BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0111015153:

KAREE VIEYRA, Charging Party, vs. KELLY ETZEL, Respondent.	) Case No. 1924-2012))) HEARING OFFICER DECISION) AND NOTICE OF ISSUANCE OF) ADMINISTRATIVE DECISION)))

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I. Procedure and Preliminary Matters

Karee Vieyra filed a complaint with the Department of Labor and Industry on September 22, 2011, alleging that her employer, Bella Sauvage (a salon and spa in Missoula, Montana), terminated her employment because of her sex (pregnant female). On May 4, 2012, the department gave notices that Vieyra's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer. "R & K d.b.a. Bella Sauvage" was the business name of the employer according to Vieyra's W-2's during her entire employment – Exhibits 17 through 20.

Subsequently, the Hearing Officer granted Vieyra's motion to amend her complaint and replace Bella Sauvage with Kelly Etzel as the respondent. The amendment related back to the date of complaint filing. Etzel is the individual who owned and operated the business during the last calendar year that Vieyra worked there, and thus owned and operated the business when Vieyra's employment was terminated. The record reflects that "R & K, an LLC," was involuntarily dissolved on December 1, 2010. The uncontested evidence, when the motion was granted and at hearing, established that Kelly Etzel had owned and operated Bella Sauvage from December 1, 2010, through the termination of Vieyra's employment at the end of August 2012.

The contested case hearing took place on October 2-3, 2012, in Missoula, Montana. Vieyra attended with her attorney, Philip A. Hohenlohe, Hohenlohe Jones PLLP. Etzel attended with her attorney, Elizabeth O'Halloran, Milodragovich, Dale & Steinbrenner, P.C. Witnesses Karee Vieyra, Jenny Bowman, Ashley Littlefield, Dawn Costello, Christine Scheffer, Kaylene Nelson, Gina Henderson, Kelly Etzel, Andrea Gaertner Chase and Kathy Smith testified under oath.

The Hearing Officer admitted Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 101, 102, 103, 105, 109, 110, 111, 112, 113 and 116[1] into evidence. The parties timely filed their post-hearing responses to the opponent's proposed decisions, and the case was submitted for decision.

II. Issues

The primary issues here are whether Etzel illegally discriminated against Vieyra because of sex (pregnancy) and (since she did), what reasonable measures are necessary to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to Vieyra. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. In March 2008, a beauty salon in Missoula, Montana, doing business as Bella Sauvage, hired Karee Vieyra as an esthetician. At all times pertinent to this case, Vieyra was licensed as a manicurist and an esthetician by the State of Montana. Vieyra had lunch with the then manager of the salon and with the owner and operator of the salon, Kelly Etzel. Etzel approved the hiring of Vieyra. It was advantageous to have an esthetician who could work with nails as well as skin. Over the course of her employment at Bella Sauvage, Vieyra did manicures, pedicures, waxings and facials for customers.

2. While Vieyra worked at Bella Sauvage, Etzel was in fact the owner and operator of the salon. Etzel originally owned Bella Sauvage through R&K, LLC, a limited liability company, but that company was dissolved in December 2010 and Etzel thereupon became the legal sole proprietor of Bella Sauvage.

3. During Vieyra's employment at Bella Sauvage, Etzel did not have any written policy regarding employment discrimination.

4. Vieyra was qualified for her job and did a good job. She got along well with her co-workers and supervisors, and had many repeat customers. She was a hard worker and often worked six days a week. She made a good living doing her job at Bella Sauvage.

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[1] Etzel's exhibits were actually numbered 1 through 21, and appear in her three-ring binder of exhibits with those numbers. Nonetheless, her exhibits were listed as 101 through 121 in the Hearing Officer's hearing exhibit list, and referenced by those numbers, at least some of the time, during hearing. Since most of Etzel's exhibits were actually duplicated by admitted Vieyra exhibits, it may not be necessary to locate any Etzel exhibits, but their hearing numbers (such as "101") appear in the three-ring binder as one and two-digit numbers (such as "1").

5. It was common at Bella Sauvage for customers to complain from time to time about various employees, including but not limited to Vieyra. During the time that Vieyra worked at Bella Sauvage, no other employees were disciplined based upon customer complaints and no other employees were irrevocably discharged.[2] Before the summer of 2011, Vieyra had never received any kind of discipline at work.

6. Over the course of Vieyra's employment, Etzel hired a number of persons, one at a time, to work as on-site managers. For the most part, these individuals also worked in the salon as employees or booth renters. Andrea Chase, one of these managers, testified that many of the employees of the salon failed to appreciate the need for being present and working throughout the hours of operation of the salon, cooperating in maintaining coordinated schedules among the workers to ensure that advance appointments and walk-ins alike would be covered. Chase was initially a booth renter who had offered to assist Etzel in managing the employees and had done so on a temporary basis until another manager was appointed.

7. Chase's testimony about the situation in the salon was credible. As she described them, the employees and booth renters were, for the most part, attractive and ambitious young women who had found in esthetician work opportunities to work hard, with limited supervision, to develop one-on-one relationships with their customers and to make an independent living. They tended to be high-energy people who did not like supervision and preferred to make independent choices about how and when to do their work. Conflict and drama were fairly common in the salon, when these high-energy and sometimes fiercely independent people clashed.

8. Adherence to salon working hours was not so common. The most successful of the women, of whom Vieyra was one, made a very good living without the necessity of always being at work for a full "shift" to take appointments with walk-ins or new customers seeking first appointments. Walk-in and first time appointments were scheduled on a seniority basis, meaning that the most senior available woman got the business. For the "senior" women (of whom Vieyra was also one by late 2009 and thereafter), when no regular customers were on the schedule, coming in late and/or leaving early, or even taking a day off without much or any notice, seemed natural and appropriate, unless those "senior" women wanted to be present for any new customers or first time appointments. Their absences provided more opportunities for other workers who lacked seniority, for whom there was thus

[2] There was evidence that another employee was discharged around the same time or soon after Vieyra's discharge, but that this other employee contacted Etzel and pleaded for her job, which Etzel thereafter restored to her.

a greater incentive to honor the schedule to be available for walk-ins or first time appointments in the absences of the more senior employees.

9. This volatile mix created management problems for Etzel, who had her own career as a nurse. She worked full-time at a clinic at another location. Her on-site managers, having been workers or renters, often felt their interests aligned with the other workers and renters and not with management, so Etzel did not always get the kind of management she wanted at the salon.

10. In spring or early summer 2011, Etzel decided she needed a full-time manager who was not a worker or renter, and hired Kaylene Nelson, who had not worked at the salon and was not experienced in salon work, to be the manager of Bella Sauvage. Nelson answered to Etzel and met with Etzel almost every work day to discuss Bella Sauvage. Etzel gave Nelson the authority to fire Bella Sauvage employees. Knowing her employees would not like the imposition of an "outsider" to manage them, Etzel initially introduced Nelson to the employees as Bella Sauvage's advertising liaison.

11. Nelson's management tasks included changing the scheduling practices of the salon, implementing and enforcing attendance policies, ordering supplies, encouraging the women to sell the supplies on hand to their customers, and conducting other assorted duties relating to the day to day management of the salon. The initial response to Nelson was negative, precisely because she tried to manage the employees, as she had been hired to do, so Etzel soon had to be more direct and confirm that Nelson was, indeed, the new manager of the salon.

12. Scheduling and ensuring employee availability until seven in the evening, when the salon closed, was a key problem for Nelson. Her efforts to address it, as well as her other management duties, after as well as before Etzel confirmed that Nelson was the manager, were met with derision and resistance from Vieyra and several other long time employees. Nelson's lack of experience in salon services and her lack of consultation with the employees were major factors in the negative employee responses. Etzel could see that the employees didn't like having a "real" manager like Nelson, even when Nelson was trying to be supportive or encouraging, (for example, in making positive comments about sales of supplies). Many of the women simply resisted all of Nelson's efforts at management, because they saw no benefit to themselves in being managed.

13. In June 2011, Vieyra learned that she was pregnant with twins. Vieyra called Etzel and informed her of the pregnancy. She also informed Nelson.

14. Although Nelson was positive and supportive about Vieyra's pregnancy, friction between Vieyra (and other workers) and Nelson had been developing at the

salon. As the summer wore on, those conflicts deepened. On July 24, 2011, Vieyra sent Nelson a text message about any rescheduling of Vieyra's waxing appointments, which she believed would be part of a change in the kinds of work that would be scheduled for her, resulting in a substantial loss of established customers and a resulting drop in her income, all without her approval:

> Hey Girl. If my waxing appointments get moved, I will start looking for another job and we will not b friends. U are messing with peoples careers and a clientell I've been working hard for for 4 years. christine and I told u if this happens it will not b good. And try having the respect to talk to me bout moving all my app before.

Exhibit 9.

Nelson went to Etzel to confirm that she could fire Vieyra for insubordination, based upon the text. Etzel told her that it was up to her and she could.[3]

15. The next day, Nelson met with Vieyra. Together, the two women reached at least a temporary understanding. Nelson told Vieyra she was not going to try to move Vieyra's customers to other estheticians and Vieyra apologized and expressed remorse for sending the text. Nelson decided not to discharge her, instead counseling her. Documentation of Nelson's "oral warning" of July 25, 2011, which Etzel directed Nelson to prepare, was done on the employer's "Employee Incident and Discipline Documentation Form," completed and signed by Nelson and dated July 31, 2011, less than a week later. Exhibit 22.

16. In July 2011, Vieyra found that, because of the pregnancy, it was becoming extremely uncomfortable for her to bend over close to the ground. This made it very difficult for Vieyra to perform pedicures, which required her to be in a hunched-over position close to the ground for extended periods of time. The body position required for doing pedicures is very different from the body position necessary for facials and waxings, and required constant crouching and bending.

17. At some point in 2009 or earlier, Vieyra had considered giving up performing pedicures, but decided instead to renew her nail license and keep doing pedicures. Etzel had encouraged Vieyra to retain her nail license, because it was better for the salon to have employees licensed for facials, waxings and pedicures.

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[3] Vieyra's testimony that she didn't know at the time she sent the text that Nelson was the manager is not credible. She may not have appreciated the implications of Nelson being her manager, but she had reasonable notice by that time that Nelson was her manager and supervisor, even if she didn't like it and tried to disregard it.

18. Now, in July 2011, Vieyra approached Nelson and told her that it was becoming difficult for her to do pedicures. Nelson conferred with Etzel, and responded that Vieyra would need to get a doctor's note if she wanted to stop doing pedicures.

19. Vieyra contacted her obstetrician, who signed a note on August 1, 2011, stating that Vieyra was not advised to bend over for long periods of time, as when performing pedicures. This restriction was uncommon, but Vieyra is a small and slender woman and she was carrying twins. Vieyra had used a maternity belt, which provided support for her back and belly, but this did not solve the problem. Based upon the medical restrictions documented by two such notes (both admitted into evidence, Exhibits 1 and 2), the restrictions upon her working in various positions were necessary for Vieyra and were not just an excuse for her to avoid doing pedicures.

20. Vieyra gave the first note to Nelson on or around August 15, 2011. She did not provide the note sooner because she had many pedicures scheduled between August 1 and August 15 and did not want to inconvenience Bella Sauvage. Vieyra performed the pedicures scheduled, against her doctor's advice, but with no resulting medical complications.

21. When Vieyra provided the doctor's note to Nelson, Nelson became visibly annoyed and frustrated. Despite the note, Nelson immediately concluded that Vieyra was simply using her pregnancy as an excuse to avoid doing pedicures. Although there were several other employees at Bella Sauvage who could perform pedicures, Nelson knew that Etzel wanted as many of her estheticians as possible to also be manicurists, too, to maintain a "full service" salon for first time and walk-in customers, to continue to build the customer base.

22. Nelson gave Etzel the note. Etzel reacted even more strongly than Nelson had. Etzel was angry about what she saw as Vieyra's uncooperative attitude and also about what she saw as a lack of clarity in the restrictions. As a nurse, Etzel had some experience in describing work limitations for patients of her clinic. Etzel agreed with Nelson that Vieyra was using her pregnancy as an excuse to avoid doing pedicures.

23. Neither Nelson nor Etzel had enough information or enough expertise to make independent decisions about Vieyra's medical restrictions. Nelson may have or may not have watched Vieyra for a few minutes while she was doing a pedicure, but did not have sufficient experience with nails work to understand the physical demands. There is no evidence that Nelson had any meaningful experience in ergonomics, occupational safety or health care. Etzel had not observed Vieyra try to do a pedicure while pregnant, and had no information about Vieyra's specific medical

condition. She had no basis upon which to decide whether it was difficult, painful or unsafe for Vieyra to do pedicures during her advancing pregnancy. Nonetheless, Etzel immediately assumed that Vieyra was just being manipulative and dishonest. Etzel thereafter relied upon that assumption, without any kind of further inquiry or research, in the face of first one and then two notes from Vieyra's physician.

24. Etzel called Vieyra's nurse, Gina Henderson, and complained in a very angry tone, "This is bullshit!" Etzel told Henderson that she did not believe the restrictions were necessary. Again, even though Etzel was a nurse, she was not a treating physician, and lacked both the information and the expertise to make such an assertion.

25. After speaking with Etzel, Nelson made several handwritten notes on the doctor's note, including the phrase, "list of things she can do!!" At Etzel's direction, Nelson then called the nurse back and asked if the obstetrician could provide a more detailed note.

26. On August 18, 2011, Vieyra's obstetrician faxed Bella Sauvage a more detailed note. The note stated that Vieyra was not able to bend while working for longer than 30 minutes at a time without a one-hour break from bending, spent in standing or sitting up positions. She was not able to work standing for more than one hour without a break of 30 minutes spent in a sitting up position. She was able to work sitting in an upright position for an unlimited amount of time. Exhibit 3.

27. The "breaks" of standing or sitting, on the face of the note, did not say that Vieyra had to stop working. The most reasonable interpretation of the note was that after Vieyra had worked for an hour in a standing position, she was then restricted to working sitting up for half an hour before she could resume working in a standing position, and that after Vieyra had worked for half an hour in a bending position, she was then restricted to working in either a standing or sitting up position for an hour. Under these restrictions, Vieyra was not supposed to perform pedicures, which involved bending for more than 30 minutes. She could still do manicures, which required sitting in an upright position. She could still do waxing, which involved standing up. If a waxing took more than an hour, she could sit for part of it. If she was standing for an hour, however, she would need to ensure that she spent the next half hour working in a sitting position, if she continued to work. Vieyra could still perform facials, which could be done either standing or sitting upright.

28. Less than two weeks after the salon received this more expansive description of Vieyra's work restrictions, Nelson would fire Vieyra, and Etzel would approve of the firing when told of it.

29. When she saw the note, Etzel directed Nelson to ensure that Vieyra was taking 30 minute breaks from work after every hour of working. This was not what the note meant. It was not even what the note said, on its face. Neither Etzel nor Nelson ever asked the obstetrician's office to clarify the second note. Nelson informed Vieyra that Etzel had received the second doctor's note and told Vieyra that she was on Etzel's "shit list" because of the medical restrictions. Nelson was agitated and frustrated about the restrictions. In an aggressive tone, Nelson told Vieyra that she that she could not "have [her] cake and eat it too," and that she would have to follow the instructions "to a T." A coworker observed that Nelson was visibly upset about the note and told Vieyra that she would call her every hour on the hour to make sure that Vieyra was "sitting on her butt." Etzel and Nelson were not acting out of concern for Vieyra's health but were taking adverse employment action against her because of her pregnancy and the health restrictions it placed upon her, as they unreasonably misunderstood them.

30. After the second note, Vieyra (and other employees) noticed that there were increased hostility and tension on Nelson's part. Vieyra felt uncomfortable and was worried that she would get in trouble no matter what she did. She told other employees she was worried she would be fired. Vieyra was fearful for her job, but decided to do the best she could to do her job and abide by her doctor's restrictions. She reasonably did not ask for another note clarifying that she did not have to stop working and sit down idly for 30 minutes after every hour of work, afraid that yet another note would heighten her employer's hostility towards her.

31. Before the problems with Vieyra's pregnancy-related limitations arose, Etzel, when she was at the salon and happened to see Vieyra, would visit with her. Etzel liked to keep in contact with her employees, and felt that they should be able to come to her directly with any problems. After the limitations problems developed, Etzel and Vieyra had no interactions. The evidence indicates that Vieyra did not seek interactions with Etzel, and based upon her hostility toward Vieyra, it is more likely than not that Etzel did not seek interactions with Vieyra, either.

32. Nelson discussed the restrictions in the second note with Vieyra on a number of occasions. In one instance, on August 23, 2011, when Vieyra pointed out that the receptionist had scheduled her to perform a pedicure (contrary to the second note), Vieyra volunteered to do that scheduled pedicure, to make things easier for receptionist and customer. Nelson agreed that Vieyra could do that scheduled pedicure (which Vieyra did), and agreed that she should not have to do any more pedicures and told the receptionists to refrain from scheduling her for any more pedicures. At other times when Nelson discussed the restrictions in the second note,

the purpose of the discussions was hostility towards Vieyra for having real pregnancy related limitations that Nelson, without a valid basis, disbelieved. For example, Nelson repeatedly scolded Vieyra for not abiding by Etzel's incorrect interpretation of what the second note required. The spirit of the employer's conduct toward Vieyra regarding her medical limitations was neither helpful nor concerned – it was hostile.

33. Etzel and Nelson kept track of how many appointments Vieyra worked, documenting dates and times when she failed to follow Etzel's misinterpretation of Vieyra's medical restrictions. The sole purpose of doing so was to gather evidence that they could use to take adverse employment action against Vieyra because she was pregnant and had provided medical verification of her pregnancy-related limitations, particularly regarding not performing pedicures.

34. Etzel and Nelson testified about a number of allegedly improper practices with customers about which Vieyra was allegedly counseled on a number of occasions during the second half of August 2011. The documentation of such alleged counseling consisted of four Employee Incident and Discipline Documentation Forms completed by Nelson (Exhibits 3-6), all dated August 30, 2011. All four write-ups were completed and signed by Nelson, and then given to Vieyra, during the process of firing her, on August 31, 2011.

35. One write-up addressed Vieyra's discharge on August 31, 2011. Exhibit 5. At the end of August, an appointment book (apparently not the current book, but an already completed book, full of customer names and contact information on the various calendar pages) was missing. Nelson testified that she was told by two individuals that Vieyra might have the missing book. There was no direct evidence that Vieyra took or had possession of the book. Nelson advised Etzel of the missing book and of Nelson's conclusion that Vieyra had taken the book. Etzel directed Nelson to get the book back immediately.[4]

36. Looking to have a private discussion with Vieyra, Nelson asked another employee to text Vieyra to come back to the salon. Vieyra apparently responded that she was at the Silver Dollar Bar next door.[5] Nelson went to the bar to get Vieyra and to discuss the matter in private.

37. Vieyra was sitting and talking with Christine and Kimberly Scheffer. She had heard, from her fellow employees, about the search for the missing book, and

[4] Vieyra's uncontroverted testimony was that employees were allowed to jot down contact information from the appointment books as they wished.

[5] The evidence is uncontroverted that Vieyra was not drinking alcohol.

about Nelson's belief that Vieyra had taken it. When Nelson approached, and asked to talk with Vieyra outside, Vieyra told her, "I know exactly what you are going to ask me, I don't have your appointment book."

38. Nelson then coaxed Vieyra to go outside for a private conversation. The two conversed outside the bar, with no witnesses. The conversation quickly became hostile.

39. Nelson asked Vieyra about the whereabouts of the book. Vieyra again denied having it and denied taking it. Nelson continued to pursue the whereabouts of the book, making clear by her comments that she did not believe Vieyra's denials. Vieyra began to respond with comments about being able to point to things Nelson was doing wrong as manager. Nelson decided that Vieyra's conduct was incredibly rude, disrespectful and insubordinate. She decided to terminate Vieyra's employment. She said something like "We're finished" or "You're finished," and went back to the salon, while Vieyra went back into the bar.

40. Nelson next filled out all four of the write-ups that are in evidence as Exhibits 3-6. The write-up about the confrontation on August 31, 2011, Exhibit 5, was dated August 30, 3011 (like Exhibits 3, 4 and 6). The description of what happened between Nelson and Vieyra was reported therein to have occurred on August 29, 2011. However, according to the substantial and credible evidence, the key events (the conduct of Vieyra on the day she was fired) actually occurred on August 31, 2011, the day <u>after</u> Nelson purportedly wrote up the incident to document firing Vieyra. From this evidence, it is more likely than not that Nelson completed all four write-ups while she was so upset and angry that this misdating of Exhibit 5 was one of several errors she made in producing the write-ups.

41. The description of the incident, written by Nelson immediately after her August 31 confrontation with Vieyra, started "took book home from [line break] salon / copied people's names." This was what Nelson suspected – that Vieyra had taken the book, to record the contact information for salon customers – but Nelson had no proof of her suspicions. On the next line, Nelson wrote "client – 2 people said [line break] she may have it." This is consistent with Nelson's testimony about what she heard said by others who did not testify. Even if others did say that Vieyra <u>might</u> have the book (as Nelson says they did), that did not prove that Vieyra <u>had</u> taken the book, and the speculation about the possibility that she might have the book is not strengthened by further speculation that she might have taken it to copy customer names out of it.[6]

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[6] Missing from the record is any credible evidence upon which to base a finding that Vieyra did take the appointment book.

42. The rest of the description of the incident, as Nelson wrote it immediately after her August 31 confrontation with Vieyra, stated “when confronted – she was incredible [sic] [line break] rude – disrespectful. – Karee says does not have books! Denied [line break] Rude / Insubordinate” The last two words are repeatedly underscored. “Rude” is underscored twice. “Insubordinate” is underscored five times, with the lines appearing to be drawn heavily and rapidly.

43. In the “Action Taken” portion of Exhibit 5, Nelson drew (with what appears to have been a very heavy hand) a large “X” in the box for “Spoke to employee,” then underlined it so many times that the lines merge into a single, sloppy, dark and heavy line. She also put a similarly large “X” in “Termination notice” and circled it. Next to the circle around “Termination notice” she wrote “at time of conversation”. As already noted, Nelson signed this form and dated it August 30, 2011, the day before the confrontation.

44. Nelson returned to Vieyra with the discharge and disciplinary write-ups, presented them to her, and told her she was fired. Vieyra asked if she was being discharged because she could “no longer perform the duties she was originally hired for” and Nelson agreed.

45. Vieyra’s conduct on August 31, 2011, was defensive and combative. However, that conduct was triggered by an unproved accusation against her, at a time when she already reasonably feared that she would be fired on any pretext Nelson could find. Vieyra’s defensive and combative response to Nelson was foolish and counter-productive, but the actual cause of her discharge that day was discriminatory animus of Etzel and Nelson towards her because of Vieyra’s pregnancy related limitations. But for that animus, Nelson would not have made a poorly supported accusation that Vieyra had taken the appointment book, presenting and insisting upon that accusation as if it were a foregone fact, and thereby inciting Vieyra to respond in a defensive and combative manner.[7] Firing Vieyra for her defensive and combative manner in the face of the unfair and unfounded accusation was a pretext.

46. Etzel defended Vieyra’s discrimination charges on the basis that Nelson fired Vieyra (which Etzel approved after the fact) because of Vieyra’s insubordination

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[7] The scope of Nelson’s investigation as to the whereabouts of the missing appointment book appears to have consisted of speaking to the receptionists and other employees, and perhaps one or two customers, by telephone or at the salon, and asking if they had seen the missing appointment book or knew who might have taken it or might have it. Whether Nelson’s inquiries were purely neutral or invitations to blame Vieyra is unclear. In other words, the testimony does not reveal whether Nelson only asked, “Do you know who might have the appointment book?” It is also possible that she asked for suggestive questions, such as, “Do you think Karee might have taken it?” Given the hostility of Nelson and her immediate supervisor, Etzel, towards Vieyra, this is an open and troubling question.

during the confrontation with Nelson on August 31, 2011. Even so, Etzel also offered the other three write-ups dated August 30, 2011, and testimony about them, as evidence of Vieyra's alleged poor performance. The facts involved in each write-up follow, in chronological order.

47. Etzel did not prove, with substantial and credible evidence, that any of the three write-ups regarding alleged performance shortcomings in August prior to Vieyra's discharge had actually been started before August 31, 2011, or that Vieyra had received the oral warnings the forms purported to document, before she was fired. Thus, the only disciplinary action ever taken against Vieyra before she presented medically documented limitations due to her pregnancy was the oral warning Nelson gave Vieyra on July 25, 2011, regarding the text message about moving her appointments, described in Nelson's July 31, 2011, write-up.[8]

48. The first of the three write-ups, Exhibit 3, stated that on August 15, 2011, a customer complained that Vieyra used a waxing dipstick more than once, using the stick "twice/several [sic] times double dipping in wax!!"[9] Nelson wrote that the "customer was grossed out and said she would not return to salon." The form indicated a first name for the alleged customer, and says "Holly told us sent text" and below that handwriting, "text attached." The exhibit is only one page, with nothing attached. The form indicated that the disciplinary action taken was "spoke to employee." The box for that action was not only checked, but circled multiple times and underlined. The write-up does not state that Nelson spoke to Vieyra about it or showed it to her before their confrontation on August 31, 2011. The lines for signature of the employee and for date of that signature are blank. The circles and underlining of the checked box for "spoke to employee" appears to have been done by Nelson on August 31, 2011, as she prepared paperwork to give to Vieyra on that date as she completed firing her. The date reported for the complaint is on or about the date that Vieyra submitted her first doctor's note. Nelson and Etzel testified that Vieyra admitted to them both, when they inquired about this incident, that she had double dipped as the customer complaint reported.

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[8] Exhibit 22, see Finding No. 15.

[9] A "waxing dipstick" looks like a wooden tongue depressor for use in a doctor's office, or a wide popsicle stick. Its name describes its function – to dip in depilatory wax to spread the wax on the stick over the skin of a customer, subsequently removing the wax and pulling out the customer's hair with the wax. Application of wax to the customer's skin will leave some matter (skin, any substances on the skin, or hair) adhering to the wax still on the dipstick. Dipping it again in the wax may transfer some of that matter to wax that remains in the container, which will then be contaminated when it is used to provide wax for another customer, or even for the further depilatory work on the same customer.

49. Vieyra testified that earlier in her employment at the salon she had been double dipping, under directions to do so to save on dipstick use. She testified that the other employees did so, too, for the same reason, and there was direct testimony from other employees confirming this. The same sources testified that at a meeting at the salon, Nelson directed them all to stop double dipping. Vieyra testified that she happily agreed not to do so anymore. Because Etzel and Vieyra both confirmed that they had no direct contact after the problems with medical limitations developed, it is not credible that Exhibit 3 accurately reflects that a complaint on August 15, 2011, at about the time when Vieyra delivered the first doctor's note, resulted thereafter in an investigation in which Vieyra admitted to both Nelson and Etzel that she was still double dipping.

50. It is more likely than not that Nelson created Exhibit 3 with reference to a double dipping complaint that, if it happened at all, had happened earlier in Vieyra's employment.

51. The second of the three write-ups involving alleged poor performance in August 2011, Exhibit 4, stated that on August 19, 2011, Vieyra erased appointments for another employee from the appointment book at the reception desk, reentering the appointments as being her own appointments. On the write-up, the line for signature of the employee contains (in Nelson's handwriting) "8/19" and the line for the date is blank. There is a line drawn from the "spoke to employee" entry (a check mark in the box in front of the printed words) to a space above that line, to the right of "Action Taken," where a question mark is above the words (again, written in Nelson's handwriting) "on the day that it happened." However, Nelson's testimony established that she filled out or completed this write-up and gave it to Vieyra on the day she fired her, August 31, 2011, and her fuzzy explanation for the delay in completing and providing the write-up, after starting it when she allegedly talked to Vieyra, was not persuasive.

52. Vieyra's testimony was that earlier that summer (before August) when she would check the appointment book and discover appointments that should have been hers (either existing customers' appointments or appointments made when she was available and was the senior employee available) had been given to other employees, she had changed them to being her appointments. Based on prior practice, she felt she had every right to make those changes. After she was told this was now not allowed, she stopped doing it. She specifically denied doing it on August 19, 2011. Her denial was credible.

53. The third of the three write-ups involving alleged poor performance in August 2011, Exhibit 6, stated that on August 23, 26 and 29, 2011, Vieyra did not follow the employer's misinterpretation of her second medical note ("on three

different days!!"). The form indicates that Nelson spoke to Vieyra about this "on same date as book incidence [sic]," which would be on the day that Nelson fired her, and that the action taken against Vieyra was her termination. The lines for signature of the employee and date of that signature are blank. Vieyra denied that she failed to follow her understanding of the doctor's second note, except that she did perform a pedicure (with Nelson's approval) on August 23, 2011.

54. As already noted, Nelson, in the grip of strong emotions resulting from her hostile conversation with Vieyra immediately before she filled out or completed Exhibits 3, 4, 5 and 6 on the 31st, got the dates wrong in Exhibit 5 regarding the firing of Vieyra. The strong underlining, circling, and multiple exclamation marks in Exhibit 5 (and in the other three August write-up exhibits), as well as the incomplete and condensed phrases in the hastily written descriptions of the alleged events, bear stark witness to how angry Nelson was when she fired Vieyra, and make it more likely than not that August 31, 2011, was when Nelson filled out, signed and dated all four write-ups.

55. None of the four write-ups were known to or shown to Vieyra before August 31, 2011. The accuracy of all four write-ups was doubtful. Nelson's anger at Vieyra existed well before that date, but on the 31st, because Vieyra adamantly refused to agree to taking the appointment book, as Nelson had hastily concluded she had, that anger flared to new heights.

56. Based upon the substantial and credible evidence of record, Bella Sauvage failed to present any of the three write-ups for alleged prior inappropriate conduct (in August but before the date of her firing) to Vieyra until Nelson was completing the process of firing her for her alleged conduct on the 31st. At that point, the only possible reason to complete and present the write-ups was to create a record regarding alleged prior transgressions which predated the events of the termination itself.

57. Burying Vieyra under paperwork created at the last second but allegedly relating back to prior conduct was dubious at best. Obviously, presenting these write-ups to Vieyra on the 31st while firing her was not an attempt to improve her performance by counseling. It likewise could not have been an effort to be fair by giving her notice of problems she needed to correct in order to maintain her employment. Other than as an effort to intimidate her into accepting her discharge, the flurry of paper pushed at Vieyra on the date of her discharge was inexplicable.

58. In any event, Etzel did not prove the basis for the disciplinary write-up in Exhibit 3, the alleged dipstick incident. That write-up contains evidence of Nelson's anger on the 31st, showing that it was not completed until the day Vieyra was fired

and (as noted in Finding No. 47) does not verify any contact with Vieyra about this fabricated and more recent alleged dipstick incident before August 31st.

59. Given the manner in which the write-up in Exhibit 4 was created and ultimately provided to Vieyra, it also lacks credibility. Even if the substance of the write-up regarding Vieyra's taking of appointments by changing the appointment book was true (except for the date), Vieyra's testimony was that once she was told that her seniority preference for appointments no longer applied, she stopped "taking" appointments to which she would before have been entitled. That credible testimony makes this write-up, at most, a justification for oral counseling, and not support for discharge.

60. Etzel also did not prove the bases for the write-up in Exhibit 6. On its face, this write-up was produced in its entirety on August 31, 2011. There is no credible evidence that Nelson provided oral counseling of Vieyra about the three incidents alleged in Exhibit 6 before the discharge of Vieyra.

61. Vieyra did perform a pedicure on August 23, in violation of her medical restrictions. However, she did so with Nelson's approval, on a one time basis, to prevent the customer from showing up and being told she had to be rescheduled. To offer this event as proof that Vieyra's medical restrictions were bogus or presented in bad faith is incredible.

62. The other two instances of alleged failure to follow medical limitations that appeared in Exhibit 6 involved failure by Vieyra to comply with the employer's unreasonable misunderstanding of her medical restrictions. Complying with that unreasonable misunderstanding should not have been a basis for any kind of discipline. Reliance upon these three incidents, on this record, as additional evidence of a legitimate business reason for firing Vieyra supports a finding that the discharge was unreasonable and discriminatory.

63. Vieyra proved, by substantial and credible evidence, that her employer took adverse employment action against her (discharge) because of her sex (pregnant female). The medical limitations that so outraged Etzel and Nelson were entirely due to Vieyra's pregnancy.

64. Etzel did not prove by substantial and credible evidence that Vieyra would have been fired even without the discriminatory animus of both Etzel and Nelson towards her that was due to her pregnancy-related limitations.

65. Etzel also offered evidence that Nelson or Etzel had heard complaints from customers about Vieyra being "too rough" in providing services to a customer, "rushing" eyebrow and lip waxing, and that Vieyra had been consistently rude and insubordinate with Nelson when Nelson directed her to make the bed in her

workroom, or otherwise instructed her about her delivery of services to her customers. Vieyra denied some of the incidents, and offered evidence that Nelson was difficult to deal with and sometimes overreacted. The additional evidence did not justify Vieyra's discharge. The overstated allegation that Vieyra was consistently rude and insubordinate towards Nelson omits a fact that was proved at hearing – that when Vieyra was, as she sometimes was, defensive and combative toward Nelson it was (with the exception of the July incident which was unrelated to her discharge) in response to Nelson's clumsy and often hostile efforts to "manage" Vieyra. Her instances of defensive and combative responses to Nelson's poorly framed management efforts did not justify firing Vieyra.

66. Etzel did not successfully rebut Vieyra's direct evidence of sex discrimination in employment (because of pregnancy).

67. At the end of the evidence, after considering all of the arguments as well as the evidence, it is clear that Nelson and Vieyra had a number of clashes and came to dislike each other. It also was clear that Nelson had similar clashes and problems with other employees and that after Etzel overruled Nelson's decision to fire another employee (see Finding 5, footnote 2, page 3), Etzel eventually ended Nelson's employment as the salon manager, as something that had not worked out. These facts also support the conclusion that discriminatory animus towards Vieyra, rather than her conduct at work, led to Vieyra's discharge, the only discharge by Nelson that Etzel ultimately approved and upheld.

68. The same day she fired Vieyra, Nelson told Etzel what had happened, and Etzel approved the decision. Etzel did not attempt to contact Vieyra to discuss the matter.

69. After being fired, Vieyra returned to the salon to collect her belongings. Visibly upset and in tears, she still tried to smile at a customer.

70. After her discharge, Vieyra did not attempt to contact Etzel to seek her job back. Under the circumstances, she reasonably believed that any such effort would be futile. Based on the way she had been treated by Nelson, and on Nelson's accurate characterizations to Vieyra of how Etzel felt about her, it is more likely than not that any such appeal to Etzel from Vieyra would not have evoked the compassion that Etzel showed to the other employee that Nelson fired.

71. Before she was fired, Vieyra had thought about finding another job, but she did not want to quit her job at Bella Sauvage. She did not know of any jobs available that paid nearly as much as Bella Sauvage. In fact, she had never before had a job that paid as much as Bella Sauvage, or even came close to paying as much as Bella Sauvage. Had she not been fired, she would have stayed at Bella Sauvage.

72. As of the summer of 2012, Etzel no longer owned Bella Sauvage, which she had sold to Christine Scheffer. There was no significant change in personnel when Scheffer took over. Had she not been fired, Vieyra would have continued to work at Bella Sauvage after Scheffer became the owner. Vieyra's most recent annual earnings at Bella Sauvage, before she was fired, were $36,827, including tips. Had she not been fired, she could have continued to generate earnings in that range.

73. Vieyra sought new employment. She did not apply to return to work at Bella Sauvage after Christine Scheffer took over, because she knew that Scheffer was Etzel's cousin and she believed that even if she was hired (which she doubted) it would be very uncomfortable. This was reasonable.

74. About a week after she was fired, she contacted Sarah Smith, the owner of Soleil Tanning and Nail Spa, and they agreed that Vieyra would begin working there once a room was available for her. That room did not become available until 2012, and that delay was not caused by Vieyra.

75. Aside from $200.00, earned working for individuals in late 2011,[10] Vieyra found no work of any kind from September 1, 2011 until she delivered her twins on December 20, 2011. She knew where she would be working after she had her twins and was ready to return to work the following year. In anticipation of needing help caring for the twins, and having more flexibility working as a new mother, Vieyra focused her job searches upon places and hours of work that would allow her to recruit family to help with the children and minimize travel time to her work at Soleil. She could not seek seasonal work that included Christmas because of her projected due date. Her work searches were reasonable, although unsuccessful, from September 1 through December 19, 2011. There was no failure to mitigate her damages during this period.

76. For September 1 through December 19, 2011, Vieyra lost 110 days of earnings at $36,827.00 per year. $36,827.00 per year amounted to $100.90 per calendar day. Over that same 110 days, her $200.00 in earnings amounted to $1.82 per calendar day. Her lost earnings were $99.08 per calendar day. Beginning December 20, 2011, she was on maternity leave and lost no further earnings in that calendar year. Her total earning loss for 2011 was $10,898.55.

77. In January 2012, Vieyra began purchasing supplies and preparing the facial room at Soleil. In February 2012, Vieyra signed a booth rental agreement with Soleil, and she began working at Soleil in April 2012. The time spent in 2012

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[10] Vieyra was unclear about whether part or all of the $200.00 was earned in 2011 or 2012. By attributing it all to 2011, the Hearing Officer is resolving uncertainty about when the money was earned in favor of Etzel, reducing the earlier wage loss, which accrues prejudgment interest longer.

preparing before commencing work was reasonable under the circumstances. She did as much as she could to return to work as soon as possible in her profession, a reasonable decision given how successful she had been, and given the lack of any realistic prospect of achieving such earnings in any other work for which she was qualified. There was no failure to mitigate her damages during this period.

78. Vieyra incurred expenses in setting up her room at Soleil and obtaining supplies, in the total amount of $1,856. For the five-month period of April 3, 2012, through August 31, 2012, Vieyra earned $2,820.00 from services provided at Soleil, and $352.00 in tips, for a total of $3,172, during that 151 calendar days, with no benefits, for a total net income from Soleil of $1,316.00, or $8.72 per calendar day. Had she returned to work at Bella Sauvage on January 20, 2012,[11] her daily calendar day earnings would have been $100.90 from January 20 through April 2, 2012, a period of 74 calendar days. From April 3 through August 31, 2012, her net daily earning loss because of her discharge from Bella Sauvage was $92.18.

79. Vieyra made the decision to continue in her chosen profession at Soleil after August 31, 2012, although she expected to earn only $700.00 per month net after expenses, because of her belief that persevering in her profession gave her better long-term prospects to reestablish her earning capacity. This is a reasonable decision, and supports finding the salon responsible for all of Vieyra's earning losses until the end of 2012. It is not reasonable to charge Bella Sauvage for all of Vieyra's actual earning losses after the end of calendar 2012, by which time Vieyra would certainly have been able to secure a full time minimum wage job.

80. For the last four months of 2012, Vieyra's projected net earnings were $2,800.00, for 122 days, for a daily earning of 22.95. At Bella Sauvage, her earnings for those four months would have been $100.90 per calendar day. Her net lost earnings per calendar day during this period were $77.95.

81. For January 1 through December 31, 2012, Vieyra's total earning loss was $30,895.68.

82. In 2013, the minimum wage in Montana is $7.80 per hour, which is $312.00 for five days of full time work in a week, for average earnings of $44.57 per calendar day. For January 1 through August 31, 2013, it is reasonable to reduce Vieyra's lost earnings from Bella Sauvage by what she could have earned working a full-time minimum wage job, because her career choices over this longer time following the discriminatory discharge did and will have impacts upon her earnings

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[11] Vieyra's proposed decision cited the reasonableness of her being off work for 4 weeks, starting December 20, 2011, for delivery and recuperation. The Hearing Officer used 31 days, also reasonable.

for which Etzel is not responsible. For the 243 days in 2013, January 1 through August 31, the earning loss from Bella Sauvage was and will be $56.33 per calendar day. Her total earning loss for 2013 will be $13,688.19.

83. It would be unreasonable to extend Vieyra's recovery from Etzel for any lost earnings beyond two years after the date of Vieyra's discriminatory discharge, given the increasing effect upon her earning capacity of the decisions she made and continues to make about where and in what jobs she works. Vieyra is a very good worker, excellent in establishing and maintaining good relations with her clients, experienced in her profession and knowledgeable about her market value. By the time two years have passed from her discriminatory discharge, it is more likely than not that her decisions about her career (changing her workplace, changing her approaches to providing her professional services, changing her pricing and marketing, etc.) will have restored her to the best income available to her in the present market. With unpredictable economic ups and downs, and a change in Bella Sauvage ownership, it is not reasonable to carry Vieyra's immediate lost earnings out further than two years as the standard for what she would be earning but for her discharge. Etzel's responsibility for any reduced income Vieyra may experience ends on August 31, 2013. It is reasonable to award her the entirety of her future earning losses immediately, without discount.

84. It is reasonable to award Vieyra prejudgment interest on lost earnings through the date of judgment herein. Based upon the foregoing findings, interest at 10% simple per year on her lost earnings, calculated as of the last day of each calendar month from October 2011 through January 25, 2013 (the date of this decision) is forth in the following table. The wage loss for each date for interest calculation consists of the total wages due and unpaid by end of the previous month. That wage loss is multiplied by .1 (10%) divided by the days in that calendar year, times the days in the present month for the interest calculation.

85. In 2011 and 2013, the total days in the year are 365, but in 2012 the total days in the year are 366. When .1 is divided by 365 (rounded to the nearest 10^{-4}) it is .0003, which times the number of days in the month (rounded to nearest 10^{-3}) is .008 for February (28 days) and .009 for all months of 30 or 31 days. When .1 is divided by 366 (rounded to the nearest 10^{-4}) it is .0003, times the number of days in the month, which (rounded to nearest 10^{-3}), is .008 for February (29 days) and .009 for all months of 30 or 31 days. Thus, for all three years, the interest rate for February is .008 and for all other full months is .009, times the total lost wages due as of the last day of the previous month.

86. For January 2013, the 25 days of lost wages ($1,450.75) did not accrue any prejudgment interest because they are not considered due until the end of the

month. For the total interest due on January 25, 2013, the total wage loss as of December 31, 2012, is multiplied by .0003 times 25, which is .007.

87. Monthly interest amounts are rounded to the nearest penny for addition, and the ultimate interest total is rounded to the nearest dollar. To avoid larger differences in totals due to rounding of numbers, the exact numbers in the previous findings are used for wage losses at year ends.

Int. Calc. Date	Wages Due – Prior Mo. End	Accrued Interest Calc. Date	Total Interest Due to Date	Current Month's Wage Loss	Total Wage Loss to Date
10-31-11	$ 2,972.40	$ 26.75	$ 26.75	$ 3,071.48	$ 6,043.88
11-30-11	$ 6,043.88	$ 54.39	$ 81.14	$ 2,972.40	$ 9,016.28
12-31-11	$ 9,016.28	$ 81.15	$ 162.29	$ 1,882.27	$ 10,898.55
01-31-12	$ 10,898.55	$ 98.09	$ 260.38	$ 1,210.80	$ 12,109.35
02-29-12	$ 12,109.35	$ 96.87	$ 357.25	$ 2,926.10	$ 15,035.45
03-31-12	$ 15,035.45	$ 135.32	$ 492.57	$ 3,127.90	$ 18,163.35
04-30-12	$ 18,163.35	$ 163.47	$ 656.04	$ 2,782.84	$ 20,946.19
05-31-12	$ 20,946.19	$ 188.52	$ 844.56	$ 2,857.58	$ 23,803.77
06-30-12	$ 23,803.77	$ 214.23	$ 1,058.79	$ 2,765.40	$ 26,569.17
07-31-12	$ 26,569.17	$ 239.12	$ 1,297.91	$ 2,857.58	$ 29,426.75
08-31-12	$ 29,426.75	$ 264.84	$ 1,562.75	$ 2,857.58	$ 32,284.33
09-30-12	$ 32,284.33	$ 290.56	$ 1,853.31	$ 2,338.50	$ 34,622.83
10-31-12	$ 34,622.85	$ 311.61	$ 2,164.92	$ 2,416.45	$ 37,039.28
11-30-12	$ 37,039.28	$ 333.35	$ 2,498.27	$ 2,338.50	$ 39,377.78
12-31-12	$ 39,377.78	$ 354.40	$ 2,852.67	$ 2,416.45	$ 41,794.23
01-25-13	$ 41,794.23	$ 292.56	$ 3,145.23	Not applicable	Not applicable

Vieyra's total prejudgment interest, due upon judgment, is $3,145.23.

88. Vieyra's total past and future earnings loss, due upon judgment, is $55,482.42.

89. The loss of her job caused Vieyra a substantial amount of emotional distress. At the time when she was pregnant with twins and most in need of support from friends, she abruptly lost her social support network - her coworkers at Bella Sauvage. Losing her job posed an extreme financial hardship – Vieyra was forced to move back in with her parents. She entered 2012 a new mother without income. Vieyra cried and lost sleep as a result of the termination. Vieyra, who had prided herself in her ability to support herself and be independent, was anxious and afraid to find herself with mounting bills and no income. She has not yet regained her ability to command the earnings she was making at Bella Sauvage, and thus she still suffers emotional distress resulting from the loss of her independence because of her pregnancy related limitations.

90. For the emotional distress Vieyra has suffered, still suffers and will continue to suffer into the future, the sum of $50,000.00.

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IV. Opinion[12]

Montana law prohibits employment discrimination on the basis of sex. Mont. Code Ann. §49-2-303. Pregnancy is a condition limited to women, and therefore, discrimination based upon pregnancy is sex discrimination. See, e.g., Bankers Life & Cas. Co. v. Peterson, (1993) 263 Mont. 156, 866 P.2d 241, 243-45; Miller-Wohl Co., Inc. v. Comm. Labor (1984), 214 Mont. 238, 692 P.2d 1243; Mount. States Tele. v. Comm. Labor (1980), 187 Mont. 22, 608 P.2d 1047. In addition, Montana law specifically prohibits terminating an employee because she is pregnant. Mont. Code Ann. §49-2-310.

Vieyra has proven by direct evidence that she was fired because of her pregnancy. Therefore, she has proved that Respondent unlawfully discriminated against her in violation of Montana law. In making the determination as to whether Vieyra proved discrimination, this Hearing Officer has made credibility determinations based on observation of the witnesses at the hearing. The Hearing Officer finds that Vieyra's testimony was more credible, in particulars in which it differed from the testimony of Etzel and Nelson.

Direct evidence is proof which "speaks directly to the issue, requiring no support by other evidence," and proves a fact without resort to inference or presumption. See Black's Law Dictionary, p. 413 (5th Ed. 1979). When a charging party presents direct evidence of discrimination, the respondent bears the burden of proving by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence is not credible and is unworthy of belief. See Mont. Code Ann. 24.9.610(5); Laudert v. Richland County Sher. Dep't, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. In addition, if the respondent can prove that it would have taken the challenged action even in the absence of discrimination, the charging party cannot recover compensatory damages. See Laudert at ¶¶33-35.

Vieyra provided direct evidence that she was terminated because of her pregnancy. Etzel and Nelson were openly frustrated and angered by the restrictions resulting from Vieyra's pregnancy. They responded by trying to make sure that was "sitting on her butt" after every hour she worked, even though the doctor's note did not require Vieyra to take hourly breaks from any work at all. Then, two weeks after Vieyra brought the restrictions to the attention of Etzel and Nelson, she was fired. When Nelson fired Vieyra, she admitted that she was doing so because of the pregnancy restrictions, although Etzel unsuccessfully attempted to spin the statement

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[12] 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.

into a declaration that Vieyra could no longer perform her job because Nelson would no longer tolerate her attitude. In short, the evidence is clear that Etzel and Nelson "placed substantial negative reliance on an illegitimate criterion in reaching [their] decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

There is a general principle of employment law, stemming originally from federal arbitration law but logically applicable in many other situations, that an employee who disagrees with an employer's directions should first follow the directions and then challenge them in the appropriate fashion ("work first, grieve later"). E.g., "Special Topics in Labor Relations: the Role of Arbitration in Collective Bargaining Dispute Proceedings: Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again," 44 U. Miami L. Rev. 237 (Nov. 1989), n. 303:

> The principle of "work first, grieve later" was established early by Dean Harry Shulman. See Ford Motor Co., 3 Lab. Arb. (BNA) 779 (1944) (Shulman, Arb.). In establishing the principle, Dean Shulman allowed for a limited number of exceptions to the rule. An employee, for example, need not obey an employer's order if obedience would require the commission of a crime or would create an unusual health or safety hazard. Id. at 780. The acceptance of the "obey and grieve" obligation among arbitrators is close to being axiomatic. Arbitrators often deny or limit a remedy for a meritorious grievance if employees have initially resorted to self-help rather than grievance procedures. See F. Elkouri & E. Elkouri, How Arbitration Works 199, n.216 (1985) (citing numerous arbitration awards). For an excellent discussion of the limited "health and safety" exception, see Gross & Greenfield, "Arbitral Value Judgments in Health and Safety Disputes: Management Rights over Workers' Rights," 34 Buffalo L. Rev. 645 (1985).

This doctrine has not been formally adopted in Montana to apply to Human Rights Act cases, and Etzel did not raise it in this case, but it is still useful in examining Etzel's defense that her ultimate adverse action of discharge was not discriminatory but instead was a legitimate business response to the employee's insubordination, bad attitude, refusal to follow directions, etc. The Hearing Officer weighed Etzel's defense in light of this doctrine. Clearly, the final event, and essentially the only event directly relevant to the discharge of Vieyra according to Etzel's defense, was the missing appointment book and Vieyra's insistence that she did not take the book, during a hostile exchange between Nelson and Vieyra.

First, in that peculiar situation it was impossible for Vieyra to "obey" Nelson's directions, and then later challenge the directions in the proper forum. Nelson was essentially demanding that Vieyra both admit taking the book and return it. The evidence did not justify Nelson's hasty conclusion that Vieyra had actually taken the book. An employer is not entitled to demand that an employee first obey an order to admit doing a bad act that the employee actually did not do and only then find a proper forum to challenge (grieve) that demand. A false admission of wrongdoing is not required under the "obey then grieve" doctrine. It follows that refusal to admit to wrongdoing the employee did not do is not insubordination. Heated responses to heated repeated accusations is likewise not insubordination.

In addition, since Vieyra, according to the substantial and credible evidence of record, did not take the appointment book, it was also impossible for her to obey Nelson's further direction to return it. She could not return what she did not have, and refusal to do so on the grounds that she had not taken the book was likewise not insubordination.

Vieyra demonstrated a temper several times during her employment, but responding to Nelson's angry and untrue accusation with hostile and defensive behavior on August 31, 2011, did not justify her discharge as a legitimate business decision.

Because Vieyra presented substantial and credible direct evidence of sex discrimination, Etzel bore the burden of proving that Vieyra's pregnancy played no role in her discharge. Etzel did not do so. The evidence is clear that pregnancy-related limitations played the major role in Vieyra's discharge. Etzel and Nelson displayed discriminatory animus and took discriminatory actions based upon the pregnancy restrictions. Their behavior toward Vieyra abruptly changed after she provided the first doctor's note and only escalated after the second note, culminating in her termination.

Nor has Etzel proven that Vieyra would have been fired even if she had not been pregnant (with the medical limitations she presented), so as to avoid liability for compensatory damages. In light of the escalating attacks upon Vieyra at work, Etzel has not really provided any evidence of a valid nondiscriminatory reason that would have justified termination of one of the salon's most productive employees. She certainly has not presented evidence that put in doubt Vieyra's proof that, more likely than not, she was fired because of the medical limitations of her pregnancy.

Although counsel for Etzel argued that Etzel is not liable for Nelson's act of firing Vieyra, the facts are clear that Etzel supported and actively encouraged Nelson in her adverse employment actions against Vieyra, up to and including ratifying Nelson's decision to fire her. Nelson was not as angry about the doctor's notes as

Etzel herself. Nelson clearly acted within the scope of her authority, with active encouragement from Etzel, in attempting to enforce Etzel's misunderstanding of Vieyra's limitations and in generally castigating and ostracizing Vieyra for providing the doctor's notes. Etzel cannot distance herself from Nelson's treatment of Vieyra in any of its particulars.

Etzel's counsel also made the remarkable statements in a reply brief that there was "no demonstration that Etzel or Nelson held Vieyra in disdain due to her pregnancy, nor that any imagined disdain was the motivating factor for Vieyra's termination." On the contrary, there was more than disdain, there was active animosity expressed towards Vieyra by both Etzel and Nelson about what both appeared to view as Vieyra's temerity in seeking and providing medical support for the limitations she had already unsuccessfully requested (no more pedicures). Nelson's comment to Vieyra that she was now on "Kelly's [Etzel's] shit list" seems to have been an entirely true statement, and a fair, albeit crude, assessment of how both Nelson and Etzel responded to her requests for accommodation. That a proud and independent young woman would respond in kind to this level of disdain and animosity should hardly have surprised the salon's management.

It is unfortunate that a health care professional who was also an employer would be inflamed by an employee's medical documentation of her need for limitations upon her work activities. Etzel argued that she had "nothing to do with the decision" to terminate Vieyra, which is patently untrue, in light of her behavior about Vieyra when meeting with Nelson, and her ratification of Nelson's decision to fire Vieyra. For her to argue further that she "required that [Vieyra's] doctor's restrictions be observed" is inconsistent with much of the evidence she herself put on, which established that she had misunderstood the medical restrictions in a fashion that was punitive towards Vieyra.

Vieyra proved she was terminated from employment because of her sex (her pregnancy), and therefore the Hearing Officer is empowered to any reasonable measure to rectify any harm, pecuniary or otherwise, to Vieyra as a result of this illegal discrimination. Mont. Code Ann. §49-2-506(1)(b). That includes recovery of her lost earnings. See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); see also Dolan v. S.D. 10 (1981),195 Mont. 340, 636 P.2d 825, 830 (1981). She must prove the amounts of her losses, but not with unrealistic exactitude. Horn v. Duke Homes, 755 F.2d 599, 607 (7th Cir. 1985); Goss v. Exxon Office Systems Co., 747 F.2d 885, 889 (3d Cir. 1984); Rasimas v. Mich. Dep't Mental Health, 714 F.2d 614, 626 (6th Cir. 1983). Back pay is computed from the date of the discriminatory act until the date of the final judgment. EEOC v. Monarch Tool Co., 737 F.2d 1444, 1451-53 (6th Cir. 1980). Vieyra is entitled to lost earnings from the date of termination to the date of this order, as calculated in the findings.

Prejudgment interest on lost earnings due before judgment is a proper part of the department's award of damages. P. W. Berry Co. Inc. v. Freese, (1989), 239 Mont. 183, 779 P.2d 521 (1989). Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times an appropriate rate of interest. E.g., Reed v. Mineta, 438 F.3d 1063 (10th Cir. 2006). The appropriate rate is 10% annual simple interest, as is applicable to tort losses capable of being made certain by calculation, only without the requirement of a written demand to trigger commencement of the interest accrual, which has not been required in Human Rights Act cases. Mont. Code Ann. § 27-1-210.

Reasonable measures to rectify pecuniary harm to Vieyra can also include losses in future earnings, if the evidence establishes that future losses are likely to result from the discriminatory acts. Martinell v. Montana Power Co. (1994), 268 Mont. 292, 886 P.2d 421, 439. Front pay is an amount granted for probable future losses in earnings to make the victim of discrimination whole when reinstatement is not feasible and front pay is temporary, lasting until the charging party can reestablish her "rightful place" in the job market. Sellers v. Delgado C. C., 839 F.2d 1132 (5th Cir. 1988); Shore v. Federal Expr. Co., 777 F.2d 1155, 1158 (6th Cir. 1985); see also, H.A.I. v. Rasmussen (1993), 258 Mont. 367, 852 P.2 628.

Reinstatement of Vieyra at Bella Sauvage is not a feasible remedy. Etzel no longer owns the salon, and if she did, her significant animosity towards Vieyra would preclude reinstatement. Front pay, rather than reinstatement, is the appropriate remedy in this case, for a limited period of time into the future, and because the front pay is for a short period of time, payment in a lump sum is reasonable as well.

Etzel has not proven that Vieyra failed to mitigate her damages. Vieyra made a decision to stick to her profession, in an attempt to recover her lost earning capacity over time. Etzel has not established, by a preponderance of evidence, let alone by clear and convincing evidence, see Benjamin v. Anderson,¶62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039, citing, P. W. Berry Co. Inc., that a lesser amount than the award for front pay would be proper. The Hearing Officer has taken into account Vieyra's choices about employment, over time, which take on a greater causal significance as the discriminatory discharge recedes into the past. At two years after the discharge, Vieyra's decisions will be the effective cause of her earnings thereafter, and recovery for lost earnings due to her discharge should and will end. The earning loss award, overall, is reasonable and appropriate.

The department also has the authority to award money for emotional distress damages. See, Vainio v. Brookshire (1993), 258 Mont. 273, 852 P.2d 596. The freedom from unlawful discrimination is clearly a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally

protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. Johnson v. Hale, 940 F.2d 1192 (9th Cir.1991); Vainio; Campbell v. Choteau Bar & Steak House (1993), HR No. 8901003828. The severity of the harm governs the amount of recovery. Vortex Fishing Sys.v. Foss, ¶33, 2001 MT 312, 308 Mont. 8, 38 P.2d 836.

Vieyra provided ample evidence concerning the impact that the discrimination and discharge had on her life. She was pregnant, for the first time, with twins, when she was fired. At a time when she most needed the financial stability and social support which she had established in her employment, these were abruptly taken from her. The appropriate amount of emotional distress damages under the circumstances is in the findings.

The law requires affirmative relief enjoining further discriminatory acts and may further prescribe any appropriate conditions on Etzel's future conduct relevant to the type of discrimination found. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring Etzel to consult with HRB to identify appropriate training to ensure that she does not commit further acts of discrimination. Although Etzel no longer owns Bella Sauvage, she owns at least one other business.

V. Conclusions of Law

1. The Department has jurisdiction over the charges made in Vieyra's complaint. Mont. Code Ann. §49-2-512(1).

2. Etzel illegally discriminated against Vieyra in employment because of sex (pregnant female) by firing her (through her manager, whose decision she ratified after the fact) because of her medical limitations instead of respecting the limitations as actually were stated by her physician. Mont. Code Ann. §49-2-303(1)(a).

3. The Department is empowered to issue an order herein that prescribes conditions on Etzel's future conduct relevant to the type of discrimination found and requires the reasonable measures stated in the findings to rectify the harm to Vieyra.

4. Vieyra is the prevailing party, under Mont. Code Ann. §49-2-512(3).

VI. Order

1. Judgment is found in favor of Karee Vieyra and against Kelly Etzel on the charge that Etzel illegally discriminated against Vieyra in employment because of sex (pregnant female) by firing her (through her manager, whose decision she ratified after the fact) because of her medical limitations instead of respecting the limitations as actually were stated by her physician.

2. Etzel is ordered immediately to pay to Vieyra the sum of $55,482.42 for lost earnings, $3,145.23 for prejudgment interest accrued on past lost earnings as of the date of this judgment, and $50,000.00 for emotional distress, for a total immediately due and owing of $108,627.65.

3. Etzel is permanently enjoined against taking adverse action against any employee because of sex (pregnant female). She is further ordered, within three weeks (21 calendar days) of the date of this judgment, to contact the Human Rights Bureau, to invite HRB to review current policies and procedures and notices regarding employment discrimination, in any and all businesses in which she currently has any ownership interest, and to take action as directed by HRB: (a) to undertake training in discrimination law and (b) to modify said policies and procedures and notices.

Dated: January 25, 2013.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Philip A. Hohenlohe, Hohenlohe Jones PLLP, attorney for Charging Party Karee Vieyra, and Elizabeth O'Halloran, Milodragovich, Dale & Steinbrenner, P.C., attorney for Respondent Kelly Etzel:

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 Marieke Beck
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. Contact Annah Smith, (406) 444-4356 immediately to arrange for transcription of the record.

Vieyra.HOD.tsp