

BEFORE THE MONTANA DEPARTMENT OF

LABOR AND INDUSTRY

(Human Rights Act Case Nos. 9802008368 & 9802008369

Paddy and Patricia Griffith, (

Charging Parties, (*Final Agency Decision*

versus (

Edison Palacios, (

Respondent. (

(

I. Procedure and Preliminary Matters

Paddy and Patricia Griffith)"Griffiths"(filed a verified complaint with the Montana Department of Labor and Industry on October 31, 1997. They filed an amended complaint on February 3, 1998. They alleged, in pertinent part, that Edison Palacios)"Palacios"(discriminated against the charging parties on the basis of retaliation when he took significant adverse actions because they filed a complaint and participated in an investigation and proceeding under the Human Rights Act. The department appointed Terry Spear as hearing examiner.

This contested case hearing began on August 6, 1998, in Polson, Lake County, Montana. Paddy Griffith was present with Timothy C. Kelly, attorney for Griffiths. Patricia Griffith was not present, except during her testimony¹, due to her multiple chemical

¹ Patricia Griffith testified in her home, to which the hearing examiner, the attorneys and the other parties went for that testimony. Palacios was absent during the testimony, due to Patricia Griffith's reaction to a scent (apparently from some lotion) he was wearing. His absence during her testimony, and her absence during the rest of the proceedings, were without objection from either side.

sensitivity, a medical problem that precludes her access to most public facilities. Edison Palacios was present with Heidi Fanslow, Warden, Christiansen, Johnson & Berg, PLLP, attorney for Palacios. The hearing examiner excluded witnesses on Griffiths' motion. Paddy and Patricia Griffith, Joyce K. Rogers, Peggy Shippen, Martha Miwongtum and Edison Palacios testified. Exhibits are listed on the accompanying exhibit docket.

Hearing proceeded on August 6, 7 and 8, 1998. Griffiths filed their written closing argument and proposed findings and conclusions on September 21, 1998. Palacios filed his closing argument and proposed findings and conclusions on October 5, 1998. Griffiths filed their reply closing argument on October 12, 1998.

II. Issues

The key issue in this case is whether Palacios unlawfully retaliated against the Griffiths after he learned of their sexual harassment complaint or had a legitimate, non-discriminatory reason for his actions. A full statement of issues appears in the final prehearing order)issued August 4, 1998, amended at hearing to add contentions 101-102 and request for relief 5 for Griffiths, without objection(.

III. Findings of Fact

1. Griffiths reside in Polson, Montana. Palacios resides in Los Angeles County, California. He has experience in law enforcement and investigations. Uncontested Fact Nos. 1 and 2; testimony of Griffiths and Palacios.

2. Palacios bought the residential property at 712 Third Avenue East, Polson, Montana)“the house”(, in 1992 and still owns it. Uncontested Fact No. 3; testimony of Palacios.

3. In May 1995, Palacios applied for insurance on the house. In his application he described the condition of the roof as “good” and stated that the roof was 3 years old. These statements were false. Testimony of Palacios; Exhibit CP's 21.

4. Before July 1995, Gem Mercer, owner of Sailmaker Realty, began acting as Palacios' property manager for the house. Uncontested Fact No. 4; testimony of Palacios.

5. In July 1995, Palacios went to Montana and stayed in the upstairs residential unit at the house. There were two women renting the downstairs unit. Uncontested Fact No. 5; testimony of Palacios; Exhibit CP'S 9.

6. After his visit in July 1995, Palacios did not return to Montana or to the house until August 21, 1997. Uncontested Fact No. 6; testimony of Palacios.

7. On September 15, 1995, Palacios entered into a written property management agreement with Sailmaker Realty under which Mercer would manage the house for Palacios. Uncontested Fact No. 7; testimony of Palacios; Exhibit CP'S 7.

8. When managing residential property owned by others, including the house, Mercer's practice was to manage the property as if it is his own. He did manage the house as if it was his own. Uncontested Fact Nos. 8 and 9; testimony of Griffiths; Exhibit CP's 10.

9. During the period that Mercer managed the house, Palacios never instructed Mercer to manage the house in compliance with fair housing laws. During the period that Mercer managed the house, Palacios never instructed Mercer not to discriminate or sexually harass any persons applying for residence at or residing at the house. During the period that Mercer managed the house, Palacios never instructed Mercer to advise Palacios if a discrimination complaint was filed against Mercer while he was managing the house. Palacios relied upon his understanding that Mercer was a licensed broker and property manager. Palacios assumed Mercer would follow all applicable laws. Palacios did not establish any grievance procedure for tenants with problems with Mercer. Uncontested Fact Nos. 10, 11, 12; testimony of Palacios.

10. In March 1996, Mercer agreed to rent the house to the Griffiths and their 16-year-old daughter Annie. Uncontested Fact No. 14; testimony of Griffiths; Exhibits CP's 10 and 11.

11. Beginning April 10, 1996, the Griffiths rented the entire house from Sailmaker Realty at a monthly rental of \$700. At some point after the rental arrangement began Mercer gave Griffiths permission to cut an entryway between the upper and lower levels. Uncontested Fact No. 15; testimony of Griffiths; Exhibits CP'S 10 and 11.

12. The Griffiths had a written rental agreement with Sailmaker Realty for the rental of the house signed by Paddy Griffith and Mercer. Uncontested Fact No. 16; testimony of Griffiths; Exhibits CP'S 10 and 11.

13. During the period that Mercer managed the house, Palacios did not disclose in writing to the Griffiths at or before the commencement of their tenancy the name and address of Palacios as the owner of the house. Uncontested Fact No. 17; testimony of Griffiths and Palacios.

14. There was never any written rental agreement between Palacios and Griffiths regarding the rental of the house. Palacios never provided Griffiths with a copy of the property management agreement he had with Mercer)Exhibit CP's 7(. Uncontested Fact No. 18; testimony of Griffiths and Palacios.

15. Annie Griffith lived in the downstairs area of the house when the Griffiths lived there. On October 17, 1996, Mercer was "peeping" into Annie Griffith's living area when she was undressed. Uncontested Fact Nos. 19 and 20; testimony of Griffiths.

16. During the week of October 21, 1996, Mercer gave notice to Palacios and the Griffiths that he was resigning as property manager of the house at the end of that rental period. Uncontested Fact No. 21; testimony of Griffiths.

17. On October 25, 1996, Palacios spoke by telephone with Paddy Griffith regarding the pending resignation of Mercer. Uncontested Fact No. 22; testimony of Griffiths and Palacios.

18. On November 5, 1996, Mercer faxed a message to Palacios that a "handy-man" would be repairing the leaky roof at the house. Palacios refused to authorize the temporary repairs, and asked for three estimates of repair costs. Palacios subsequently decided to wait until the following summer to perform repairs. Testimony of Palacios; Exhibit CP's 16.

19. By letter dated November 12, 1996, Palacios notified the Griffiths that Mercer had resigned as property manager and that they should send rent payments directly to Palacios for the house. Uncontested Fact No. 23; testimony of Griffiths and Palacios, Exhibit CP'S 18.

20. On November 12, 1996, the agreement between the Griffiths and Sailmaker Realty regarding the rental of the house ended. Uncontested Fact No. 24; testimony of Griffiths.

21. By letter dated December 2, 1996, Palacios requested from the Griffiths a list of items and receipts regarding deductions from the November rent and advised the Griffiths not to deduct any amounts from the rent in the future without advance authorization. The Griffiths had paid \$279.00 of the November rent, and deducted the balance of \$421.00 for the cost of repairing carpet damaged by the leaking roof. Palacios was aware of the payment and the deduction at the time. Uncontested Fact No. 25; testimony of Griffiths and Palacios, Exhibits CP'S 16, 17, 19. See also Exhibit CP's 23)Palacios forwarding copy of repair receipt to his insurer in May 1997(.

22. By money orders dated December 9, 1996, the Griffiths paid to Palacios \$600 of the \$700 agreed rental amount for the December 10, 1996 to January 10, 1997 rental period. Uncontested Fact No. 26; testimony of Griffiths; Exhibit CP'S 20.

23. By money order dated January 7, 1997, the Griffiths paid \$700 in rental monies to Palacios for the January 10 - February 10, 1997 rental period. Uncontested Fact No. 27; testimony of Griffiths; Exhibit CP'S 20.

24. By money order dated February 12, 1997, the Griffiths paid \$640 in rental monies to Palacios for the February 10 - March 10, 1997 rental period. Uncontested Fact No. 28; testimony of Griffiths; Exhibit CP'S 20.

25. By money order dated March 11, 1997, the Griffiths paid \$700 in rental monies to Palacios for the March 10-April 10, 1997 rental period. Uncontested Fact No. 29; testimony of Griffiths; Exhibit CP'S 20.

26. In April, May and June 1997, the roof at the house again leaked and caused damage to the house. Uncontested Fact No. 30; testimony of Griffiths and Palacios.

27. In May 1997, Palacios submitted a claim to his insurer, State Farm, for damage caused by the leaky roof of the house, claim No. 26-L004-078. In that report, he indicated that the renters were complaining of water damage. The report also attributes to Palacios the untrue statement that a tree had fallen on the roof in June of 1996. Palacios denied making the statement. Testimony of Palacios, Exhibits CP's 22 and 23.

28. By letter dated April 29, 1997, Palacios informed the Griffiths that their rent for April was late and he would be contacting an attorney if both the April and May rent were not paid by May 10, 1997. On May 2, 1997, Palacios provided the Griffiths with a notice to

vacate for nonpayment of rent in April 1997. Uncontested Fact No. 30a; testimony of Griffiths and Palacios; Exhibits R's A, B and C.

29. By money orders dated May 2, 1997, the Griffiths paid \$1400 in rental monies to Palacios for the April 10-May 10, 1997 and May 10-June 10, 1997 rental periods. Uncontested Fact No. 31; testimony of Griffiths; Exhibit CP's 26.

30. By money order dated June 10, 1997, the Griffiths paid \$500 in rental monies to Palacios for the June 10-July 10, 1997 rental period. Uncontested Fact No. 32; testimony of Griffiths; Exhibit CP's 26.

31. By letter dated June 23, 1997, Palacios notified the Griffiths that their tenancy agreement would end by August 18, 1997, and that Palacios intended to use the house as his summer home. By a letter dated June 24, 1997, Palacios acknowledged receipt of part of the rent and objected to Griffiths' deduction from rent for June 10 - July 10, 1997. Palacios also notified the Griffiths that he intended to file suit and seek all unpaid rent for which Griffiths had not submitted either a receipt or other proof of payment of repair expenses Uncontested Fact Nos. 33 and 33a; testimony of the Griffiths and Palacios; Exhibits CP's 28 and R's D.

32. In late May, June and early July, State Farm investigated the roof damage claim of Palacios. The adjuster concluded that there were three different claims appropriate)each with a separate deductible(because the damage to the house had occurred at different times in different locations. The adjuster also concluded that Griffiths had sustained some damage from the leakage, and had incurred some expense on repairs. The adjuster recommended that State Farm make four different payments. State Farm relied upon the recommendation and decided to pay Palacios and Caldbeck Construction \$1,130.38 on claim 26-L004-078, to pay Palacios and Caldbeck Construction \$814.38 on claim 26-L004-183, to pay Palacios and Paddy Griffith \$338.01 on claim 26-L004-184, and to pay Paddy Griffith separately \$322.00 on that same claim. Testimony of Paddy Griffith; Exhibit CP's 23.

33. On June 30, 1997, Palacios demanded proof for rent deductions, and reiterated his intent to sue for unpaid rent not supported by such proof. Testimony of Palacios; Exhibit R's D.

34. On June 30, 1997, Paddy Griffith on behalf of Annie Griffith filed HRC Complaint 9702008244. The complaint alleged sexual harassment and discrimination by reason of sex

in housing. The complaint named Palacios as respondent, naming Mercer as the agent of Palacios who engaged in the illegal conduct, directed toward Annie Griffith, the Griffiths' minor daughter. Uncontested Fact No. 37; testimony of Paddy Griffith; Exhibit CP's 1.

35. In the first week of July 1997, the Griffiths had a two-day yard sale outside the house. Uncontested Fact No. 34; testimony of Griffiths.

36. Palacios had actual notice of Complaint 9702008244 on or before July 7, 1997. By letter dated July 8, 1997, Palacios filed an answer to Complaint 9702008244. Palacios was angry. He called Mercer on July 7, 1997, to discuss the allegations of the complaint. His secretary, Stacy Hunter, listened to the conversation and typed notes. In that conversation, Palacios learned that Griffiths had cut an entry way between the upper and lower levels of the house. Mercer denied authorizing the entryway. Mercer denied any wrongdoing and blamed Griffiths, but told Palacios that he settled with Griffiths for \$4,000.00. Palacios rejected the idea that he was potentially liable for Mercer's alleged conduct. Palacios was outraged "the State" was investigating him. He began thinking "the State" should investigate Griffiths. Uncontested Fact Nos. 38 and 39; testimony of Palacios and Shippen; Exhibits CP's 30 and 60.

37. During the investigation of the harassment complaint, Palacios told Human Rights investigator Peggy Shippen that he could not understand why "the State" was investigating him, but not investigating the Griffiths. Shippen told him he would have to act on his own regarding his allegations against the Griffiths. Testimony of Palacios and Shippen.

38. On July 9, 1997, Palacios wrote to Brian Caldbeck, confirming that Caldbeck would work on the roof of the house in August 1997. Palacios directed Caldbeck to "make no inappropriate remarks or comments that can be construed to be of a sexual nature, no comment that would have any sexual connotations." Palacios gave the directions, the first directions he had ever given regarding possible sexual harassment, because of the Griffiths' complaint against him. Testimony of Palacios, Exhibit CP's 31.

39. By two identical letters dated July 10, 1997, Palacios informed the Griffiths that a roofing contractor would visit the house approximately August 11 to perform roof repairs. He reminded the Griffiths in the letters that they were to vacate the house no later than August 18, 1997. Palacios sometimes sent more than one original of the same letter-- sometimes one original by certified mail and the other by first class mail. No consistent

pattern existed regarding multiple originals. Uncontested Fact No. 35a; testimony of Griffiths and Palacios; Exhibit R's F.

40. On July 11, 1997, Palacios wrote to Griffiths demanding that Griffiths pay a portion of a large water bill for June 1997. Under the written agreement with Mercer and the continuing practice of Palacios and Griffiths, Palacios paid the water bill for the house. The water company cut the large bill)\$175.04(in half)\$87.52(after Palacios called them. Palacios paid \$40.00 and demanded payment of \$47.52. Testimony of Griffiths and Palacios, Exhibits CP's 10 and 32.

41. On July 15, 1997, Palacios' attorney, Charles Wall, served the Griffiths with a 3-day notice to vacate for nonpayment of rent due July 10, 1997. On July 15, 1997, Paddy Griffith and Wall spoke and agreed that the Griffiths would pay a pro rata rental rate of \$22.50 per day for the period from July 10 to the date the Griffiths vacated if before August 10, 1997. Paddy Griffith then wrote to Wall on July 25, 1997, enclosing a money order for \$292.50 for July rent and advising that the Griffiths would vacate the house by July 27, 1997. Based on the pro rata daily rental rate, the amount tendered by the Griffiths did not include the daily rent for 4 days at the beginning of the rental period and the Griffiths owed an additional \$90 for that period. Uncontested Fact Nos. 35, 35b and 35c; testimony of Paddy Griffith; Exhibits CP's 26 and 29.

42. On July 23, 1997, Paddy Griffith filed a rebuttal to Palacios' answer to Complaint 9702008244 and a proposal to settle Complaint 9702008244. Uncontested Fact No. 40; testimony of Paddy Griffith, Exhibit CP's 36.

43. On July 25, 1997, Palacios, through Wall, filed Complaint #50-268-97 in the Lake County Justice Court against the Griffiths. The complaint alleged that the Griffiths failed to pay rent due July 10, 1997. The complaint alleged that the Griffiths failed to vacate the house after receiving the July 15 three-day notice. The complaint alleged that the Griffiths failed to pay any rent for November and December of 1996. The complaint alleged that Griffiths failed to pay \$200.00 of the rent for June 1997. The complaint alleged that Griffiths ran the water constantly during the May 1997 billing period, causing Palacios to incur \$187.00 for the water bill and plumbing charges to check for leaks of approximately \$100.00, although the average water bill was \$25.00 to \$35.00. The complaint sought \$1,852.00, and rent for July. Uncontested Fact No. 41; Exhibit CP's 33.

44. On July 25, 1997, the Griffiths owed Palacios, by Palacios' own records and letters, not more than \$407.52 exclusive of July rent, for the period of time covered by the complaint he filed that day, seeking \$1,852.00 and rent for July. Palacios knew all of the facts from which the smaller amount owed was calculated. Testimony of Palacios.

45. On July 27, 1997, the Griffiths vacated the house. Uncontested Fact No. 36; testimony of Griffiths.

46. On July 28, 1997, Palacios' attorney requested service of Complaint #50-268-97 upon the Griffiths. Uncontested Fact No. 42; testimony of Palacios; Exhibit CP's 34.

47. By letter dated August 4, 1997, Palacios rejected the Griffith proposal to settle Complaint 9702008244. Among other reasons for rejecting further settlement discussions, Palacios accused Paddy Griffith of permitting additional contact between his daughter and Mercer, thereby failing to protect her. Palacios also asked why "the State," that was investigating the Human Rights complaint, was not investigating Griffiths for failing to protect their daughter. Palacios was disturbed to be held accountable for another man's actions. Palacios was angry with the Griffiths for pursuing this claim against him. Uncontested Fact No. 43; testimony of Palacios and Shippen; Exhibit CP's 38.

48. On August 4, 1997, Wall told Palacios by letter that he had the house keys. Wall forwarded a list from Griffiths identifying items needing repair at the house, and Griffiths' July payment of \$292.50. Uncontested Fact No. 44; testimony of Palacios, Exhibit CP's 39.

49. On August 11, 1997, Palacios called the DPHHS Child Protective Service in Polson. He accused Griffiths of not protecting their daughter, reporting to Child Protective Service that Paddy Griffith continued to work for and socialize with Mercer, allowing Mercer to visit the Griffiths' home. Since he had not been in Montana since mid-1995, Palacios had no personal knowledge of the matters he reported to Child Protective Service. Palacios relied upon Mercer for his allegations about continuing contact between Mercer and the Griffiths. Palacios did not rely upon Mercer himself in alleging that exposure to Mercer was harmful. Mercer told Palacios he had done nothing wrong. Uncontested Fact No. 45; testimony of Palacios; Exhibit CP's 40.

50. By letter dated August 14, 1997, addressed to the Griffiths at 712 Third Avenue in Polson, Palacios demanded to know their current address and advised the Griffiths he would

report them for lack of cooperation if they failed to provide that information. Uncontested Fact No. 46; testimony of Griffiths and Palacios; Exhibit CP's 41.

51. On August 14, 1997, State Farm issued check 115593641J , made payable jointly to "Edison Palacios and Paddy Griffith" for \$338.01 on Claim #26-L004-184. State Farm sent check 115593641J to Palacios who signed his own name endorsing the check, then signed Paddy Griffith's name without Griffith's knowledge or consent, and then presented the check for payment. Palacios knew or should have known that the money was not paid entirely to him. Palacios knew or should have known that Paddy Griffith would not agree that the money was entirely for Palacios. Uncontested Fact No. 56; testimony of Palacios; Exhibit CP's 25.

52. On August 21, 1997, Palacios arrived at the house in Montana around 3:00 p.m. He found the house in substantially greater disrepair than he remembered it. He found an entryway between the upper level and lower level had been cut and left unfinished. Palacios also found that some personal items that he thought were in house were absent. He was furious with the Griffiths, whom he blamed for everything he found. Uncontested Fact No. 48; testimony of Palacios; Exhibit CP's 83.

53. Within an hour of arriving at the house on August 21, 1997, Palacios initiated a theft complaint with the Polson Police Department)he called the police at 4:06 p.m., according to the case report, Ex. CP's 44(. That same day, he reported theft and vandalism claims to his insurer, State Farm. He also videotaped the condition of the house)Exhibit CP's 83(. The next day, he provided a list to the police of over \$1,670.00 of personal property items reportedly missing from the house. A week later, his secretary, at his direction, repeated the accusations of theft to the Human Rights Bureau investigator, Peggy Shippen. Uncontested Fact No. 49; testimony of Palacios; Exhibits CP's 43, 44, 45, 46.

54. By his letter of September 3, 1997, Palacios told Polson Police Chief Ron Buzzard that he wanted to pursue and prosecute the Griffiths. Palacios also stated that no other tenants had rented the upstairs level of the house "since I left the residence." That statement was false. After Palacios' visit to Montana in mid-1995, two other tenants rented the upper level--Williams and Mills--and four tenants rented the lower level--Mitchell, Merkel, McCrea and Cline. The six tenants rented portions of the house after Palacios left in 1995 and before Griffiths rented the house. Palacios received rental income from all six tenants, and reports from Mercer identifying all six tenants. During July 1995 to March

1996, Mercer provided to Palacios regular written statements regarding the rentals of the house. In 1995 and in 1996, Palacios had personal knowledge of the tenants in the house, through Mercer's reports and the income received. Uncontested Fact Nos. 13, 50, testimony of Palacios, Exhibits CP's 9 and 47.

55. By September 9, 1997, the Polson Police had obtained statements from both Paddy Griffith and Mercer suggesting that Griffiths had stolen no personal property of Palacios. By October 3, 1997, the police had completed their investigation. They found that Paddy Griffith, Mercer and the State Farm adjuster all verified that with two possible exceptions the property Palacios alleged was missing had not been in the house while Griffiths were residents. The two possible exceptions did not improve the merits of Palacios' claim. First, Mercer told the police he and Paddy Griffith had moved some "junk" from the home that Mercer then hauled to the dump. Second, Paddy Griffith told the police)correctly(that Palacios had made claims with State Farm and received payment for some damaged items)carpet(. The Polson Police, after consultation with the Lake County Attorney, closed the file, classifying it "No further action." Testimony of Griffiths; Exhibits CP's 48, 51 and 52.

56. By a letter erroneously dated August 14, 1997, and sent in September, Palacios told Griffiths he would report them for lack of cooperation and advised them that he had filed a police report naming the Griffiths as having stolen his personal property from the house when they left the residence. Uncontested Fact No. 47; testimony of Griffiths and Palacios; Exhibit CP's 42.

57. Shippen issued her final investigative report regarding Case 9702008244 on September 10, 1997. By letter dated September 29, 1997, Human Rights Bureau Chief Jerry Keck sent Palacios a copy of the final investigative report in Case 9702008244. On October 1, 1997, Palacios received a copy of the Final Investigative Report of the Human Rights Bureau concerning HRC Claim 9702008244. The final investigative report found reasonable cause to believe Palacios, as an absentee landlord responsible for the conduct of his agent)Mercer(, engaged in unlawful discrimination in housing based on sex. Palacios filed a claim with his insurer on October 1, 1997 regarding this case. He expressed his feelings about the claim in letters to his insurer and to the Human Rights Bureau. He stated in his letter to the Human Rights Bureau)Exhibit CP's 54, Oct. 13, 1997(that the harassment complaint against him was "a ridiculous case." He stated he was sending copies of the file to the governor and to Dateline. He accused the agency of being at fault for not notifying him of other complaints of harassment against Mercer. He reiterated his complaint that he could not be

at fault for Mercer's actions. He repeated the allegations of theft. His anger and outrage were patent. He threatened to sue the agency. Uncontested Fact Nos. 51, 52, 53, 54; Exhibits CP's 50, 53, 54.

58. On October 7, 1997, Child Protective Services concluded that Palacios' allegations that the Griffiths had failed to protect their daughter were unfounded. Exhibit CP's 49.

59. In October 1997 Palacios located the Griffiths, and drove by their new residence, both front and back)through the alley(. The Griffiths observed him driving by. It was reasonably foreseeable that they would see him driving by. Testimony of Griffiths and Palacios.

60. On October 30, 1997, the State Farm adjuster wrote to Palacios and told him there had been other tenants in the upper level after Palacios left Montana in 1995. Exhibit CP's 88.

61. On October 31, 1997, Griffiths filed a complaint of retaliation against Palacios)Human Rights Commission Case Nos. 9802008368/8369(. The first five paragraphs of that complaint stated the identity and residences of Griffiths and Palacios, the landlord-tenant relationship between them, Palacios' ownership of the house, the content of the sexual harassment complaint filed against Palacios, and the content of the investigator's findings regarding that complaint. All these allegations were true and subject to no reasonable dispute. Palacios denied these allegations. Testimony of Griffiths; Exhibits CP's 55, 56.

62. Paragraph 6)a(of the retaliation complaint stated that during the investigation, after Palacios had notice of the pending harassment complaint, Palacios filed a theft complaint against the Griffiths for more than \$1,670.00 of personal property allegedly missing from the house. It further stated that Palacios informed the Polson Police that he filed the complaint with the intent to pursue and prosecute the Griffiths. It further stated that the complaint was factually and legally baseless, false and known to be false by Palacios. It further stated that the Polson Police investigated the complaint and found no basis for further action. Palacios responded in writing by denying all these allegations. Exhibits CP's 55, 56.

63. Paragraph 6)b(of the retaliation complaint stated that during the investigation, after Palacios had notice of the pending harassment complaint, Palacios filed or caused to be filed a complaint with child protective services alleging that the Griffiths had endangered

their daughter, Annie, by causing Annie to come into continued contact with Mercer after the “peeping” incident. It further stated that Palacios knew his complaint was legally baseless and false. It further stated that the state agency investigated and determined the complaint unfounded. Palacios responded in writing by denying all these allegations. Exhibits CP's 55, 56.

64. Paragraph 6)c(of the retaliation complaint stated that in October 1997 and on other occasions after Palacios knew that the Polson Police had concluded they had no evidence to support Palacios' theft complaint, Palacios repeated the accusations that Paddy Griffith stole his personal property, in writing as well as orally. It further stated Palacios knew these statements were false. Palacios responded in writing by denying all these allegations. Exhibits CP's 55, 56.

65. In November 1997, Palacios sent a handwritten note to the State Farm adjuster, in which he again asserted falsely that no one other than Griffiths rented the upper level of the house after Palacios left Montana in the summer of 1995. He also asserted falsely that no one other than Mercer and Griffiths had access to the house. This note was in furtherance of Palacios' insurance claim for theft of personal property. On November 12, 1997, in a telephone conversation with Jerry Keck, Montana Human Rights Bureau, Palacios again stated that items were missing from the house and that he had filed a police report and an insurance claim. On January 23, 1998, Palacios again made allegations of missing items, this time to a State Farm adjuster. Palacios, after he was aware that the police found no evidence to support his complaint, continued to allege that Griffiths stole his property, and continued to make statements that suggested his property was gone and only Griffiths could have taken it. Testimony of Palacios; Exhibits CP's 57, 58, 72.

66. By a letter dated December 8, 1997, Palacios again denied all allegations in the retaliation complaint and refused to respond to any questions from the Human Rights Bureau regarding the retaliation complaint. During the investigation of that complaint, Palacios repeatedly threatened to sue the investigator, the agency and the State of Montana. Testimony of Palacios and Shippen, Exhibits CP's 62, 65)p.7(, 66, 67, 71.

67. Palacios falsely denied reporting to Child Protective Services that Griffiths were not protecting their minor daughter. Testimony of Palacios; Exhibits CP's 4, CP's 40.

68. Palacios refused to answer questions from Human Rights investigator Shippen about whether he filed charges with Child Protective Services against Griffiths. The Human

Rights Bureau then obtained a court order to gain access to the Child Protective Services file. Testimony of Palacios and Shippen; Exhibits CP's 68, 69, 70.

69. On January 27, 1998, the Human Rights Bureau issued to Palacios the final investigative report regarding Case 9802008368/8369, finding reasonable cause to believe Palacios retaliated against Griffiths for filing their sexual harassment complaint. Palacios responded by attacking the agency as biased and suggesting again that Griffiths were responsible for his missing personal property. Uncontested Fact No. 55; Exhibits CP's 73, 74.

70. On March 31, 1998, Palacios wrote to the Griffiths, claiming \$3,718.52 in back rent from the rental of the house. He also cited his "personal belongings" as a "separate issue which will be handled accordingly." When asked about his back rental claims and the claim that Griffiths took his personal belongings from the home during the first day of hearing, he testified that he might still pursue legal claims against the Griffiths for these items. He testified that he had calculated these damages, set forth again in a draft complaint, and that these damages were accurate. Testimony of Palacios, Exhibits CP's 79, 89.

71. On the third day of hearing, testifying for the second time, Palacios admitted that there had been tenants in the upper level of the house after June of 1995, although he denied knowing that until sometime in 1997 or 1998. Palacios testified that as of that date, the third day of hearing, he no longer believed the Griffiths had stolen any of his property, and did not intend to pursue a claim for the missing property. Palacios testified that now, on the third day of hearing, he was sorry he filed the theft report. Palacios testified that now, on the third day of hearing, he did not believe the Griffiths owed him rent and did not intend to pursue a claim for rent. Palacios testified that now, on the third day of hearing, he did not believe in the merits of his complaint to Child Protective Services. Testimony of Palacios.

72. Griffiths suffered shock and anguish at being accused of neglecting and abusing their daughter. Child Protective Services called Patricia Griffith and told her she had been accused of being an unfit mother. Patricia Griffith's reactions during that telephone conversation caused Paddy Griffith to assume that a member of his family had just died. After the conversation, Patricia Griffith collapsed in tears. Paddy Griffith felt the accusation was an attack upon him that was devastating. Testimony of Griffiths.

73. Griffiths received a barrage of letters from Palacios threatening suit, prosecution, pursuit. Patricia Griffith's environmental sensitivities left her particularly susceptible to

stress. Accusations of theft, triggering a police investigation, staggered both Griffiths. Testimony of Griffiths.

74. Palacios' fusillade of accusations had a lasting impact upon Griffiths. Paddy Griffith felt he could not let his wife collect and open the mail, because some new accusation or threat from Palacios could be inside. The on-going conflict became the focal point of their lives, dominating thought, feeling and communication. Testimony of Griffiths.

75. Annie Griffith no longer lives with her parents. Patricia Griffith believes her daughter moved away to escape the looming shadow of Palacios' actions. Patricia Griffith, as a result of the distress resulting from the suits, accusations and investigations has lost the desire to stay in the Polson community and make it her home. Testimony of Griffiths.

76. Because of Palacios' complaints, suits and accusations, the Griffiths have suffered emotional distress. They have been exposed to investigations by Child Protective Services and the Polson Police Department. They have diverted their time and energy to responding to these investigations and accusations. Their relationship with their daughter, Annie, has been strained considerably. While certainly other factors enter the straining of that relationship, the on-going controversies with Palacios have contributed to that strain. The Griffiths now are considering leaving Polson, their home. Patricia Griffith, whose environmental sensitivities make daily life difficult in all circumstances, has been further confined and disturbed by the series of accusations made against the Griffiths. Paddy Griffith has been forced to carry most of the burden of responding to the accusations, while attempting to provide continuing emotional support for his wife. The severe emotional distress both Griffiths have suffered entitles them to recover the sum of \$100,000.00)\$50,000.00 each(.

IV. Opinion

Montana law bans retaliation against a person who has filed a discrimination complaint. *Mahan v. Farmers Union Central Exchange, Inc.*, 235 Mont. 410, 422, 768 P.2d 850, 857-58)1989(; §49-2-301 MCA. The Montana Human Rights Act prohibits retaliation against a person because he or she has participated in any manner in a human rights

investigation or proceeding. §49-2-301, MCA. This prohibition is also expressed in 24.9.603)1(ARM:

It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation.

Unlawful and retaliatory actions include “coercion, intimidation, harassment, the filing of a factually or legally baseless civil action or criminal complaint, or other interference with the person or property of an individual.” Rule 24.9.603)2)a(, ARM.

Griffiths charged that Palacios illegally retaliated against them because Paddy Griffith filed a sex discrimination complaint against Palacios in June 1997. Griffiths’ proof of retaliation is unrelated to the merits of that sex discrimination claim. Griffiths here must prove that Palacios took significant adverse action because they exercised their right to file and pursue that claim.

The basic elements of the claim require proof that)i(Griffiths engaged in protected activity;)ii(Palacios took adverse actions against them; and)iii(there was a causal link between the adverse actions and the protected activity. See, *Laib v. Long Construction Co.*, HRC Case #ReAE80-1252)August 1984(, *quoting Cohen v. Fred Meyer, Inc.*, 686 F.2d 793)9th Cir. 1982(; *accord, Schmasow v. Headstart*, HRC Case #8801003948)June 26, 1992(; see, *Moyo v. Gomez*, 40 F.3d 982, 984)9th Cir. 1994(; see *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 195)7th Cir. 1994(. Griffiths must establish that Palacios would not have taken the adverse actions but for Griffiths’ protected activity. See, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513-1514)9th Cir. 1989(; *Ruggles v. Cal. Poly. State Univ.*, 797 F.2d 782, 785)9th Cir. 1986(.

Griffiths met their burden to prove a causal link between the protected activity and the adverse action with circumstantial evidence. When the subsequent adverse actions closely follow the protected activities², particularly coupled with confirmation that

² *Strother v. Southern California Permanent Medical Group*, 79 F.3rd 859, 869)9th Cir. 1996(; see also *Love v. Re/Max of America*, 738 F.2d 383)10th Cir. 1984(.

respondent knew of the protected activities and then took the adverse actions³, the time sequence can itself establish this causal link. When the person taking the adverse action is the subject of the human rights complaint, that itself can establish this causal link⁴. The Montana Human Rights Commission recognizes these methods of proof by rule. “When a respondent . . . has actual . . . knowledge that proceedings are . . . pending . . . to enforce a provision of the act or code, significant adverse action taken by respondent . . . against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a rebuttable presumption that the adverse action was in retaliation for protected activity.” 24.9.603(3) ARM. Other circumstantial evidence, such as evidence of defendant’s antagonism toward charging party⁵, can also convince the factfinder that the adverse actions were due to the protected activity⁶.

Griffiths adduced substantial circumstantial evidence to support their claim of retaliation. Palacios’ rental claims and litigation, his police report and accusations of theft, and his complaint to Child Protective Services, all begin almost immediately after he learned of the sex discrimination claim against him. His antagonism toward Griffiths fueled his adverse actions. Griffiths have presented an overwhelming case that Palacios engaged in a concerted course of action to harry and intimidate Griffiths, all triggered by the filing of the sex discrimination complaint against Palacios.

Reeves v. Dairy Queen, 953 P.2d 703, 706-708)Mont. 1998(articulates the standard of proof for Palacios’ defense. Griffiths have presented strong circumstantial evidence to support their claim of retaliation. They have also presented substantial direct evidence. Palacios’ outrage at being investigated for Mercer’s alleged acts is beyond cavil. Griffiths presented direct evidence that Palacios believed that if the Griffiths could start a government investigation of him, then he could and would cause government investigations of them. Griffiths proved by indisputable evidence that protected activity played a significant or motivating role in Palacios’ adverse actions, and Palacios must prove by a preponderance of the evidence that a retaliatory motive played no role in those actions.

³ *Wall v. A.T.&T. Technologies, Inc.*, 754 F.Supp. 1084)D.C. N.C. 1990(.

⁴ *Miller v. Fairchild Industries*, 797 F.2d 727)9th Cir. 1986(; *see also, Dey v. Colt Const. & Develop. Co.*, 28 F.3rd 1446, 1459)7th Cir. 1994(

⁵ *Woodson v. Scott Paper Company*, 109 F.3d 913, 920)3rd Cir. 1997(.

⁶ *Cohen v. Fred Meyer Inc.*, 686 F.2d 793)9th Cir. 1982(; *see also, Morgan v. City of Jasper*, 959 F.2d 1542, 1547)6th Cir. 1992(.

Even responding solely to the circumstantial evidence, Palacios must produce admissible evidence of legitimate, nonretaliatory reasons for his actions.

Palacios filed Complaint 50-268-97 in the Lake County Justice Court on July 25, 1997, claiming substantially more money than Griffiths owed him, within a month of learning the sex discrimination claim was pending against him. Palacios made the complaint of child endangerment against Griffiths on August 11, 1997, adverse action he clearly would not have considered, much less taken, except for the sex discrimination complaint against him. Palacios filed a theft complaint against Griffiths with the Polson Police on August 21, 1997, and made false statements to further that complaint. Palacios made false statements about the Griffiths, using available processes to attack Griffiths with accusations of fraud, vandalism, theft, unpaid debt and child endangerment, all after learning of the sex discrimination complaint.

Retaliation, once adverse actions alleged to be retaliatory are proved, is a question of motive. "The jury was properly instructed to find for the Department if there was sufficient and independent grounds for Strong's dismissal. If the jury believed by a preponderance of the evidence that the filing of the complaint was the motivating factor for the firing, it was instructed to find for Strong." *Strong v. State of Montana*, 183 Mont. 410, 415, 600 P.2d 191, 194 (1979) (approving the jury instructions and affirming the jury verdict against the employer on a retaliation claim). The evidence adduced, together with the demeanor of the witnesses, finally coupled with Palacios' own confession, on the final day of trial, that he now could see the baselessness of his claims, establishes beyond any doubt that Palacios' motive was retaliatory.

Once a claimant proves violation of civil rights statutes, the claimant can recover for emotional harm that occurred as a result of the respondent's unlawful conduct.⁷ The claimant's testimony alone can establish compensable emotional harm from a civil rights violation, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The trier of fact can infer that the emotional harm did result from the illegal discrimination.⁸

⁷ *Carey v. Phipps*, 435 U.S. 247, 264, at n. 20 (1978); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7th Cir. 1974); *Brown v. Trustees of Boston Univ.*, 674 F.Supp. 393 (D.C. Mass. 1987); *Portland v. Bureau of Labor and Industry*, 61 Or.App. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475 (1984); *Hy-Vee Food Stores v. Iowa Civ. Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990).

⁸ *Carter*, *supra*; *Seaton*, *supra*; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172 (1985);

The power and duty to award money for emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596)1993(. Griffiths' testimony proved their distress. They are entitled to recover for it. The award for emotional distress in this case is substantially larger than the awards in cases involving less prolonged and malicious conduct.⁹ However, as counsel for Griffiths pointed out, the damages in this case involve emotional distress and torment from Palacios' yearlong campaign of retaliation, that included attacks upon Griffiths' reputations and standing in the community. Palacios haled the Griffiths into court on claims of money owed that far exceeded what Palacios himself could compute was the Griffiths' debt. Palacios set in motion a child abuse investigation based solely upon second-hand telephone information, largely from a man Palacios no longer trusted. Palacios made accusations of theft to both the police and his insurance company, repeating the accusations to others. Palacios continued to assert theft, even of items he knew were not missing from the house, without informing either the police or his insurer of the new information he obtained. Palacios never informed the authorities that he had falsely claimed no one other than Griffiths rented the upper level of the house after mid-1995. Only on the third day of hearing did Palacios acknowledge how baseless his multiple claims had been.

An award of \$50,000.00 to each of the Griffiths is consistent with other awards for emotional distress resulting from illegal discrimination. The Eleventh Circuit has affirmed an award of \$35,000.00 each to an unmarried black couple denied housing, based on claimant's testimony of devastation, humiliation, and intense anger, stress on the couple's relationship and their inability to find satisfactory housing. *Banai v. HUD*, 102 F.3d 1203)11th Cir. 1997(. The same Circuit Court affirmed an award of \$100,000 to the plaintiff in a racial discrimination case based on emotional stress, loss of sleep, marital strain and humiliation that occurred over several years. *Stallworth v. Shuler*, 777 F.2d 1431, 1435)11th Cir. 1995(. A federal district court awarded \$50,000.00 for emotional distress resulting

Fred Meyer v. Bureau of Labor & Industry, 39 Or.Ap. 253, 261-262, *rev. denied*, 287 Ore. 129)1979(; *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314)1970(.

⁹ *Arrotta v. V. K. Putman, Inc.*, HRC Case Nos. 9101004544 and 9109004736)9/29/93(; *Stensvad v. Towe*, 232 Mont. 378, 759 P.2d 138)1988(; *Brookshire v. Phillips*, *op. cit.*; *Webb v. City of Chester*, 813 F.2d 824)7th Cir. 1987(; *Brown v. Trustees of Boston University*, *op. cit.*; *Paxton v. Beard*, Case No. GC89-327-S-0, 58 FEP 298)N.D. Miss. 1992(; *Shelby v. Flipper's Billiards*, HRC Case No. RPa-800185)January 1983(; *Capes v. City of Kalispell*, HRC Case No. SGs83-2121)January 1985(.

from a discriminatory layoff, based solely on the claimant's testimony about humiliation and anguish. *Hughes v. Reeverts*, 967 F.Supp. 431)D.C. Col. 1996(. Another federal district court awarded \$100,000.00 in a retaliation case, based on testimony of humiliation and embarrassment, loss of time with children and strain on a marital relationship. *Dickerson v. HBO & Co., et. al.*, 1995 U.S. Dist. LEXIS 19213)D.D.C.(.

V. Conclusions of Law

1. The department has jurisdiction. §§49-2-501, 49-2-505, 49-2-509)7(MCA.
2. Respondent Edison Palacios engaged in an unlawful discriminatory practice by retaliating against Paddy and Patricia Griffith for Griffiths' filing and pursuing a sex discrimination claim against Palacios. §49-2-301)a(MCA.
3. Pursuant to §49-2-506)1)b(MCA, Griffiths are each entitled to the sum of \$50,000.00 for emotional distress resulting from Palacios' course of retaliatory conduct.
4. Affirmative and injunctive relief is necessary in this case. §49-2-506)1)a(MCA. Palacios must refrain from any further unlawful discriminatory practices and must refrain from any contact with Griffiths except through the attorneys in this case.

VI. Order

1. Judgment is found in favor of charging parties Paddy and Patricia Griffith, and against respondent, Edison Palacios on the complaint of illegal retaliation.
2. Edison Palacios is ordered to pay the sum of \$50,000.00 to Paddy Griffith and the sum of \$50,000.00 to Patricia Griffith, for a total of \$100,000.00.
3. Edison Palacios is enjoined from engaging in any further unlawful discriminatory practices. Edison Palacios is further enjoined from any contact with Paddy and Patricia Griffith or any member of their family, direct or indirect, through any person, entity, organization or representative, excepting only contact through his counsel in this case with Griffiths' counsel in this case regarding this case.

Dated: March 25, 1999.

Terry Spear, Hearing Examiner
Hearings Bureau, Montana Department of Labor and Industry