BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

James and Ella Childs,	)	**Human Rights Act Case No. 9901008859**
Charging Parties,	)	
vs.	)	*Final Agency Decision*
Evergreen Butte Health and	)	
Rehabilitation Center	)	
d.b.a. **Evergreen at Butte, LLC**,	)	
Respondent.	)	

I. Procedure and Preliminary Matters

Charging parties filed a complaint with the Department of Labor and Industry on March 24, 1999. They alleged the respondent discriminated against them on the basis of race (African American) and color[1] when it subjected them to a racially hostile and offensive working environment in October 1998. On August 19, 1999, the department gave notice the complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

On February 9, 2000, the parties jointly stipulated to extend department jurisdiction beyond 12 months after the complaint filing date. On February 24, 2000, the parties agreed to submit the case on stipulated facts. On March 3, 2000, the parties filed the stipulated facts. On April 13, 2000, the parties completed their briefing, and submitted the case to the department.

II. Issues

The legal issues in this case are whether the respondent required James Childs to submit to racial harassment by residents of the Evergreen nursing home and whether the respondent required Ella Childs to submit to work assignments based solely on her race.

III.Findings of Fact

The parties stipulated to the following facts:

[1] Throughout the decision, the hearing examiner will refer to "race" to encompass the dual claims of discrimination due to race or color.

1. The charging parties are James Childs and Ella Childs, husband and wife, who currently reside in Kansas. They are both African Americans. They are nonwhites (blacks). Each is licensed, and was licensed in 1998, as a certified nursing aide (CNA) in the state of Montana.

2. The respondent (Evergreen) is the Evergreen at Butte, LCC, which does business as the Evergreen Butte Health and Rehabilitation Center, a health care facility providing skilled nursing care in Butte, Montana.

3. James and Ella Childs resided in Montana throughout the 1990s until February 1999. During and before 1998, they were employees of Priority Staffing, Inc., a temporary health-staffing agency whose principal offices are located in Billings, Montana. As employees of Priority Staffing, James and Ella Childs worked on assignments as CNAs at various health facilities and nursing homes located in a multistate region that includes Montana.

4. Pursuant to a contract between Priority Staffing and Evergreen, Priority Staffing assigned James and Ella Childs to work as CNAs at the Evergreen facility in Butte for the period of October 18, 1998, through October 28, 1998. Priority Staffing assigned James and Ella Childs two 8-hour shifts per day at Evergreen, with wages of $10.25 per hour for the first 8-hour shift each day and time-and-one-half ($15.375 per hour) for the second 8-hour shift each day. Priority Staffing reimbursed James and Ella Childs for travel costs to and from the assigned facilities and paid their lodging in advance. They received no health, retirement, vacation or other benefits. Priority Staffing did not provide James and Ella Childs with any employee handbook or with any specific policy or procedure in the event they were subject to discrimination or harassment while on an assignment.

5. On work assignments from Priority Staffing, James and Ella Childs were under the supervision of the operators of the various health care facilities at which they worked as CNAs. The operators of the facilities scheduled James and Ella Childs' work, made their work assignments while at the facility, and otherwise controlled and directed their work. This was the arrangement at Evergreen.

6. James and Ella Childs arrived at Evergreen as scheduled to begin their assignment on October 18, 1998. Pursuant to customary practice, Evergreen assigned James and Ella Childs to specific residential areas (Halls). Evergreen assigned James and Ella Childs to separate Halls when working there. As CNAs assigned to specific units at Evergreen, James and Ella Childs' duties and responsibilities in caring for residents at the facility included: providing assistance to residents in waking, getting out of bed, grooming,

hygiene, dressing, transfers from bed to wheelchair, and general assistance in making them comfortable. At Evergreen, James Childs also worked as a "floater," working as needed in any unit as assigned. Evergreen had an employee handbook that included nondiscrimination and anti-harassment policies and a procedure in the event an employee was subject to unlawful harassment. Exhibit A is a copy of the policy and procedure dated July 1997. Exhibit B is a copy of the policy and procedure dated January 1999. Evergreen did not provide James and Ella Childs with copies of its employee handbook or with copies of any specific policy or procedure to follow in the event they were subject to discrimination or harassment while at Evergreen.

7. James and Ella Childs, along with other CNAs working in the same area, were under the supervision of a charge nurse who was responsible for operation of the unit during the shift. The charge nurse was under the supervision of the Director of Nursing who was responsible for the management of the nursing services throughout the Evergreen facility. The Director of Nursing reported to and was under the Executive Director who was responsible for general operations at the Evergreen facility. During October 1998, Zita Holcomb was the Director of Nursing and Paul Sokolowski was the Executive Director at Evergreen.

8. While working at Evergreen on October 18, 19, 20, and 21, 1998, James Childs performed all his duties and responsibilities as a CNA in an acceptable manner and was considered a good worker. While James Childs was working at Evergreen on those dates, two elderly residents of Hall 400 at the facility directed racially derogatory remarks and statements at him, including statements referring to him as a "nigger." The two residents were a man named Robbins (now deceased) and a woman named Leonard. On one occasion when Robbins subjected him to the racial remarks and statements, James Childs reported Robbins' conduct to Sandy Secomb, the charge nurse supervising his work. Secomb did not recall whether she took any action to remove James Childs from the situation. James Childs was not aware of any action taken by Secomb to address Robbins on the subject or to correct his actions. James Childs did not file a formal complaint or grievance with Secomb or any other supervisor, but did request that she go with him into Robbins' room to observe his conduct toward James Childs. On prior occasions, Robbins and Leonard had made offensive and rude comments to Caucasian employees of Evergreen. On October 20, 1998, Evergreen reprimanded Robbins and placed him in his room for inappropriate comments, including remarks made to James Childs.

9. While working at Evergreen on October 18, 19, 20, and 21, 1998, Ella Childs performed all her duties and responsibilities as a CNA in an

acceptable manner and Evergreen considered her a good worker. On or about October 21, 1998, Ella Childs was working the afternoon shift (2:00 p.m. to 10:30 p.m.) on Hall 200. The charge nurse was Trisha Davies, also the RN Building Supervisor at Evergreen. Ella Childs' original assignment was to work with the residents on one side of the floor. Davies revised Ella Childs' work assignment, telling Ella Childs that she should avoid one room on her side of the floor and switch with her fellow CNA, Brenda Weber, who was working the other side of the floor. Davies told Ella Childs that the switch was necessary because a resident named Montgomery who lived in that room did not want a black woman assisting as a CNA assisting him. Ella Childs asked Davies not to exclude her from working with the resident on that basis and asked that they approach the resident together. Davies decided to stay with the decision switching CNA responsibility for the room. Ella Childs' duties did not change as a result of the revised room assignment nor her pay change in any manner. Another CNA named Weber recalls Ella Childs being told to "stay completely away from residents" in two rooms. Ella Childs recalls Davies telling her to try to stay out of sight of Montgomery.

10. Before the incident involving the change of assignment described in the preceding paragraph, Ella Childs worked in another unit at Evergreen where one of the residents objected to Ella Childs because of her race. Staff at Evergreen took action to explain to the resident that Evergreen would not consider objections to CNA staff by the resident based on race, and that Evergreen considered such complaints inappropriate. The resident, named Keenan, offered an apology to Ella Childs for the objections. Ella Childs, who had not known of the objection until afterwards, accepted the apology and worked with the resident without further incident.

11. Each of the residents referenced in Paragraphs 8, 9, and 10 above, suffered from dementia or other medical conditions affecting their capacity or competency.

12. None of the staff at Evergreen subjected either James or Ella Childs to racially derogatory remarks, statements or treatment during the time they worked there.

13. As a result of the racially derogatory remarks and statements made by residents toward him, James Childs experienced distress and humiliation and anxiety about working at Evergreen. As a result of directions not to work in a specific room because of the objections of a resident to her race, Ella Childs experienced distress and anxiety about working at Evergreen.

14. On October 22, 1998, James and Ella Childs went to work at Evergreen at the scheduled time. Early in the shift, Robbins against subjected

James Childs to racially derogatory statements. James Childs went to the administrative section of the facility to discuss the matter with Ella Childs and talk about how it was affecting him. Sokolowski observed James and Ella Childs and that they were visibly agitated. He asked them into his office. James and Ella Childs told Sokolowski about the treatment that they were experiencing, including the racial remarks made by residents and the instruction to Ella Childs to stay out of a resident's room. Sokolowski was surprised and concerned. He stated that there was nothing he could do about the residents because they were "out of it." He did not inquire further about Ella Child's revised assignment. Sokolowski asked Holcomb to join them in the meeting. He asked James and Ella Childs for input on what to do. James Childs recommended that the staff receive training on how to handle and prevent such incidents and such conduct from the residents. Sokolowski agreed that James and Ella Childs should go home and were to call him in the morning. He did not communicate to James and Ella Childs what he intended to do to resolve the problem or what action he would take to remove them from the likelihood of further incidents. Sokolowski planned to and subsequently did investigate the situation and speak with the staff.

15. James and Ella Childs left the meeting and the facility, went to their motel and packed, and returned to Billings that day. They did not have any further contact with Evergreen directly.

16. At the meeting between James and Ella Childs, Sokolowski, and Holcomb, Sokolowski also asked James and Ella Childs if there were any incidents with any employees or coworkers. James Childs described an incident in which he was explaining to one of the housekeepers the treatment that he and his wife were receiving from residents as a result of race, when a kitchen worker came up behind him. James Childs turned and saw that the kitchen worker, Dave Newbold, was smiling. James Childs had the impression that Newbold was smiling to indicate his agreement with the type of treatment James and Ella Childs had received. After James and Ella Childs left Evergreen, Sokolowski reviewed the incident with Newbold who denied that he had intended to act in any way supporting the treatment of James Childs or in any way to give James Childs offense. Newbold agreed to and did call James Childs at his motel room and apologize for the mistaken impression he may have given him. James Childs accepted the apology.

17. After the meeting and after James and Ella Childs left, Sokolowski talked to Robbins and told him that he had to be polite to staff members. Later the same day, he met with management staff at Evergreen and a number of employees. Sokolowski recalled telling them that residents had not treated James and Ella Childs well and that the staff should make an effort with the

residents to temper the situation. He directed the RNs to report all incidents to himself and Holcomb. RN Rosa Gerber attended the October 22, 1998 staff meeting, but could not recall the discussions at the meeting. Holcomb recalled that the meeting addressed coworker harassment, but did not recall any discussion of harassment of staff by residents.

18. In an effort to prevent future similar racial incidents at Evergreen, Sokolowski arranged for a staff training session on the facility's policy against discrimination or harassment and on procedures for handling such incidents. The session took place on October 28, 1998.

19. Priority Staffing paid James and Ella Childs in full for the hours they actually worked at Evergreen. As a result of the early termination of their assignment at Evergreen, James and Ella Childs lost a total of five days work. They obtained and proceeded with a new assignment from Priority Staffing at a different facility shortly after October 28, 1998.

20. If Evergreen violated the rights of James Childs under the Human Rights Act, the sum of $4,500 will rectify that harm, pecuniary and otherwise. §49-2-506(1)(b), MCA.

21. If Evergreen violated the rights of Ella Childs under the Human Rights Act, the sum of $4,500 will rectify the harm, pecuniary and otherwise. §49-2-506(1)(b), MCA.

IV. Opinion

A. Introduction

Montana law prohibits discrimination by an employer against a person in the terms of employment because of race. §49-2-303(a)(1) MCA. Montana has not addressed whether an employee of a temporary service has standing to make a discrimination claim against the company that contracts with the employer for temporary workers. In the absence of state authority, Montana will follow federal discrimination law if the same rationale applies under the Montana Human Rights Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987).

B. The Employment Relationship and Standing

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). Like the Montana statute, this prohibition does not specify that the employer committing the unlawful employment practice must be the employer of the aggrieved person. §49-2-303(a)(1) MCA.

James and Ella Childs worked in a temporary placement at Evergreen, but were actually employees of Priority Staffing. When the actual employer is not primarily responsible for the discriminatory conduct, and another employer controls both the work environment and the offending persons, the fact that the aggrieved person is not an employee of the other employer does not defeat a Title VII discrimination claim.[2] *Pardazi v. Cullman Medical Ctr.*, 838 F.2d 1155, 1156 (11th Cir.1988); *Doe ex rel. Doe v. Saint Joseph's Hosp.*, 788 F.2d 411, 422-25 (7th Cir.1986); *Gomez v. Alexian Brothers Hosp.*, 698 F.2d 1019, 1021 (9th Cir.1983); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1340-43 (D.D.C.1973); *King v. Chrysler Corp.*, 812 F. Supp. 151, 153 (S.D.Mo. 1993).

Some federal courts reach the same conclusion by construing the term "employer" in a functional sense, to encompass companies that are not employers in conventional terms, but that nevertheless control some aspect of the plaintiff's terms, conditions or privileges of employment. In effect, the plaintiff can be the employee of more than one "employer." These courts analyze all of the circumstances surrounding the work relationship to decide whether the defendant was an "employer," with the greatest emphasis on the extent of the defendant's right to control the manner and means of the aggrieved person's performance." ***See***, *Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500, 507-10 (E.D.Va. 1992). Under this Title VII analysis, an employee of a temporary service can bring a discrimination claim against the putative employer, the business that bought her services from her employer. *Amarnare v. Merrill Lynch*, 611 F.Supp. 344, 347-48 (S.D.N.Y., 1984), ***aff. without op.***, 770 F.2d 157 (2d Cir. 1985).

Under the Montana Human Rights Act, an "employer" employs of one or more persons, without any reference to employing the aggrieved party:

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[2] When the actual employer is responsible for the discriminatory conduct, some federal courts read Title VII to require a relationship between the aggrieved person and another defendant substantially like that of employer and employee. *Rivas v. Federacion de Asociacions Pecuarias*, 929 F.2d 814 (1st Cir. 1991); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986); *Williams v. Evangelical Retirement Homes*, 594 F.2d 701, 704 (8th Cir. 1979).

> "Employer" means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis.
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> §49-2-101(11) MCA.

Montana law does not require the "putative employer" rationale.[3] So long as the defendant is an employer (i.e., has employees) and controls both the work environment and the offending persons, the defendant is an "employer" under the statute. Evergreen clearly was such an employer.

Finally, Montana law prohibits an owner or employee of a public accommodation from denying anyone access to its services, facilities, advantages, or privileges because of race. §49-2-304(1)(a) MCA. In operating a health care facility (including a nursing home), all phases of the operation must be without discrimination because of race. §50-5-105 MCA. Utilization of a temporary service to provide workers was a phase of Evergreen's operation.

For all of these reasons, the Human Rights Act gives James and Ella Childs standing to make a discrimination claim against Evergreen, even though Evergreen was not their actual employer. The Montana Human Rights Act, read in the context of §50-5-105 MCA, is consistent with the federal law at issue in the cited federal cases. Under the Montana Act, a temporary worker under the control of a customer of the temporary service, and working within an environment also controlled by the customer, can sue the customer for discrimination by offending individuals also under the control of the customer.

The public policy against discrimination in employment is important. As the federal district court noted in *King*, ***supra***, if the company controlling the work environment and the offending persons was not a proper defendant because it did not employ the aggrieved person who worked in that environment and with those offending persons, that company could allow or encourage a hostile work environment to exist for someone else's employees, although it could not do so for its own employees. ***See*** *Sibley*, ***supra*** at 1341. A health care facility allowing or encouraging a hostile work environment based upon race is not operating the facility without discrimination because of race. James and Ella Childs have standing to proceed on their complaints.

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[3] If it did, the only additional factor added to whether the respondent had control of the work environment and offending persons would be whether Evergreen controlled the manner and means of James and Ella Childs' performance. Evergreen clearly did have such control.

Evergreen argued James and Ella Childs could not pursue a claim based upon the conduct of residents' ("third parties") unless Evergreen benefited from the conduct. *Rosenbloom v. Senior Resources, Inc.*, 974 F.Supp. 738, 744 (D.Minn. 1997). The same year the District Court decided *Rosenbloom*, the Circuit Court decided that the operator of a program for developmentally disabled individuals could be liable for sexual harassment under Title VII and the Minnesota Human Rights Act for failure to respond appropriately to conduct of mentally incapacitated residents toward program employees. *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997). The argument that aggrieved parties must prove the third parties' harassment was for the benefit of the respondent is unpersuasive. If persons on the premises for the benefit of the respondent (residents in a rest home, a co-worker with a different employer,[4] customers in a pizza parlor[5]) harass the aggrieved parties, they have standing to seek redress from the respondent. The pivotal question then becomes a question of reasonable care. Once the respondent had actual or imputed knowledge of the harassment, did the respondent act timely in ways reasonably calculated to protect against the harassment?

C. Liability

James and Ella Childs had to prove that they were subject to unwelcome racial harassment that affected a term of their employment and that Evergreen knew or should have known about the harassment but failed to take reasonable action to address it. ***Cf.***, *Moore v. Kuka Welding Systems*, 171 F.3d 1073, 1078 (6th Cir. 1999).[6] Both James and Ella Childs are black. James Childs endured repeated racist epithets from a resident. Ella Childs' supervisor changed her work area to placate the racist reaction of another resident. Clearly, James and Ella Childs were subjected to harassment based upon race.

An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile working environment. *Brookshire v. Phillips*, HRC#8901003707 (April 1, 1991), ***affirmed sub. nom.*** *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). The same rationale applies to harassment due to race.[7]

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[4] *Costilla v. State*, 571 N.W.2d 587 (Minn. Ct. App. 1997), ***rev. den.*** (Minn. Jan. 28, 1998)

[5] *Lockard v. Pizza Hut, Inc.*, 162 F.2d 1062 (10th Cir. 1998).

[6] *Moore* arose under the Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. § 2000e *et seq.*, and, as already discussed, the federal prohibitions against discrimination based upon race are identical in scope and purpose to those under the Montana Human Rights Act.

[7] For a fairly exhaustive discussion of the evolution of a single standard for workplace harassment due to membership in different protected classes (sex, race, etc.), ***see, e.g.***,

If bias against any protected class generates harassment sufficient to alter of the terms of employment, it is illegal.

For James Childs' claims, racial harassment affected a term of his employment if the conduct created an unreasonably abusive or offensive work-related environment or adversely affected the employee's ability to do his or her job. *Moore*, ***supra***. The question is whether James Childs, the aggrieved party, reasonably found the comments of the residents intolerable. In essence, the question is the degree to which racial epithets can be excused as casual speech. In undertaking that inquiry, the law does not consider the motivation or intent of the speakers, in this case the residents.[8] The operator of a program for developmentally disabled individuals could be liable for sexual harassment under Title VII and the Minnesota Human Rights Act, due to failure to respond appropriately to conduct of mentally incapacitated resident toward program employees. The incapacity of the speakers was not a relevant part of the inquiry. *Crist*, ***op. cit.*** Similarly, under Montana law, the inquiry into racial harassment deals with whether the reaction of Childs to the conduct was reasonable, not what the offending persons intended. *Snell v. MDU*, 198 Mont. 56, 63, 643 P.2d 841, 845 (1982). Given the existing Montana case law, a program operator is liable for the known discriminatory conduct of incompetent residents.

The Montana Supreme Court found no liability in *Snell* on the merits, but this case is factually dissimilar. In *Snell*, an overly sensitive employee took personally generalized rough talk, cursing and ethnic jokes "characteristic of construction jobs." ***See***, *Snell* at 63-65, 643 P.2d at 844-45. *Snell* involved a construction site, rather than a nursing home. The participants in *Snell* were roughnecks, not nursing home residents. The behavior the facts established in *Snell* was that of manual laborers engaging in casual profanity and crudity, including occasional general epithets of race or national origin, without any particular animus toward Snell. The behavior here was specific, explicitly

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"How Free Is Harassment Free? Employer Liability For Third-Party Racial Harassment," *2 U. Pa. J. Lab. & Employment L.* 179 (Spring 1999).

[8] The incompetence of the residents involved would not be a proper defense even if it were relevant to whether racial harassment occurred. Insane persons can be liable for intentional torts. ***E.g.***, *Polmatier v. Russ*, 206 Conn. 229, 234-36, 537 A.2d 468 (1988), (adopting majority rule that insane persons may be held liable for their intentional torts: such liability is consistent with "the common law principle that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who caused the loss rather than upon the other who had no agency in producing it and could not by any means have avoided it."). Montana has not addressed the issue, but should follow the majority rule.

racial, directed toward James Childs as a person, and extremely hateful.[9] It is *per se* unreasonable to expect a black worker in a nursing home to consider that a white resident who repeatedly called him "nigger," was engaging in casual conversation in the workplace.[10] If Evergreen allowed this harassment by failing to take reasonable action to stop it, then Evergreen effectively made endurance of racial epithets a term of James Childs' employment.

James Childs had the burden to prove that Evergreen allowed the hostile conditions. To hold Evergreen liable for the conduct of the residents, Childs must establish that Evergreen knew or should have known of the alleged conduct and failed to take prompt remedial action. *Moore*, ***op. cit.*** at 78-79. Evergreen's knowledge of the incidents involving Robbins is clear. Before Robbins was reprimanded on October 20, 1998, James Childs' supervisor had notice from Childs of the resident's conduct. Evergreen's knowledge of the incidents involving Leonard arose, if at all, from the meeting with Holcomb and Sokolowski on October 22, 1998, after which James and Ella Childs did not return to the facility.[11] Only after that meeting could Evergreen have any duty to act to restrain the racial harassment originating from Leonard. Thus, the scrutiny of Evergreen's conduct starts from different points for the two offending residents.

In taking reasonable action to address racial harassment by incompetent residents, Evergreen faced some limitations. Evergreen could not transfer or discharge the residents for their racial epithets. 42 U.S.C. §§13951-3(c), 1396r(c)(2) and 48 C.F.R. 483.12(a)(2). Evergreen's ability to punish

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[9] The chasm between the facts of *Snell* and the stipulated facts of this case are clear from the *Snell* opinion. "Finally, petitioner exhorts this Court to 'breathe life into the words "equal opportunity"' by requiring a lower threshold for a finding of racial harassment than that established by the federal courts in Title VII cases. We would remind petitioner that this Court has a responsibility to the employer as well as to the employee. Part of that responsibility consists in requiring adequate credible evidence of discrimination before subjecting an employer to the penalties associated with a finding of discrimination. This is particularly important where, as here, there is only one person alleging harassment or discrimination. It would be irresponsible for this Court to reverse the District Court, in the teeth of the hearing examiner's finding that, as to a crucial question of fact, petitioner's testimony was not credible, and despite the District Court's determination that the weight of evidence supported MDU's innocence of constructive discharge. That we decline to do." *Snell* at 69, 643 P.2d at 848. Unlike *Snell*, where disputed facts and evidentiary findings were crucial to the outcome, the parties in the present case have stipulated to the facts.

[10] For cases from other jurisdictions addressing the issue of such racial epithets, see Charging Parties' Brief in Support of Motion for Summary Judgment, pp. 11-12.

[11] The only finding related to this notice issue, No. 14, only says, "James and Ella Childs advised Sokolowski about the treatment they were experiencing, including the racial remarks made by residents . . ." without specifying which residents' remarks James and Ella Childs recounted to Sokolowski.

incompetent residents for use of racial epithets likewise was limited. Punishing an incompetent for inappropriate behavior is necessarily a suspect proposition. Thus, Evergreen could only try to train the residents not to harass. Failing in that effort, Evergreen reasonably could attempt to shield James Childs from the harassment.

Evergreen reprimanded Robbins and confined him to his room on the third day James and Ella Childs worked at Evergreen. This was a reasonable first step to remedy the racial harassment, without regard to whether James Childs knew of the action. It was the only step Evergreen had time to take regarding the residents before James Childs left the facility permanently.

Evergreen had no opportunity to act to shield James Childs from further harassment by residents, since James Childs did not return to the facility. After the meeting with James and Ella Childs, Sokolowski did counsel Robbins to be courteous to the staff. In response to a suggestion by James Childs, Evergreen also scheduled and carried out a training session for staff regarding racial harassment. Whether those steps would have been effective is unknown. What other action, if any, Evergreen could have and should have taken had James and Ella Childs returned is unknown. Once James and Ella Childs left their assignments at Evergreen, it owed them no further action to prevent harassment.

On his last day at Evergreen, in the course of the meeting with Sokolowski and Holcomb, James Childs also gave notice that he believed a member of the Evergreen staff indicated (through a smile) support for the racial harassment. Once on notice of his belief, Evergreen obtained an apology to Childs from that employee, with a disclaimer of discriminatory intent. This also was a reasonable first step to remedy the racial harassment.

Evergreen responded promptly and properly to James Childs' complaints.[12] Evergreen did not cause, encourage, condone, ratify or allow racial harassment of James Childs, by residents or employees.

Ella Childs also had the burden to prove discrimination. Evergreen (acting through one of its charge nurses) transferred her from one work assignment to another for the explicit purpose of placating a resident who did not want help from a black woman. Her supervisor refused Childs' request to speak with the resident and told Childs to avoid being seen by the resident.

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[12] The parties presented no agreed facts regarding any prior notice to Evergreen of racial discrimination at the facility before James and Ella Childs worked there. On this record, Evergreen had no prior information suggesting any risk of such discrimination until the complaints of James and Ella Childs.

Job assignments are terms of employment. Rule 24.9.604(2)(d) ARM. Change of Childs' assignment based on her race was an alteration of the terms of her employment. Directions to Child to stay out of a resident's sight because of her race constituted prima facie evidence of a racially hostile work environment.

This conduct is attributable to Evergreen. This is not an instance of third-party conduct, but rather conduct by a supervisor acting on behalf of Evergreen. Even after Evergreen's higher management had notice of the supervisor's conduct (on the last day Ella Childs worked at the facility), the only action taken was the training session for employees. Changing the assignment of the aggrieved party to keep her away from the offending residents is an inappropriate first step in remedying the harassment. The stipulated facts do not address whether the mental state of the involved residents was so severely impaired as to make any disciplinary or training steps an exercise in futility.[13] Without such evidence, Evergreen cannot justify its reassignment of Ella Childs. Evergreen could have engaged in counseling and discipline of these residents, as it did with Robbins, before subjecting Childs to the hostile act of reassigning her to keep her away from residents who took offense at her race.

Evergreen argued that it had taken no adverse employment action, and therefore could defend against James and Ella Childs' claims based upon holdings in *Burlington Industries* and *Faragher*. Both cases held that an employer has no vicarious liability to an employee for an actionably hostile environment created by that employee's immediate supervisor if the employer exercises reasonable care to protect employees from such a hostile environment. The employer can only interpose this defense if it took no tangible employment action against the complaining employee.[14]

The defense comprises two necessary elements: (a) proof that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) proof that the complaining employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer to avoid harm. In the present case, the defense is redundant for James Childs' claim. For Ella Childs' claim, the defense is available only if the reassignment to which she objected was not tangible action.

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[13] Confinement of a resident to his room, as Evergreen did with Robbins, could be either disciplinary action or an attempt at operant conditioning or aversive therapy.

[14] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Ordinarily, a reassignment without any materially adverse impact on the terms of employment is not a tangible adverse action. Nevertheless, even the authority cited by Evergreen recognizes that simply maintaining the same wages and benefits will not automatically insulate a reassignment from being an adverse action. *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 (7th Cir. 1994). In addition to the material aspects of a reassignment--wages, benefits, responsibilities, job title, and so forth--there can be "other indices that might be unique to a particular situation" that could render a reassignment tangibly adverse despite the absence of change in the material aspects of that transfer. *Kocsis v, Multi-Care Management, Inc.*, 97 F.3d 876, 885-86 (6th Cir. 1996). "Materially significant" does not only refer to the material elements of the job such as salary, benefits, responsibilities and job title. Any "materially significant" adverse impact of the reassignment removes the *Faragher* defense. *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). Personal humiliation from the reassignment, even in public, is not enough to constitute a tangible adverse employment action, without other evidence. *Crady v. Liberty National Bank and Trust Co.*, 993 F.2d 132, 135 (7th Cir.1993).

A reassignment for the express purpose of placating racially biased residents is a tangible adverse employment action. Personal humiliation stemming from a transfer that others see as a demotion would not be enough to constitute an adverse action, but reassignment that tolerates the bigotry of residents is not merely humiliating. It also stands as an endorsement by the employer of the racial bias of the residents. Since exercise of such bias in the workplace is illegal, a reassignment to mollify residents who exercise that bias is an adverse action. Therefore, with regard to Ella Childs, Evergreen cannot interpose the *Faragher* defense. If it could, it still failed to take any action once it learned of the supervisor's conduct. Ella Childs proved Evergreen's liability for her supervisor's discrimination based on race.

D. Damages and Remedies

The remedies for discrimination appear in §49-2-506 MCA. When the department holds a hearing and finds the discrimination alleged in the complaint, the department shall order the respondent to refrain from engaging in the discriminatory conduct. In so ordering, the department may prescribe conditions on the respondent's future conduct and require any reasonable measure to correct the discriminatory practice.

The department must enjoin Evergreen from further discrimination and mandate distribution of its anti-discrimination policies to temporary workers as well as regular employees. In addition, the department considers it reasonable for Evergreen to adopt a policy that defines what steps it will take, when faced

with resident harassment against staff. Reasonable steps would include counseling the resident, then using confinement to his or her room, then continuing to add consequences for repeated harassment. The policy should also define the criteria by which Evergreen will measure whether the resident's incompetence has progressed to the point at which counseling and discipline are useless, and shielding the staff member is the only available option.

Under §49-2-506 MCA, the department also may require any reasonable measure to rectify any harm, pecuniary or otherwise, to the person discriminated against. The parties stipulated to damages. Ella Childs is entitled to recover $4,500.00. Because of the nature of the damages, which are not for lost wages, no prejudgment interest is proper.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. James Childs did not prove that Evergreen Butte Health and Rehabilitation Center d.b.a. Evergreen at Butte, LLC., unlawfully discriminated in employment against him because of his race during his work at Evergreen as a temporary worker from October 18 through October 22, 1998. §§49-2-303(1)(a) and 49-2-304(1) MCA.

3. Evergreen Butte Health and Rehabilitation Center d.b.a. Evergreen at Butte, LLC., unlawfully discriminated in employment against Ella Childs because of her race when it subjected her to a hostile and offensive work environment during her work at Evergreen as a temporary worker from October 18 through October 22, 1998. §§49-2-303(1)(a) and 49-2-304(1) MCA.

4. The corporation must pay to Ella Childs the sum of $4,500.00 for stipulated liquidated damages.

5. Pursuant to §49-2-506(1)(a) and (c) MCA, the corporation must distribute its policies against harassment at its facility to all employees (whether employed by Evergreen or some other employer with whom Evergreen has contracted for temporary workers) and post those policies prominently in both a public place and a place open only to employees (such as an employee lounge). Additionally, Evergreen must adopt a policy that defines what steps it will take when faced with resident harassment against staff. Reasonable steps include counseling the resident, then using confinement to his or her room, then continuing to add consequences for repeated harassment. The policy must define the criteria by which Evergreen will measure whether the resident's incompetence has progressed to the point

at which counseling and discipline are useless, and shielding the staff member is the only available option. Within 60 days of this decision, Evergreen must submit to the Montana Human Rights Bureau (attn: Ken Coman) a proposed method of providing and posting policies, and its new policy regarding the successive steps it will take upon verifying a complaint of harassment by a resident. Upon Bureau approval (with or without changes mandated by the Bureau) Evergreen must immediately proceed with providing and posting.

6. Evergreen must cease and desist immediately from allowing residents and supervisors to engage in racial harassment at its facility.

VI. Order

1. Judgment is granted in favor of Evergreen Butte Health and Rehabilitation Center d.b.a. Evergreen at Butte, LLC., and against James Childs on the charge that it unlawfully discriminated against him in employment on the basis of race and color in October 1998.

2. Judgment is granted in favor of Ella Childs and against Evergreen Butte Health and Rehabilitation Center d.b.a. Evergreen at Butte, LLC., on the charge that it unlawfully discriminated against her in employment on the basis of race and color in October 1998.

3. Evergreen must pay to Ella Childs the sum of $4,500.00 in stipulated liquidated damages. Interest accrues on this judgment by law.

4. The department enjoins Evergreen from further discriminatory acts and orders it to comply with Conclusions of Law No. 5 and No. 6..

Dated: August 8, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry