

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

Scott Dion,)	Human Rights Act Case No. 9804008493
)	
Charging Party,)	<i>Final Agency Decision</i>
)	
versus)	
)	
Commissioner of Higher Education, MSU College of Technology--Great Falls,)	
)	
Respondents.)	
)	

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on March 25, 1998. He alleged the respondents discriminated against him on the basis of his sex (male) when they subjected him to a sexually hostile and offensive educational environment, and gave him a failing grade in the college's practical nursing program. The complaint also charges that the respondents retaliated against him because he was openly outspoken against the practice of demeaning men. On November 4, 1998, the department gave notice Dion's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on March 2, 1999, in Room 104, Cascade County Courthouse Annex, 325 2nd Ave. N., Great Falls, Cascade County, Montana. Dion was present with his attorney, Michael Dahlem. Respondents were present through their designated representative, Connie MacKay, Director of the Practical Nursing Program, and their attorney, Leroy Schramm. On respondents' motion and over Dion's objection, the hearing officer permitted Elissa Orcutt, instructor in the program, to remain despite a witness exclusion order. The hearing examiner allowed Orcutt to remain because respondents established that her presence, as the instructor involved in Dion's two failing grades in clinical rotations, was essential to permit counsel to prepare the case and question the witnesses. The hearing examiner excluded all other witnesses on Dion's motion.

Dion called Connie Hix, Wayne McKay, Doug Williams, Katherine McHargue, Mendy Brinkman, Janae Ruckman, Joyce Kaul, Mike Mascarenas, Robert Dieruf, Lily Wyman, Willard Weaver, Bonnie Siebenaller, Janice Rothweiler, Joyce LaDaun Muir, Nancy Birch Thomas, Jeri Halter, Michael Parchen and Scott Dion, who each testified under oath. Respondents called William Lanier, Mark Berry, Linda Monroe, LaDonna Kay Walker, Betty Ginn, Alan Heisler, Julie Wyatt, Patricia Kercher, Connie MacKay, Elissa Orcutt and Cheryl Alt, who each testified under oath. Dion then testified again as a rebuttal witness.

The parties stipulated to the admission of Exhibits CP1, CP2, CP7, CP21, CP24, CP25, CP27, CP29, R102, R103, R104, R105, R106, R107, R108, R109, R111, R112, R113, R114, R115 and R117. The hearing examiner admitted without objection exhibits CP8, CP9, CP11, CP13, CP14, CP15, CP16, CP17, CP18, CP23, CP26, CP28, CP30, CP39 and R118. The hearing examiner admitted CP10, CP12 and CP38 over respondents' relevance objections. The hearing examiner admitted CP20 over respondents' hearsay objections, and sealed the exhibit (keeping it out of the public record) on Dion's motion. The hearing examiner admitted CP30 over respondents' foundation objection, limiting the use of the exhibit to providing context for the opinions of Joyce Kaul and not relying upon the exhibit as evidence of her opinions. The hearing examiner admitted R120 and R121 over Dion's objections of relevance, hearsay and res gestae. The hearing examiner admitted CP40 and CP41 over respondents' objections of relevance, inadmissible hearsay (quotes from the Final Investigative Report), and inadmissible references to settlement offers (exhibits CP40 and CP41 were part of the same "transaction"--the grade appeal--as R120 and R121). The hearing examiner refused R119 initially, because respondents had failed to provide reasonable access to the documents summarized. Subsequently, the hearing examiner admitted exhibit R119 over the foundation objections of Dion, after respondents made the documents summarized (MacKay's grade books) available for inspection by Dion. The hearing examiner ordered the college to produce the grade books for review by counsel, sealing that review and any testimony regarding the exhibit. The hearing examiner further ordered the college to provide reasonable access to transcript information pertaining to the grades in the grade books after hearing, sealing that information also. The parties offered no other exhibits. This decision references exhibits by number, without the party designation of "CP" or "R".

The parties gave closing arguments by telephone conference on March 8, 1999. The evidentiary record closed that day.

II. Issues

The essential issue in this case is whether the practical nursing program at the college unlawfully discriminated against Dion on the basis of his sex by subjecting him to sexual intimidation, denying him an opportunity to attempt successful completion of his program in a gender-neutral environment. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. The Montana State University College of Technology at Great Falls (the college) is a public institution of higher education and is part of the Montana University System. The college offers a practical nursing curriculum. Uncontested Facts, No. 1.
2. The Montana Board of Regents of Higher Education governs the Montana University System. Uncontested Facts, No. 2.
3. Scott Dion applied for and enrolled in the practical nursing program at the college in 1996. While enrolled in the program, he received a Florence Roberts Scholarship Grant in June 1996 and a Lula Mae Clay Scholarship in May 1997. Uncontested Facts, No. 3; testimony of Dion; exhibits 8, 9, 10, 11, 12 and 13.
4. Before enrolling in the practical nursing program, Dion had attended Montana State University-Northern (MSU-N), another school that is part of the Montana University System. Dion transferred some credits earned at MSU-N toward his practical nursing requirements when he enrolled at the college. Dion successfully completed a course in sterile enucleation and Montana Eye Bank policies on November 8, 1996; an LPN cardiac conference on May 9, 1997 and a 28 hour I.V. Therapy workshop on May 13, 1997, outside of the college's nursing curriculum. Uncontested Facts, Nos. 4, 5 and 6; testimony of Dion.
5. While enrolled in the practical nursing curriculum at the college, Dion heard numerous comments from Connie MacKay, Director of the Practical Nursing Program and one of the instructors, that he considered hostile to men. As he progressed toward completion of his studies, Dion began to fear that he was subject to a higher performance standard than female students because of these comments. Testimony of Dion.

6. In classes and clinical settings, other students in the practical nursing program also heard comments by MacKay that sounded hostile or derogatory toward men. To some students, the comments were incidental, a matter of MacKay's personal experience or personality. To others, the comments seemed threatening and intimidating. Testimony of Hix, Williams, McHargue, Brinkman, Mascarenas, Dieruf, Wyman, Siebenaller, Parchen, Berry and Heisler.

7. MacKay called men "sperm donors," suggesting that was their only genuine use. She commented that if men would keep their genitals in their pants, women would not have to deal with them. She characterized men as lazy, relying upon women for support. She analyzed psychosocial problems of single mothers and lower economic status for women in terms of men's responsibility for the problems. She made jokes that focused upon the male anatomy, milder forms referring to the "worthless male appendage." She remarked critically about men asking obstetricians stitching episiotomies to "add an extra stitch" or "tighten her up a little bit." Students embarrassed or bothered by her comments noticed them occurring frequently--in each class period or during each week. Students who dismissed the comments as incidental did not recall such frequency. Testimony of Hix, Williams, McHargue, Brinkman, Mascarenas, Dieruf, Wyman, Siebenaller, Parchen, Berry and Heisler.

8. MacKay was Dion's instructor in some of his courses. MacKay made most of the comments Dion considered hostile toward men while acting as an instructor. Nonetheless, Dion passed all courses he took in which MacKay was the primary instructor. Uncontested Facts, No. 10; testimony of Dion.

9. The practical nursing program failed many of its students. Joyce Kaul left her position as an instructor in the practical nursing program in part because she disagreed with the practice of admitting far more students than could be accommodated in clinical rotations and using low grades in classroom and clinical settings to reduce the class size by eliminating the lower achievers. Kaul understood that as the practical nursing program expanded from 10 months to multiple school years and became a university prep course, higher expectations and achievement requirements were appropriate. She did not consider higher achievement requirements necessary or appropriate for LPN training. She preferred admitting fewer students to using attrition to get rid of more students. Testimony of Brinkman and Kaul.

10. As he progressed through the practical nursing program, Dion

performed satisfactorily in class work. His instructors, including but not limited to MacKay and Elissa (Lisa) Orcutt, considered his practicum performances less satisfactory. Students performed practicum work in actual nursing settings. Dion's weak point, as a candidate for LPN status, was recalling and applying his technical learning to actual patient care. Dion regularly met with MacKay and to a lesser extent with Cheryl Alt, another instructor. Many of these conferences addressed performance, with Dion seeking advice on how to succeed in the practical nursing program. Other conferences resulted from Dion's position as president of the students' nursing club. By his final year in the practical nursing program, Dion did not frequently seek out MacKay, because he feared her hostility toward him based on his gender.

11. Dion also feared Orcutt. He knew that Orcutt taught with MacKay and consulted with her frequently. Orcutt was sometimes critical of Dion's performance in practicum settings. Dion thought Orcutt's criticism of him was also gender rather than performance based. His fear of Orcutt and MacKay increased Dion's tension, particularly in clinical settings. It affected his ability to hear his instructors when they gave him information about what they expected him to do. Testimony of Dion, MacKay, Orcutt and Alt; exhibit 16.

12. The practical nursing program included several practical clinical courses, culminating in Practicum III, the final practicum. A major component of clinical courses was preparation of two written daily patient care plans for each assigned patient. To prepare satisfactory daily patient care plans, students had to demonstrate familiarity with their patients' conditions, problems and nursing care needs. They did so by preparing bibliography cards on all conditions or diseases appearing in each patient's admission sheet, physician history and physical sheet, and by identifying all abnormal lab results and explaining how those results related to the patients' current conditions. Students had to identify the medication needs of the patients, including the nature, use and administration of the medications. They did so by preparing drug cards that provided the details of the medications involved. Students had to explain what nursing care the student would provide to address patients' pertinent manifest signs and symptoms. They did so by designating priority problems and detailing nursing care actions and strategies to address the priority problems. Instructors questioned students about the care plans, drug cards and bibliographies. Students had to explain the patients' current condition and requisite nursing care, and justify the explanations. Instructors graded practicum performances, including the accuracy, adequacy and promptness of these explanations. Testimony of Hix, Williams,

McHargue, Kaul, Dion, MacKay and Orcutt.

13. Practicing LPNs and RNs held varied opinions on the value of LPN-written care plans for actual patient-care nursing. Some considered the plans vital. Others considered the plans formal necessities of little actual value. Preparing such plans was sometimes part of the normal job of an LPN providing care to patients, although RNs more typically prepared the plans. Student preparation of the plans, with the supporting documents and preparation to answer questions about the plans and patients, demanded hard work in a short time when a student acquired one or more new patients during a rotation. Testimony of Hix, Williams, McHargue, Kaul and Rothweiler.

14. Students sometimes shared their nursing care plans and drug cards with other students, because of common patients and the press of time. Consequently, students were able to compare grades on identical and substantially similar plans. In some instances, students received different grades for those plans. The grading included evaluation of answers to questions, including explanations of the contents of plans, drug cards and bibliographies, so two students could receive very different grades on identical or similar written plans, based upon different explanations of the meaning and reasoning of the plans. The practical nursing program did not record or document the discussions of care plans. Students who did not agree with the evaluations perceived the process as a means of eliminating students that instructors disliked. Testimony of Hix, Williams, McHargue, Mascarenas, Dieruf, Wyman, Thomas, MacKay and Orcutt.

15. Instructors meticulously scrutinized patient care plans until the student proved himself or herself. Instructors exercised different degrees of scrutiny for care plans, depending upon their perceptions of the competence levels of the students involved. For example, while a student in the practical nursing program, Katherine McHargue received a "U" grade for a care plan during a 2-day obstetrics rotation. Fifty percent "U" grades in a category resulted in a failing grade. Fearing she would fail, McHargue consulted Orcutt. Orcutt told her, "Don't worry, you're a strong student. Nobody has ever been 'U'd' out for care plans alone." McHargue redid the care plan and obtained an "S" grade for the redone plan. On the other hand, Mike Mascarenas received "U" grades for two care plans he had prepared together with other students. In one instance, the other student (a female) received an "S+" grade for essentially the same plan. In the other instance, Robert Dieruf shared his care plan with Mascarenas. Dieruf received an "S" for the plan. Like Dion, Mascarenas had argued with Orcutt about techniques taught in the practical nursing program versus actual techniques in "the real world." Mascarenas also

had attended classes with alcohol on his breath, and had “blown off” criticism about his conduct, reasoning that what he did with his off time was his own business. The instructors went further in scrutinizing Mascarenas’ care plans and his understanding of the plans, because they did not perceive him to be a strong student. Therefore, his grades for the same plans were lower, based upon his explanations of the plans. Testimony of McHargue, Mascarenas, Dieruf, Parchen and Kaul.

16. To complete a clinical rotation within a practicum, the student had to obtain a satisfactory grade for at least 75% of the ratings in each category pertaining to patient care plans. The categories included completion of the drug card, the bibliography card, the identification and explanation of abnormal lab result and the two care plans per patient before the pertinent clinical day. The categories also included having complete and appropriate care plans, explaining and answering questions appropriately, completing a physical assessment of the patients by the day following the care giving and demonstrating appropriate review of the patients’ charts. Testimony of MacKay, Orcutt and Alt; Exhibits 106, 107, 111, 112, 113, 114 and 115.

17. Clinical rotations within practicums included different kinds of patients and different physical locations within care facilities in Great Falls. The rotations involved different work in different areas such as pediatrics, medical, surgical, orthopedics. Rotations also involved different numbers of days of work. Because of this, one unsatisfactory rating could be sufficient to fail a rotation in one instance, while in another rotation one unsatisfactory rating could still result in an acceptable performance. In a rotation of 3 or fewer days, receiving 1 “U” grade out of 3 or fewer grades was failing. For a 4-day rotation, receiving 1 “U” grade out of 4 grades was passing. In other words, a single “U” grade in a single category in a single rotation in some instances constituted unacceptable performance for an entire class. Testimony of MacKay, Orcutt and Alt; Exhibits 106, 107, 111, 112, 113, 114 and 115.

18. Dion completed all classes necessary to complete the practical nursing curriculum at the college except Nursing Practicum III. During the summer of 1997, Dion enrolled in Practicum III, a required course consisting of 9 clinical rotations. Orcutt was one of his instructors during the clinical rotations. She had also supervised and graded him during his successful completion of clinical rotations in previous practicums. Uncontested Facts, Nos. 7 and 14; testimony of Dion, MacKay and Orcutt.

19. On June 23, 1997, the last day of Dion’s medical rotation in Practicum III, Dion made critical comments about Orcutt’s instruction and

supervision. His criticism did not include any assertion of sexual bias or discrimination. Testimony of Hix, McHargue, Brinkman, Ruckman and Dion.

20. Also on June 23, 1997, Orcutt noted (Exhibit 111) that that Dion needed to know the rationales for prescription medications for his patients and needed to come to the “med cart” with knowledge regarding the therapeutic dosage involved. Orcutt wrote that Dion “is now aware he should know this from the outset of medication administration” (Exhibit 111). These comments did not include Dion’s signature acknowledging that he had received and discussed them with his instructor. Testimony of Dion and Orcutt, Exhibit 111.

21. For his 2-day pediatric rotation, beginning on June 24, 1997, Orcutt assigned Dion a post-surgical infant who had just had skull surgery. This patient presented a complicated case, and required much nursing care and attention. Orcutt normally permitted students to select their own patients. In this instance, she was concerned that Dion usually selected easier patients. She also had long-standing concerns that had developed during supervision of Dion’s clinical rotations. These concerns included Dion’s abilities to calculate and administer medications, to explain the reasons for prioritizing particular problems and patient needs, and to answer questions about what to do in patient care without first reviewing written sources to find answers. For these reasons, she assigned him this more difficult patient. Testimony of Orcutt.

22. On June 24, 1997, Orcutt gave Dion 4 “U” grades regarding this patient. Dion had failed to include a patient’s pre-operative diagnosis in the care plan. He had not included a bibliography card for the patient’s pre-operative diagnosis (the card specifying the appropriate post-operative care for this surgery). He neither verbalized relevant information concerning all aspects of the patient’s disease process nor identified appropriate nursing care for the patient. He also failed to calculate the proper medication dosage to administer to the patient. Any one of these “U” grades technically justified dropping Dion from the practical nursing program. Testimony of Dion and Orcutt; Exhibit 111.

23. Dion considered the 4 “U” grades unfair. He thought Orcutt had assigned him this patient to fail him because he had insufficient time the night before to do an adequate work-up. He thought Orcutt should have allowed him to obtain the bibliography card later. He argued with Orcutt about his performance, and concluded she would not have accepted any rationale for his patient care plan, because she would not permit him to get more information and then respond later. He blamed Orcutt for his failure to calculate the

proper medication dosage because she did not help him calculate it or permit him to find another nurse to help him; he refused to proceed with the administration of the medication and accused Orcutt of trying to “set him up.” He considered it her fault that he was now in danger of failing. He expressed these feelings to her. Testimony of Dion and Orcutt.

24. Orcutt decided whether to assist a student unable to calculate the proper dose of a medication. She, like any instructor, had the right to assist a student or insist that the student demonstrate the ability to make the proper calculation. In this instance, she wanted Dion to calculate the dosage. Testimony of Kaul, MacKay and Orcutt.

25. After consulting with MacKay, Orcutt decided that Dion’s performance on June 24, 1997, justified failure for the rotation, with dismissal from the practical nursing program as a direct result. MacKay customarily discussed grading that resulted in a student’s failure. She did sometimes suggest either changing a “U” grade to an “S-” grade, or allowing a student to repeat the procedure or care plan. The decision was the instructor’s, but MacKay, as director, would suggest reasons for allowing more latitude if she considered it warranted in a particular case. She did not do so in Dion’s case. After the decision, MacKay told Dion. Uncontested Facts, No. 8; testimony of Dion, MacKay and Orcutt.

26. On June 26, 1997, Dion requested reinstatement. He met with Associate Dean Patricia Kercher and submitted a written statement to the college. The statement did not assert sex discrimination. Dion criticized the way the college structured the practical nursing program, asserted other students made similar errors but continued in the practical nursing program, and argued that a “personality issue” with Orcutt caused his failure. In a subsequent telephone conversation with Kercher on June 27, 1997, Dion asked what steps he could take if he faced discrimination when he attempted to complete the course during a subsequent term. He did not specify the kind of discrimination he feared. Testimony of Dion and Kercher; exhibits 14 and 15.

27. Other students noticed Dion’s absence and asked Orcutt if Dion would be returning to the practical nursing program. She responded that it did not matter if he returned because he would not graduate from the practical nursing program. Testimony of McHargue and Orcutt.

28. Dion met with Kercher and MacKay in July 1997. Dion had learned of Orcutt’s comment that he would not graduate even if he returned. He knew she would be one of his instructors if he retook Practicum III. His

fear of never graduating had grown. He attempted to tape-record the meeting. Kercher refused to allow it. Dion received MacKay's list of his strengths and weaknesses, including reference to resources he could use to improve his performance. Testimony of Dion, Kercher and MacKay; exhibit 16.

29. The practical nursing program's general policy was to allow two attempts to pass nursing courses. Dion re-enrolled in Practicum III in the fall of 1997. It was the only remaining course necessary for his graduation. Uncontested Facts, Nos. 9 and 13.

30. On October 15, 1997, while re-enrolled in Practicum III, Dion wrote a letter to Willard Weaver, the Dean of the College. The letter did not address hostility toward men, but instead complained about the treatment of Dion by Orcutt and MacKay. The letter complaint was replete with criticism of the practical nursing program and of Orcutt and MacKay. Dion's letter recounted comments Orcutt made regarding problems with Dion's performance. In each instance, Dion dismissed the problem and complained that the instructor was being unfair or harassing him by bringing up the problem. Specifically with regard to problems calculating the proper medication dosage, Dion quoted Orcutt as concerned that he "was going to make a big medication error or some patient would start to crash and I would not catch this." Dion's response was "She is making judgements [sic] against me again. This would be my problem and not her's [sic]." Testimony of Dion; exhibit 17.

31. On December 9, 1997, the first day of Dion's surgical rotation, Orcutt gave "U" grades to care plans Dion had prepared for two patients. Orcutt also gave Dion a "U" grade for his explanation of the rejected plans. She offered Dion the chance to redo the clinical day on the designated make-up day. She suggested that before December 15, his next clinical day, Dion obtain help from Mark Berry, a practical nursing student who tutored other students, regarding patient care plans. Testimony of Dion and Orcutt; exhibits 107 and 109.

32. On December 9, 1997, Dion had all but one of the medications for a patient. The pharmacy had not yet delivered the remaining medication to the floor. Orcutt was present to supervise administration of medications. Dion knew that instructors sometimes allowed students in their final year to administer medications without direct supervision. Dion also knew that such a practice was against the college's policy. Orcutt told Dion that he could give the medications when the final medication arrived. He understood her to be directing him to give the medications whether she was present or not. Orcutt

had never directed or allowed Dion to give any medications except under her direct supervision. She had never led Dion to believe that she now trusted him to give medications without direct supervision. She did not intend him to give the medications without direct supervision, but Dion gave the medications after the final medication arrived, although Orcutt was not present. Orcutt gave him a “U” grade on medication technique. Testimony of Kaul, Dion and Orcutt; exhibits 107 and 109.

33. In preparing his care plans for December 15, 1997, Dion obtained the assistance of Janice Rothweiler, a registered nurse. She helped Dion prepare the plans. Orcutt gave Dion “U” grades for the 2 plans. Rothweiler wrote to the practical nursing program confirming that she assisted Dion in the plans, and gave her written opinion that the care plans were satisfactory. Janae Ruckman was the floor LPN responsible for one of Dion’s patients that day. Ruckman heard Orcutt tell Dion that deep breathing was not a priority for the patient. Ruckman considered it a priority for the patient. Joyce Kaul, a former instructor in the practical nursing program, reviewed Dion’s care plans after Orcutt graded him “U” on the plans. Kaul considered the plans satisfactory, including the deep breathing priority for patient “K.S.” Kaul had worked as an instructor in the college’s Practical nursing program from July 1976 through July 1994. She considered the patient care plans “acceptable and appropriate for a Licensed Practical Nurse entry-level practitioner and . . . certainly within the scope of Standards of Care accepted by the Joint Commission on Accreditation of Hospitals.” Orcutt offered Dion an opportunity to redo and submit two priority plans the next day. He redid the plans but Orcutt found them unsatisfactory. She also gave him another “U” grade (dated December 16) for not following instructor guidance. Testimony of Rothweiler, Ruckman, Kaul, Dion and Orcutt; exhibits 21, 26, 30, 107 and 109.

34. One of the safety hazards of nursing care is accidental puncture of the nurse’s skin with a needle. A needle stick can occur with a sterile needle, before the nurse uses the needle for patient care. Because the needle is sterile, the risk is minimal, although the resulting wound is exposed to its immediate surroundings with attendant risks of infection from those surroundings. A needle stick can also occur with an unsterile needle, after the nurse has used the needle for patient care. The risk is then greater and immediate, depending upon the prior use of the needle. The protocol a needle stick requires immediate reporting for record keeping, for insurer notification and for any appropriate medical treatment. The urgency of the immediate reporting requirement depends upon the circumstances of the needle stick. Testimony of Kaul and MacKay.

35. Late on the morning of December 15, 1997, Dion stuck himself with a needle he had just used to draw a urine sample from a catheterized patient. The needle was not sterile. Orcutt was present, but did not realize Dion had stuck himself. Dion did not tell her. He admitted the needle stick later that day. The next day, Orcutt questioned Dion about the delay in notification. Dion refused to discuss it with her. Testimony of Orcutt; exhibit 109.

36. December 16 was Dion's last scheduled clinical day before graduation. The college dropped him from the practical nursing program on December 16, because he failed Practicum III for the second time, due to the number of "U" grades he received on December 15 and 16. Dion never proceeded with the make-up day for the "U" grades he previously received on December 9, 1997. Uncontested Facts, Nos. 11 and 13; testimony of Dion and Orcutt; exhibit 109.

37. Counting the "F" grade Dion received in Nursing Practicum III, his cumulative grade point average was 2.510 at the time of his dismissal. Uncontested Facts, No. 12; testimony of Dion.

38. Dion attempted to appeal his grade. Kercher informed him in a letter dated December 29, 1997 that "grades issued by the faculty member responsible for the course cannot be changed by anyone except that faculty member, and as a consequence of this assignment of responsibility, grades are not appealable." This statement contradicts Board of Regents' policy. Kercher has never retracted it. Testimony of Kercher.

39. Aside from corrections of mathematical and clerical errors in calculating and recording grades, faculty members in the practical nursing program have never granted a student grade appeal. Although the regents' policy empowers grade changes at each level of appeal, up to and including the Commissioner, deference to the instructor makes it extremely unlikely that any such change will result. Testimony of Kaul, Kercher and MacKay.

40. Before Dion's complaints, a number of students had complained to the administration and the Commissioner of Higher Education, alleging abusive treatment or favoritism by MacKay and Orcutt in the practical nursing program. No action had been taken about those complaints, none of which involved claims of sex discrimination. Testimony of Weaver and Siebenaller.

IV. Opinion

Montana law prohibits discrimination against an individual enrolled as a student in an educational institution because of sex. §49-2-307(1) MCA. Dion asserts that he received disparate treatment in grading from the practical nursing program because he was male.

The provisions of the Montana Human Rights Act that assure protected groups freedom from discrimination adhere to the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. For Human Rights Act claims of disparate treatment due to protected class membership, the Montana Supreme Court has expressly adopted the federal three-tier standard of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), except in direct evidence cases. *E.g.*, *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988). Dion provided no direct evidence that Orcutt was hostile to males.

The first tier of *McDonnell Douglas* requires a complainant to prove four elements by a preponderance of the evidence. First, he must prove that he belongs to a protected class. Second, he must prove that he qualified for an entitlement he sought from the respondent. Third, he must prove that the respondent rejected him despite his qualification. Finally, he must prove the respondent extended the entitlement to others similarly qualified. *See*, *McDonnell Douglas* at 411 U.S. 802.

The Supreme Court noted in *McDonnell Douglas* that the elements of the first tier are flexible. The precise four elements need not apply to every disparate treatment case. For example, the Montana Supreme Court in *Martinez v. Yellowstone Co. Welfare Dept.*, 192 Mont. 410, 626 P.2d 242, 246 (1981), recognized that a claimant met the fourth element of proof in that particular employment discrimination claim by showing that a job vacancy was filled by an applicant who was not a member of the particular protected group.

In the present case, the practical nursing program subjected all of its students to a high-pressure environment. In some clinical rotations, a single “U” grade meant failure of the entire practicum. Failure of a single practicum meant both retaking and successfully completing that entire practicum or failing the entire practical nursing program. Males and females alike feared the real prospect of such failure.

Part of the pressure arose from the subjective nature of the grading. The same care plan could be either satisfactory or unsatisfactory, depending

upon the instructor's evaluation of not simply the plan, but also the explanation of the plan, the student's responses to questions about the components of the plan, and the student's understanding of the nursing care the plan dictated.

Nothing was inherently wrong with this subjective grading. The practical nursing program had the right to rely upon the experience and expertise of its instructors. Evaluation of student performance in practical components of many professional programs--law schools, medical schools and nursing schools--can be subjective. Indeed, sometimes the nature of the practical work may require subjective evaluations.

However, the practical nursing program allowed hostile and derogatory comments about men by its director for a period of years. This conduct rose to the level of sexual intimidation, i.e., unreasonable behavior, verbal or nonverbal, with the effect of subjecting members of either sex to humiliation, embarrassment or discomfort because of their gender. 24.9.1002(10) A.R.M.

Because of this intimidation, Dion reasonably feared that his instructors might treat him more harshly than they might treat a female student. This case involved more than sensitivity to casual remarks, isolated incidents of harassment or a passing slur. *See, e.g., Snell v. Montana Dakota Utilities Co.*, 198 Mont. 56, 643 P.2d 841 (1982). Unlike *Snell*, this case involved a continuing pattern of such comments reasonably known to the practical nursing program and the college. The source of the comments was the nursing director.

Dion proved that he was a member of a protected class, in this case that he was male. He proved that he received lower subjective evaluations than other students who differed from him because they were female. He also proved that other qualified nurses, including a former instructor in the practical nursing program, evaluated the care plans at issue as satisfactory. But what he could not prove by direct evidence was that Orcutt gave him those lower subjective evaluations because he was male. Given the subjective nature of the evaluations, he could not provide such proof short of an admission by Orcutt that she gave him discriminatory grades.

Dion did not prove by a preponderance of the evidence that Orcutt and the practical nursing program graded him differently than other students because he was a man. His proof of differential treatment failed. However, he did prove that sexual intimidation caused or contributed to his fear of Orcutt and of failure.

Dion's fear became a self-fulfilling prophecy. Dion did not like Orcutt. His defensive responses to her criticisms fueled a personality conflict between them. As his fear grew, his ability to respond appropriately to her questions and directions diminished. Dion's written comments to Dean Weaver (exhibit 17) demonstrated the degree to which he was unable to function because of his fear. Dion offered Orcutt's concerns about improper medication as evidence of unfair treatment. He suggested that it was wrong for an instructor to be concerned about a student at risk of making a medication error or missing indications that a patient was "crashing." He asserted that such matters were his problem rather than the instructor's. For Dion to argue seriously that an instructor had no business addressing such lack of competence demonstrated how defensive and unrealistic he had become.

The practical nursing program intentionally subjected its students to rigorous supervision. The instructors targeted weak students for critical review and scrutiny. Dion showed genuine weaknesses in his clinical rotations. Dion's weaknesses subjected him to legitimate criticism, to demands that he perform immediately under pressure, and to suggestions that his performance must improve.

If the hearing examiner could properly disregard Dion's fear of discrimination, then Dion's conduct in June and December of 1997 would justify both decisions to fail him in Practicum III. However, his fear of discrimination resulted from illegally hostile and derogatory comments about men. That fear of discrimination fed his fear of Orcutt. His fears fed his weaknesses. Given his weaknesses, Dion did not prove that he would have graduated but for the illegally hostile environment. He did prove that he never had the opportunity to attempt to graduate free from the illegally hostile environment. This does establish a causal connection between the sexual intimidation and the practical nursing program's adverse actions against Dion.
24.9.610(2)(b)(v) A.R.M.

Respondents did not successfully rebut Dion's proof. The respondents did not prove that more likely than not Dion would have performed in the same unsatisfactory manner on both June 24, 1997 and December 15-16, 1997, without his exposure to the illegally hostile and derogatory comments.

Dion did not prove that men generally were subjected to either disproportionate admission rates (applicants versus admissions) or disproportionate failure rates after admission. Absent statistically valid data supporting such conclusions, the anecdotal evidence of the experiences of particular men fell short of establishing disproportionate impact upon men or sexual intimidation causing harm to men other than Dion.

At no time pertinent to the college's decision processes regarding Dion did the college or the practical nursing program have sufficient notice of Dion's claims of sexual intimidation to consider those claims and retaliate against him in the decision making. Dion has not proved retaliation. The defensive acts of the college and the practical nursing program in resisting Dion's grade appeal demonstrate neither discriminatory intent nor retaliatory intent.

The Montana Human Rights Act empowers the department to issue an order to rectify any harm, pecuniary or otherwise, resulting from illegal discrimination. §49-2-506(1)(b) MCA. Because Dion failed to prove the degree to which the sexual intimidation intensified his fear, no sufficient substantial and credible evidence supporting an award for emotional distress exists in the factual record. Because Dion may or may not have failed without the increased burden of sexual intimidation, no award for loss of subsequent earnings is proper, nor does the record support any quantification of such an award. The harm Dion suffered is, primarily, his lost opportunity to attempt completion of Practicum III free of reasonable fear of discriminatory treatment. That harm can and should be remedied, by ordering the college, at Dion's election, either to refund all charges for Dion's second enrollment and participation in Practicum III or to re-enroll Dion free of charge in Practicum III at the next available session.

The Human Rights Act mandates reasonable affirmative relief, to correct the discriminatory action. §49-2-506(1)(a) and (b) MCA. Injunctive relief is proper to address the risk of continued sexual intimidation. Subjective evaluation of the competence of nursing students is entirely appropriate. An educational policy decision to subject students to heavy pressure and high stress, to test each student's resolve and ability to function under such conditions, is within the ambit and expertise of the program. Nevertheless, given such conditions, scrupulous avoidance of any practice or comment that smacks of sexual intimidation is vital. The college and the Commissioner must take the appropriate steps to draft and implement policies and practices to achieve this avoidance.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Respondents Commissioner of Higher Education and MSU College of Technology--Great Falls unlawfully discriminated in education by subjecting

charging party Scott Dion to sexual intimidation while he pursued graduation from the practical nursing program in 1997. §49-2-3073(1) MCA.

3. Pursuant to §49-2-506(1)(b) MCA, the respondents must expunge the failing grade Dion received for Nursing Practicum III in the Fall term 1997, and offer Dion the choice between a refund of all charges for his Fall 1997 re-enrollment in Practicum III or re-enrollment without charge in the next session of Practicum III. If Dion successfully completes Practicum III, the college must graduate him from the practical nursing program, awarding him the same rights and entitlements as any other successful graduate.

4. Affirmative relief is necessary in this case. §49-2-506(1)(a) MCA. The college must refrain from engaging in any further unlawful sexual intimidation in its practical nursing program. Within 45 days of the entry of this order, the college must submit to the Human Rights Bureau a proposed written policy to notify administration, instructors and students of the policy, under which a student can register a complaint with a member of the administration unconnected to the practical nursing program. That administration member must then be responsible to follow a particularized procedure to investigate and eliminate any continuing practice or instance of sexual intimidation in the practical nursing program. Within 30 days after the Human Rights Bureau approves (with or without suggested modifications) the proposed policy, the college must file written proof with the Human Rights Bureau that it has adopted and published the policy (with any suggested modifications). The college must also comply with any additional conditions the Human Rights Bureau places upon its continued operation of the practical nursing program, or at once cease offering the practical nursing program as part of its operation as an education institution.

5. For purposes of §49-2-505(4), MCA, Dion is the prevailing party.

VI. Order

1 Judgment is found in favor of Scott Dion and against Respondents Commissioner of Higher Education and MSU College of Technology--Great Falls on the charge of illegal discrimination in education on the basis of sex.

2 The college must expunge the failing grade it gave Dion for Nursing Practicum III in the Fall term 1997, and offer Dion the choice between a refund of all charges for his Fall 1997 re-enrollment in Practicum III or free re-enrollment in the next session of Practicum III. If Dion successfully completes Practicum III, the college must graduate him from the practical nursing program, awarding him the same rights and entitlements as any other successful graduate.

3 The college is enjoined from further discriminatory acts and ordered to comply with the provisions of Conclusion of Law No. 4.

Dated: July 1, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

