

1 damages as a result. A full statement of the issues raised by the parties appears in the final
2 prehearing order (June 30, 1998). The issues necessary to the decision are:

3 1. Did Glazier sexually harass Vezane by unwanted sexual comments and unwanted
4 physical contact?

5 2. If Glazier did sexually harass Vezane, was it reasonable for her to leave her job
6 because she considered the atmosphere at work intolerably hostile?

7 3. Did Vezane attempt to influence the testimony of Pamela Jones?

8 4. If Glazier did sexually harass Vezane, what damages resulted?

9 5. Did Davis illegally discriminate against Vezane, by reason of her sex?

10 6. If so, what order is necessary to remedy any resulting harm and prevent future
11 recurrences?

12 7. If Vezane suffered damages, did she mitigate?

13 **III. Findings of Fact**

14 1. Davis Pipe and Machinery was a sole proprietorship owned and operated by
15 Dawson Glazier. Testimony of Vezane and Glazier.

16 2. Glazier hired Tamela Vezane in October of 1993, to work as a bookkeeper for the
17 business. Glazier also employed his son, Jeff Glazier, Vezane's husband, Rick Vezane, and an
18 experienced bookkeeper, Alvina Lyford. Uncontested facts, testimony of Vezane.

19 3. Glazier hired Vezane because Lyford needed some help with the book work of the
20 business. Vezane started by helping Lyford, who had worked for Glazier for over 25 years.
21 Lyford trained Vezane to take over the bookkeeping for the business. Lyford retired in 1993,
22 after training Vezane. After her retirement, Lyford occasionally came into the office to assist
23 Vezane. Testimony of Vezane and Lyford. Lyford never observed inappropriate comments or
24 behavior between Vezane and Glazier. Testimony of Lyford.

25 4. Vezane liked her job, and liked her boss, Glazier. After Lyford's retirement,
26 Glazier and Vezane were often alone together at the business. Vezane visited with Glazier
27 about mundane personal matters, including occasional comments about her marriage and her
28 husband, and explanatory comments about personal phone calls at work (involving legal

1 problems for members of her family). Testimony of Vezane and Glazier. Glazier considered
2 himself a friend and confidante of Vezane. Testimony of Glazier.

3 5. In the summer of 1995, Rick Vezane was absent from work and home for his annual
4 National Guard training. Before he left, Vezane visited with him about her concerns that
5 Glazier was making some sexual advances toward her. Rick Vezane wanted to confront
6 Glazier, but they both agreed that they could not afford to lose one of their two incomes. She
7 and her husband decided, after discussing it for several days, that she would be able to handle
8 the situation. They agreed she would tell him if she could not handle it. Testimony of Vezane
9 and Rick Vezane.

10 6. During Rick Vezane's absence for training, in May or June of 1995, Glazier began
11 more overt sexual innuendoes toward Vezane. Initially he made comments about how good
12 her clothing (usually her jeans, sometimes her shirts) looked on her. He also began standing
13 so close to her in the office that their bodies were in contact. He made this contact both when
14 Vezane was standing and when she was sitting in her chair. Testimony of Vezane and Glazier.

15 7. Beginning in 1995, Vezane talked to a friend, Kathy Barlow, about Glazier's
16 conduct. These conversations continued over the course of Vezane's employment, on an
17 irregular basis. Barlow initially agreed with Vezane that she should continue to work, because
18 the family needed the money. Testimony of Barlow.

19 8. Glazier only initiated the contact and made the comments when Vezane and Glazier
20 were alone in the office. No one else observed any of the incidents. After Rick Vezane
21 returned, the frequency of the contact and the comments decreased. However, when Rick
22 Vezane and Jeff Glazier, the only other employees, were either in the shop or out in the field
23 working (a fairly frequent occurrence), Glazier still occasionally engaged in the same behavior.
24 Testimony of Vezane and Glazier.

25 9. Vezane did not actively and directly discourage Glazier's conduct, except with
26 comments that her husband would violently object to Glazier's attentions toward her. She was
27 concerned about losing her job, which she needed. During 1995, when the conduct began, it
28 was not "too bad," although it made her uncomfortable. Because the conduct "slowed down"

1 after her husband returned from training, Vezane tolerated it. She was afraid her husband
2 would lose his temper and do something extreme if she told him. Testimony of Vezane.

3 10. Glazier interpreted the absence of active and direct discouragement as
4 encouragement. He began overt flirtation with Vezane. He called her into his office at the
5 business when the two of them were alone there, and pulled her onto his lap to “play computer
6 games” on the office computer system. He went into the tiny coffee area when she was
7 already there, to initiate additional body contact.

8 11. Although the frequency of Glazier’s attentions varied, eventually both the
9 frequency and the degree of the comments and contacts worsened. He grabbed Vezane around
10 the waist, usually from behind. He became more aggressive about pushing up against her. By
11 1996, Glazier’s increasingly aggressive overtures were making Vezane very nervous, and even
12 afraid. He grabbed her and attempted to pull her into the coffee area or back room, which had
13 no windows. When she became more evasive, staying in the front area of the office and
14 moving away from him, he grew more insistent, and even angry. He told her on one occasion
15 that he would rather stay and chase her around the office than go to lunch. In one incident,
16 Glazier grabbed Vezane and held onto a belt loop on her jeans, so that when he pulled and she
17 pulled away, the loop was torn from her jeans. Testimony of Vezane.

18 12. Rick Vezane entered the office soon after the belt loop incident, and found his wife
19 shaky and unresponsive. She was holding her belt loop and looking for a pin to fasten it to her
20 jeans. She did not explain what had happened. Testimony of Rick Vezane.

21 13. Vezane reported to Barlow that Glazier was becoming more aggressive. Vezane
22 still wanted to continue working, and Barlow essentially offered a sympathetic ear--someone
23 with whom Vezane could discuss what was happening, without fear of triggering an angry
24 response. By September of 1996, Barlow had moved to Missoula to go to school, but the two
25 women continued to talk together about the situation at Vezane’s workplace. Testimony of
26 Vezane and Barlow.

27 14. Vezane now believed she had no choice but to ask Glazier to stop. Reluctant to
28 confront her employer, she continued to try to pull away from him when he initiated contact.

1 She made such statements to him as, “No, Dawson, stop.” Testimony of Vezane. He
2 interpreted her comments and behavior as playful fear that her husband would find out. He
3 interpreted her choice of clothing to wear to work (which he characterized as “revealing” and
4 “low-cut”) as indicative of her desire to continue what he perceived as flirtation. Glazier
5 initiated these episodes when the two of them were alone at work. Testimony of Glazier.

6 15. Vezane’s fear grew. By late 1996 or early 1997, she could tell that Glazier was
7 now holding on to her harder and pulling harder to get her closer to him or further from public
8 view. Glazier now acted as if he did not care if somebody walked in, taking away the only
9 effective discouragement Vezane had found. In one instance, she had succeeded in deterring
10 Glazier by saying, “Stop, Rick’s coming back.” Now, Glazier seemed almost unconcerned
11 about discovery by others. He attempted to unbutton her blouses, or pull them out of her
12 pants. He also tried, and began to succeed, to get his hand inside her pants. Vezane thought
13 about quitting her job, but she feared that if she did, her husband would lose his job, also. She
14 also was afraid of her husband’s temper, and what he might do if he found out the reason for
15 her increased interest in quitting her job. Testimony of Vezane.

16 16. Glazier still considered Vezane’s resistance to be playful--a kind of subtle
17 encouragement. In one instance, when he was pulling out her blouse to slide his hand onto her
18 back, she jumped away and said, “Rick’d kill us both.” He, by his own admission, now was
19 making sexual advances, still believing the advances were not unwelcome. Testimony of
20 Glazier.

21 17. Rick Vezane noticed the change in his wife’s emotional state. In late 1996 and
22 early 1997, he saw a “drastic change in a bad way.” He thought it was his own behavior, or
23 problems with the family, or tight finances. Vezane was distant and jumpy. She fell asleep on
24 the couch or the rocking chair, avoiding going to bed. She smoked heavily and suffered from
25 nightmares, but was unwilling to talk with her husband about what was wrong. Testimony of
26 Rick Vezane.

27 18. Barlow noticed that as Vezane’s reports indicated Glazier was getting more
28 aggressive, Vezane seemed more and more depressed. Vezane complained to her of

1 nightmares and of a change in her marital relationship (from “real affectionate” to “jumpy”).
2 Barlow changed her mind in 1997 and urged Vezane to quit her job. Testimony of Barlow.

3 19. On or about February 21, 1997 Vezane terminated her employment with Davis
4 Pipe & Machinery. Uncontested Facts. She believed she had no choice. The situation kept
5 getting worse, to the point where she was afraid to go into work if she would be alone with
6 Glazier. She was afraid to talk to her husband. Their joint decision in 1995 that she could
7 handle Glazier was not true now--she could not handle him. She finally told her husband.
8 Together they decided it was time for her to quit. She did not return to work after that
9 conversation. Testimony of Vezane.

10 20. After Vezane shared with her husband her problems at work with Glazier, Rick
11 Vezane talked to Jeff Glazier. He told Jeff Glazier that Vezane was quitting, and told him
12 why. Rick Vezane then himself quit.

13 21. Jeff Glazier did not believe what Rick Vezane told him. Rick said Jeff’s father,
14 Glazier, “almost raped my wife.” Jeff had never seen any inappropriate behavior by his father
15 toward Vezane. Jeff Glazier did consider Rick Vezane potentially violent, and did hear from
16 Vezane’s father about reports of Rick Vezane’s conduct, but had no first-hand knowledge of it,
17 either. He did know that Vezane was not an assertive person, from the time he had spent in
18 her presence. Testimony of Jeff Glazier.

19 22. At the time she quit, Vezane was earning \$5.50 per hour, for hours ranging from
20 20 to 40 per week. An average week would probably have been 32 hours, except that Vezane
21 missed work to avoid Glazier. Testimony of Vezane. Vezane would have continued to work
22 for Glazier but for the harassment, and would have earned \$176.00 per week (32 hours times
23 \$5.50 per hour). This is \$9,177.17 per year (\$176.00 times 52.143 weeks per year), or an
24 average of \$764.76 per month (\$9,177.17 divided by 12 months). Testimony of Vezane.

25 23. Through November 13, 1998, Vezane has lost 20.742 months’ wages, or
26 \$15,862.77 (\$9,177.17 plus 8.742 times \$764.76). She will lose an additional \$764.76 each
27 month, until she finds comparable employment. Accrued prejudgment interest through
28 November 13, 1998, is \$1,304.88, at 10% per annum simple.

1 24. The emotional impact upon Vezane of Glazier's continued course of conduct was
2 considerable. She was upset and on edge. Glazier's conduct caused increased friction between
3 Vezane and her husband--they separated for a time in the winter of 1997. The financial strain
4 of Vezane and then her husband leaving their jobs increased the emotional stress. For a long
5 time after quitting, Vezane could hardly bring herself to leave her home. She felt isolated,
6 depressed and tired--she did not want to be around anyone. Vezane had previously
7 experienced clinical depression. She had ("a long time ago") taken a prescription anti-
8 depressant (Zoloft). She has not sought treatment for the depression brought on by the impact
9 of Glazier's conduct, because she and her husband can neither afford a therapist nor
10 medications. Testimony of Vezane.

11 25. Vezane has a pattern of difficulty asserting herself. She had previously complained
12 of sexual harassment by an investigating Highway Patrolman in an accident she had witnessed.
13 Recounting that incident during cross-examination, Vezane again consistently demonstrated her
14 difficulty confronting an aggressive male, and her fear of angering an aggressive male.
15 Testimony of Vezane.

16 26. Since quitting her job with Glazier, Vezane has called three prospective employers
17 for work. She also has looked through the local newspaper, and has been to Job Service and
18 applied for unemployment insurance. She is still unemployed. Her ability to seek work has
19 been substantially diminished by her emotional distress. She has very limited qualifications to
20 find a job as suited to her as the position at Davis Pipe & Machinery. She and her husband
21 would still be working for Glazier but for the incidents involved in this case. Testimony of
22 Vezane.

23 27. Vezane's relationship with her husband still shows the impact of the long-standing
24 problems she experienced with Glazier. She remains depressed and nonresponsive. Testimony
25 of Vezane and Rick Vezane. Not only does she still noticeably struggle with her own
26 emotional aftermath, but she also must deal with her husband's. Rick Vezane also still deals
27 with his own feelings of shame, stupidity and foolishness for his failure to recognize what was
28 happening to his wife. His feelings, resulting from the harassment she endured, also affect her

1 marital relationship. Her husband's feelings have an effect upon her capacity to recover.¹

2 Testimony of Rick Vezane.

3 28. Within three months prior to this hearing, Rick Vezane called the police because his
4 wife was behaving and talking in a fashion that caused him to fear for her safety. She was
5 very upset, holding some of her medications, and talking about "being no good to anyone" and
6 "look at all the trouble" she had brought. He had never seen his wife in such a depressed and
7 self-destructive state. Testimony of Rick Vezane.

8 29. Vezane's emotional distress entitles her to recover \$20,000.00, apart from recovery
9 of lost wages and interest.

10 30. After filing her complaint against Glazier, Vezane called Pam Jones, a potential
11 witness, to discuss with her an incident in the shop in 1996. Vezane recounted to Jones what
12 she, Vezane, recalled, and asked Jones to provide a statement for the investigator. Vezane
13 prepared and sent the statement, and Jones signed it under oath. Exhibit 204. Douglas Buck,
14 present during the telephone conversation between Jones and Vezane, heard Vezane ask Jones
15 to recount her own recollection and "put it in your own words."

16 **IV. Opinion**

17 Montana law bans sex discrimination in employment. §49-2-303(1)(a) MCA (1997).
18 An employer who engages in unwelcome conduct of a sexual nature toward an employee that is
19 sufficiently abusive to alter the terms and conditions of employment creates a hostile working
20 environment that violates the employee's right to be free from discrimination. *Brookshire v.*
21 *Phillips*, HRC Case #8901003707 (April 1, 1991), *affirmed sub. nom.*
22 *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). There is little reasonable dispute
23 about what this employer did. The sole issue is whether his conduct was unwelcome.

24 Glazier Engaged in Sexual Harassment

25 Both Vezane and Glazier are credible in describing their beliefs. Vezane is credible in
26 describing her fear and depression, and in describing how that fear and depression arose from

27
28 ¹ Rick Vezane's emotional distress and lost wages are not part of Vezane's claim. Her emotional
distress, according to the testimony of both Vezanes, has been deepened in part by the financial distress resultant
from his also quitting, and in part by his negative emotions about the situation with Glazier at work.

1 the continued sexual innuendoes, contacts and advances by Glazier. Glazier, in turn, is
2 credible in describing his belief that Vezane's attempts to discourage him were not serious.

3 However, Vezane's descriptions of what happened, what she did and how she felt, are
4 both credible and reasonable. It is reasonable that this woman, needing this job, with her
5 personality and pattern of behavior, found Glazier's conduct unwelcome, abusive and hostile.
6 It is reasonable that this woman, placed in this situation, made every effort she could to
7 discourage Glazier without antagonizing him. It is reasonable that she was unable to be more
8 aggressive in rebuffing her boss. It is reasonable that she could see no alternative to quitting
9 her job when she could not discourage Glazier.

10 It is not reasonable that Glazier, engaging in these activities only when free from
11 potential discovery, growing bolder in his advances toward an employee married to another
12 employee while carefully avoiding getting caught, failed to notice the growing resistance and
13 fear of Vezane. The very heart of sexual harassment in the workplace, when an employer
14 makes advances toward an employee, is the unequal status of the two people. Any employer
15 who behaves toward an employee as Glazier behaved toward Vezane assumes the risk that he is
16 failing to notice subtle signals to cease and desist. If the employee reasonably fears for her
17 job, the signals may well be subtle.

18 The evidence that Glazier made sexual advances toward Vezane is essentially
19 uncontroverted. The evidence that Vezane, in effect, "asked for" or encouraged Glazier's
20 conduct is indirect, unreliable and weak. That Vezane quit a job she liked, a job better than
21 any she was likely to find again easily after quitting, speaks volumes about her attitude toward
22 what Glazier viewed as flirtation and mutual "fun."

23 Any employer who brings into the workplace sexual innuendo, contact and advances,
24 directed toward a female employee who displays even the slightest signs of dismay, dislike or
25 disapproval, skates upon exceedingly thin ice. This employer engaged in this conduct over a
26 significant period of time, concealing it from everyone else except the target employee and
27 ignoring comments about what her husband would do if he found out. Glazier could not
28 reasonably have believed, when Vezane jumped away from him and told him that her husband

1 would kill them both, that she was telling him to keep right on harassing her, so long as he hid
2 the conduct from others. Faced with a claim of sexual harassment, his defense that he never
3 noticed Vezane discouraging him is both incredible and irrelevant. Glazier's view of
4 discouragement, in the heat of the chase, has no credibility. He may indeed have been
5 unaware that his attentions were unwelcome. His ignorance is unreasonable in the extreme.

6 Veane Reasonably Quit Her Job Because the Atmosphere at Work Was Intolerably Hostile

7 The Montana Supreme Court has articulated the applicable standard to apply to a
8 constructive discharge due to harassment claim, in a case involving allegations of racial
9 discrimination (by jokes and racial slurs). There is no reason to apply any different standard to
10 sexual harassment:

11 [F]inding ... racial harassment would not automatically mandate a finding of
12 constructive discharge:

13 "There is no clear standard for constructive discharge in a Title VII case. In
14 some situations where 'an employee involuntarily resigns in order to escape intolerable
15 and illegal employment requirements,' a constructive discharge may be found.
16 *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144
17 (5th Cir. 1975). Contrary to plaintiff's theory, however, the conclusion of constructive
18 discharge does not automatically arise whenever employment discrimination is followed
19 by the victim's resignation. *See e.g., Muller v. U.S. Steel Corporation*, 509 F.2d 923
20 (10th Cir. 1975), cert. denied, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975);
21 *Cullari v. East-West Gateway Coordinating Council*, 457 F.Supp. 335 (E.D.Mo.1978).
22 A determination of constructive discharge depends on the totality of circumstances, and
23 must be supported by more than an employee's subjective judgment that working
24 conditions are intolerable." *Nolan v. Cleland* (N.D.Cal.1979), 482 F.Supp. 668, 672.

25 It is a matter of degree, a question of fact for the trial court, whether by encouraging,
26 participating in or allowing a known pervasive pattern of discrimination, against an employee
27 or a class of employees, the employer has rendered working conditions so oppressive that
28 resignation is the only reasonable alternative.

Snell v. Montana Dakota Util. Co., 198 Mont. 56, 65, 643 P.2d 841 (1982).

21 The testimony of Vezane adequately established that she saw no reasonable alternative
22 to quitting. Given her difficulty with assertive responses to aggressive males, she had no
23 reasonable alternative. Vezane reasonably quit her job because of Glazier's sexual advances.

24 Veane Did Not Demonstrably Attempt to Influence the Testimony of Pamela Jones

25 Vezane clearly expected and wanted Pamela Jones to support her claims of harassment.
26 Although Jones initially did so, under oath, Jones later recanted. In recanting, Jones blamed
27 Vezane for Jones' prior declaration, which Jones now disavowed. But Jones seems to have
28 been influenced more by Micahel Keys, Vezane's brother with whom she was living at the

1 time, than by Vezane in the twisting series of inconsistent statements. There is no direct
2 evidence that Vezane acted improperly in seeking a corroborating statement from Jones. There
3 is no credible evidence that Vezane acted or caused others to act to harass Jones, through
4 vandalism or otherwise, after Jones changed her statement.

5 Vezane Is Entitled to Recover Wages Lost Because of the Illegal Discrimination

6 The department is empowered, when it finds illegal discrimination, “to require any
7 reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or
8 otherwise, to the person discriminated against.” §49-2-506(1)(b) MCA. Had Vezane
9 continued to work for Glazier, as she would have but for the harassment, she would have
10 earned an average of \$764.76 per month, or \$9,177.17 per year. Courts and quasi-judicial
11 agency tribunals award damages in employment discrimination cases to rectify the harm caused
12 and to make the victims whole. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521,
13 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981);
14 *accord*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2372 (1975). Vezane
15 is entitled to recover these wages, lost because of the illegal discrimination.

16 Vezane Is Entitled to Prejudgment Interest on the Wages Lost

17 Prejudgment interest is awarded on back pay. *P. W. Berry Co., op. cit.*; *Foss v. J.B.*
18 *Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987). The Commission
19 has awarded prejudgment interest from when wages would have been paid, *P. W. Berry Co.,*
20 *op. cit.*, or from when the hearing was held, *Amstutz v. Mountain Bell*, Case No. HpE80-1235
21 (Montana Human Rights Commission, 1986). The differences in commencement dates for
22 prejudgment interest result from differences in proof. When the amount lost and the accrual
23 date for it are proved, interest from the due date is proper. *P. W. Berry Co., op. cit.*; *Foss,*
24 *supra*. Prejudgment interest accrues at 10% per annum simple. §25-9-205(1) MCA.

25 Vezane Is Entitled to Recover for Emotional Distress

26 Once a claimant proves a violation state or federal civil rights statutes, emotional harm
27 is compensable if the claimant proves (1) distress, humiliation, embarrassment or other
28 emotional harm actually occurred, and (2) the harm was proximately caused by the unlawful

1 conduct of the respondent. *See, e.g.*: *Carey v. Phipus*, 435 U.S. 247, 264 at n. 20 (1978)
2 (denial of voting rights); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984)
3 (employment discrimination); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7th Cir. 1974)
4 (housing discrimination); *Brown v. Trustees of Boston University*, 674 F.Supp. 393
5 (D.C.Mass. 1987) (unlawful denial of tenure); *Portland v. Bureau of Labor and Industry*,
6 61 Or.Ap. 182, 656 P.2d 353 (1982), *aff'd* 298 Or. 104, 690 P.2d 475 (1984) (employment
7 discrimination); *Hy-Vee Food Stores v. Iowa Civil Rights Comm.*, 453 N.W.2d 512, 525
8 (Iowa, 1990) (employment discrimination). The injured party's testimony, standing alone can
9 prove compensable emotional harm resulting from a civil rights violation, *Johnson v. Hale*,
10 942 F.2d 1192 (9th Cir. 1991). The trier of fact can also infer compensable emotional harm
11 from the circumstances of the discrimination. *Carter v. Duncan-Huggins, Ltd.*, *supra*;
12 *Seaton v. Sky Realty Co.*, *supra*; *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass.Ap.Ct. 172
13 (1985) (finding of discrimination alone permits inference of emotional distress as normal
14 adjunct of employer's actions); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253,
15 261-262, *rev. denied*, 287 Ore. 129 (1979) (mental anguish is direct and natural result of
16 illegal discrimination); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314 (1970) (indignity
17 compensable as "natural, proximate, reasonable and foreseeable result" of discrimination).

18 The power and duty to award money for emotional distress is clear as a matter of law.
19 Vezane's testimony proved her distress. She is entitled to recover for it. The award for
20 emotional distress in this case is one and one-thirds the size of a similar award by the Human
21 Rights Commission in *Arrotta v. V. K. Putman, Inc.*, HRC Case Nos. 9101004544 and
22 9109004736 (9/29/93). For other such awards, and their bases, *see, Stensvad v. Towe*, 232
23 Mont. 378, 759 P.2d 138 (1988) (\$5,000 for mental anguish based on family testimony of
24 embarrassment, sleeplessness, reluctance to go out); *Brookshire v. Phillips*, *op. cit.* (\$20,000
25 for workplace sexual harassment); *Webb v. City of Chester*, 813 F.2d 824 (7th Cir. 1987)
26 (\$20,250 awarded for embarrassment and humiliation although claimant only employed for two
27 weeks); *Brown v. Trustees of Boston University*, *op. cit.* (\$15,000 for emotional distress from
28 discriminatory loss of tenure); *Paxton v. Beard*, Case No. GC89-327-S-0, 58 FEP 298 (N.D.

1 Miss. 1992) (\$15,000 award for mental distress from termination due to pregnancy); *Shelby v.*
2 *Flipper's Billiards*, HRC Case No. RPa-800185 (January 1983) (\$5,000 award for denial of
3 public accommodation on account of claimant's race); *Capes v. City of Kalispell*, HRC Case
4 No. SGs83-2121 (January 1985) (\$750 award for sex based refusal to register child for city
5 baseball).

6 Glazier Did Not Prove Failure to Mitigate, But the Award for Future Losses Must Be Limited

7 Glazier contended Vezane failed to act reasonably to mitigate her losses. A charging
8 party is required to make reasonable efforts to mitigate damages from discrimination by
9 seeking comparable, alternative employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231
10 (1982). The respondent bears the burden of proving a lack of reasonable diligence in
11 mitigating damages from lost wages and benefits, and the respondent must prove failure to
12 mitigate by at least a preponderance of the evidence. **E.g.**, *P. W. Berry Co., op. cit.*;
13 *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132 (1987).

14 A charging party is not required to seek all possible employment opportunities, but may
15 exercise reasonable discretion in pursuing offers of work. Factors such as whether the
16 opportunity is in her chosen field of work, whether it is comparable to the opportunity lost as a
17 result of discrimination, and whether it is economically feasible in light of the charging party's
18 actual circumstances, can be considered. *Ford Motor Co., supra*, 458 U.S. at 231 ("...the
19 unemployed or underemployed claimant need not go into another line of work, accept a
20 demotion or take a demeaning position..."); **accord**, *Hullett, supra*.

21 Vezane's duty to minimize damages does not obligate her to accept a position she finds
22 to be "substantially more onerous than her previous position." *Goss v. Exxon Shipping Co.*,
23 745 F.2d 967, 978 (5th Cir. 1984). Because Vezane's testimony about her emotional distress
24 is credible, Glazier's mitigation defense fails. Unable to afford professional help, Vezane
25 continues to struggle to do what she must to find work. Until she can afford professional help,
26 any position is substantially more onerous than working was before Glazier's harassment.
27 Vezane is entitled to front and back pay, but with a reasonable limitation on the amount of
28 front pay.

1 "Front pay" is an amount granted for probable future losses in earnings, salary and
2 benefits to make the victim of discrimination whole when reinstatement is not feasible. Front
3 pay is temporary, lasting until the victim should reasonably be able to reestablish her "rightful
4 place" in the employment market. *Sellers v. Delgado Community College*, 839 F.2d 1132
5 (5th Cir. 1988), *citing Shore v. Federal Express Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985);
6 *Rasmussen v. Hearing Aid Inst.*, Case No. 8801003988 (Mont. Human Rights Comm., 1992),
7 *aff'd sub nom. Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628 (1993). Front
8 pay is awarded when reinstatement is impossible or inappropriate. *Thorne v. City of El Segundo*,
9 802 F.2d 1131 (9th Cir. 1986); *EEOC v. Pac. Press Publ. Assoc.*, 482 F.Supp. 1291 (N.D. Cal.)
10 (when effective employment relationship cannot be restored, front pay is appropriate), *aff'd*,
11 676 F.2d 1272 (9th Cir. 1982).

12 In *Rasmussen, supra*, the Montana Supreme Court articulated the front pay standard: "An
13 award of front pay is made in lieu of reinstatement when the antagonism between employer and
14 employee is so great that reinstatement is not appropriate." 258 Mont. at 378, *quoting*,
15 *Fadhl v. City and County of San Francisco*, 741 P.2d 1163, 1167 (9th Cir. 1984). The evidence
16 of continuing emotional distress, as well as the evident lack of remorse or even understanding on
17 Glazier's part, support and mandate the conclusion that no effective employment relationship
18 between Vezane and Glazier can be restored.

19 Front pay, as noted, is a temporary expedient. The clear evidence is that Vezane will be
20 ineffective in job-seeking until she is able to resolve her emotional difficulties. The only
21 explanation of record for the on-going problems is that she is unable to afford help. Upon
22 receipt of her award in this case, she will be able to afford help. Thus, six months (a reasonable
23 period for obtaining professional help and subsequently employment) after receipt of her award
24 in this case, her entitlement to front pay ceases.

25 Evidentiary Matters--Irrelevance of Some Testimony and Witnesses

26 The parties at hearing offered a considerable amount of testimony addressing the
27 reputation, character and behavior of members of Vezane's family, as well as interactions
28 between Glazier, Vezane and other witnesses or members of Vezane's family. During the

1 course of the hearing, it was impossible to determine whether some or any of that proffered
2 evidence would ultimately relate to facts in issue.

3 Admission of testimony does not transform irrelevant testimony into relevant testimony.
4 The parties had ample opportunity to present their cases, and establish the relevance of the
5 evidence presented. Much of the evidence presented, either without objection or with
6 assurances of eventual relevance, simply does not withstand even a cursory relevance analysis
7 now that the evidence is all adduced.

8 Vezane's father, James Edward Keys, testified at some length about his conversations
9 with Glazier. Glazier, in turn, testified at some length about his fear of Keys, apparently to
10 establish that whatever he said was not a genuine admission, but only an attempt to placate
11 someone he considered dangerous. In substance, the alleged statements of Glazier to Keys, if
12 Keys is believed, go no further than Glazier's testimony at hearing. I.e., Glazier at the time
13 believed that Vezane welcomed his advances, that her only concern was that her husband might
14 find out, and that it was all just innocuous fun at work. If Keys is believed, nothing of
15 substance is added to the testimony of the parties. If Keys is not believed, nothing of substance
16 is subtracted from the testimony of the parties. Not only is Keys' testimony regarding
17 Glazier's statements cumulative at best, the lengthy cross-examination of Keys about his violent
18 past and criminal record sheds no light on the conduct and motives of the parties.

19 Similarly, Connie Martin, a former employee who worked for Glazier after Vezane
20 quit, never observed Glazier engage in any improper sexual comments or behavior. However,
21 this evidence is not relevant to establish that Glazier did or did not act properly with Vezane.
22 Character evidence (of other wrongs) is not admissible, and neither is character evidence of the
23 absence of other wrongs, to prove conformity of conduct. Rule 404, M.R.E.

24 Pamela Jones' testimony is only slightly less irrelevant. Jones testified that Vezane
25 prepared her original statement to the Human Rights Bureau staff (Exhibit 204). Jones signed
26 this statement under oath, knowing that it was not correct. Jones says she was under pressure
27 from members of Vezane's family, including Vezane's brother, Michael Keys, with whom
28 Jones was living at the time. At some point, the relationship between Michael Keys and Jones

1 ended. Jones' mixed feelings about Michael Keys are obvious. The possibility that those
2 feelings colored some of her statements is apparent.

3 A month later, Jones prepared and signed under oath another statement, correcting the
4 first one. Both statements involved her perception of Glazier and Vezane. The pertinent
5 differences between the two statements were as follows:

6 1st statement

SPECIFIC INCIDENT JONES SAW

7 Glazier was standing beside Vezane

8 Vezane's shirt was pulled out of her jeans

GENERAL COMMENTS

9 "Aware" of Glazier's innuendoes and advances

10 Confirms Vezane's depression and avoidance
of Glazier.

2nd statement

Glazier was heading out the door

Vezane's shirt was "puffed out" not pulled all the way out

"Aware" as before, but adds "mutual flirtation, harmless"

Confirms Vezane's depression and avoidance of Glazier,
Adds assertion that Vezane and her husband agreed not to
pursue this claim if Glazier told UI they were laid off.

11 Jones' testimony establishes that she was afraid of Michael Keys and Rick Vezane, and
12 perhaps James Edward Keys as well. Jones' testimony suggests that Vezane was angry with
13 her for changing her written statement. Jones' property was vandalized after she filed her
14 second written statement, and Jones filed a Human Rights Act complaint against Vezane
15 (Jones testified she later dropped this complaint) and a criminal complaint against Vezane
16 (Jones testified she later dropped this complaint) involving the vandalism.

17 Jones' testimony goes even farther than her second written statement regarding
18 Vezane's "flirtatiousness," suggesting that Vezane made statements to Jones about using
19 Glazier's attraction to manipulate him into providing her with financial assistance. Jones
20 testified that Vezane wore inappropriate and suggestive clothing. Her second statement and
21 her testimony are in striking contrast to her first statement under oath. Her willingness to
22 give contradictory statements under oath, including false statements, is patent.

23 Jones also harbors a bias against Vezane--she blames Vezane (with no basis in fact as
24 opposed to suspicion) for a series of acts of vandalism against her. She blames Vezane, based
25 solely upon hearsay, for a HUD complaint filed against her. Her hostility and fear toward
26 Vezane and her entire family was apparent from her demeanor while testifying. The sole basis
27 for the assertions that Vezane masterminded both a plan to infatuate and take advantage of
28 Glazier and a campaign of vandalism against Jones rests upon Jones' testimony. On grounds

1 of demeanor, bias, inconsistent statements and an admission of untruthfulness under oath,
2 Jones simply is not a reliable and probative witness. §§26-1-302(1), (3), (7) and (8) MCA,²
3 and §26-1-303(3) MCA.³

4 **V. Conclusions of Law**

5 1. The department has jurisdiction. §§49-2-501, 49-2-505, 49-2-509(7) MCA.

6 2. Respondent Dawson Glazier engaged in an unlawful discriminatory practice in
7 employment by sexually harassing Tamela Vezane for a period of years culminating in her
8 constructive discharge from employment on February 21, 1997, by which time Glazier's
9 pervasive pattern of sexual comment, innuendo and contact rendered working conditions so
10 oppressive that resignation was Vezane's only reasonable alternative. §49-2-301(a) MCA.

11 3. Pursuant to §49-2-506(1)(b) MCA, Vezane is entitled to the sum, through
12 November 13, 1998, of \$15,295.25 for lost wages, and \$4,588.56 for front pay beyond the
13 date of satisfaction of judgment. Prejudgment interest through November 13, 1998, is
14 \$1,304.88. Each month that the judgment is not satisfied, an additional \$764.76 shall be added
15 to the amount owed. Vezane is also entitled to the sum of \$20,000.00 for emotional distress.

16 4. Affirmative relief is necessary in this case. §49-2-506(1)(a) MCA. Glazier must
17 refrain from engaging in any further unlawful discriminatory practices. Within 60 days of the
18 entry of this order, Glazier must obtain from the Human Rights Bureau designation of an
19 approved training course designed to education Glazier both to his responsibilities as an
20 employer and to the limits the law places upon his behavior as an employer in dealing with
21 female employees. Within 60 days thereafter, Glazier must file written proof with the Human
22 Rights Bureau that he has enrolled in and commenced or if possible completed the approved
23 training course. Glazier must also comply with any additional conditions the Human Rights

24
25 ² "A witness is presumed to speak the truth. The jury or the court in the absence of a jury is the
26 exclusive judge of his credibility. This presumption may be controverted and overcome by any matter that has a
tendency to disprove the truthfulness of a witness' testimony; such matters include but are not limited to:

- 27 (1) the demeanor or manner of the witness while testifying;
28 (3) bias of the witness for or against any party involved in the case;
(7) inconsistent statements of the witness;
(8) an admission of untruthfulness by the witness . . ."

³ "[A] witness false in one part of his testimony is to be distrusted in others."

1 Bureau places upon his continued activity as an employer, or at once cease doing business in
2 Montana as an employer.

3 5. For purposes of §49-2-505(4), MCA, the charging party is the prevailing party at the
4 hearing of this matter.

5 **VI. Order**

6 1. Judgment is found in favor of Tamela Vezane and against Dawson Glazier on the
7 complaint of sexual harassment in employment.

8 2. Tamela Vezane is awarded a monetary judgment against Dawson Glazier of
9 \$41,756.21. Each month the judgment is not satisfied, an additional \$764.76 shall be added to
10 the amount owed.

11 3. Dawson Glazier is enjoined from engaging in any further unlawful discriminatory
12 practices, and must further comply with the provisions of paragraph 3, Conclusions of Law,
13 herein.

14 Dated: November 13, 1998.

15
16

Terry Spear, Hearing Examiner for the
17 Montana Human Rights Commission
18 Hearings Bureau, Montana Department of Labor and Industry
19
20
21
22
23
24
25
26
27
28