BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0131015726 and 0131015725:

KATE WILLS,	) Case Nos. 1167-2013 and 1429-2013
	)
Charging Party,	)
	) HEARING OFFICER DECISION
vs.	) AND NOTICE OF ISSUANCE OF
	) ADMINISTRATIVE DECISION
SARA POWERS AND BOULDER CREEK LODGE,	)
	)
Respondents.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Kate Wills brought these complaints alleging that her employer, Boulder Creek Lodge(BCL), owned by Sara Powers, discriminated against her in her employment on the basis of marital status and that Powers, acting as her landlord, discriminated against her in housing on the basis of marital discrimination. The matter was originally assigned to Hearing Officer Terry Spear. On October 22, 2013, Hearing Officer Spear assigned this matter to Hearing Officer Gregory Hanchett

Wills filed two pretrial motions in this matter, one a motion for summary judgment on the housing discrimination claim and the other a motion to amend the caption to reflect the respondent as "Sara Powers, d/b/a Boulder Creek Lodge." Hearing Officer Spear denied the motion for summary judgment in an order dated August 23, 2013. Hearing Officer Hanchett granted the motion to amend in an order dated November 19, 2013. On November 20, 2013, Powers filed a motion to reconsider the order granting the motion to amend. Her motion to reconsider was denied for the reasons stated on the record at the time of hearing on November 25, 2013.[1]

[1]At the time of considering the respondent's motion for reconsideration on the motion to amend, it became obvious to the hearing officer that the charging party's motion to amend was in reality only a motion to add Sara Powers as a named respondent, not an effort to name Sara Powers in place of BCL. Accordingly, for the reasons stated in the order granting the motion to amend, the hearing officer finds that it is appropriate to add Sara Powers as an additional named respondent in

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on November 25 and 26, 2013 in Phillipsburg, Montana. Ryan Shaffer and Nate McConnell, attorneys at law, represented Wills. J. Ben Everett, attorney at law, represented the respondents.

At hearing, Wills, Powers, Randy Hornbacker, Debbie Hass, Patty Haggerty and Keith G. Powers all testified under oath. Exhibits were admitted at hearing as reflected in the record.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Hearings Bureau on January 29, 2014. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES:

A complete statement of issues is contained in the final pre-hearing order which is incorporated into this final agency decision.

III. FINDINGS OF FACT

1. Sara Powers personally received both Charges of Discrimination filed by Kate Wills. Ms. Powers testified that she read and understood the Charges of Discrimination, including the allegations that "Sara Powers" engaged in discriminatory conduct.

2. Sara Powers disputed the factual allegations in Kate Wills' Charges of Discrimination and submitted a written response to the Montana Human Rights Bureau on October 17, 2012. In her response, she stated that she was "the sole owner and proprietor of Boulder Creek Lodge 31 Shakopee Dr., Anaconda."

3. Sara Powers received timely notice of Wills' charges of discrimination and was provided a full and fair opportunity to defend against such charges, and in fact did defend against such charges.

4. Sara Powers personally operates Boulder Creek Lodge ("BCL") and has, on at least two occasions in this case, represented that she is the sole owner and

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this matter since she is the only respondent that can be named in the housing discrimination and because she had proper notice of the proceedings and responded on her own behalf as well as on behalf of BCL from the outset of the filing of the complaint in 2012. The first four facts in the findings of fact are meant to supplement the hearing officer's earlier findings of fact in his order granting the motion to amend the complaint and his verbal order at the time of hearing denying the respondent's motion to reconsider the motion to amend.

proprietor of BCL. As an authorized agent of BCL, Powers hired and supervised Kate Wills during Wills' employment at BCL.

5. In addition to Boulder Creek Lodge, Powers owns the Forest Edge Inn (FEI) located on Georgetown Lake. Powers also owns a house located at 31 Shakopee Drive in Anaconda, Montana (hereinafter "Shakopee House") in her own name.

6. At all times relevant hereto Wills was married to Scott Van Fossen. They have a family together.

7. Wills leased the Shakopee House for $650.00 per month. Wills' monthly rent was deducted from her paycheck from BCL. The lease was between Wills and Powers only and the lease provided that up to eight people could live in the house. Powers knew that Van Fossen would be living with Wills at the house when the lease was signed. The lease term commenced on September 5, 2011 and was to end on September 5, 2012. The home came fully furnished as a part of the lease.

8. Powers did not like Van Fossen. She believed that Van Fossen used drugs, was lazy and did not support Wills and Van Fossen's family. Powers did not believe that Van Fossen was a good husband to Wills. Powers also felt that Van Fossen was not a good father to his and Wills' children. Powers also felt that Wills' and Van Fossen's family was dysfunctional.

9. Powers' judgments about Van Fossen were based on speculation and untrue assumptions and had nothing to do with Wills' conduct as a tenant.

10. At no time during the period of the lease did Powers ever tell Wills that either her conduct or Van Fossen's conduct violated the lease. At no time did Powers ever tell Wills that Wills was a bad tenant.

11. At one point, Van Fossen stored a pick up camper on the front of the property at Shakopee. He also stored construction equipment on the property. Powers did not want the camper stored liked that and told Wills in December, 2011 that it would have to be moved. In March, 2012, Van Fossen moved it to the side of the house so that it was not out front.

12. In November, 2011, Powers was helping Wills at the Shakopee House and had the opportunity to go inside. Powers felt the home looked disheveled. Powers also noticed that the kitchen had been packed up into boxes. Powers said nothing to Wills about this.

13. Powers had other occasions to enter the Shakopee House during Wills' tenancy. At no time during those visits did she ever complain to Wills about the condition of the property.

14. After becoming concerned about Van Fossen, Powers did a background check of both Wills and Van Fossen. The background check disclosed judgments against Van Fossen.

15. On June 23, 2012, Powers and Wills went to look at a rental house that Von Fossen was renovating. Powers complained to Van Fossen about various problems with the way that Van fossen was renovating the house.

16. On June 24, 2012, Powers told Wills that she would not lease the Shakopeee House to Wills anymore unless Van Fossen moved out. In doing so, she never told Wills that Van Fossen was a problem renter nor did she express any concerns about Van Fossen's treatment of the property. She never told Wills that she was unhappy with the way that Wills was keeping up the property. In fact, at hearing, Powers admitted that when she told Wills that she would not renew the lease unless Van Fossen moved, Powers was not at that time worried about any damage that might have occurred to the home.

17. Powers also told Wills that "I'm forcing you to make a decision and since you don't want to make the decision, I'm making it for you. You either work and rent from me or you don't." Testimony of Wills.

18. At hearing, even Powers testified that she told Wills during this conversation that "Scott was not pulling his weight, he's troubling you, I don't like his conduct on our property and I won't renew the lease unless he leaves."

19. Powers also admitted at hearing that had Van Fossen moved out, she would have renewed the Shakopee lease to Wills. Powers also admitted at hearing that she would have allowed Wills to continue to lease the property even if the construction equipment had stayed on the property as long as Van Fossen moved out.

20. At one point, Wills moved some of the lease furniture out of the Shakopee House to other properties that Powers owned. Wills prepared a list of the moved furniture and the location to which it was moved and provided the list to Wills. At no time during the lease did Powers ever complain to Wills that furniture had been moved.

21. Wills and her family moved out of the Shakopee House on August 24th, 2012, after Wills left her employment at BCL.

22. Powers refused to renew the Shakopee House lease to Wills because of Wills' marriage to Van Fossen. Powers did not want to renew the lease on Shakopee to Wills if Wills remained with Van Fossen. Powers' asserted legitimate reasons for refusing to renew the lease to Wills are pretextual.

23. In mid-September, 2011, Powers hired Wills to work for Powers at Forest Edge Inn(FEI). Wills did a good job working for Powers at FEI. Exhibit D. Wills did such good work for Powers at FEI that Powers eventually hired her on to also work as a housekeeper and camp manager at BCL. In March, 2012, Powers gave Wills a raise from $15.00 per hour to $18.00 per hour.

24. In April, 2012, Powers placed Wills on salary, paying her $2,800.00 per month, the salary equivalent of paying her $18.00 per hour. She also received tips and was given an automobile, a Ford Fusion, to use as part of her remuneration. The only condition placed upon Wills' use of the automobile was that she not let her husband drive it. Other than that, Powers placed no restrictions upon the use of the automobile.

25. Powers had no policy about the use of sick leave time. Her only spoken requirement regarding sick time was that "if you're sick, you're sick so don't come in to work." An employee would earn one week of vacation after working one year for Powers, two weeks after working two years, and three weeks after working three years.

26. In December, 2011, Powers orally warned Wills about spending too much time talking on her cell phone. On another occasion, Powers admonished Wills that she needed to make sure that her grandchildren's clothes (which had been left on the lawn of BCL while the grandchildren were playing in the sprinklers on the lawn) were hung neatly on the railing while the clothes were drying.

27. During the summer of 2012, Patty Haggerty worked for Powers at BCL. She shared car rides to and from work with Powers' and Wills' and observed them interacting both during the rides and at work. Haggerty observed that Wills and Powers interacted well and had a friendly relationship. At no time did Wills complain about how she was treated at BCL. To the contrary, Haggerty noticed that Wills loved her job at BCL and Haggerty envied Wills and Powers relationship because "they were having fun."

28. Powers also hired Randy Hornbacker to work at BCL in July, 2012. Hornbacker worked at BCL until July, 2013. Hornbacker noticed that Wills and Powers had "very positive interactions" while working together at BCL. He thought Powers and Wills were best friends. Hornbacker did not notice that the work

environment was hostile toward Wills. To the contrary, he felt they worked together like family.

29. At no time during her employment did Wills ever complain to Powers about a hostile working environment. She never complained to Powers that Powers was talking to Wills too much about Van Fossen or that she felt Powers was interfering in her marital life.

30. Powers was not rude to Wills but she could became "snappy" toward Wills. Testimony of Wills.

31. Sometime in June, 2012, Powers came into work and began to tell Powers about an incident that occurred at Wills' house involving Van Fossen being without a shirt in front of Wills' grandchildren. Wills never told Powers that Van Fossen had exposed himself to the grandchildren; however, Wills "admitted" to Powers that she and Van Fossen were having " an intimate moment" and that the grandchildren had seen Van Fossen. In response, Powers told Wills that if Powers ever again heard about Van Fossen was in the nude in front of the grand children, she would call "DFS." Wills joked with Powers that Powers needed to "go to take her "Razepam," you're awfully grumpy."[2]

32. During July, 2012, Wills informed Powers that she would need to go to Huron, South Dakota to clean out a storage locker that she had there. She told Powers that she would need a week off to do that. Powers knew that Wills would need to make this trip.

33. On Friday, August 3, 2012, Wills called Powers to tell Powers that she was sick. She also called Powers on Saturday to let her know she would not be in. Wills did not call Powers on Sunday to let her know she would not be in.

34. On Monday, August 6, 2012, Wills called Powers to let her know that she was on the way back from Anaconda after picking up a prescription and that she would be leaving that day to go to Huron, South Dakota to clean out the storage locker. Powers did not tell Wills that she could not go to Huron. Neither did Powers complain to Wills that she would be left shorthanded during the week by Wills' decision to go over to Huron. All Powers told Wills to do was to drop off the company car at Powers' house before she left. Wills did as Powers requested.

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[2]Though Wills did not explain at hearing what she meant by the term "Razepam," the hearing officer assumes that Wills' reference was to Lorazepam, a benzodiazepine drug often used for treating anxiety disorders.

35. Wills returned to work on August 11th. When Wills came in, Powers told Wills that she was being taken off salary, remaining at $18.00 per hour, that she would no longer have the use of the company car and that she would have to share her waitressing tips with the cook. Powers made a point to say to Wills that she was not being fired and Wills could take some time and think about it. Wills put her keys to BCL on the table, told Powers that she could "not work this way," and quit her job. Wills quit because she would no longer stand for Powers discriminating against her on the basis of Wills' marriage to Van Fossen.

36. Powers articulated bases for imposing adverse employment action on Wills, specifically, that Wills went unannounced to South Dakota, that Wills put too many miles on the company car and that Wills did not satisfactorily perform her work during the last three weeks before she quit are pretext. These were not legitimate bases for imposing adverse employment action upon Wills.

37. Powers discriminated against Wills on the basis of marital status when she refused to renew the lease on the Shakopee House because Wills would not leave Van Fossen. Powers also discriminated against Wills in employment based upon marital status when she imposed adverse employment action against her by reducing her tips.

38. As a result of the discrimination against Wills in her employment, she lost $2,800.00 in wages per month, approximately $200.00 in tips per month, the use of a company car valued at $200.00 per month and one week of vacation pay, $700.00. She seeks back pay from the date of her discharge, August 11, 2012 through the time of hearing on November 25, 2013, approximately 16 months, as well as interest on that amount at 10% per annum. The total of lost wages is $52,133.28 (($2,800.00 per month wages + $200.00 per month use of company car +$200.00 per month tips plus + $58.33, the monthly value of one weeks vacation per year) x 16 months

= $52,133.28).[3] Interest on the lost wages, calculated on a monthly basis through the date of judgment, March 27, 2014 is $4,882.52.[4]

39. Wills suffered emotional distress when Powers discriminated against her on the basis of marital status both in housing and employment. She felt anguish over the situation, endured physical symptoms and suffered other emotional distress as well as the loss of a portion of her tips. An emotional distress award in the amount of $21,000, representing $6,000.00 for the housing discrimination claim and $15,000.00 on the employment discrimination claim, is appropriate to compensate Wills for her emotional distress.

40. The respondents have failed to prove by clear and convincing evidence that Wills failed to mitigate her damages.

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[3] The charging party in her post hearing brief has suggested two different numbers for the lost wages portion of her claim (See Charging Party's Post hearing brief, pages 12 and 17) but no where effectively explains how she arrived at the two different numbers. The hearing officer has been unable to replicate the charging party's proposed amount or to figure out how she arrived at those amounts. The hearing officer's number of total monthly lost wages is based on what the hearing officer understood the testimony on lost wages to be times the number of months (16) that elapsed between August 11, 2012, Will's last day of work, and the date of hearing in this matter. To the extent that the charging party's second calculation of lost wages is based upon a perception that she is entitled to be paid lost wages from the date of hearing through the date of judgment, the hearing officer does not agree. Wages claimed from the date of hearing going forward are front pay damages. The hearing officer has no testimony regarding wages that the charging party might have been unable to recuperate after the hearing and the charging party has not sought front pay in this matter. See Page 6, Paragraph VII (f), Final Pre-hearing order (charging party's only request is for lost wages). To award the charging party pay for time periods after the date of hearing where there has been no request for front pay or opportunity for the respondents to litigate the issue of front pay would violate the respondents' due process rights.

[4] The hearing officer calculated interest on the amount of lost wages by determining the daily value of interest on the monthly income lost and then calculating the number of days that have elapsed between the end of the month would the income would have been due and the date of the judgment in this matter, March 27, 2014. This process was applied to each of the months of lost income, and then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income. The daily interest value for the period of lost income for the first month of lost income, which is only a partial month, is $.57 per day (10% per annum divided by 365 days =.00027% x $2,102.15 ($3,258.33 per month lost income for 20 days) =$.57 per day). The daily interest value for the period of lost income for the subsequent 16 months which would have been full months of income is $.89 per day (10% per annum divided by 365 days =.00027% x $3,253.88 = $.89 per day). Using these calculations, the interest due on the lost income through March 27, 2014 is $4,882.52.

41. Wills did not look for any work in the Anaconda/ Georgetown Lake area. Instead, she moved with Van Fossen to Ismay, Montana because Van Fossen found a house that he wanted to buy there because he is in the business of fixing up and selling houses. Testimony of Wills. Due to the limited capacities of the vehicles she had available to her, Wills and her family were forced to make 10 trips to Ismay from Anaconda in order to complete their move. Her fuel costs and other expenses in completing the move totaled at least $4,000.00.

42. Wills has applied for work in Miles City and in Ismay approximately three times per week since moving to Ismay, but has not found any work to date. She has not looked for work anywhere other than in these two locations.

43. Affirmative relief must be imposed in this matter to ensure that Powers and BCL do not engage in marital discrimination in the future.

IV. DISCUSSION[5]

A. Housing Discrimination Claim

The Montana Human Rights Act provides that it is an unlawful discriminatory practice for a property owner to refuse to lease a premises to a person on the basis of marital status. Mont. Code Ann. §49-2-305(1)(a). The term "marital status" as used in the human rights act is broadly defined under Montana law and includes discrimination based upon the identity of the spouse. Thompson v. Bd. of Trustees, (1981), 192 Mont. 266, 269-70, 627 P.2d 1229, 1231 (1981); Mercer v. McGee, 2008 MT 374, 346 Mont. 484, 197 P. 3d 961 (holding that in the context of employment, martial status not only refers to the charging party's marital state but also includes conduct directed against a charging party because of the identity of that person's spouse). Unlawful marital discrimination under the Montana Human Rights Act includes discharging an employee because of animus against the employee's spouse. European Health Spa v. Human Rights Commission, (1984), 212 Mont. 319, 687 P.2d 1029 (upholding a Montana Human Rights Commission finding that marital status discrimination in employment had been inflicted upon a charging party where she was fired from her employment with a health spa because she was married to the health spa's former manager whom the new manager did not like).

Direct evidence or circumstantial (indirect) evidence can provide the basis for making out a prima facie case. Direct evidence cases are ones in which the parties do

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

not dispute the reasons for the action taken, but only whether the actions amount to illegal discrimination. Reeves v. Dairy Queen, 1998 MT 13,¶17, 287 Mont. 196, ¶17, 953 P. 2d 703,¶17. Where a prima facie claim is made out by direct evidence, the respondents must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(5); Reeves, ¶17. Where the charging party's case is comprised of indirect evidence, the three tiered burden shifting standard of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies. Heiat v. E.M.C. (1996), 275 Mont. 322, 912 P.2d 787. Laudert v. Richland County Sheriff's Office, ¶22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386.

Wills argues that this is either a direct evidence case or an indirect evidence case.[6] The hearing officer does not believe that this is a direct evidence case. The credible evidence here establishes that Powers told Wills that she would not continue to rent to Wills unless Van Fossen left and the parties strenuously dispute the reasons for the actions that Powers took. This case is an indirect evidence case, therefore, and it is the McDonnell Douglas three-tier burden shifting analysis that must be applied to the facts as found by the hearing officer.

The McDonell Douglas burden shifting test has been embodied in the administrative rules applicable to this proceeding. See generally, Admin. R. Mont. 24.9.610. Under these rules, a charging party can show a prima facie case of unlawful discrimination by putting on evidence from which a trier of fact can infer that adverse action against the charging party was motivated by consideration of the charging party's membership in a protected class. Admin. R. Mont. 24.9.610 (2). In a housing discrimination class, the charging party's prima facie case consists of presenting evidence that (1) the charging party is a member of a protected class, (2) that the charging party sought and was qualified for a housing opportunity or service, and (3) that the charging party was denied the opportunity for housing or otherwise subjected to adverse action by the respondent in circumstances raising a reasonable inference that the charging party was treated differently because of membership in a protected class. Admin. R. Mont. 24.9.610 (2) (a)(i-iii).

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[6]The charging party lays out both the law related to direct evidence cases and the law related to indirect evidence cases but never argues explicitly that this case is one of direct evidence or this case is one of indirect evidence. The hearing officer gleans from the charging party's brief that the charging party intends to simply argue that one or the other applies.

If Wills can make out her prima facie case, the burden then shifts to Powers to show that she refused to lease the premises to Wills for legitimate, non-discriminatory reasons. Admin. R. Mont. 24.9.610 (3). If Powers carries that burden, Wills must then prove preponderantly that the legitimate reasons offered by Powers were not her true reasons but were a pretext for discrimination. Admin. R. Mont. 24.9.610(4). Wills at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. St. Mary's Honor Center at 507; Heiat, 912 P.2d at 792.

Wills has presented a prima facie case of housing discrimination. Powers does not dispute that Wills is a member of a protected class. Powers told Wills that she would not renew the lease for the premises to Wills unless Van Fossen moved out. In conjunction with Powers' other comments(for example, her comment to Wills while they were driving together that "Scott was not pulling his weight, he's troubling you," and her comments that Van Fossen was lazy and not doing enough to contribute to the upkeep of the family) which were close in time to the statement that she would not renew the lease to Wills if Van Fossen did not move out, Wills has proven her prima facie case through indirect evidence that Powers discriminated against Wills in housing on the basis of marital discrimination.

As Wills made her prima facie case, the burden then shifts to Powers to show legitimate reasons. She asserts that she wanted Van Fossen out of the house because she was concerned about his purported drug use, his failure to move equipment, his failure to move construction equipment and the failure to move a camper out of the front of the house. These reasons, at least on their face, constitute legitimate reasons for not renewing the lease and the burden then shifts back to Wills to show that these articulated reasons are mere pretext.

Pretext can be proven by showing that the respondent's acts were more likely based on an unlawful motive or with indirect evidence showing that the explanation for the challenged action is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(4). As noted in the context of employment cases, the analysis of the validity of the proffered legitimate reasons for taking the complained of action is whether the respondent has "'use[d] the factor reasonably in light of the [respondent's] stated purpose as well as [the respondent's] other practices.'" Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir. 1986) (quoting Kouba v. Allstate Ins., 691 F.2d 873, 876-77 (9th Cir. 1982)).

Powers' asserted legitimate bases for refusing to renew the lease are shattered when considered in the context and circumstances of the facts of this case. Powers'

concerns about Van Fossen's drug use were patently unfounded, she admitted as much at hearing. Her concerns about the conditions of the house were also unfounded. At no time during the tenure of the lease did Powers ever tell Wills that she was violating the lease or that she needed to come into conformity with the lease. She never indicated to Wills that she was a bad tenant. Indeed, there is no evidence that Powers ever told Wills that Van Fossen was a bad tenant. Powers only concern seems too have been that Van Fossen was not treating Wills properly and was not caring for Wills and her family in the way that Powers thought he should have been. Powers admitted at hearing that she was not worried about the damage to the house when she said she would not renew the lease unless Van Fossen left the house. The storage of the camper and the construction equipment in front of the house provided no basis for failing to renew the lease as they had been moved long before Powers told Wills that she would not renew the lease. Not one of the asserted proffered legitimate reasons withstands even minimal scrutiny. Accordantly, Wills has proven that Powers discriminated against her in housing on the basis of marital status.

B. Employment Discrimination Claims:

Wills has advanced two bases upon which she claims Powers is liable for employment discrimination. The first basis is that Powers engaged in employment discrimination based upon marital status when she took away Wills' car, made Wills split tips and took her off of salary and returned her to an hourly wage. The second argument is that Powers created a hostile working environment by making disparaging remarks to Wills at work about Van Fossen. Each of these claims will be considered in turn.

1. Wills Has Proven Her Adverse Employment Action Claim.

Wills contends that Powers took adverse employment action against her because Wills would not leave Van Fossen. The Montana Human Rights Act prohibits discrimination in employment based upon marital status. Mont. Code Ann. §49-2-303(1)(a). As noted above in the discussion on housing discrimination, unlawful marital discrimination in employment includes discharging an employee because of animus against the employee's spouse. European Health Spa, supra.

Wills argues that this facet of her claim is an indirect evidence case and the hearing officer agrees. Therefore, the multi-tier McDonnell Douglas standard applies. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, et seq., mirrors the Montana Human Rights Act prohibitions against discrimination. The principals articulated in federal cases applying Title VII are useful in interpreting and applying

the Montana Human Rights Act to the extent they comport with the Montana Human Rights Act.

Wills must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a prima facie case exist in this matter. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). In order to prove a prima facie case of discrimination based upon marital status, a charging party must show that she (1) is a member of a protected class, (2) she was qualified to continue in her employment, and (3) that she was subjected to an adverse term or condition of her employment because of her membership in the protected class. Admin. R. Mont. 24.9.610. If Wills proves a prima facie case of discrimination, the burden shifts to Powers who must then offer evidence that is sufficient, if believed, to support a finding that her decision to discipline Wills was based on a factor other than marital status. St. Mary's Honor Center at 506-07; Heiat at 328, 912 P.2d at 791(quoting Texas Dept. Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)). If Powers carries that burden, Wills must then prove preponderantly that the legitimate reasons offered by Powers were not her true reasons but were a pretext for discrimination. Id.; Admin. R. Mont. 24.9.610(3). Wills at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. St. Mary's Honor Center at 507; Heiat, 912 P.2d at 792.

Wills has made a prima facie case of discrimination in employment based upon marital status. There is no dispute that she is a member of a protected class (married) and that she was subjected to adverse action in her employment by the loss of the use of the company car and by being required to split her waitressing tips with the cooks. Wills has also demonstrated a reasonable inference that the reason for the adverse employment action was to discriminate. This stems in part from the fact that the adverse employment action was taken in close proximity to the time when Powers was continuing to urge Wills to leave Van Fossen and in close proximity to the time when Powers threatened to not renew Wills' lease if Wills stayed with Van Fossen.

As Wills has presented a prima facie case, the burden then shifts to Powers to show legitimate business reasons for her conduct. Powers has met this burden, albeit barely. Powers' concerns regarding Wills not giving her adequate notice to take the week off to go to South Dakota coupled with the admonition in December regarding phone call use is adequate to show a legitimate basis for taking the adverse employment action she took against Wills. It is difficult to see how Powers' concerns about the mileage placed on the car could be considered 'legitimate" under the circumstances of this case because Powers placed no mileage limitations on Wills' use of the car yet she claims that is one of the basis upon which she imposed discipline.

Nonetheless, the hearing officer will take at face value Powers' argument that what she perceived as excessive mileage on the car is a legitimate business reason.

As Powers has offered evidence of legitimate business reasons for her adverse action against Wills, the burden of production now falls back to Wills to show that Powers' proffered legitimate reasons were not her true reasons, but were a pretext for discrimination. Admin. R. Mont. 24.9.610(4). Her burden of production then merges with her ultimate burden of persuasion to show that she has been the object of intentional discrimination. Burdine, supra, 450 U.S. at 254-55. As noted above, pretext can be proven by showing that the respondent's acts were more likely based on an unlawful motive or with indirect evidence showing that the explanation for the challenged action is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(4). See also, Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994) (pretext can be proven by showing that the proffered reasons had no basis in fact). "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" Maxwell, supra, 803 F.2d at 446.

Wills has shown by a preponderance of the evidence that the adverse employment action was mere pretext. Had Powers really felt that Wills' trip to South Dakota was a legitimate basis for disciplining her, Powers would have said something to Wills at the time that Wills spoke to her on August 6 to let her know that Wills was leaving to go to South Dakota. The fact that Powers voiced no objection of any kind to Wills when she called on August 6 corroborates Wills' version of events that Powers had already agreed back in July that Wills could go to South Dakota when she did. Having already given approval for the absence, Powers could not then use Wills' trip to South Dakota as a legitimate basis for discipline.

Likewise, Powers, having placed no restrictions on Wills' use of the car other than prohibiting Van Fossen from driving it, could not then use some after the fact limitation as legitimate basis for discipline. Nothing in the evidence suggests that the mileage that Wills put on the car was outside any reasonable parameters of usage.

As to the alleged malfeasance in the performance of job duties during the last three weeks of work, Powers at no time attempted to correct Wills' perceived deficiencies prior to imposing adverse employment action against Wills. It is far more likely that Powers, by taking away Wills' use of the car and a portion of her tips, was carrying through on her attempt to force Wills to make a decision regarding Van Fossen.

Powers asserted reasons for discipline are also undermined by the fact that she discriminated against Wills in housing because of Wills' marriage to Van Fossen at a time close to when she took adverse employment action against Wills. Powers' conduct in taking adverse action against Wills because of a desire to discriminate goes hand-in-hand with her conduct in discriminating against Wills in housing. Wills has proven preponderantly that Powers discriminated against her because of her marriage to Van Fossen.

2. Wills Has Failed to Prove Her Hostile Work Environment Claim.

Wills has also asserted that she was subjected to a hostile working environment because of Powers' comments to Wills about Van Fossen. In doing so the charging party complains that the hostile working environment emanates from Powers taking "any and every opportunity to communicate her opinion of Van Fossen to Wills at work." Charging Party's opening brief, page 19. While the hearing officer can conjure up possible scenarios where so many invectives are used or comments are so frequently made that comments might amount to a hostile working environment in the context of marital discrimination, this case is not one of them. Powers' conduct, while ultimately proving to be discrimination, can not under any objective assessment be considered to have created a hostile working environment.

A charging party establishes a prima facie case of a hostile working environment with proof that he was subject to "conduct which a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." McGinest v. GTE Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004). See also, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The abusive work environment must be both subjectively and objectively hostile. Beaver v. Montana Dept. Of Natural Resources, 2003 MT 287, ¶31, 318 Mont. 35, 78 P.3d 857. A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. Id. The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id., citing Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998). The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).

The charging party has suggested without specific reference to the record that Powers' conduct was so pervasive that it created a hostile working environment.

Charging party's brief, page 18. The charging party's suggestion is not supported by the record and is not credible. In the first place, two non-party witnesses both testified (and the hearing officer finds the testimony to be credible) that while they were with Powers and Wills, the relationship was quite friendly. Indeed, Haggerty indicated that she was envious of the relationship that Powers had with Wills. In addition, the number of discussions between Powers and Wills regarding Van Fossen over eleven months of employment and the tone of those conversations(e.g., Wills' joking response to Powers to "take her Razepam") does not support a finding of an objectively hostile work environment. On at least one occasion, Wills broached with Powers the issue of Van Fossen not sharing living expenses with her. The charging party concedes that Powers' comments were directed at Van Fossen, not Wills. The comments were not comprised of invectives and were generally about Van Fossen's laziness. At no time, for example, did Powers say something that impugned Wills' character because of her relationship to Van Fossen. The charging party has not cited, nor has the hearing officer found, any case that would suggest that the conduct in this case is legally sufficient for the charging party to prove that an objectively hostile work environment existed.

Moreover, the charging party has overstated her testimony in this matter in certain respects and for that reason, the charging party's testimony is not to be believed in every particular.[7] For example, she testified that Powers bought her the company car to use in order to drive a wedge between Wills and Van Fossen. This testimony is patent embellishment by the charging party and not credible. If that were true, the charging party would have rejected the use of the car or at least said something to Powers about it. She said nothing. The hearing officer believes that Wills' embellishment in this regard also casts a shadow on her testimony regarding the purported hostile work environment and strengthens the hearing officer's belief, and finding, that no hostile work environment existed in this case. Wills has failed to carry her burden of proving her hostile working environment claim.[8]

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[7] This statement should not be construed in any way to undermine the strength of the facts which the hearing officer has found to be true that support the finding that housing and employment discrimination occurred in this matter. The fact that a party's evidence may be weak, conflicting or not found to be true in every regard does not render the evidence insubstantial. Whiting v. State (1991), 248 Mont. 207, 213, 810 P.2d 1177, 1181.

[8] The charging party, undoubtedly in an effort to be thorough, also broached in her post hearing brief a "mixed motive" scenario and the ramifications such a finding would have in this case. Charging Party's post hearing brief, page 18. The respondents did not argue a mixed motive defense in

C. Damages

The department may order any reasonable measure to rectify any harm Wills suffered as a result of illegal discrimination. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. E.g., P. W. Berry v. Freese, (1989), 239 Mont. 183, 779 P.2d 521, 523. See also, Dolan v. School District No. 10, (1981), 195 Mont. 340, 636 P.2d 825, 830. To be compensable, however, the damage must be causally related to making the victim whole. In other words, the damage must flow from the discriminatory conduct. Mont. Code Ann. §§ 49-2-506(1)(b); Berry, supra. See also, Village of Freeport Park Commission v. New York Division of Human Rights, 41 A.D. 2d 740, 341 N.Y.S. 2d 218 (App. 1973)(loss of earnings which did not flow from the discriminatory act is not compensable as it does not flow from the discrimination). Damages include emotional distress endured as a result of unlawful discrimination. Vortex Fishing Systems v. Loss, 2001 MT 312, ¶33, 308 Mont. 8, 38 P.3d 836.

With respect to employment discrimination, once the charging party has established that her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of back pay. Berry, 779 P.2d at 523-24. To defeat this presumptive entitlement, the respondent must demonstrate by clear and convincing evidence that a lesser amount of back pay is due the charging party. Id. See also, Benjamin v. Anderson, 2005 MT 123, ¶62, 327 Mont. 173, 112 P.3d 1039.

Wills has claimed damages both as to the housing discrimination she endured and her employment. Turning first to the housing discrimination, she seeks both damages resulting from having to move and emotional distress damages. Wills is entitled to compensatory damages for emotional distress which she suffered both as a result of the housing discrimination. The value of this distress can be established by testimony or inferred from the circumstances. Vortex, ¶ 33. Wills testified that she suffered stress as a result of having to move out of the Shakopee House because Powers did not want Wills living with her husband. She was also concerned about having to find a new place for her family to live. That concern, however, was apparently somewhat short-lived as prior to the time of vacating the house, its appears that Wills and Van Fossen had located a home in ismay that van Fossen wanted to buy. Her emotional distress was more than what the plaintiffs in Hale v.

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this matter and the hearing officer sees no need to reach that issue since the burden was upon the respondents to prove it and the respondents have not seen fit to argue it much less prove it.

Johnson faced. An emotional distress award in the amount of $5,000.00 is appropriate for the discrimination in housing that she suffered.

Moreover, there is no question that she incurred moving expenses, although the respondents apparently dispute the validity of the amount of those expenses. Wills' request for $4,000.00 does not on its face seem unreasonable, given the nature of the piecemeal move that she had to make due to the limited capacities of the vehicles she had available to her. In addition, Ismay, Montana is some 450 miles east of Anaconda.

The respondents argued that Wills' evidence of the expenses is not credible because she estimated the cost for fuel (providing no receipts) and she made several trips because she did not have a vehicle large enough to move all of her belongings at one time. The respondents also argued that Wills' failure to look for housing in the Anaconda area demonstrates a failure to mitigate damages. The respondents have presented no case law to suggest that moving out of the area in part because of an unlawful discriminatory eviction constitutes a failure to mitigate. Likewise, the respondents have presented no evidence, as was their burden, to show that Wills' piecemeal move to Miles City was unnecessary under the circumstances she found herself in. Therefore, requiring the respondents to pay the cost of moving is appropriate.

Turning now to the damages emanating from the employment discrimination, the evidence demonstrates that Wills' loss of tips was directly related to Powers' discriminatory conduct of making Wills split tips with the cooks and she is entitled to that amount. Her lost wages, however, were not lost because of a decision to reduce Wills' pay (Powers simply returned Wills to an hourly wage that was commensurate with her salary) or to outright terminate Wills, but rather by the fact that Wills decided she had to quit. The question then becomes whether, under this scenario, Wills would have to show that she was subjected to a constructive discharge in order to demonstrate that her lost wages flowed from the discrimination that she endured. This issue has not escaped the notice of the charging party as she has urged the hearing officer to find that Powers made a decision to constructively discharge Wills, arguing that Wills was subjected to a hostile working environment. Charging Party's Closing Brief, proposed finding of fact number 64.

Wills' perception that she was subjected to a hostile work environment is not sustainable as her perception was not objectively reasonable. However, Montana's citizens, by statute, have a right to be free from discrimination and this includes a specific right "to obtain and hold employment without discrimination." Mont. Code

Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Mason-Watson v. Nancy's Hallmark, (2007), HR No. 0061011773 page 16. The language of the Montana Human Rights Act demonstrates that Montana does not expect any person to endure harm resulting from the violation of such a fundamental human right. Johnson v. Hale (9th Cir. 1991), 940 F.2d 1192; Campbell v. Choteau B&S House (1993), HR No. 8901003828. Thus, while Powers told Wills that she was not being discharged and Wills apparently understood as much, she was under no obligation to continue to endure the discrimination even though the adverse employment action did not affect her hourly wage and even though there is no finding of a hostile work environment. Because the adverse employment action which she endured emanated from discriminatory conduct and because Wills did not have to endure such illegal conduct, her decision to quit flowed from the illegal discrimination.[9] Wills has thus demonstrated that her damages for lost wages flow from the discrimination and she is presumptively entitled to back wages. The respondents must prove by clear and convincing evidence that Wills failed to mitigate her damages.

With respect to the claimed back wages award, the respondents have attempted but failed to present clear and convincing evidence that Wills failed to mitigate her damages. The only evidence presented to contradict Wills' claim for damages is that she failed to look for work in the Anaconda/Georgetown Lake area.

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[9]The hearing officer notes that federal case law under Title VII holds that in those situations where an employee quits her job after being unlawfully discriminated against, she is not entitled to lost wages unless she is constructively discharged. See, e.g., Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989)(a Title VII claimant who quits is entitled to collect back pay only where the claimant is constructively discharged from employment). See also, Marten Transport v. Dep't of Industry, Labor & Human Relations, 176 Wis. 2d 1012, 501 N.W. 2d 391, 397 (Wis. 1993)(adopting rationale of Title VII cases and holding that under Wisconsin's anti-discrimination statutes, where an employee quits but is not actually or constructively discharged, no award for back pay is permissible even if the employee is found to have been discriminated against)(Bablitch, J., dissenting). The rationale behind these cases is that unless the employee is subjected to some type of discharge, "society and the policies underlying Title VII will best be served if, whenever possible, unlawful discrimination is attacked within the context of existing employment relationships." Id. at 396, citing Jurgens v. E.E.O.C., 903 F.2d 386, 390 (5th Cir. 1990). That rationale, while perhaps appropriate under Title VII cases, does not comport with the extent of the protections accorded by the Montana Human Rights Act and Montana cases interpreting the human rights act to victims of discrimination. In light of Mont. Code Ann. §49-2-201, which enshrines in statute the right to obtain and hold employment without discrimination, and in light of Montana case law that unequivocally demonstrates that no person is expected to endure harm resulting from discrimination, it makes no sense to require a charging party in Wills' circumstance to prove more than that she was subjected to unlawful discrimination and as a result she quit her job rather than continuing to endure illegal discrimination.

The respondents made no effort to undercut Wills' testimony that she applied for at least three jobs per week in the Miles City/Ismay area. The respondents made no effort to show the number of jobs available for the type of work that Wills sought. While the hearing officer can imagine that $8.00 per hour jobs would be somewhat readily available in Miles City in the motel housekeeping industry such that Wills should have been able to mitigate some part of her damages, the hearing officer cannot find that here because he has no evidence before him upon which to base such a finding. Because the burden here is upon the respondents, the lack of evidence goes against the respondents. Wills has demonstrated that her lost back wages flow from the discrimination she endured and the respondents have failed to demonstrate by clear and convincing evidence that Wills has failed to mitigate her damages. This tribunal must, therefore, award Wills back wages.

Wills is also entitled to compensatory damages for emotional distress which she suffered both as a result of the housing discrimination and the employment discrimination to which she was subjected. The value of this distress can be established by testimony or inferred from the circumstances. Vortex, ¶ 33.

Wills unquestionably suffered emotional distress from the employment discrimination which she suffered. She felt anguish over the situation, endured physical symptoms and suffered other emotional distress. While the employment situation was not proven to be a hostile working environment, $15,000.00 is appropriate and reasonable under the facts of this case to compensate her for the distress she suffered both as a result of the employment discrimination.

The charging party has asked for emotional distress damages totaling $60,000.00, $30,000.00 for the housing discrimination and $30,000.00 for the employment discrimination. The hearing officer does not agree that those amounts are merited under the facts of this case. As to the housing discrimination, while it is clear that Wills felt trepidation at having to find housing for her family, that trepidation was short lived because her husband found a house in Ismay apparently prior to the time they vacated the Shakopee House. The hearing officer believe that $6,000.00 is merited. This case is somewhat not unlike the situation that the two black men found themselves in Johnson v. Hale, supra. There, the court awarded the plaintiffs $3,000.00 in emotional distress damages for the humiliation they suffered after being told that the landlord would not be renting to them because of their race. Wills, too, felt anger at being discriminated against in housing because of her marriage to Van Fossen. Beyond the humiliation, Wills also felt an understandable trepidation in not knowing where she would be moving. However, she was able to secure new housing of her family's choosing (the house in Ismay which Van Fossen

would be buying) prior to having to vacate the Shakopee House. Under these circumstances, an award totaling twice the amount in the Johnson case is appropriate to compensate Wills for her emotional distress resulting from the housing discrimination she endured.

As to the employment discrimination, an amount of $15,000.00 is appropriate. This case is similar to the situation that befell the charging party in Vortex, supra, where the Montana Supreme Court upheld an award of 42,500.00 for each charging party. ¶34. There, because of an anti-nepotism policy, the charging party lost his employment with the respondent. The charging party lost sleep worrying over economic hardships, had to sell his automobile in order to sustain himself, was hounded by a collection agency and had to move in with relatives in order to find accommodations after losing his job. Here, Wills faced emotional upset and physical ailments as a result of the discrimination to which she was subjected. She also had to deal with the humiliation of having to leave employment because of continued discrimination. She was not however, subjected to a hostile working environment. Under these circumstances, $15,000.00 is proper.

D. Affirmative Relief

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

V. CONCLUSIONS OF LAW

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

2. Powers discriminated against Wills by refusing to renew her lease because of her marriage to Van Fossen.

3 Powers violated the Montana Human Rights Act by discriminating against her on the basis of her marriage to Van Fossen.

4. Powers did not subject Wills to a hostile working environment.

5. Wills is entitled to an award of back pay to compensate her for lost wages, lost tips and lost vacation pay which she suffered as a result of Power's discrimination against her.

6. Wills is also entitled to be compensated for emotional distress damages and the lost tips which she suffered as a result of Powers' discrimination against her.

7. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Powers must pay Wills damages for emotional distress.

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

VI. ORDER

1. Judgment is found in favor of Kate Wills and against Sarah Powers for discriminating against Wills both in housing and employment on the basis of martial status.

2. Powers is enjoined from engaging in housing discrimination on the basis of marital status or against any employee on the basis of martial status.

3. Powers must pay Wills the sum of $82,015.80, representing $21,000.00 for emotional distress, $52,133.28 in lost wages, $4,882.52 in interest on those wages through the date of judgment, and $4,000.00 in moving expenses.

4. Powers in her capacity as an employer must develop and implement specific policies to prohibit marital discrimination in the work place. In developing and implementing this plan, Powers shall work with the Montana Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau. No later than 90 days after the decision in this matter becomes final, Powers must attend and successfully complete four hours of training on preventing discrimination which is taught by an instructor certified in training to prevent work place discrimination. In addition, Powers shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: March 27, 2014

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Ryan R. Shaffer and Nate S. McConnell, attorneys for Charging Party Kate Wills; and J. Ben Everett, attorney for Respondents, Sara Powers and Boulder Creek Lodge:

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.

Wills.HOD.ghp