

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

VIRGINIA JOSEPH)	
Charging Party,)	HRC NO. 9401005999
v.)	
)	FINDINGS OF FACT, CONCLUSIONS
TOWN PUMP, INC.)	OF LAW AND FINAL ORDER
Respondent.)	
_____)	

In July 1993, Virginia Joseph filed a complaint with the Human Rights Commission against Town Pump, Inc. The complaint alleged that respondent discriminated against the charging party in the terms and conditions of her employment because of age and gender. In May 1994, the charging party filed an amended complaint of discrimination against Town Pump, Inc., alleging that she was also subject to unlawful retaliation while employed by respondent. Charging party claims that respondent violated her rights under §49-2-303 and §49-2-301, MCA, causing emotional distress.

The case was certified for hearing in June 1995. By agreement of the parties, the hearing commenced on February 8, 1996, and continued on February 9, 1996, at the State of Montana Job Services offices in Missoula, Montana. The hearing was resumed on March 6, 1996, at the City Council Chambers, Missoula, Montana, and continued there each day until completed on March 9, 1996. Hearing examiner Tim Kelly presided.

At the hearing, charging party was present and was represented by her attorney, James Ranney of Missoula, Montana. Respondent appeared at the hearing through its authorized representative Barb Forgett and was represented by its attorney, Tina Morin of Butte, Montana. Written closing arguments were timely received and the hearing record was closed on March 28, 1996.

On July 10, 1996, the hearing examiner issued a proposed order in favor of respondent. On July 16, 1996, charging party filed a motion for extension of time to file exceptions, which was granted July 31, 1996. On August 29, 1996, charging party's attorney notified the Commission by letter that "we do not intend to appeal the decision of the hearing examiner in [this] case." No exceptions were filed, and no transcript was provided.

The Montana Human Rights Commission considered the proposed order on October 8, 1996, at Billings, Montana. Commission members Lopp, Etchart, Ogren and Svec were present, and indicated they had reviewed the entire record, which included the pleadings and the proposed order.

Upon its review of the record, and the findings of fact, conclusions of law and proposed order as entered by the hearing examiner, the Montana Human Rights Commission now adopts the findings of fact, conclusions of law, and proposed order of the hearing examiner as its final order, as follows.

I.

ISSUES

1. Did respondent subject charging party to workplace harassment on account of age and in violation of §49-2-303, MCA?
2. Did respondent discriminate against charging party in the terms and conditions of her employment because of her sex and in violation of §49-2-303, MCA?
3. Did respondent take adverse action against charging party because she had engaged in protected human rights activity and in violation of §49-2-301, MCA?
4. Is charging party entitled to any relief under §49-2-506(1)(b), MCA, and if so in what amount and what form?
5. Is respondent entitled to dismissal of the charge of discrimination pursuant to §49-2-507, MCA?
6. If respondent is found to have engaged in an unlawful discriminatory practice or in unlawful retaliation, is any affirmative relief necessary other than an order requiring respondent not to engage in such conduct in the future as required by §49-2-506(1), MCA?

II.

WITNESSES AND EXHIBITS

Charging party called eight witnesses who testified at the hearing: Larry Goode, Trish Waldbillig, Glen Schild, Deb Holland, Erin Joseph, David J. Walton, Alan Thompson, and the charging party herself, Virginia

Joseph. Respondent called nine witnesses who testified at the hearing: Barb Forgett, Yolanda Andrews, Patty Wolf, Jan Sampsel, Lee Terry, Joe Shellenberger, Ron Gruss, Bill DeMartini and Rusty Forgett.

Charging party's exhibits 1-6, 8, 9, 10, 12, 13, 16, 17, 19, 20, 21, 23, 24 and 25 were admitted. Charging party's exhibits 7 and 27 were refused. Charging party's exhibits 11, 14, 15, 18, 26 and 28 were not offered. Charging party's exhibits 26 and 28 were utilized for identification purposes only. Charging party's exhibit 22 was used for refreshing recollection and not admitted.

Respondent's exhibits C, C-1, F, F-1, G, H, J, K, L, M, P, U, V, X, Y, BB, CC, DD, FF, GG, HH, II and JJ were admitted. Respondent's exhibits AA and EE were refused. Respondent's exhibits A, B, [3, E, I, R, S, T and W were duplicative of exhibits of charging party which were admitted. Respondent's exhibit N was not identified for the record.

III.

FINDINGS OF FACT

1 . The charging party is Virginia Joseph. She is a resident of Stevensville, Montana. Her date of birth is October 16, 1944.

2. The respondent is Town Pump, Inc., a corporation licensed to do business in the state of Montana.

3. Respondent employed charging party from September 1992 to February 16, 1994, at its store in Lolo, Montana.

4. Town Pump owns and operates a number of convenience stores/service stations in the state of Montana. A store manager is responsible for day to day operation and for supervision of employees at each store. The store manager reports to and is supervised by a district manager, who oversees operations at a number of Town Pump stores in designated geographical districts.

5. During the period of charging party's employment, Barb Forgett held the position of store manager at the Lolo store. Forgett's immediate supervisor was district manager Jan Sampsel. Sampsel reported to and was supervised by officers at the Town Pump corporate headquarters, including the personnel director, Ron Gruss, and the director of operations, Lee Terry.

6. On September 21, 1992, Virginia Joseph began work as a deli clerk at the Town Pump store in Lolo. Her rate of pay was \$4.25 per hour. Less than a month later, on October 9, 1992, respondent promoted Joseph to the position of deli manager. Respondent's initial evaluation of the charging party, on October 14, 1992, was that she was an excellent employee. Her pay rate after the promotion was \$4.75 per hour.

7. Larry Goode worked at the Town Pump store in Lolo from late May 1992 until December 11, 1992. He worked as a deli clerk during the period that Virginia Joseph worked there as the deli manager. As a general rule, their work shifts were different and overlapped 1 hour each work day in the afternoon. Goode testified that he worked a full shift with the charging party on 5-10 occasions.

8. Deli managers at Town Pump stores are subordinate to the store managers. Performance of the store manager is evaluated on the basis of the overall profitability of the store.

9. When charging party agreed to take the position of deli manager at the Lolo Town Pump store, she was enthusiastic about her employment with the respondent and intent upon making the deli operation at the store operate successfully and profitably. The charging party was not extensively trained or oriented in corporate policies and procedures governing the deli operations or its place in the context of the overall operation of the entire store.

10. On November 2, 1992, Virginia Joseph received a second pay raise to \$5.00 per hour. Store manager Barb Forgett described charging party as "eager and ready to learn", "showing great promise", "trained new deli help with patience and understanding", and "shows great leadership."

11. On November 3, 1992, Deb Holland was hired as a deli clerk at the store.

12. Shortly after being hired, Holland and charging party discussed how they could increase sales in the deli. At Joseph's urging, Holland wrote up a number of ideas to change the deli operation at the Lolo store, including changes in "on site advertising", customer relations, customer ordering practices, product lines, menus, marketing campaigns, and other practices in order to "fine-tune an already great program." Joseph provided copies of the proposals to Barb Forgett and the district manager, Jan Sampsel. Holland's proposals were not adopted. A number of the proposals conflicted with standard Town Pump policy and practice.

13. During November of 1992, conflicts began to occur between Virginia Joseph and Barb Forgett. Joseph wanted to demonstrate autonomy in her management of the deli. She acted in a manner which led her subordinate, Deb Holland, to erroneously conclude that Joseph was not subject to the store manager's direct supervision. Joseph also desired to implement the types of changes that were described in the proposal by Holland. Forgett was resistant to the changes and to charging party's attempt to exercise independent control over the deli as contrary to company policies and to established lines of authority in the store.

14. During November of 1992, a competitor (Ole's) opened a deli near respondent's Lolo store with a former Town Pump deli manager running the operation. Forgett was concerned about the competition. According to the charging party, the store manager "badgered [her] daily about information from Ole's" for weeks and "was in such a constant rage over [the former deli manager] that [charging party's] life in the deli, along with Deb [Holland's] was unbearable."

15. Virginia Joseph testified that beginning sometime in November 1992, Barb Forgett began referring to her as "mom", as the "old one" or the "oldest one" in the store, and as an "old bag". Joseph stated that the references continued until sometime in February 1993. Charging party testified that she understood the remarks to be age related, that the reference to her as "mom" was degrading, the remarks were hurtful and bothersome, and caused her to question her appearance and on at least one occasion to cry. She stated that she asked Forgett to stop without success.

16. Barb Forgett acknowledged that she did refer to Virginia Joseph as "mom", but testified that the reference was to charging party's status as a mother and not to her age. Forgett knew Joseph's daughter, Erin, who occasionally visited her mother in the store. Forgett also acknowledged referring to Joseph as the "old one" or "oldest one" in answering a customer's question for directions, but the store manager claimed the reference was to charging party's status as a long term area resident and not to her age. Forgett denied referring to Joseph as an "old bag."

17. Barb Forgett's reference to charging party as "mom" was not intended as a derogatory reference based on age. Forgett's reference to charging party as the "old one" in the store in answering a customer's

request for directions was also not intended as a derogatory reference based on age. Neither of those remarks would have been so offensive or abusive as to alter the employment terms or conditions of a reasonable employee.

18. Larry Goode testified that he heard Barb Forgett refer to Virginia Joseph as the "old bag" on more than one occasion and heard Forgett make age related comments regarding Joseph "numerous times."

19. Larry Goode's testimony regarding the frequency of age related remarks directed at charging party by Forgett was not credible. Age related remarks were not attributed to Forgett until November 1992, allowing Goode little more than a month to be present when such remarks were allegedly made. Goode's testimony was not specific in terms of time, place, and context.

20. Trish Waldbillig was employed as a cashier at respondent's Lolo store from July 1991 to September 1993. At the time of hearing, Waldbillig was working for respondent as a casino manager at one of its other establishments. Waldbillig acknowledged that prior to the hearing she had stated to charging party's lawyer that she had heard Barb Forgett refer to Virginia Joseph as an "old bag." Waldbillig testified at the hearing that on further reflection she could not personally recall Forgett making such a statement. Waldbillig's explanation for the discrepancy was that she had difficulty separating what she personally overheard from what she was told by others.

21. Trish Waldbillig's explanation for the inconsistencies between her prior statement and her testimony at the hearing concerning whether Barb Forgett ever referred to Virginia Joseph as an "old bag" was not credible. The prior statement, that Waldbillig had overheard such a comment, occurred closer to the events in question and was more reliable. In addition, Waldbillig appeared uncomfortable at the hearing providing evidence against the interests of her employer, a position which would have been much less apparent under the circumstances when she had provided the earlier statement.

22. In November 1992, Barb Forgett was also involved in an incident at the store when she was looking at the centerfold of a Playgirl magazine which depicted a naked black man. While reviewing the photo, Forgett remarked that now she knew "what color Larry [Goode]'s dick is", showing the magazine to another female

employee. Charging party was present, was deeply offended and remarked that the store manager was "sick and out of line."

23. In late November 1992, Virginia Joseph wrote up a detailed list of work responsibilities for Larry Goode. The list was prepared at the request of Barb Forgett who advised Joseph that Goode was not getting all his work done. Goode had recently taken a second job at Sear's. Joseph relayed to Goode the concerns about his work. When Goode received his copy of the duties list, he was upset and stated "this is a fucking bitch." Deb Holland was present and understood his response to be a reference to Joseph as a fucking bitch. "Holland reported the remark to Virginia Joseph who discussed the matter with Barb Forgett. Forgett called the district manager about the incident and was told that Goode should be written up.

24. In a counseling report dated December 4, 1992, Virginia Joseph wrote up Larry Goode for insubordination, failure to follow company policies and demoralizing fellow employees. The write-up was prepared in consultation with Forgett. In the report signed by the charging party, Joseph advised Goode that the problems could be remedied by taking the following steps:

1. Treat manager and fellow employees with respect; 2. A. Do not write off or take spoilage from the store, B. Be to work on time - work assigned hours, C. Do work assigned; 3. Develop a positive attitude toward self and fellow employees, develop team spirit, help make this the best Town Pump store in the state.

25. Virginia Joseph and Barb Forgett presented Goode with the counseling report at a meeting on December 4, 1992. Goode objected to the report and refused to sign. He stated that he did not call Virginia Joseph a "fucking bitch" but only used that term to refer to her work list. Goode acknowledged writing off spoilage but claimed he did so with Forgett present. He also stated that Forgett had told him that when he was done with his work, he could sit and visit with a female coworker. Goode admitted his attitude about work was not good.

26. Joseph understood that Goode was upset and decided to withdraw the counseling report. She told Forgett that she would not turn in the report because it was the word of one employee against another. Forgett

disagreed with Joseph's withdrawal of the report and indicated that it was necessary to establish her supervisory authority in the deli. Joseph still refused and did not turn in the counseling report.

27. According to charging party, Barb Forgett directed a "temper tantrum" at her on December 11, 1992, when Joseph came in on an off day to help Deb Holland. Holland recalled the incident, claiming that Forgett had been "trashing" the charging party and then angrily turned on Joseph when she came in the store.

28. In mid-December 1992, Larry Goode quit his job at the Town Pump store in Lolo.

29. Around Christmas time 1992, Barb Forgett opened a gift, a Christmas tree skirt, at the store. One of the employees commented that Rusty Forgett, the store manager's husband and another employee, could wear it. In response, Barb Forgett remarked that "no, it's too big for him". Charging party understood the remark as sexual and was offended by it.

30. At the end of December 1992, Deb Holland quit her job at the Town Pump store in Lolo. She took a similar position with a higher wage at the deli operated by respondent's competitor in Lolo.

31. At the end of December or in early January, Virginia Joseph called the district manager Jan Sampsel to complain about Barb Forgett and about language and conduct at the store which Joseph found offensive. Sampsel told charging party to try and work it out with the store manager and that he was reluctant to get in the middle of a problem between Forgett and Joseph.

32. On January 15, 1993, the deli operation at the Lolo store was inspected by Jan Sampsel. A number of problems were noted including complaints of chicken not being cooked properly, spoiled roast beef, no hot chocolate, certain cleanliness problems, and display of out of date products. An average score (78.6%) was given for the inspection. The deli operation had also been inspected in October 1992 when a slightly above average score (85.7%) was noted, and in December 1992 when an excellent score (94.4%) had been given. In subsequent inspections of the deli while charging party was deli manager, the scores were higher than that reported for the January 15 inspection.

33. Virginia Joseph reviewed the January 15 inspection report with Jan Sampsel. The results were very upsetting to her and she left the store. The inspection was later discussed at a store meeting and the report itself

was posted behind the deli counter. Virginia Joseph considered the discussion of the inspection and the posting of the report as an intentional effort by Barb Forgett to embarrass her.

34. Jan Sampsel testified at the hearing that the January 15 inspection was not that bad, but that charging party took it very hard. He explained that one of the more serious problems, spoilage of roast beef, had been noted as a supplier problem statewide which was later corrected by replacing the supplier. The spoilage problem was not considered a performance deficiency.

35. On January 18, 1993, Virginia Joseph met with her physician. She told her doctor that since July 1992 she had been having "extreme difficulty [with] hot flashes [sic] and emotional lability [sic]". Joseph was given a hormonal drug treatment (Deproestradiol) and advised to return for a complete examination in two weeks.

36. On January 20, 1993, Yolanda Andrews began working as a deli clerk at the Lolo store. Andrews had worked at the store since the spring of 1992 as a cashier. She had not worked in the deli previously.

37. In January 1993, after the phone call with Joseph, Jan Sampsel did speak with Barb Forgett concerning charging party's complaints about employee behavior at the store. Sampsel told Forgett to clean up the situation at the store and to stop the behavior involving the adult magazines, the jokes and the offensive language. At the next staff meeting, on January 21, 1993, Forgett followed Sampsel's instructions. Employees were told to stop reading magazines on work time and to stop any sexual or racial or other offensive joking. At the same meeting, the prior week's problems with the deli inspection were discussed, with Forgett urging employees to work together and to not view the situation as a conflict between the deli and the store.

38. Virginia Joseph attended the January 21, 1993 staff meeting. Charging party believed the tone used by Forgett in issuing the warnings was not sufficiently serious. Charging party also believed the manner in which the warnings were issued were intended to degrade her. No other witness at the hearing confirmed the charging party's view or understanding that the warnings issued at the January 21 meeting were not intended seriously.

39. On January 22, 1993, Virginia Joseph called the Human Rights Commission (HRC) and reported by phone that she was being discriminated against because of age and sex. She claimed "she refused to put up with

porno statements and porno pictures" and refused "to take part in racial jokes." Joseph also reported that the store manager "tried to get [her] to write up a black employee but she refused," and that Forgett stated "I wonder if she is a boy or a girl -- I guess I will have to hire her anyway" when the store manager interviewed Deb Holland.

40. By letter dated January 22, 1993, Deb Holland wrote to the Town Pump personnel director praising Virginia Joseph and complaining about Barb Forgett. In the letter, Holland claimed that Forgett discriminated "against people because of race, color, gender or any other reason she picksmaking sexual-in-nature derogatory comments about her own peoplehas called Virginia an 'old bag', Larry a 'nigger' She also likes to stand around and discuss the porno magazines with the young males who work in the store ...does that in front of customers too" Holland also wrote of her belief that Forgett had "Jan [Sampsel], the district manager, wrapped around her little finger."

41. Testimony from Holland at the hearing provided few specifics concerning the numerous and wide-ranging charges in her letter of January 22, 1993. It was unclear that Holland personally observed or overheard the actions she attributed to Forgett. Holland had an inflated sense of her own business experience and capabilities. She had little or no awareness of respondent's policies or procedures, including its staffing customs and its practices in marketing perishable products. She did not understand the lines of authority at the Lolo store, believing incorrectly that charging party had independent authority and that the deli operation was separate from the store as a whole. She worked less than eight weeks at the Lolo store as a deli helper. She would have had little opportunity, if any, to observe the actual working relationship between Forgett and district manager Sampsel. Much of what Holland wrote in her letter and much of her conclusory testimony appeared to parrot words, phrases and accusations of the charging party. The statements made by Deb Holland in her January 22 letter and her testimony at the hearing concerning the operations of the Lolo store were not credible.

42. At the end of January 1993, Barb Forgett was provided with a copy of Deb Holland's January 22 letter. Forgett was surprised by the accusations and believed Holland's personal animosity was attributable to

the former employee's belief that Virginia Joseph should have been allowed to run the deli independently from the rest of the store, but was not permitted to do so by Forgett.

43. Charging party testified that on January 28, 1993, Barb Forgett accused her of having left trash on the ground outside the store dumpster. According to Virginia Joseph, she responded by asking about a rumor that Forgett had said the charging party "would not be around much longer" and the store manager then lost control, started throwing things around, acted in a physically menacing manner, and indicated that she would get the charging party out no matter what it took. Joseph claimed another employee, Joe Shellenberger, witnessed the entire event.

44. At the hearing, Shelrenberger did not recall witnessing Forgett throwing things around or raging at the charging party. Barb Forgett testified that she did recall having an altercation with charging party about cooking chicken properly and feeling frustrated over efforts by charging party to try and run the deli on her own. Forgett specifically denied ever throwing things, menacing charging party or raging at her.

45. On February 1, 1993, Virginia Joseph wrote a 9-page typewritten letter to Town Pump personnel director Ron Gruss. The letter recounted charging party's view of four months of employment with respondent at the Lolo store. She listed various complaints about the conditions at the deli, described the inadequacy of her training, responded to the deficiencies in the January 15 inspection report, detailed her version of the events surrounding the write-up of Larry Goode in December 1992, and accused Barb Forgett of harassing a number of employees.

46. Among the accusations made by Virginia Joseph in her February 1, 1993, letter to Town Pump management were the following:

- (1) that the deli kitchen was filthy, there was a mice problem, the freezer and broaster and ice machine were in a state of disrepair, employees spit tobacco in the deli sink and garbage containers, roast beef was spoiled, and the manager stored wild game in the deli freezer;

(2) that Barb Forgett referred to Joseph as the "old bag" or the "old one" in the store, that Forgett had remarked "we need help in the deli so I don't care if she is a he or a she" after the Holland interview, that ladies' panties were hung near or on the cash register area and had to be removed by a coworker, that the store manager and other employees had made a number of racially insensitive remarks regarding Larry Goode and treated Goode differently, that male employees looked at "porno" magazines sold by respondent while on duty, that the store manager made crude sexual jokes about employees including her own husband, that Forgett favored a female employee with overtime benefits in contrast to unfavorable treatment of a male employee, and that Forgett "daily" harassed charging party about old people;

(3) that charging party's training concerning inventory, calculation of spoilage, and sanitation had been inadequate;

(4) that the problems noted in the January 15 inspection were not primarily due to the actions of the charging party but were the fault of others; and,

(5) that the 12/4/92 write-up of Larry Goode, which was prepared and signed by Joseph, was handled improperly and withdrawn, and provoked offensive racial remarks from the store manager.

47. In her February 1, 1993 letter, Virginia Joseph omitted any mention of Barb Forgett threatening her, menacing her, throwing things or raging at her. 48. In her February 1, 1993 letter, Virginia Joseph described six separate occasions when help was provided to her in the deli during January 1993 by either other employees or the store manager herself. 49. Charging party's complaint about ladies' panties being hung near the cash register referred to an item which respondent had available for sale. The panties were displayed near the register area and packaged in small, clear tubes, which occasionally came open. On two occasions, unpackaged panties were hung in the area. Yolanda Andrews found the display of unpackaged panties offensive and removed them. 50. At the hearing, charging party testified that after her refusal to file the December 1992 write-up on Larry Goode, Barb Forgett refused to provide her with needed help in the deli. Charging party also claimed that she was refused any help, or provided only with occasional help, because she is a woman. Testimony of other employees at the hearing did not corroborate charging party's claim she was intentionally refused assistance.

Virginia Joseph's own words in her February 1 letter contradicted her statements in support of that charge of retaliation or discrimination. Her testimony that she was unreasonably denied or refused assistance when she was deli manager was not credible.

51. Town Pump management treated the February 1, 1993, letter from Virginia Joseph as a serious matter.

52. Town Pump personnel director Ron Gruss went to the Lolo store on February 9, 1993 and met with Jan Sampsel, Barb Forgett, Virginia Joseph and Yolanda Andrews to discuss the issues raised in Joseph's letter. Gruss concluded that there was "a lot of Joking and teasing going on in the store and some of it was of a sexual nature." Gruss ordered Sampsel and Forgett to stop all the Jokes, horseplay and teasing and was informed that employees had already been instructed about their behavior at the last staff meeting. Gruss further ordered Sampsel to make sure that all meetings on harassment be documented and instructed the district manager to become more involved with discipline in the store. Forgett was directed to reorient the charging party on company policy and procedures. Gruss also ordered Forgett to discuss company policies prohibiting discrimination and harassment at the next meeting of store employees.

53. As part of his investigation into Joseph's letter, Ron Gruss arranged for Roy Brennan, Town Pump Food & Beverage director, to conduct his own inspection of the Lolo deli operation. Brennan gave the operation an excellent score (94.9%) and noted that the mice problem was taken care of by professional pest control as soon as the store manager was notified, wild game was stored in the freezer, hot and cold cases were "ok", the freezer was operating properly, the broaster problems were due to improper use and cleaning, and the roast beef problem had been resolved by changing statewide suppliers.

54. On February 12, 1993, deli clerk Yolanda Andrews sent a handwritten letter to Ron Gruss complaining that Virginia Joseph was not performing all her duties and was causing Andrews additional work. Andrews claimed she tried twice to work the problems out with charging party but had no success. Andrews sent the letter to Gruss because she had been advised that Barb Forgett was not authorized at that time to handle any discipline problems with the charging party.

55. At the hearing, Virginia Joseph denied the substance of the complaints in Andrews February 12, 1993 letter, asserted that management considered Andrews' complaints "petty", and claimed that the letter was "set up" by Forgett. Charging party also argued that the letter was improper because it was an attempt by a subordinate employee to "write up" her supervisor. No other witness at the hearing substantiated the claim that the Andrews complaint letter was a "set up." The Andrews letter was not a "write-up", i.e., it was not a notice of a reprimand or of disciplinary action by the respondent. The Andrews letter was a grievance letter which followed much the same procedure as charging party herself had followed earlier the same month.

56. The week of February 15, 1993, Jan Sampsel went to the Lolo store to meet with Barb Forgett and Virginia Joseph in an effort to mediate their differences and help them develop a more functional working relationship. Charging party testified she agreed to try improving the working relationship with Forgett, but the store manager merely crossed her arms and glared. Charging party's interpretation of the body language of the store manager appeared to overstate both its meaning and its import. Forgett recalled that she indicated to Sampsel that she could work with Joseph and specifically denied charging party's version of the meeting.

57. On February 22, 1993, Jan Sampsel worked directly with Virginia Joseph showing her respondent's computerized inventory program, food costing techniques, and how to trouble shoot errors. Sampsel also discussed methods for coordinating deliveries in order to keep accurate track of inventory in the deli.

58. On February 23, 1993, Sampsel reported to Town Pump management that Larry Goode, Deb Holland and Virginia Joseph had been seen meeting at the Lolo store, with Goode inviting employees to lunch with him. Sampsel reported that he did not think the problems at the Lolo store were over. Town Pump management had been trying to reach Larry Goode concerning his experiences at the Lolo store but had not been successful.

59. On February 24, 1993, Town Pump director of operations Lee Terry went to the Lolo store to conduct his own investigation of the situation there. On that day, Terry spoke briefly with Virginia Joseph and Barb Forgett.

60. While Terry was in the store on February 24, he spoke with Larry Goode by phone. Goode informed the operations director that he intended to file a discrimination complaint. Before Terry left the store that day, Goode dropped off a letter confirming his stated intentions.

61. On February 25, 1993, Lee Terry continued his investigation into the Lolo store by interviewing all available employees privately, with only Jan Sampsel present. In the interview with charging party, Virginia Joseph repeated many of the same complaints of harassment reported in her February 1, 1993 letter and added her description of an incident on January 28 when she claimed that Barb Forgett lost her temper and raged at her. Yolanda Andrews confirmed that some racial remarks had been made which were offensive to Larry Goode. Andrews also reported that two or three of the male employees had made inappropriate comments about females, but that Andrews had reprimanded them and the behavior stopped. Three employees (Trish Waldbillig, Scott and Norm) indicated that they did not personally know anything about employees making racial or sexual comments. Joe Shellenberger acknowledged he and Rusty Forgett did discuss the adult magazines when they were delivered to the store, but had not heard remarks about anyone. Rusty Forgett reported there was a lot of "kidding around", "nicknames" and "teasing", but not anything serious and that Larry Goode had participated.

62. After the interviews, Lee Terry issued a standing order effective February 24, 1993, stating that
No employee in the Lolo Town Pump store may: A. Be terminated, B. Be
disciplined with loss of income/hours, C. Be documented for cause without
confirmation from D.M. Jan Sampsel and/or Town Pump Inc. Legal Department.

Terry had all the store employees sign the standing order. At the hearing, Terry testified that the purpose of the standing order was to prevent any retaliation. The standing order was later adopted as standard procedure for handling disciplinary matters.

63. Terry's impressions from the interviews conducted on February 25 were as follows:

There is more that has been said or admitted to up to now but that is only my feeling. Also I feel that there is a history of antagonism & acidic commentary that has formed some deep hard feelings that only surfaces in the form of 'performance carping'possible that the antagonists may not understand the pain on the receiving end.

That's why the focus on mundane store duties, etc. I don't feel we have everything. Many of these interviewees are covering their assets[sic]. There is pain here & it has been going on for months.

64. Jan Sampsel's impressions from the interviews were reported as follows: Very conflicting statements as to seriousness of conversations and store atmosphere. Very apparent that Virginia has deep-seated dislike for any type of offcolor language or conversation. Resented being exposed to racial comments or sexual innuendo. Differing presentations of Larry's role; from active participant who sometimes initiated conversation to person who was easily offended. My feeling is that atmosphere was so loose that the line between playful banter and offensive behavior was crossed without anyone even realizing it, particularly Barb.

65. In a handwritten instruction to Barb Forgett, Lee Terry and Jan Sampsel advised the store manager that "there is little question that comments were made on various occasions which had sexual or racial overtones" and explicitly warned her that "there can no be recurrence of any 'banter', 'horseplay', comments or conversation which may be considered racially or sexually offensive." Forgett was also directed "to make clear to each employee that such behavior is unacceptable." 66. Virginia Joseph testified that she was encouraged by the February actions of Town Pump management and believed conditions at the store would change for the positive as a result. 67. On March 10, 1993, at a meeting of employees at the Lolo store, Barb Forgett warned all employees again that there would be disciplinary action in the event of any discriminatory or harassing conduct. Forgett filed a written report with management concerning the subjects of the meeting, advising she warned the staff on the subject of "discrimination-harassment" as follows: ...Stop, think before you say it, if it may be offending to another person, don't say it. No looking at porno magazines, no discussing of magazines, no name calling, nothing about person's age, act like church going people but be careful not to discriminate against religion. If any of this does take place, I will discuss it with Jan and there will be write up. All employees signed the report indicating that they either attended or that the store manager had discussed its content with them after the meeting.

68. In a supplement to her report on the March 10, 1993 staff meeting, Forgett wrote to Ron Gruss advising him that Virginia Joseph was assigned to the cash register and did not attend the meeting. Forgett

reported that she spoke with charging party later, told her "everything that went on", "went into depth in the discrimination and harassment area." Joseph had complained that she was excluded from the meeting. Forgett also reported the following about her discussion with Joseph: We discussed the panties incident in her letter. She is still offended for this but they did come from Town Pump. I also asked for patience on her part, contrary to her belief, I did not bring the jokes etc. with me when I became manager, they were here long before I was here. Discussion was over, she got up and left. All she would say was things have to be taken care of. Ron, it's really hard to talk with her because of her attitude. I'm trying and I've been really good.

69. Although there was conflicting testimony concerning who suggested or decided Joseph would not be at the meeting, one of the motivations for the decision was a concern for the awkwardness of the situation for the charging party as a source of the complaints about discrimination and harassment. Assigning the charging party to the cash register during the March 10 meeting was not an adverse employment action against her. 70. The behavior of employees at the Lolo store changed as a result of the January 21 staff meeting when Forgett first directly warned employees to refrain from offensive language or conduct, the February 9 investigation by Ron Gruss, the February 25 interviews by Lee Terry and Jan Sampsel, and the March 10 staff meeting. After those actions by respondent, there were no specific instances of racial, sexual or age-related remarks or conduct at the Lolo store which resulted in specific complaints by Virginia Joseph or other Lolo store employees. 71. On March 24, 1993, Virginia Joseph called Town Pump corporate headquarters to speak to Ron Gruss or Lee Terry and to inquire about the status of her complaints. Charging party was advised that neither Gruss nor Terry were immediately available, Joseph indicated she would wait, and she was put on hold. Virginia Joseph waited approximately 8 minutes for Terry or Gruss to take her call, then hung up because she had to leave for work. Neither Terry nor Gruss would have expected the call from Joseph at that time and neither would have known that she had to leave for work at exactly that time.

72. Virginia Joseph testified at the hearing that as a result of her 8 minute phone call on March 24, 1993, she had lost trust in Town Pump management concerning their desire to do anything about conditions at the Lolo store. Ron Gruss called the store to speak with Joseph a short time later. Charging party was unable to

recall what he said, except that he had asked her if there was anything else he could do and she had told him of her intention to call her attorney. According to charging party, the return phone call from Gruss had no effect on her complete loss of trust in Town Pump management because she had already given up on them after her 8 minute phone call.

73. On March 31, 1993, a meeting of Town Pump store managers was held in Polson. At the meeting, store managers were specifically instructed concerning the company's policies against discrimination and harassment.

74. On April 1, 1993, deli managers joined the meeting in Polson. Charging party attended the meeting attended by store managers and deli managers. She testified that during the meeting several people laughed when one of the persons attending made a joke that "deli managers got very little support for their hard work and now could not even get a pat on the back." Charging party was offended by the joke and stated that it proved the company's discussion of its policies against harassment and discrimination the preceding day had not been serious. No other witness confirmed charging party's version of the meeting on April 1, 1993, in Polson.

75. On April 14, 1993, Virginia Joseph was given her semi-annual employment evaluation. She scored average in all categories except "delegation" which was rated minimum acceptable. Her overall score was average. She was described as being persevering, hard working, and having good relations with customers and fellow employees. On April 28, 1993, she was awarded a 4% raise, taking her pay rate to \$5.20 per hour.

76. Virginia Joseph was designated "employee of the month" for the Lolo store for the month of May 1993. She was notified of the designation on June 15, 1993, and awarded of \$.05 per hour as a bonus.

77. On June 28, 1993, Virginia Joseph intended to tell Barb Forgett that she was quitting her job. Before Joseph could inform the store manager that she was resigning, Forgett suggested that Joseph take a leave of absence. Rather than quit, Joseph decided to accept that offer. Forgett was never informed that day that charging party originally intended to quit. Joseph testified that she was surprised by the offer from Forgett and appreciated it.

78. On June 28, 1993, Lee Terry was at the Lolo store and spoke with Virginia Joseph. He reported her as saying she "had no complaints", as complimenting Jan Sampsel, and as remarking that Barb Forgett was making a good effort. Terry considered Joseph to be in a good frame of mind. In his contacts with Forgett and Sampsel, Terry was advised that they hoped that the problems at the store had been resolved.

79. Charging party denied she said anything to Lee Terry on June 28, 1993, other than she had learned to work around Barb Forgett.

80. Respondent approved a leave of absence for Virginia Joseph for the period July 7 to September 2, 1993. Barb Forgett and Virginia Joseph agreed that someone else would take over as deli manager during the absence and charging party would return as a cashier/deli clerk. Joseph's transfer from the deli manager position would not result in a reduction of her pay rate.

81. On the same day her leave of absence was approved, Virginia Joseph prepared a discrimination complaint against Town Pump alleging age and sex discrimination. The complaint was filed with the HRC on July 8. Charging party included in her complaint her allegations concerning the use of the term "old bag" and "old one", Forgett's tone of voice at the January 21 staff meeting, a joke at the April 1 managers meeting in Polson, and a general allegation that Forgett blamed charging party for her problems with control over the younger employees. The complaint also stated that Forgett had refused to interview a female job applicant who had mentioned that she had been harassed at her last job and that charging party had asked for and received a leave of absence but "would lose [her] managers position."

82. No credible evidence was presented at the hearing to support charging party's contention that Barb Forgett had refused to interview any female applicant who had mentioned that she had been harassed at her last job.

83. On occasion, Forgett did mention to one or more employees that she had difficulty maintaining control over the youngest employees in the store because of the low wages that they were paid.

84. In mid-July 1993, Yolanda Andrews became deli manager at the Lolo store.

85. On September 2, 1993, Virginia Joseph returned to work at the Lolo store after a trip with her husband to Alaska. She assumed the position of a cashier.

86. On September 3, 1993, Joseph had a cash shortage of \$39.15 and a gas key variance of \$52.24 while working the register at the store. In accordance with strict company policy, charging party was written up four days later for the losses. In the September 7, 1993 counseling report, charging party responded to the write-up by stating that she understood that she was responsible for her cash and that the store manager had explained that the write-up was not an accusation of theft.

87. In October 1993 and July 1995, charging party claimed that she was falsely accused of having a cash shortage on September 3, 1993, and that it was a "set up" by Forgett in retaliation for having engaged in protected human rights activity. At the hearing, charging party testified the shortage report was not false. Instead, she claimed it was the result of poor training. Charging party maintained that the action was still retaliatory because she believes the lack of training was intentional. In her closing argument, charging party acknowledged that the write-up of September 7, 1993, was not false and withdrew the claim that it was retaliatory.

88. On September 30, 1993, Ron Gruss was at the Lolo store and spoke to charging party. Gruss reported that he asked Joseph how things were going and she responded, "fine." He asked if she wanted to talk and Joseph responded, "I'm ok." Gruss asked if she liked working as a cashier and Joseph said "yes", indicating that she enjoyed the contact with people.

89. On October 5, 1993, an employee staff meeting was held at the Lolo store. At the meeting, Yolanda Andrews explained a number of items involving the deli operation which Andrews considered important for all staff to know. Virginia Joseph did not attend.

90. After the October 5, 1993 staff meeting, Andrews was angry with Joseph for not attending. Andrews testified she had seen Joseph driving near the store at about the time that the meeting had been scheduled.

91. On October 7, 1993, Yolanda Andrews decided to confront Virginia Joseph about her failure to attend the staff meeting. Prior to the confrontation, Andrews indicated to coworker Glenn Schild that she was about to

clash with the charging party. At some point while charging party was working, Joseph mentioned that she was not aware of revised chicken prices in the deli. Andrews used that remark to criticize Joseph. A verbal argument ensued between the two which escalated quickly into a shouting match. As the argument began and escalated, Barb Forgett came out of her office, walked through the store area and left to make a deposit at the bank. As she left, Joseph asked whether or not Forgett was going to do anything. Forgett warned both employees that she would deal the matter as soon as she returned and would be contacting corporate headquarters in Butte to send down a representative. After Forgett left, the shouting continued with Joseph going into the office to call her attorney and Andrews continuing to vent her anger at the charging party as she made the call. Tempers cooled somewhat and the two returned to their respective areas of the store.

92. On October 7, 1993, Virginia Joseph and Yolanda Andrews were written up for engaging in a fight with a coworker. Both were given a one day suspension for the altercation. Joseph did not sign or provide any response on the write-up form to the discipline. Andrews signed the form but wrote,

I disagree, I think what I said wasn't abusive! I stated facts to coworker in regards to her absence at the store meeting on 10/5/93. She responded in false accusations to me.

93. Virginia Joseph testified that the altercation with Andrews had been planned and instigated by Forgett in an effort to retaliate against charging party for engaging in protected human rights activity. No other witness corroborated that version of the events. Joseph was unaware until much later that Andrews had also been disciplined for the altercation.

94. Yolanda Andrews denied Forgett had anything to do with causing the altercation on October 7. Andrews claimed she had become increasingly frustrated with charging party's attitude at work and was especially angered at her failure to attend the staff meeting. Andrews testified that after the fight with Joseph, she realized that her job at Town Pump was becoming all consuming and was causing her to become a person she did not like or respect. After she received the write-up, Andrews decided she had to leave the circumstances and decided to quit her job. She gave two weeks notice the following day.

95. On October 12, 1993, a request by Yolanda Andrews for a leave of absence was refused by Jan Sampsel.

96. On October 19, 1993, Virginia Joseph received her six month performance evaluation. Her performance was evaluated as average. Forgett noted that charging party showed no enthusiasm for the work and little respect for her supervisors or for some of her coworkers. Forgett wrote that "this is shown by confrontation with coworker (supervisor), spreading rumors and talking about fellow employees and management." Forgett did note that charging party was strong in customer relations, friendly and responsive to customer needs, punctual and dressed appropriately. Charging party did not sign the form and indicated that she disagreed with Forgett's evaluation.

97. On October 21, 1993, Virginia Joseph received a \$.10 per hour pay raise.

98. Yolanda Andrews also was evaluated on October 19, 1993. She received a superior evaluation but was marked down for her judgment, responsibility, leadership, and relations with subordinates as a result of the altercation with Virginia Joseph. Andrews also received a \$.10 per hour raise in connection with the evaluation.

99. Yolanda Andrews left her employment with Town Pump on October 22, 1993. She pursued other employment and self-employment opportunities for approximately six months. In the spring of 1994, she learned of an opening at the Town Pump store in Lolo and applied to work there again. She was hired. At the time of the hearing, Andrews was manager of the Lolo store.

100. In November 1993, Yolanda Andrews went into the Town Pump store to see Virginia Joseph. Andrews apologized for her conduct during the altercation on October 7, saying she was sorry not for what she had said, but for how she had acted that day.

101. Virginia Joseph testified that she understood Andrews' apology to be an admission that Forgett had instigated the fight. Charging party also testified that Andrews promised to testify on charging party's behalf. At the hearing, Andrews disputed Joseph's testimony regarding the meaning of her apology.

102. On February 16, 1994, Virginia Joseph resigned her employment at the Town Pump Lolo store.

103. Glen Schild worked at Town Pump throughout the period that Joseph was employed there. Schild testified that on the day that charging party resigned, he overheard remarks exchanged between Jan Sampsel and Barb Forgett concerning the resignation. According to Schild, Forgett stated to Sampsel that "she quit, I didn't have to fire her, you owe me," and Sampsel responded, "I guess you win." It was Schild's understanding that the two had some sort of wager concerning how charging party would leave Town Pump.

104. In her preliminary prehearing statement, charging party claimed that on the day of her resignation, Sampsel told Barb Forgett that "I guess I owe you, because you got her outa here." No evidence was presented at the hearing to support the charging party's contention that that statement was ever made.

105. Both Jan Sampsel and Barb Forgett denied making the statements attributed to them by Schild and by the charging party regarding Virginia Joseph's resignation.

106. In the summer of 1992, Glenn Schild had been disciplined by Barb Forgett for engaging in sexual harassment of a customer of the store. Schild was warned at that time that if he repeated the conduct, he would be terminated.

107. During the period after she returned to work in September 1993 through her resignation, Virginia Joseph was not happy about working at the Lolo store and felt she was continually mistreated. Joseph was not enthusiastic about working there and was repeatedly urged by her family to leave the job. In addition to her complaints about being falsely accused of a cash shortage the first week after her return, about inadequate training and about being set up in the fight with Andrews, charging party also testified that she continued to be ostracized by the other employees, except one or two, as a result of actions by Barb Forgett and she was scheduled to irregular working hours although promised otherwise by the store manager.

108. No other witnesses substantiated the charging party's claim that she was deliberately ostracized by coworkers because of actions by Barb Forgett. Bill DiMartini did indicate he talked to Virginia Joseph less after her complaint regarding discrimination. DiMartini demonstrated on the stand however that he is an avowed racist and that his disinclination to be friendly with charging party was a personal decision which required no prompting by the store manager.

109. Charging party also claimed that the deli operation was "sabotaged" when she was deli manager because of the objections she had made to discrimination and harassment at the store. It was charging party's opinion that her inventory was purposely hidden from her in order to disrupt her performance and that out of date products were required to be sold through the deli to reduce the profitability of the deli operation. There was no credible evidence admitted at the hearing to support the charging party's contention that anyone purposely hid deli inventory from her or that the deli operation was "sabotaged" at any time during the period she was deli manager. Testimony by Town Pump management indicated that it was company policy to move perishable products through the deli when those items neared their expiration dates. Charging party was unfamiliar with that policy when she held the position of deli manager.

110. Charging party testified at the hearing that she and other women at the store were treated less favorably than men with respect to enforcement of company policy regarding uniforms. Virginia Joseph specifically objected to being told not to wear open-toed shoes on one occasion when she was still deli manager. Open-toed shoes in a food service and preparation area was considered a possible health code violation.

111. Witnesses at the hearing confirmed that some male employees at the Lolo store did violate uniform policies on occasion, but they were told to conform to the uniform requirements by the store manager. There was no evidence that any employee was subjected to formal discipline resulting in loss of pay or time or any other material employment benefit as a result of a uniform violation.

112. Barb Forgett denied any impropriety in scheduling Joseph's work hours as a cashier, denied breaking any scheduling promises, and claimed that she had actually worked to accommodate the charging party's personal needs and to avoid scheduling her for late hour shifts when she would be alone. Virginia Joseph admitted in her testimony that she was not entirely knowledgeable about company policy or procedure concerning the scheduling of employee work hours.

113. Charging party testified that her employment experience with respondent caused her intense and long lasting emotional distress, weight loss, sleeplessness, disruption of her family life, loss of self confidence

and loss of self esteem. Her daughter and husband testified at the hearing that charging party did undergo significant personality and physical changes during the period she was employed by Town Pump.

114. Virginia Joseph also testified that during the same period that she was employed by respondent, her unmarried daughter became pregnant then later had a miscarriage, her son struggled with a drug problem and was in a group home and in counseling, charging party tried to stop smoking, and she did have hot flashes which were serious enough to require medical treatment. Charging party claimed that those personal events or conditions did not cause her significant stress. Her testimony in that regard was inherently implausible.

115. Yolanda Andrews was a credible witness. She was direct and forthright in her testimony. She did not equivocate when asked whether there had been any inappropriate behavior at the Lolo store. She also was clear that when it occurred in front of her, she spoke up and it would stop. Andrews also was the person who removed the panties from the register area which she found to be an improper sales display.

Andrews' discussion of the reasons why she left respondent's employment in October 1993, particularly her reflections on how the job had distorted her sense of values and priorities and on the inappropriateness of her behavior in the altercation with charging party, was genuine and self-critical. In responding to accusations that she had merely been the tool for retaliatory action by Barb Forgett, Andrews appeared authentically offended by the notion that she did not have the intelligence or the integrity to refuse to be manipulated in such a manner.

116. Barb Forgett was very controlled and deliberate in her testimony at the hearing. At times, her testimony was forthright and credible, particularly the description of the write-up incident with Larry Goode, her contention that she did provide help to Joseph in the deli, and her denials that she encouraged other employees to mistreat Joseph, that she excluded Joseph from the March 10, 1993 staff meeting in retaliation for complaints about discrimination, that uniform requirements were not enforced against men, that she sabotaged the operation of the deli, and that she caused or instigated the altercation between Joseph and Yolanda Andrews.

In other respects, Forgett's testimony was not credible. Testimony that she never made insensitive age related remarks regarding Virginia Joseph was not believable. Prior to the February 1993 investigation of

conditions at the Lolo store by representatives from corporate headquarters, Forgett had made insensitive and crude remarks regarding a number of employees, male and female, and engaged in some acts which she herself described as "stupid." Occasional disparaging remarks directed at Joseph based on age would have been consistent with Forgett's management style prior to January 1993.

Forgett also was not credible when she equivocated about her involvement in the Playgirl centerfold incident. She also made a noticeable effort to try and minimize her apparent personal anger at the charging party for making a wide range of accusations and complaints against her.

117. In some respects, Virginia Joseph presented credible testimony. She did testify accurately concerning the fact that she was offended by the Playgirl centerfold incident and informed Forgett immediately. She accurately described that she was also offended by sexual remarks, by adult magazines being read by male employees, by inappropriate racial remarks, by employees spitting tobacco in the store, and by the difficulties with certain equipment and conditions in the deli. The accuracy and objectivity of other testimony and statements were not so apparent.

Charging party had a tendency to mischaracterize key events. She changed her story significantly regarding the write-up of Larry Goode. At times, she claimed she refused to sign a false write-up on Goode, then altered that story when it was clear she not only signed the document but prepared it. She distorted the circumstances leading up to her leave of absence. In her complaint to the HRC, she claimed she asked for a leave of absence from respondent and suggested that it resulted in a demotion from her position as deli manager. At the hearing, charging party acknowledged that Barb Forgett offered the leave without even being asked. Charging party admitted that she agreed in advance to the transfer from the deli manager job and actually appreciated the effort by Forgett. Finally, Joseph claimed she was "falsely accused of having a cash shortage" on September 3, 1993 and that she was "subjected to [a] false setup on cash register" on that date. Charging party admitted at the hearing however that the report of the cash shortage was accurate and true. Her claim of a false accusation or setup was fabricated.

Virginia Joseph also overstated or exaggerated the proof she had to support her accusations against the respondent. Charging party's harsh assessment of the January 15, 1993, deli inspection was not an objective one. The average score she received on that date was not much lower than a score she had received in a prior inspection when she was rated barely above average. Yet, the charging party's reaction to the January 15 inspection was extreme, causing her to leave the store and to make unsubstantiated allegations that the deli operations had been sabotaged.

Prior to the hearing, Virginia Joseph also reported that she had "clear evidence" that Yolanda Andrews acted "in concert" with Barb Forgett to "purposefully and maliciously 'set up' Joseph for what led to a one-day suspension from work". No such evidence was produced.

Viewing the testimony of the charging party as a whole, the number of inconsistencies in her statements, her lack of objectivity in interpreting events at the Lolo store, and her willingness to make charges without substantial proof, Virginia Joseph was not a credible witness.

IV.

OPINION

Virginia Joseph has made three separate claims in this case that Town Pump, Inc., violated her rights under the Human Rights Act. Her first charge is that respondent subjected her to a hostile work environment because of her age. The second charge is that Town Pump discriminated against her in the terms, conditions, and privileges of employment because of her gender. The second charge includes a contention that she was also subject to a work environment hostile to women. Finally, charging party claims Town Pump retaliated against her because she engaged in protected human rights activities.

Age Discrimination Claim

The Human Rights Act prohibits an employer from harassing a worker because of age. §49-2-303(1), MCA. To prevail on a claim of an age-based hostile work environment, a charging party must prove that she was subjected to disparaging conduct because of her age, the conduct was unwelcome and was sufficiently pervasive or severe to alter the terms and conditions of employment and to create an abusive work environment,

and the employer knew or should have known about the abusive conduct, but failed to take effective action. Cf., Harrison v. Chance, 797 P.2d 200 (Mont. 1990) (reciting elements of gender based employment harassment); see also, Snell v. Montana Dakota Utilities Co., 643 P.2d 841 (Mont. 1982) (discussing employment harassment based on race).

In this case, Virginia Joseph failed to establish that she was subjected to actionable employment harassment based on age. The evidence at the hearing showed that a number of the remarks made by Barb Forgett which were challenged by charging party were not in fact disparaging nor age-related. While a disparaging term, "old bag", was used in reference to the charging party on occasion by the store manager, it was not proved that the term was used so frequently or was in itself so severe to actually alter the terms and conditions of Virginia Joseph's employment. Joseph's statements that she was badgered daily by Forgett about old people were not credible.

Sex Discrimination Claim

The Human Rights Act also prohibits an employer from discriminating against an employee in the terms, conditions or privileges of employment because of her gender. X49-2-303, MCA. Part of the charging party's claim relates to receiving less favorable treatment than men who worked at the Lolo Town Pump store, specifically in regard to the amount of work assigned to female employees, the training she received, the enforcement of uniform policies, and the applicability of other work rules.

To prevail on a claim of disparate treatment, charging party must first establish a prima facie of discrimination with proof that (1) she is a member of a protected class, (2) she was subject to an adverse employment action, and (3) similarly situated employees outside the protected class were treated more favorably by the employer. See, for example: Kientzy v. McDonnell Douglas Cor., 990 F.2d 1051 (8th Cir. 1993) (employer applied different standards to female and male workers who left premises while on duty); Beaven v. Ky., 783 F.2d 672 (6th Cir. 1986) (black and white employees disciplined differently for same work infractions); Green v. Armstrong Rubber Co., 612 F.2d 967 (5th Cir. 1980). A careful examination of the question of whether the employees are "similarly situated" is often necessary. Consideration may be given to

such factors as the circumstances surrounding the infractions, the comparability of the positions, the significance of the work rule or policy in question, etc. E.g., Yowell v. US Postal Service, 810 F.2d 644 (7th Cir. 1987) (circumstances surrounding record of absences of two employees demonstrated that they were not "similarly situated" for purposes of discrimination analysis.)

Virginia Joseph failed to establish a prima facie case with respect to her claim that she was required to do more work, not provided with training, subject to stricter uniform rules, or otherwise discriminated against in the terms, conditions or privileges of her employment because she is a woman. For the most part, charging party offered only conclusory allegations in support of this claim, echoed by Deb Holland. Holland was not a credible witness in light of her limited experience at the store, her noticeable lack of knowledge about respondent policies or practices, and the general lack of specifics to support her conclusions. Charging party also offered few specifics to support this aspect of her discrimination claim.

Joseph's claim that respondent tolerated infractions of the uniform policy by male employees but not by female employees was not substantiated. Both males and females were told to conform. The infraction for which Virginia Joseph was cited, wearing open-toed shoes while serving in the deli operation, was significantly different from other violations in that her infraction implicated a possible health code violation. In any event, no one, neither male nor female, was shown to have been subjected to any formal disciplinary action as a result of uniform infractions. The absence of any significant adverse action deprives the charging party of an essential element of her prima facie case in this regard. Virginia Joseph's claim that she was required to do more work or was subject to more onerous work rules because she is a woman was also unsubstantiated. As a general matter, her work assignments as deli manager were significantly different than the cashiers, stock personnel or others she offered in comparison. They were not similarly situated employees. Even assuming sufficient similarity in work responsibilities, the evidence still did not establish that the work loads were lower for any men than they were for women or that the work rules were enforced more strictly against one group than another. Several witnesses specifically disputed charging party's analysis of relative work loads. Charging party herself, in her February 1, 1993, letter to management, described a number of incidents in which she appeared to complain that

men were treated badly when women were not. Conclusory allegations of discrimination are not credible evidence. Charging party did not present a prima facie case in support of a claim of gender-based disparate treatment at the Lolo store.

Separate from her claim of discriminatory work loads, uniform requirements and other terms of employment, the charging party also alleged that the Lolo store constituted a work environment which was generally hostile and discriminatory toward women. To prevail on that aspect of her sex discrimination claim, charging party had to establish a prima facie case along much the same lines as her charge of harassment based on age, i.e., that she was subjected to disparaging conduct because she is a woman, the conduct was unwelcome and was sufficiently pervasive or severe to alter the terms and conditions of employment and create an abusive work environment, and the employer knew or should have known about the abusive conduct, but failed to take effective action. Harrison v. Chance, 797 P.2d 200, 203-204 (Mont. 1990).

Determining whether a work environment is "hostile" and a violation of the law depends on the circumstances of the workplace as a whole, including the frequency of the offensive conduct, its effect on performance, the extent to which it is threatening or humiliating or otherwise disruptive of an employee's well being, and any other relevant factors indicating whether the conditions would reasonably be considered as abusive and were subjectively considered abusive by the complaining party. Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993). The harassment must be shown to be related to an illegal criterion. In the usual case, a hostile environment claim involves a pattern of improper conduct, but the more severe the specific acts, the less need there is to show a repetitive series of incidents. Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990). If the evidence establishes that the charging party has been required to work in a "discriminatory hostile or abusive environment" as a condition of her employment, then her rights have been violated.

Although Virginia Joseph presented a more substantial claim of harassment based on her sex than on her age, the evidence was still insufficient to establish an abusive work environment violative of her rights. Behavior at the Lolo store when she arrived did include inappropriate behavior by a number of employees, including the store manager. Discussion of the adult magazines on work time by male employees, the crude and

offensive remarks by Barb Forgett about male employees, the unseemly "teasing" and "horseplay" noted by both Lee Terry and Jan Sampsel, the "panties" display, and other conduct were unwelcome to the charging party and others. Such conduct would be unwelcome to a reasonable person.

On the question of whether it was so pervasive or severe as to constitute an abusive work environment, the evidence was less than clear. Again, charging party's claim was noticeably deficient in specifics. The incident with Forgett and the centerfold occurred a single time. None of the sexually oriented language or conduct was specifically directed at charging party. The evidence at the hearing did not establish how many times she was exposed to actual conversations between male employees about the adult magazines, how long she had to tolerate the display of panties near the register, or how many times exactly she had to listen to crude language by the store manager or others.

What the evidence did establish was that Virginia Joseph enjoyed her job for the first 6-8 weeks of her employment, until approximately mid-November. For that period at least, there is no dispute that the work environment was not abusive. For the next 6-8 weeks, there were a number of conflicts, many of which had nothing to do with discrimination. Joseph was struggling for greater control, perhaps complete control, over the entire deli operation and not succeeding. She claimed she was also being subjected to daily harassment from Forgett for information about respondent's competitor who had opened a deli operation down the block. She was also dealing with conflicts between employees in the deli, specifically the complaint lodged by Deb Holland against Larry Goode for calling the deli manager "a fucking bitch." Even assuming that the conditions of charging party's employment changed for the worse during that period, she failed to establish that the changes were actually due to sexually offensive language or conduct rather than the other difficulties she was having.

The evidence also did not support charging party's contention that she was required to work in a discriminatory and hostile environment as a condition of her employment with respondent. When Virginia Joseph complained about sexually offensive conduct, when she specifically objected to Forgett's conduct in commenting on the Playgirl centerfold and when she made a general complaint about the behavior at the store

to Jan Sampsel, action was taken. No further magazine incidents with Forgett were shown to have occurred. The store manager also took action to "clean up" the conduct at the store. All workers were warned at the next staff meeting. Over the next three months, repeated efforts were made to assure that employees at the Lolo store were clear that any offensive and discriminatory conduct would not be tolerated. Those efforts were heeded. As a result, the environment at the Lolo store did change and Virginia Joseph continued in her position.

Reviewing the circumstances of the workplace as a whole during the period that Virginia Joseph worked at the Lolo Town Pump store, there was insufficient evidence to establish that she was subject to an abusive or "sexualized" environment because of her gender. ' Charging party did not mention Larry Goode's use of the term "fucking bitch" in reference either to her or to her work assignment as an example of the type of crude language she found offensive at the store. There was no dispute that he used the term, only how it was used. Joseph's failure in that regard and her adamant refusal to write him up for the remark was considered significant in that it demonstrated a somewhat subjectively selective method of complaining about the conduct at the store and it also demonstrated a certain tolerance of offensive language.

Retaliation Claim

Section 49-2-301, MCA, prohibits an employer from taking any significant adverse action against an employee or otherwise retaliating against her because she has engaged in protected human rights activities. To establish a prima facie case of unlawful retaliation, a charging party must prove that (1) she engaged in a protected activity (e.g., opposing discriminatory conduct by the employer, filing a complaint with the HRC, appearing as a witness in a contested case proceeding, etc.); (2) she was subjected to an adverse employment decision (termination, demotion, discipline, etc.); and (3) there was a causal connection between the protected activity and the adverse action. Laib v. Long Construction Co., Montana Human Rights Commission, HRC No. ReAE80-1252 (August 1984), quoting Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1982). See

also: EEOC v. Hacienda Hotel, 881 F.2d 1 504, 1513-1514 (9th Cir. 1989); Ruggles Cal. Polytechnic State Univ., 797 F.2d 782, 785 (9th Cir. 1986).

Virginia Joseph did engage in protected human rights activity while employed by Town Pump. Her first protected activity occurred at the end of December or in early January when she called district manager Jan Sampsel and complained about offensive behavior at the Lolo store. Later, she filed a written grievance letter containing a number of alleged incidents of discrimination or harassment. In July 1993, she filed a formal complaint of discrimination. All of those activities qualified her for protection under X49-2-301, MCA.

The evidence presented at the hearing did not however prove that respondent took adverse action against the charging party because she had made complaints about discriminatory conduct at the Lolo store. After Virginia Joseph made her complaints, the management of Town Pump specifically rescinded Barb Forgett's authority to take any

The charging party's refusal to write up Larry Goode was not a protected human rights activity. Her decision not to file the disciplinary report was based on an uncertainty concerning what Goode had done, not on any refusal to participate in a discriminatory act. Joseph's claim that she refused because she believed Goode was being subjected to racial harassment appeared to be more of an after-the-fact rationalization for the charging party's own conduct in the situation.

disciplinary action without approval from the district manager or the company's legal department. They did so precisely for the purpose of preventing any retaliation. Virginia Joseph remained in her deli manager position, until she voluntarily transferred after her leave of absence. The charging party was given regular raises, she suffered no losses in her pay rate even after leaving her deli manager position for a lesser job. The charging party was named "employee of the month" in May 1993 and given a bonus raise in her pay rate. There was no evidence that Virginia Joseph suffered any material loss of compensation or benefits, even after she filed her formal complaint of discrimination with the Human Rights Commission.

The charging party's assertions to the contrary were simply not credible. The claim that she was ostracized and subjected to the "silent treatment" was not proven and was contradicted to some extent by her own testimony. The contention that she was denied assistance was disputed by her own letter of February 1993 and was not corroborated by any of the other witnesses. Her claim that she was set up by Barb Forgett for a false cash shortage was a fabrication. Her theory that the fight with Yolanda Andrews in October 1993 was part of a continuing pattern of retaliation by Forgett had no merit. The evidence did not substantiate charging party's conspiratorial view of the world inside the Lolo Town Pump store or respondent's corporate headquarters. Virginia Joseph failed to establish that she was subject to illegal retaliation because she had complained about possible discrimination in her workplace.

For the foregoing reasons, the evidence presented by the charging party in this case was insufficient to establish that the respondent violated her rights under any provision of the Montana Human Rights Act.

V.

CONCLUSIONS OF LAW

1. Respondent did not subject charging party to workplace harassment on account of age and in violation of §49-2-303, MCA.
2. Respondent did not discriminate against charging party in the terms and conditions of her employment because of her sex and in violation of §49-2-303, MCA.
3. Respondent did not take adverse action against charging party because she had engaged in protected human rights activity and in violation of X49-2-301, MCA.
4. Respondent is entitled to dismissal of the charge of discrimination pursuant to X49-2-507, MCA.

VI.

ORDER

1. Judgment is entered in favor of Town Pump, Inc., and against Virginia Joseph on her charges that respondent subjected charging party to a hostile work environment on account of age, that respondent discriminated against charging party in the terms, conditions and privileges of her employment because she is a

woman, and that the respondent retaliated against the charging party because she engaged in protected human rights activities.

2. Charge No. 9401005999 is hereby dismissed pursuant to §49-2-507, MCA.

DATED 25th day of November, 1996.

Jane Lopp, Chair
Montana Human Rights Commission

Commissioners Etchart, Ogren, and Svec concur Commissioner Stevenson absent

CERTIFICATE OF SERVICE

The undersigned employee of the Montana Human Rights Commission certifies that a true copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER was mailed to the following persons by U.S. Mail, postage prepaid, on this 25th day of November, 1996.

James Ranney
110 East Broadway
Missoula MT 59802

Tina Morin
1341 Harrison Avenue
Butte MT 59701

Montana Human Rights Commission