d at 16 While Doig was decided in 1991, the applicable statutes and rules have not substantially changed. There is nothing that requires a finding of employment status merely because Martinez did not obtain an independent contractor certificate

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Mont. Code Ann. § 49-2-509(7).

2. Martinez was not en employee of MME. Because of this, the Montana Human Rights Acts prohibitions of discrimination in employment do not protect her from MME's conduct of discharging her.

3. As Martinez has not proven discrimination, her claim for damages is moot.

4. Even if Martinez had proven discrimination, she failed to prove that she was entitled to emotional distress damages.

5. Because Martinez has failed to prevail in her claim of discrimination, this matter must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

Based upon the foregoing, judgment is entered in favor of MME and Martinez' complaint is dismissed.

DATED: July 22, 2011

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

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Kelly Martinez, Charging Party; and Bruce Fain, attorney for Midwest Motor Express:

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 appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense.