BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

CARYN KENNEDY,	)	
	)	
Charging Party,	)	
	)	Case No. 9401006139
versus	)	
	)	**FINDINGS OF FACT,**
BE TEAM LIMITED PARTNERSHIP, a Montana Partnership, **d.b.a. Dos Amigos, Robert Riso,** general partner,	)	**CONCLUSIONS OF LAW AND FINAL ORDER**
	)	
Respondent.	)	
	)	

I. PROCEDURE AND PRELIMINARY MATTERS

Caryn Kennedy filed a verified complaint with the Montana Human Rights Commission on October 7, 1993, alleging that she was sexually harassed by employees of respondent on a continuing basis throughout her employment, and was retaliated against for complaining of discrimination. She alleged violation of X49-2-301 and 303(1)(a) M.C.A. The case was certified for contested case hearing by the Commission on April 1 1, 1996. Terry Spear was appointed as hearing examiner.

This contested case was called to hearing on July 8, 1996, in the Justice Court, Large Courtroom, Second Floor, 920 South Main, Kalispell, Montana. Charging party was present. Respondent designated Robert Riso, general partner, as its representative. David Hawkins represented charging party. Sean Hinchey, of the John A. Lence Law Firm, represented respondent.

Exhibits offered and admitted by stipulation were charging party's Exhibit 1 (Policy Manual) and 2 (Employee Hours), and respondent's Exhibit A (guest checks and adding machine tapes), B (Calendar) and C (Gift Certificate). In this decision and the record, the exhibits of "charging party" are referenced, although labeled as "plaintiff's" exhibits.

Charging party called as witnesses Cindy Blanc, Dana Burrett, Tami Randall, Robert Riso (as an adverse witness) and the charging party, Caryn Kennedy. Blanc, Burrett and Randall all worked as waitresses in the Kalispell restaurant during at least part of the pertinent time period. Respondent called as witnesses Heather Schneider, Traci Boggs, John Shryock, Robert Riso and Shanna Mitton.

At the conclusion of the evidence, counsel for both parties elected to give oral closing arguments in lieu of submitting written closing arguments. At the end of the closing arguments, the matter was deemed submitted for decision.

A proposed order was issued in favor of charging party on September 23, 1996. On October 1 1, 1996, respondent filed exceptions to the proposed order. A transcript of the hearing record and exhibits was filed, and after briefing by all parties, the Montana Human Rights Commission heard oral argument on January 20, 1997, at its regularly scheduled meeting in Missoula, Montana. Julie Ann Hinchey appeared on behalf of respondent, and David

A. Hawkins appeared on behalf of charging party. All Commission members were present, and indicated they had reviewed the record, consisting of the complaint, the final prehearing order, the contested hearing record, a transcript of proceedings, the hearing examiner's findings of fact, conclusions of law and proposed order, the exceptions, and briefs of both parties on the exceptions.

Upon its review of the record before it, and upon full consideration of the exceptions, the Montana Human Rights Commission now overrules the exceptions of the respondent and adopts the findings of fact, conclusions of law, and proposed order of the hearing examiner as its final order, as follows.

II. RULINGS ON EXCEPTIONS

Respondent's exception 1 objects to finding of fact 3, that respondent knew of the possibility of a problem between Caryn Kennedy and some of the cooks from the beginning of her employment. This finding is supported by the testimony of Robert Riso, the managing partner of the restaurant. Riso testified that "I had tremendous concerns," about the possibility of troublesome relations between the cooks and Kennedy, from the beginning of her employment (transcript p. 122).

Exception 1 is overruled.

Respondent's exception 2 objects to finding of fact 6, that Kennedy complained of sexual harassment to John Vantresca, and that her testimony was unrebutted. The conversations between Kennedy and Vantresca is described in Kennedy's testimony (transcript p. 68). Riso acknowledged that Vantresca had mentioned complaints of foul language to him (transcript p. 124). The hearing examiner correctly described Kennedy's testimony as unrebutted, because Vantresca did not testify and no other witness had personal knowledge of this conversation. The finding is supported by substantial evidence.

Exception 2 is overruled.

Respondent's exception 3 objects to finding of fact 7, that Kennedy did not engage in or initiate the conduct of which she complained. As evidence that she did, respondent cites an incident, described by hearsay testimony, in which she is alleged to have used the phrase "god damn" in an altercation with the cooks (Transcript p. 127). Kennedy's own testimony is that in fact she used the word "damn." (Transcript p. 82.) But this use of mild profanity is irrelevant to whether she encouraged the obscene and abusive sexually oriented language directed to her by the cooks. Substantial evidence supports the hearing examiner's finding on this point. One witnesses testified that Kennedy did not initiate the conduct (Testimony of Dana Burrett, Transcript p. 29). Kennedy herself directly denied any conduct which encouraged the sexually abusive remarks of the kitchen staff (transcript, p. 67). Respondent refers to evidence of a power struggle between Kennedy and the cook staff, but this in no way excuses their choice to sexually harass her in response.

Exception 3 is overruled.

Respondent's exceptions 4, 5 and 6 object to findings of fact 10, 1 1 and 12, that Kennedy complained of sexual harassment during her employment, and that Riso and Shryock had knowledge of both her complaints and the conduct of the cooks. Respondent does not deny that Kennedy complained, but characterizes her complaints as being addressed to "foul language" rather than sexual harassment. On the record before the Commission, respondent's position is untenable. The slightest understanding of the offensive nature of the "foul language" in question would leave o doubt in a reasonable employer's mind that far more than language was involved.

Respondent does not except to the hearing examiner's conclusion that both managing partners were in the restaurant on a regular basis and that the offensive language and conduct were not hidden. The hearing examiner found Riso's and Shryock's testimony that they lacked knowledge of the sexual harassment taking place openly in the restaurant not credible. The hearing examiner is in the best position to judge credibility, and his conclusions are entitled to great deference, Brackman v. Board of Nursing, 258 Mt. 200, 851 P.2d 1055 at 1058 (1993).

Exceptions 4, 5 and 6 are overruled.

Respondent's exception 7 objects to finding of fact 13, that Dos Amigos failed to enforce its own policies regarding sexual harassment. This exception relies upon respondent's argument that Riso and Shryock did not know of the harassment. We have upheld the hearing examiner's finding that they did have knowledge of the harassment.

Exception 7 is overruled.

Respondent's exceptions 8, 9 and 10 object to findings of fact 14, 18 and 19. These exceptions contest the hearing examiner's finding that Kennedy's job performance was adequate though not exemplary, that she was discharged not for poor performance but for her refusal to submit to continued sexual harassment, and that respondent's stated reasons for discharging her were not reliable.

The hearing examiner's findings are supported by substantial evidence. The record clearly establishes that she had mixed performance appraisals during her short tenure as a Dos Amigos waitress. Some comments were positive, and some negative. Respondent introduced several ambiguous guest checks into evidence but the testimony about them did not lay a sufficient foundation to establish any financial misconduct. The final episode which led to her discharge was one in which she clearly was resisting continuing abuse from the cooks. Although Riso testified that the kitchen staff had complained she had left a plate of food unserved for 15 minutes, this testimony was uncorroborated hearsay, originating with the very employees who were abusing her. Riso made no effort to investigate the allegation, but simply took the word of the cooks.

One customer, Shanna Mitton (Transcript, p. 142-144), testified that she and her ex-husband had left the restaurant after waiting too long for their food, but she did not testify to any particular date, or that Kennedy was the cause of the delay. She also testified that her ex-husband did not believe that Kennedy was polite, but again this is hearsay. She did not testify from personal knowledge of Kennedy's waitressing skills. She did not initiate a complaint to Riso, but only responded when he called her to inquire about a complaint her stepmother, an unidentified Dos Amigos employee, had made to him.

On this record, we must credit the findings of the hearing examiner, who was present at the hearing and is the best judge of witness credibility.

Exceptions 8, 9 and 10 are overruled.

Respondent's exceptions 1 1, 12 and 13 object to findings of Fact 21, 22 and 23, which establish Kennedy's wage loss from tip income. Although the evidence of Kennedy's tip income is solely her own testimony (transcript p. 75-76, 87-90), this evidence was completely unrebutted. Certainly, the hearing examiner might have appreciated a more reliable estimate, but the burden of disproving Kennedy's testimony falls on respondent. Absent evidence to the contrary, Kennedy's own estimate of her tip income is substantial credible evidence supporting the hearing examiner's findings.

Exception 13 also excepts to the failure of the hearing examiner to deduct Kennedy's unemployment insurance payments from her wage loss. Respondent bears the burden of proof of mitigation of damages, but did not present any evidence of what deduction would be appropriate. Further, under Montana law Kennedy must repay the unemployment compensation she has received for weeks covered by the back pay award, §39-51-2306(2), M.C.A. A deduction of Kennedy's unemployment benefits is improper, see, e.g. Kaufmann v. Sidereal Corporation, 695 F.2d 343 (9th Cir. 1983); Boreson v. First National Bank of Glasgow, HRC 9201004997. Exceptions 1 1, 12 and 13 are overruled.

Respondent's exception 14 objects to finding of fact 24, that Kennedy suffered emotional distress. Respondent's rationale for this exception is a single sentence, based upon the assertion that the record does not establish "actionable sexual harassment." (Respondent's exceptions, page 6.) We have previously affirmed the hearing examiner's finding that sexual harassment did occur.

Exception 14 is overruled.

Respondent's exception 15 objects to finding of fact 25, that there is a risk of further discriminatory acts by respondent against other employees. Respondent bases this exception on its contention that it did not have knowledge of the sexual harassment. The record does not support this contention, and we have found otherwise. Respondent's inability or refusal to acknowledge the seriousness of the abuse inflicted on Kennedy by its cook staff supports this finding. The exception is overruled.

The Commission, on its own motion, has made the following amendments to the hearing examiner's findings of fact, conclusions of law and proposed order:

The second sentence of finding of fact 14 is corrected to read, "She had two performance evaluations during the six nionths time she worked for Dos Amigos."

Conclusion of Law 1 is corrected to conform to the hearing examiner's findings and opinion that respondent's discharge of Kennedy was not retaliatory. The relevant portion of conclusion of law 1 now reads, " Respondent, BE Team Limited Partnership, Montana Partnership, d/b/a Dos Amigos, Robert Riso, general partner, subjected charging party, Caryn Kennedy, to sexual harassment by employees of respondent on a continuing basis throughout her employment, and retaliated agt4ft~t discharged her for complaining of and resisting the discrimination. She alleges en--ty# Respondent violated §49-2-303(1)(a) but not §49-2-301, M.C.A."

Typographical and non-substantive corrections have also been made.

The Montana Human Rights Commission adopts the findings of fact, conclusions of law and proposed order of the hearing examiner, as amended, as its final order.

v.ISSUES

The issues of fact and law in this case are presented in the final prehearing order:

VIII. ISSUES OF FACT

1. Did Charging Party perform her daily job duties in a satisfactory manner? 2. Was Charging Party disciplined for poor performance? 3. Was Charging Party sexually harassed by co-workers, assistant and kitchen managers? 4. Did Charging Party engage in and often initiate the conduct and conversation of which she is

complaining? 5. Did Charging Party complain to Respondent of sexual harassment? 6. Was Charging Party discharged after complaining of sexual harassment? 7. Was Charging Party discharged for poor job performance, after repeated notice of same? 8. If Charging Party is entitled to recover, how was she harmed, and what order should issue to remedy that harm? 9. Are there facts proved which mandate affirmative relief against Respondent?

IX. ISSUES OF LAW

1. Has Charging Party established a prima facie case of either sexual harassment or retaliation? 2. If so, has Respondent rebutted the prima facie case? 3. Is there a public policy basis for imposing affirmative obligations upon Respondent to prevent recurrence of any demonstrated illegal discrimination? final prehearing order, pp. 3-4.

IV. FINDINGS OF FACT

1. Caryn Kennedy is the charging party. Respondent is BE Team Limited Partnership, a Montana Partnership, doing business as Dos Amigos, Robert Riso, general partner (hereinafter referred to as "Dos Amigos"). Dos Amigos had sold the Kalispell operation to others prior to 1993. Dos Amigos resumed operation of the establishment in February of 1993, taking it back from the previous operators. Two general partners, Riso and John Shryock, were directly involved in the operation of this restaurant starting in February of 1993. Riso was the direct manager of this restaurant. Shryock worked there, but spent less time in this restaurant and left management decisions to Riso. Riso did consult with Shryock about management decisions.

2. The parties stipulated that charging party was employed by respondent as a waitress at the Kalispell Dos Amigos restaurant from February 1993 until June 9, 1993.

3. The possibility of a problem between Caryn Kennedy and some of the cooks was known to Dos Amigos from the beginning. Kennedy was working for the previous operators at the restaurant as assistant manager when Dos Amigos resumed operations in February of 1993. She was offered a waitress position by Dos Amigos. Riso asked her then whether she would be comfortable as a waitress, working with cooks over whom she had exercised supervision as an assistant manager. She assured him it would not be a problem.

4. It did become a problem, almost immediately. Joe House, one of the cooks who worked regularly during her shift, bore some personal animosity toward her. Joined by Ed Horn, another of the cooks, he engaged in a campaign of harassment by cursing Kennedy, making crude and offensive sexual comments toward her, and occasionally touching her inappropriately. The two cooks were supervised by John Vantresca.

5. Kennedy was sexually harassed by Horn and House and also by the cook supervisor, Vantresca. At least one other male employee of Dos Amigos also participated in the harassment (John Badewitz, identified as a manager in the Dos Amigos in Whitefish and a part-time cook in the Kalispell restaurant where Kennedy worked).

6. Kennedy complained to Vantresca about the harassment. Testimony of this complaint is unrebutted. No action was taken on her complaint. Riso and Shryock denied receiving notice of any such complaint.

7. Kennedy did not engage in or initiate the conduct and conversation of which she complained. Her dress and behavior at work did not invite the harassment.

8. The sexual harassment occurred regularly, with multiple instances happening during each shift worked by Horn and House. Blanc, Burrett and Randall, as well as charging party, testified to multiple instances of

harassment. Specific instances proved at hearing illustrate the tone and degree of harassment involved. Horn and House called Kennedy a "fucking bitch" and like terms, on a daily basis. They made sexual comments about appearance, such as the appearance of Kennedy's nipples. They directed sexually suggestive behavior with and comments about the food being prepared toward Kennedy. In another instance, Kennedy received a written note from Ed Horn, after he and House had discussed oral sex in her presence. The note she received read, "Do you swallow?" Kennedy, in a joking reference to the hostility of the two, suggested once that House would like to drown her. Horn responded, "We'd like to get you by your neck and drown you in semen." In one instance, Badewitz told Kennedy that the kitchen staff, including the kitchen supervisor, "were discussing how we'd like to get you out on our property and tie you to a tree and butt fuck you to death." Burrett and Randall recognized this comment as something they had heard at work.

9. Other women serving customers at the restaurant were also subjected to the harassment, to a lesser degree. Dana Burrett confronted Horn and House about their unacceptable behavior. They stopped directing comments toward her. Blanc and Randall avoided the two cooks, staying away from them as much as possible. Because of the "vendetta" Joe House was conducting against Kennedy, she was unable to avoid the harassment.

10. Kennedy did complain of sexual harassment during her employment. Riso and Shryock categorically denied receiving complaints of "sexual harassment." Kennedy's complaints to Riso and Shryock may not have involved the words "sexual harassment," and were couched in terms such as "sick," "gross" and "disgusting." But in addition to her complaint to Vantresca, Kennedy did directly complain to Riso and Shryock while she was still employed by Dos Amigos.

11. Riso and Shryock had knowledge of the conduct of the cooks. Their denial of such knowledge, in light of the detailed accounts of Kennedy and the corroborating testimony of Blanc, Burrett and Randall about the conduct of the cooks, is not credible. Riso was in the restaurant on a daily basis. Shryock was in the restaurant on at least a weekly basis. Both men had ample opportunity to observe the interchanges between Horn and House and the waitresses, even if most of the harassment occurred in the kitchen area.

The loud foul language, the derisive, suggestive and directly sexual comments and occasional "poking" of waitresses, were all there to be heard and seen.

12. Dos Amigos' explanation that no action was taken because management lacked knowledge of sexual harassment is also incredible given the conduct of the partners regarding sexual harassment. Some of the waitresses who testified did recount a staff meeting at which the sexual harassment policy of Dos Amigos was discussed. Riso indicated at this meeting, the date of which was not established, that sexual harassment was not acceptable. The waitresses who witnessed Kennedy's harassment, and were subjected themselves to lesser degrees of such harassment, also testified to a reluctance to complain about the harassment. They indicated uncertainty about what, if anything, management could be expected to do if they were to complain. John Shryock admitted receiving, during Kennedy's employ at Dos Amigos, one complaint about Horn's language. In the only instance presented of any action being taken in response to at least a minimal awareness that Horn and HousV were acting inappropriately, Shryock waited until the end of the busy period of that shift, then stuck his head into the kitchen and said, "Ed, cut that out." Dos Amigos neither took disciplinary action against Horn nor made any record of this exchange.

13. Dos Amigos failed to enforce its own policies regarding sexual harassment. Charging Party's Exhibit 1, the policy manual, identified major infractions justifying immediate discharge, including "anti-social behavior." The manual defined anti-social behavior, in part, as being "abusive toward a customer or fellow employee." The manual did not define sexual harassment as a major infraction. Sexual harassment was a minor infraction, defined in part as "b. Verbal

abuse of a sexual nature; c. Graphic or suggestive comments about an individual's dress or body." Minor infractions triggered a three step disciplinary procedure of verbal warning, then written warning, then discharge. Dos Amigos did not follow this policy. Dos Amigos did not treat the one half-hearted comment to Ed Horn as the first step of the three step disciplinary procedure for a minor infraction. Dos Amigos took no action against the cooks for their continual harassment of Kennedy.

14. Kennedy performed her daily job duties in a satisfactory, though not exemplary, manner. She had two performance evaluations during the time she worked for Dos Amigos. Her two performance evaluations were mixed. Her demeanor was erratic, sometimes resulting in praise from customers, other times resulting in complaints. Dos Amigos did not discipline Kennedy for poor performance in either of the two mixed evaluations. Her mixed performance reviews did not give rise to the decision to fire her.

15. During Kennedy's last shift, on June 8, 1993, she had an altercation with the cooks. Ed House was giving her directions which included the usual verbal abuse. She responded to House's verbal abuse by saying, "I'll take [the food] out when I'm damned good and ready." She did not then immediately obey the obscenity-laced command to deliver an order to customers.

16. Supervisor Vantresca reported to Riso that Kennedy refused to take an order to customers, and that the order sat for fifteen minutes and grew cold. Vantresca reported that Kennedy was verbally abusive. Riso accepted as fact the kitchen staff's account of altercation on June 8, 1993. Riso was not clear on whether he talked to the cooks as well as Vantresca about the inciderlt. He did not talk to Kennedy before deciding what had happened. Riso talked with Shryock about the "continued tension" between Kennedy and the cooks. Shryock and Riso both testified that when they met Riso had already decided to fire Kennedy.'

17. On June 9, 1993, Riso asked Kennedy to come in and visit with him. She had no indication of the reason for the meeting. She unrealistically expected to be promoted. Instead, Riso fired her. Riso advised her that there were "some problems." He told her that her work was substandard and that the kitchen staff found her intolerable. There is no credible evidence that Riso ever obtained any detailed account from her of what had happened on June 8, 1993.

18. Dos Amigos did not discharge Kennedy for poor job performance, but for her refusal to submit to the continuing sexual harassment. Her mixed reviews did not trigger disciplinary action. Dos Amigos gave her no written warnings regarding job performance. The slow service on June 8, 1993, arose out of Kennedy's resistance to the continued 'During questioning by the hearing examiner, it was noted that Riso decided to fire Kennedy without ever asking for her account of the incident. At that point in his testimony, Riso said that he had talked to her first. He provided no explanation of when or how he talked to her about the incident before deciding to fire her. This belated change in testimony was not credible. The one-sided process of "investigation" led to an immediate decision to fire her as a solution to the "tension" with kitchen staff. Had she continued to endure the harassment without lashing back, no justification for her discharge would have been presented.

19. Dos Amigos' multiple explanations of why Kennedy was fired are not reliable. Riso gave different explanations of why he decided to fire Kennedy. At first, called as an adverse witness in charging party's case, he testified that he fired Caryn Kennedy for late service. He stated that failure to provide reasonably prompt service is grounds for immediate termination. This is not in the policy manual. According to Shryock, Riso's primary reason for firing Caryn Kennedy was that in addition to multiple customer complaints, the continued tension between kitchen staff and Kennedy was a serious problem. According to Riso, when he resumed testifying in respondent's case after Shryock, he decided to fire Kennedy because of customer complaints and refusal to deliver food on direction (basically, ir1subordination toward the kitchen staff). Riso also testified that Kennedy "lied to them" numerous times. The "lies"

involved alleged discrepancies on guest checks, Respondent's Exhibit A, which have not been adequately explained by Dos Amigos' witnesses. Dos Amigos did not establish when and how the discrepancies were discovered. Dos Amigos also failed to show why the discrepancies occurred or what their significance was. Respondent failed to prove whether the discrepancies were deliberate undercharges, concealed errors, promotional discounts, honest mistakes or even genuine discrepancies.

20. Kennedy's average monthly wage exclusive of tips was $71 1.02. Dos Amigos paid her $4.10 an hour to work as a waitress. Charging Party's Exhibit 2 documented her hours of work. Dos Amigos noted work times variably, sometimes on 12 hour basis and other times on a 24 hour (military clock) basis. The time records had minutes for some entries, and other times tenths of hours appeared. With minutes and tenths of hours converted to consistent decimals, Kennedy worked 520.25 hours from March 5, 1993 (the first date on the time sheet) through June 8, 1993. This period of 96 days was almost exactly three months. She averaged 173.42 hours a month, at $4.10 an hour.

21. Based on the credible evidence of record, Kennedy's tip income averaged $10.00 per hour, a reasonable figure for an evening shift in a restaurant with at least a partial liquor license. Kennedy testified that she earned $70.00 to $100.00 in an average eight hour shift. Neither side produced any tax records or business records which would rebut or support this testimony. Kennedy testified both that she did report her tips to the employer, and that she did not. She could not remember with certainty whether or not she did. Dos Amigos did not produce any records of her tip income. Respondent had ample opportunity in discovery to obtain Kennedy's tax records, and offered no evidence of a lower reported income.

22. Kennedy's average net tip income per month was 90% of $1,734.17, or $1,560.75. Kennedy paid 10% of her tip income to the kitchen staff. This was part of the terms and conditions of her employment.

23. Kennedy's total wage loss was $22,621.24. She was unemployed until October 2, 1993. Her wage IQss was $2,271.77 per month for the four months before she obtained any work, for a subtotal of $9,087.08. From October of 1993 until June of 1994, she earned $580.00 per month working as a motel desk clerk. Her wage loss for that eight months was $1,691.77 per month, for a subtotal of $13,534.16. In June of 1994, she obtained a second job, and her wage loss ceased. Interest at 10% per annum on the lost amounts is $1,909.20 for the first year (ending June 1, 1994), and $2,262.12 for each year thereafter, at $6.1976 per day.

24. Kennedy also suffered emotional distress. She still deals with the emotional aftermath of the sexual harassment and firing. The environment in which she worked, and the barrage of comments and behavior, caused her to feel "small," "naked," "helpless," "uncomfortable." She had always thought of herself as a strong and good humored woman. She found herself feeling degraded, "a nobody," "a walking display." Her demeanor and tone of voice during her testimony, and the virtual absence of any expression during her testimony about the particulars of the harassment (in an otherwise fairly animated witness), confirm that she indeed suffered emotional distress as a direct result of the sexual harassment to which she was subjected, and that the emotional distress she suffered has continued. She has not sought professional help. The degree of continuing emotional distress is within her capacity to endure. She is entitled, nonetheless, to monetary compensation for this harm. The amount appropriate to compensate her for her emotional distress is $8,500.00.

25. There is a risk of further discriminatory acts by respondent against other employees. The degree of blindness and indifference demonstrated in this case proves a clear risk of other female employees being subjected to similar treatment.

V. OPINION

Workplace harassment based on gender is an unlawful discriminatory practice prohibited by the Montana Human Rights Act. §49-2-303(1), M.C.A.. An employment environment permeated with unwelcome and sufficiently abusive sexual comment alters the terms and conditions of employment and creates a hostile working environment that violates the employee's right to be free from discrimination. Brookshire v. Phillips, HRC Case No. 8901003707 (April 1,, 1991), affirmed sub. nom. Vainio v. Brookshire, 852 P.2d 596 (Mont. 1993). Pervasive use of derogatory or insulting sexual language directed toward an employee and addressed to her because she is a woman is evidence of a hostile environment. Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3rd Cir. 1990). See, gen., Anthony v. Cyphers, HRC Case No. 9401006105 (Feb. 24, 1995).

Caryn Kennedy was subjected to vicious, frequent and reprehensible instances of sexual harassment. Three of the four identified harassers, John Vantresca, John Badewitz and Joe House, were listed as witnesses. None were called. Kennedy's testimony regarding all four men is essentially unrebutted. The facts of the harassment cannot seriously be disputed.

Respondent's primary attack upon Kennedy is upon her testimony that she reported the harassment. Her testimony regarding a complaint to Vantresca is undisputed in the evidence. Her testimony that Vantresca, the cook supervisor, participated in the harassment, is also undisputed in the evidence. If this were the only evidence regarding notice, charging party would prevail.

Montana has a statutory definition of notice, in §1-1-217, M.C.A.:

> (1) Notice is: (a) actual whenever it consists of express information of a fact; (b) constructive whenever it is imputed by law.
>
> (2) Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such facts.

Vantresca was an agent, as employee and supervisor of cooks, of Dos Amigos, with the power to report problems involving waitresses and cooks. He exercised this power to obtain termination of Kennedy's employment. He could and should have exercised this power to advise management of her complaints. Whether or not he did so, the knowledge he should have conveyed to management is imputed to management.

As against Dos Amigos, both Dos Amigos and Vantresca are deemed to have notice of what either knows and ought to tel I the other. §28-10-604, M.C.A.. "Knowledge of the existence of a claim will be irriputed to a party who has sufficient information to put it on inquiry notice of that claim. McGregor v. Mommer (1986), 220 Mont. 98, 108, 714 P.2d 536, 542." Benson v. Pyfer, 240 Mont. 175, 180, 783 P.2d 923, 926 (1989). Vantresca's knowledge of Kennedy's complaint, of the harassment, and of his participation in the harassment, are all imputed to Dos Amigos under Montana law.

Federal law, to which the Commission looks for guidance, mandates the same conclusion. "Employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989). "[V]arious circumstances may be considered in determining employer liability, such as the duties and authority of the supervisor, and the existence and efficacy of anti-discrimination policies and grievance procedures."

Nichols v. Frank, 732 F.Supp. 1085, 1090 (D.C.Or. 1990). "Lack of notice does not insulate the employer from liability, especially when . . . the harassing employee was also the official through whom a complaint would otherwise have been lodged." Woods v. Graphic Communs., 925 F.2d 1195, 1202 (9th Cir. 1991) (racial discrimination).

See, also, Mitchell v. Keith, 752 F.2d 385 (9th Cir.), cert. denied, 472 U.S. 1028, 105 S. Ct. 3502, 87 L.Ed.2d 633 (1985); Miller v. Bank of America, 600 F.2d 21 1 (9th Cir. 1979).

But management's protestations of ignorance are not credible. Kennedy did not say to Riso or Shryock, "I am being sexually harassed by Horn and House." She did complain of bad language, sick remarks and gross and disgusting behavior. The testimony from four waitresses, and even from Heather Schneider, who also admitted hearing the foul language of the cooks from the front of the restaurant adequately establishes that management notice. Riso and Shryock had eyes and ears. Had Kennedy said nothing, they had ample notice of what was happening. Her complaints were more than sufficient to give rise to a duty to investigate and pay attention to what was happening before the eyes and ears of management.

Kennedy testified that she had complained to Robert Riso and John Shryock as well as to John Vantresca. She stated she made an initial complaint to Vantresca, but nothing changed. She testified that she made several such complaints to John Shryock. She testified that she complained to Shryock about the "drown you in semen" comment. He said to her, "We're working with Fd and Joe." He told her he would speak to Riso about it. He denies recollection of the complaints, and denies that the complaints occurred.

She also testified that she went to Riso to complain immediately after a remark about the appearance of her nipples. Riso was in front of the restaurant. She told him about it and "he seemed disgusted," but did nothing. She testified that she complained again to Riso, in his office, after another evening of work and abuse. This time, her complaint was that Joe House had said that he did not have to do anything she said, "that I was not his fucking manager and that I could fuck off." Riso's response was that he would be speaking with John Vantresca. She testified to subsequent complaints she made to Riso after that, as well. He denies ever receiving a complaint of sexual harassment from Kennedy.

Riso and Shryock, in seeking to support their denials, focus upon the absence of complaints in performance evaluations and in a post-firing meeting Kennedy inaugurated with Shryock. Kennedy agreed that she did not complain about the harassment during performance reviews. She did not see performance reviews as appropriate times to complain about harassment. She says she did mention the harassment in the post-firing meeting. Shryock denies it. Traci Boggs was present at the meeting at the home she shared with Shryock. She did not hear such complaints while she was present. But whether Kennedy complained after she was fired and before she filed a formal complaint is not relevant.

The testimony of Riso and Shryock about receiving no complaints before firing Kennedy is simply not credible. Their stance of wronged innocence is not believable. Weighed against the testimony of Kennedy, Blanc, Burrett and Randall, management appears blind, not ignorant. Failing to see what is there to be seen is not a defense to a claim of sexual harassment.

In addition to the poorly explained guest checks and adding machine tapes, Dos Amigos offered evidence of Kennedy's poor service. Shanna Mitton was called by Dos Amigos to testify about Kennedy's poor service. Dos Amigos did not prove when Mittons had their experiences with Kennedy. Most of Mitton's testimony was a recitation of how upset her ex-husband had been about it. She testified that her husband was so angry at the slow service and lack of courtesy from Kennedy that they stopped coming to the restaurant. She testified to her ex-husband's contact later

with management about the poor service, and to receiving a gift certificate and an apology as an inducement to return as customers. The gift certificate, Respondent's Exhibit 3, is dated June 16, 1993. This complaint as well as the management response could have happened after Kennedy was already fired. Dos Amigos did not prove that the Mittons' order was delayed on June 8, 1993. Dos Amigos did not prove that the Mitton complaint triggered the firing.

Despite having complaints as well as compliments about Kennedy's service from the very beginning, Dos Amigos took no disciplinary action against her. There is no evidence that Kennedy was given warnings that her performance was not satisfactory, much less that her job was in jeopardy because of her performance. The evidence adduced about her performance, after-acquired or otherwise, fails to establish a nonpretextual and legitimate, non-discriminatory business reason for her discharge. She was fired because she was not getting along with cooks who were viciously harassing her.

Retaliation is not a precise term for the impetus to charging party's termination.

To prove retaliatory discharge, the appellant would have to show that (1) she was discharged, (2) she was subjected to sexual harassment during the course of employment, and (3) her employer's motivation in discharging her was to retaliate for her resistance to those sexual harassment activities. Holien, 689 P.2d at 1300.

Foster v. Albertson's, Inc., 254 Mont. 1 1 7, 127, 835 P.2d 720 (1992), citing Holien v. Sears, Roebuck and Co., 689 P.2d 1292 (Or. 1984).

Kennedy's discharge resulted from her resistance to the sexual harassment, but she was not discharged for complaining about it. She was fired for refusing to accept the harassment as a condition of her employment. This is a "quid pro quo" discharge rather than a retaliatory discharge. It is part of the charge of sexual harassment. Retaliation has not been proved. Sexual harassment has been. Dos Amigos fired Kennedy for resisting the harassment, creating "tension" between Kennedy and the harassers. Once a violation has been proven under state or federal civil rights statutes, then emotional harm is compensable if the claimant establishes that (1) distress, humiliation, embarrassment or other emotional harm actually occurred, and (2) the harm was proximately caused by the unlawful conduct of the respondent. See, among others: Carey v. Piphus, 435 U.S. 247, 264 at n. 20 (1978) (42 U.S.C. §1983 action, denial of voting rights); Carter v. Duncan-Huggins Ltd., 727 F.2d 1225 (D.C. Cir. 1984) (42 U.S.C. §1981 employment discrimination); Seaton v. Sky Realty Company, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. §1982 housing discrimination based on race); Brown v. Trustees of Boston University, 674 F.Supp. 393 (D.C. Mass. 1987) (unlawful denial of tenure opportunity, based on sex); Portland v. Bureau of Labor and Industry, 61 Or.Ap. 182, 656 P.2d 353 (1982), affirmed 298 Or. 104, 690 P.2d 475 (1984) (sex-based employment discrimination); Hy-Vee Food Stores v. Iowa Civil Rights Comm., 453 N.W.2d 512, 525 (Iowa, 1990) (sex and national origin discrimination). Compensable emotional harm resulting from a civil rights violation can be established by the testimony of the injured party alone, Johnson v. Hale, 942 F.2d 1192 (9th Cir. 1991), and, in some circumstances, can be inferred from the circumstances. Carter v. Duncan-Huggins, Ltd., supra; Seaton v. Sky Realty Co., supra; Buckley Nursing Home, Inc. v. MCAD, 20 Mass.Ap.Ct. 172 (1985) (finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions); Fred Meyer v. Bureau of Labor & Industry, 39 Or.Ap. 253, 261262, rev. denied, 287 Ore. 129 (1979) (mental anguish is direct and natural result of illegal discrimination); Gray v. Serruto Builders, Inc., 1 10 N.J.Sup. 314 (1970) (indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

The award for emotional distress in this case is slightly more than half that awarded in Arrotta v. V. K. Putman, Inc., HRC Case Nos. 9101004544 and 9109004736 (Sept. 29, 1993). For other examples of such awards, and the bases for them, see, Stensvad v. Towe, 232 Mont. 378, 759 P.2d 138 (1988) ($5,000 for mental anguish evidenced by family testimony of embarrassment, sleeplessness, reluctance to go to Rotary Club meetings); Brookshire v. Phillips,

op. cit. ($20,000 award as a result of sexual harassment in the workplace); Webb v. City of Chester, 813 F.2d 824 (7th Cir. 1987) (42 U.S.C. §1983 employment discrimination cafe, $20,250 awarded for embarrassment and humiliation although claimant only employed for two weeks); Brown v. Trustees of Boston University, 674 F.Supp. 393 (D.C. Mass. 1987) ($15,000 award for emotional distress resulting from discriminatory loss of tenure based on sex); Paxton v. Beard, Case No. GC89-327-S-0, 58 FEP 298 (N.D. Miss. 1992) ($15,000 award for mental distress in 42 U.S.C. §1983 action in federal court, termination due to pregnancy); Shelby v. Flipper's Billiards, HRC Case No. RPa-80-1 185 (January 1983) ($5,000 in denial of public accommodation on account of race); Capes v. City of Kalispell, HRC Case No. SGs83-2121 (January 1985) ($750 award for sex based refusal to register child for city baseball).

Affirmative relief is also necessary in this case. The blind eye of Dos Amigos may be opened to sexual discrimination by the monetary award to charging party. But it is impossible to assume that will be the case. Therefore, the partners should be required to attend classes designed to focus their attention upon the importance of policing sexual harassment in their workplace.

VI. CONCLUSIONS OF LAW

1. Respondent, BE Team Limited Partnership, Montana Partnership, d.b.a. Dos Amigos, Robert Riso, general partner, subjected charging party, Caryn Kennedy, to sexual harassment by employees of respondent on a continuing basis throughout her employment, and discharged her for complaining of and resisting the discrimination. Respondent violated §49-2-303(1)(a), M.C.A., but not §49-2-30 M.C.A.

2. Charging party is entitled to recover $31,121.24 for harm caused by the violation of her rights by respondent and pursuant to §49-2-506(1)(b), M.C.A.. Charging party is also entitled to prejudgment interest on the lost wages portion of the award, $22,621.24, at 10% per annum, in the amount of $5,726.91 to February 7, 1997.

3. The circumstances of the violation of charging party's rights by respondent indicate that affirmative relief, in addition to an order that respondent refrain from engaging in unlawful discriminatory conduct, is necessary to minimize the likelihood of future violations of the Humart, Rights Act.

VII. ORDER

1. Judgment is found in favor of charging party and against respondent in the matter of Caryn Kennedy's complaint that respondent, BE Team Limited Partnership, Montana Partnership, d.b.a. Dos Amigos, Robert Riso, general partner, subjected her to unlawful sexual harassment while employing her, and discharged her because she failed to submit to the harassment.

2. Judgment is found in favor of respondent on the complaint of retaliation.

3. Respondent is ordered to pay to the charging party the sum of $31,121.24 for the lost wages and emotional harm caused to her by the above described unlawful discriminatory acts.

4. Respondent is ordered to pay prejudgment interest at the statutory judgment rate, in the amount of $5,726.91, and post-judgment interest at 10% from the date of this order until paid.

5. Within 90 days of the final order in this case, the general partners involved in this case, Robert Riso and John Shryock are ordered each to attend four hours of training, conducted by a professional trainer in the field of

personnel relations and/or civil rights law, on the subject of preventing sexual harassment in the workplace. Upon completion of the training, the Riso and Shryock shall each obtain the signed statement of the trainer indicating the content of the training, the date it occurred and that each of them attended for the entire period. These statements of the trainer shall be submitted to the Commission staff not later than two weeks after the training is completed.

6. Respondent is further ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act.

Dated: February 7, 1997

Gloria "Patt" Etchart, Chair
Montana Human Rights Commission

Commissioners Lopp, Ogren, Stevenson and Svee concur

Certificate of Mailing

A true copy of the foregoing order dated , was served upon the persons named below by means of first class mail on the date indicated.

David Hawkins
P.O. Box 1763
Kalispell, Mt. 59903

John A. Lence
60 North Main
Kalispell, Mt. 59901

Signed this 7th Day of February, 1997.

Montana Human Rights Commission