BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Lenise Hansen, Charging Party, vs.	)	Human Rights Act No. 9901008691
Town Pump Corporation, Respondent.	)	*Final Agency Decision*

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on October 19, 1998. She alleged the respondent, Town Pump Corporation discriminated against her on the basis of sex (female) when it subjected her to a sexually hostile and offensive work environment beginning in 1998 and continuing until she was forced to quit on August 14, 1998. On May 12, 1999, the department gave notice Hansen's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened August 31, 1999, in Cut Bank, Montana. Hansen[1] attended with her attorney, Howard F. Strause. The corporation attended through its designated representative, Shelly Gustin, with its attorney, Tina Morin. The hearing examiner excluded witnesses on Hansen's motion. Cheryl Hetler, Angela Riddle, Bryan Buchanan, Myles Buchanan, Karen Wilkensen, Robert Scheett, Clayton Riddle, Stacy Scott, Carol Salway and Tony Underwood testified. The hearing examiner's docket of exhibits admitted and denied accompanies this decision.

On requests from the corporation and the witness, the hearing examiner sealed and excluded from the public record Angela Riddle's testimony and certain exhibits pertaining to her testimony. The hearing examiner took this action to protect the privacy of a non-party, without objections. The Human Rights Bureau appeared and objected to the production of certain documents from the investigation. The hearing examiner ruled on the objection, and the parties completed the hearing under that ruling.

[1] Before the hearing, Lenise Hansen and Myles Buchanon married. Lenise Hansen Buchanan, the charging party, is named as "Hansen" in this decision.

The parties completed the presentations of their evidence and gave their closing arguments on September 1, 1999. The hearing examiner closed the hearing record on September 1, 1999.

II. Issues

The legal issue in this case is whether the corporation illegally discriminated against Richards in her employment because of her sex when it permitted a patron into the casino who had subjected her to sexual harassment. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. In September 1997, the corporation hired Hansen as a casino attendant working in its Lucky Lil's Casino, Cut Bank, Glacier County, Montana ("the casino"). The corporation had Town Pump facilities in Cut Bank. Hansen had never before worked in a bar or casino. She was 18 years old. Testimony of Hansen and Karen Wilkensen (district manager).

2. The corporation maintained surveillance cameras in its facilities, including the Cut Bank casino. The cameras generated videotape records of activities within the casino, which the corporation kept on-site two months before reusing the tapes. Hansen knew about the cameras. She had considered them a comfort, because she believed the surveillance cameras were "important to keep away criminals." She was concerned about safety when she took the job. She did not want to work in a "bar atmosphere" and deal with drunks. The casino was a "beer/wine place" rather than a full bar. She felt safer for all these reasons. Testimony of Bryan Buchanan and Hansen.

3. Bryan Buchanan was the on-site manager of the corporation's Cut Bank casino. He had worked in this capacity for approximately four and a half years. He hired Hansen, and gave her orientation. She learned from him, going through the corporation's policy manuals, that the corporation had policies regarding sexual harassment. Through Bryan Buchanan's orientation, Hansen learned that the corporation prohibited vulgar and suggestive talk by customers and touching or "grabbing" of employees by customers. She also learned that the corporation did expel ("86") casino customers who caused sufficient problems in the casino. Exhibit 1; Testimony of Bryan Buchanan and Hansen.

4. Hansen met Myles Buchanan, Bryan Buchanan's son and assistant, when she began working at the casino. Myles Buchanan trained Hansen to

work both shifts. She began working mainly the 6:00 p.m. to 2:00 a.m. shift ("night shift"). Testimony of Hansen.

5. On December 11, 1997, Hansen received a generally satisfactory 90-day review from the corporation. The corporation increased her hourly wage from $5.15 to $5.20, effective December 15, 1997. Exhibit 1; testimony of Hansen.

6. In December 1997, Becky Johnson, another corporation employee at the casino, introduced Hansen to a regular customer of the casino, C.R. Woodward. Hansen did not know it, but Woodward had a history, as a patron of the casino, of making vulgar and suggestive comments to female casino attendants. In 1996, Bryan Buchanan had "86'd" Woodward and a female customer for a week after the two got into a physical altercation because of Woodward's sexual comments. Testimony of Bryan Buchanan and Hansen.

7. In January 1998, Woodward began to make sexual comments to Hansen. Hansen never encouraged the comments. Over time Woodward's comments, which Hansen never encouraged, grew more explicit and more offensive. He began to touch her, and then to grab her. His remarks became more graphic. He began to speak of what he would like to do to her sexually. Testimony of Hansen.

8. Hansen spoke to other employees. She learned that other employees experienced the same problems with Woodward. She confirmed that both Buchanans knew of Woodward's behavior with female employees. Testimony of Hansen.

9. Hansen's job duties as a casino attendant included some clean-up work, but largely consisted of being in contact with the customers. A casino attendant brought drinks to customers, made change for them and cashed winning tickets for them. Gamblers at the machines were entitled to complimentary draft beer. Attendants had to pay attention to the service needs of the customers. The successful operation of the casino depended, in part, upon casino attendants taking good care of customers to encourage and assist their gambling. Hansen did a good job as a casino attendant, although she had some write-ups for cash shortages. Exhibit 1; testimony of Bryan Buchanan, Myles Buchanan and Hansen.

10. The corporation selected Hansen as employee of the month for the Cut Bank casino for February 1998. By that time, she was dating Myles

Buchanan. Some time in March or April, she and Myles Buchanan began to live together.[2] Exhibit 1; Testimony of Myles Buchanan and Hansen.

11. Hansen attempted to discourage Woodward, within the confines of her duties. She began by politely asking him to keep his comments (and later his hands) to himself. Eventually, she was telling Woodward, "Shut up, dirty old man." Testimony of Hansen.

12. Hansen complained to both Buchanans about Woodward. Bryan Buchanan and Myles Buchanan each talked to Woodward at least twice. Woodward's behavior improved for a brief time after each warning, but soon returned to its prior progressive impropriety. By June 1998, Hansen feared her encounters with Woodward, which occurred during virtually every night shift. Testimony of Bryan Buchanan, Myles Buchanan and Hansen.

13. In early June 1998, Hansen was working the night shift at the casino. She was the only employee in the casino, as often was the case during night shifts. Woodward came into the casino at his usual time, between 9:00 p.m. and 10:00 p.m. He attempted to grope her, and grab her. He asked her to have sex with him. He asked her to go out with him (out to eat, then he would take her home with him). There were approximately six customers in the casino. Hansen attempted to ignore Woodward. He continued to comment and to touch and grab her, grabbing at her breasts and buttocks. Testimony of Hansen.

14. Woodward's comments and conduct were apparent to the other customers. One female customer eventually said to him, "C.R., why don't you just shut the fuck up?" His conduct toward her left her feeling "little and small" in front of everyone in the casino. As closing time approached, it took Hansen twenty minutes to get Woodward to leave so she could lock the casino. After she got him out, and locked the doors, Woodward called her on the work telephone two or three times. He continued to ask her out--to Shelby to eat, and then to his place for "wine and a romantic evening." He told her he would "be outside waiting." Hansen feared Woodward's advances. When she finally found the courage to leave the casino, she went home and told Myles Buchanan, with whom she was living, all of the details of Woodward's

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[2] The exact time frame over which the romance developed between Hansen and the younger Buchanan is not clear from the record. Myles Buchanan testified that he and Hansen were "dating" when she received the employee of the month award in February 1998. Both Hansen and Myles Buchanan testified that they were living together when the incident with Woodward occurred in early June 1998. The hearing examiner's sense of the testimony is that the two had been living for more than a few weeks when the incident occurred. Thus, the inference is that sometime soon after February, the relationship progressed to cohabitation.

behavior. She asked him to view the surveillance tapes from that night. Testimony of Hansen.

15. The next day, Myles Buchanan and Bryan Buchanan viewed the surveillance tapes. What they could observe was consistent with the account of Hansen regarding Woodward's behavior. Bryan Buchanan decided that Woodward was "going to keep doing it." He decided to "86" Woodward indefinitely. Testimony of Bryan Buchanan and Myles Buchanan.

16. Also on the next day, Myles Buchanan told Hansen that Bryan Buchanan had "86'd" Woodward. Around noon that day, Woodward came into the casino. Hansen was working the day shift. She told Woodward she was not going to serve him, and that he was not welcome in the casino. Woodward wanted to know the reason. Hansen declined to discuss it with him. She referred him to the Buchanans. Woodward talked to Myles Buchanan on the telephone, because Bryan Buchanan was not available. After the telephone conversation, Woodward "threw a big scene" at the casino bar, asserting prejudice (Woodward was Native American). Then he left. This interaction at the casino with Woodward after Bryan Buchanan "86'd" him left Hansen upset and more afraid of Woodward. Testimony of Hansen.

17. The following day, Myles Buchanan was at the casino and saw Woodward walking into the casino. Buchanan stopped Woodward at the door. Woodward asked for the corporate office number. Buchanan gave him Bryan Buchanan's card and the Butte corporate office number. Testimony of Myles Buchanan.

18. The reason Bryan Buchanan "86'd" Woodward was Woodward's sexual harassment of Hansen. Bryan Buchanan told Hansen, Myles Buchanan and another casino worker, Cheryl Hetler, within days of "86ing" Woodward, that the reason for the action was Woodward's harassment of Hansen. Testimony of Cheryl Hetler, Bryan Buchanan and Hansen.

19. Woodward was furious. He left an angry message on Bryan Buchanan's answering machine, threatening to call the corporation and complain. He wanted to meet Bryan Buchanan in the parking lot and "have it out." Testimony of Bryan Buchanan.

20. During the next month, Woodward again called the casino, speaking to Hansen, to inquire about being "86'd" from the casino. Hansen got the impression that Woodward still did not believe that Bryan Buchanan was serious about banning him from the casino. She also observed Woodward asking how to appeal the decision to "86" him. Exhibit 3; Testimony of Hansen.

21. Bryan Buchanan did not write up a report of the incident, although corporate policy called for him to notify upper management or his supervisor. Bryan Buchanan did not pull and preserve the videotape. Consequently, the corporation had no notice of the "86ing" of Woodward or the conduct involved, and the videotape was re-recorded at the beginning of August 1998. By August, the corporation had no documentation of the reasons for "86ing" Woodward. Exhibit 2, Policies 1205 and 1206; testimony of Bryan Buchanan.

22. On August 14, 1998, Bob Scheett, corporation operations director for casinos, received a call from Woodward.[3]

23. On August 14, 1998, Scheett called Bryan Buchanan.[4] Myles Buchanan was present and heard his father's half of the conversation. Scheett explained the telephonic challenge of Woodward to being "86'd." Scheett asked Bryan Buchanan about the "86ing." Bryan Buchanan was distraught at being questioned. He became defensive. He told Scheett that Woodward had bragged that he knew "corporate big shots" and would get back into the casino. He mentioned Hansen to Scheett, who asked Bryan Buchanan about the relationship between Myles Buchanan and Hansen. Scheett commented that Hansen's relationship with Myles Buchanan might be a problem with a corporate policy against "live-ins" (apparently referring to romantic relations between co-workers).[5] Bryan Buchanan asked if he might be in trouble, and might need to let Hansen go. Scheett's response led Buchanan to believe that since he had not let Hansen go when she first became romantically involved with Myles Buchanan, it was now too late. Testimony of Bryan Buchanan and Myles Buchanan.

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[3] Scheett testified that the phone call from Woodward came in July. He also testified that he "immediately" called Wilkensen. He did agree that the calls "might" have taken place in August. Given that Scheett had reason to respond promptly to a complaint from a patron about being "86'd," it is more credible that the call from Woodward and the conversations with Wilkensen and Buchanan occurred on August 14, as the other witnesses testified.

[4] Scheett testified that he only called Wilkensen, and that Bryan Buchanan later called him to complain after Wilkensen reinstated Woodward. However, Scheett was uncertain about the particulars of many points to which he testified in his deposition, such as whether Buchanan, when they did talk, had told him that the "86ing" occurred two months before. Scheett's recollection is less reliable than that of other witnesses regarding when he talked with Buchanan.

[5] Scheett testified that this discussion of Hansen's relationship with Myles Buchanan came "later" after the corporation decided to let Woodward back into the casino. However, Scheett agreed that this conversation occurred while Hansen still worked at the casino. There is no credible evidence that she worked at the casino after August 14. There is no credible evidence that the decision to let Woodward back in occurred before August 14. Thus, Scheett's testimony that he did not discuss the "live-in" problem until some time later is incredible.

24. Bryan Buchanan had heard from Cheryl Hetler that she would quit if Woodward came back in as a patron. Bryan Buchanan told Bob Scheett that if the corporation allowed Woodward back into the casino, there might be employees quitting. Scheett said he would "get back to" Buchanan. Testimony of Hetler, Bryan Buchanan, Myles Buchanan and Hansen.

25. On August 14, 1998, Myles Buchanan told Hansen that Scheett had called Bryan Buchanan to inquire about the "86ing" of Woodward. Myles Buchanan told her that "it sounded like" the casino would let Woodward return. Hansen knew Scheett was the corporation's head of casino operations. She felt the corporation was blaming her for the trouble with Woodward. Testimony of Myles Buchanan and Hansen.

26. Hansen asked Bryan Buchanan about Woodward's status. He told her the corporation might let Woodward back into the casino. Hansen told Bryan Buchanan that she could not work there if the corporation did let Woodward return. Testimony of Bryan Buchanan and Hansen.

27. On August 14, 1998, Hansen was at work when the corporation district manager for facilities in Browning, Cut Bank and Shelby, Karen Wilkensen, called Bryan Buchanan. Wilkensen was Buchanan's immediate supervisor. Hansen observed Bryan Buchanan go to his office and close his door to converse with Wilkensen. Testimony of Hansen and Wilkensen.

28. Wilkensen had received a call from Scheett, her supervisor. Scheett told her about Woodward's call to him complaining about being "86'd." Scheett did tell Wilkensen about Hansen's complaint.[6] Wilkensen did not seek details from Scheett. Scheett directed Wilkensen to investigate. She telephoned Woodward and Bryan Buchanan. Testimony of Wilkensen.

29. Wilkensen inquired about the "86ing" of Woodward. She confirmed that Buchanan had not submitted an incident report about Hansen's reports. She also confirmed that there was no longer a videotape record. Bryan Buchanan, trying both to protect his decision and to preserve his authority, told Wilkensen that casino employees might quit if Woodward returned as a patron. Buchanan defended his failure to preserve the videotape by arguing that he never pulled a videotape for an "86ing" unless there also was a police report. Bryan Buchanan had not called the police after receiving Hansen's complaints. Buchanan tried to bolster his reasons for "86ing"

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[6] Wilkensen testified both that Scheett did and did not tell her about Hansen's complaint. Her testimony that he did tell her about Hansen's complaint is more credible considering the entirety of the record and the credibility of the various accounts of events by the other witnesses.

Woodward without emphasizing the seriousness of Hansen's complaints, since he had chosen not to document those complaints. Wilkensen was more concerned with the absence of any record to support Hansen's complaints than with the precise nature of those complaints. Testimony of Bryan Buchanan and Wilkensen.[7]

30. After that initial conversation, Wilkensen discussed the matter with at least one other corporate officer. She could see no reason to sustain the "86ing" in the face of Woodward's challenge. She believed that Bryan Buchanan had a known obligation to prepare and file an incident report and pull the videotape if Hansen had made a complaint to him of sexual harassment by a patron. She herself had not followed this procedure in dealing with a sexual harassment complaint Bryan Buchanan had made to her, but she believed that as a district manager she need not do so. She thought nonetheless that Bryan Buchanan as a casino manager should and would follow this procedure. Exhibit 2; testimony of Wilkensen.

31. She called Bryan Buchanan back within an hour. She told him the corporation had decided to let Woodward back in to the casino. Buchanan was resentful. He argued with Wilkensen that the corporation's decision was inappropriate. Buchanan's concern was not for the safety of casino employees. He was upset that the corporation was reversing his decision. He had three decades of experience in operating bars and casinos, and he did not believe that the corporation knew as much as he did about what was appropriate. Testimony of Bryan Buchanan and Wilkensen.

32. At no time did Scheett, Wilkensen, or any other corporate representative, attempt to interview Hansen about her complaints. The decision to permit Woodward back into the casino was made based solely upon information from Bryan Buchanan and Woodward, and the absence of any incident report or videotape record of the actual incident involved in Hansen's complaints. Testimony of Scheett, Wilkensen and Hansen.

33. After the conversation, Bryan Buchanan told Hansen that the corporation was letting Woodward back into the casino. Hansen then quit her job. Bryan Buchanan said, "I don't blame you." She felt that the corporation considered her at fault for the incident with Woodward, and had exonerated

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[7] Wilkensen and Buchanan testified to sharply different recollections of their two conversations. Both lacked credibility. Wilkensen's prior inconsistent statements (in her deposition) undercut her credibility, while Buchanan's obvious hostility toward his former employer impeached his recollections. The hearing examiner finds it more likely than not that their conversations were as described in the findings, although neither witness would admit to these precise discussions.

Woodward from any wrongdoing. Bryan Buchanan did not explain the corporation's decision. He suggested she file a grievance, and showed her the corporation's grievance form. Myles Buchanan tried to talk her out of quitting. Hansen did not fill out and file the grievance form at that time. Testimony of Bryan Buchanan, Myles Buchanan and Hansen.

34. Until Hansen learned Woodward would again be allowed in the casino, she was satisfied with the actions taken to address Woodward's harassment of her. Although the harassment had not ceased, it had briefly diminished each time a member of casino management responded to her complaints by talking to Woodward. Since casino management had eventually "86'd" Woodward, Hansen was content, until Bryan Buchanan informed her the corporation was letting Woodward back into the casino. Testimony of Hansen.

35. Hansen had applied for jobs in Cut Bank before obtaining work at the casino. She still had an application in at J. C. Penney's. She obtained a job at J. C. Penney's within a week of quitting her job with the corporation. She earned $5.45 an hour at Penney's. While she worked at Penney's she also found a temporary job at the Civic Center.[8] Testimony of Myles Buchanan and Hansen.

36. Bryan Buchanan filled out an employee status report, indicating that Hansen resigned on August 15, 1998. He held it for approximately two weeks, to give her a chance to reconsider. The corporation had a standard letter it sent to departing employees. Hansen received such a letter, dated August 15, 1998, after filing her Human Rights Act complaint. The letter she received included notice of a grievance procedure for appealing "discharge from employment, including 'constructive discharge.'" Exhibit 1; testimony of Bryan Buchanan and Hansen.

37. Because Hansen quit, there was an opening for another employee. Bryan Buchanan hired Angela Riddle. On August 31, 1998, Riddle complained of an assault by Woodward at the casino shortly before closing time. Bryan Buchanan called the Cut Bank police. He mentioned Hansen's prior incident to the police. Riddle gave her statement to the Cut Bank police on August 31, 1998. On August 31, in connection with the Riddle complaint, Hansen gave her statement to the Cut Bank police about her problems with

[8] The limited evidence about this temporary job is only that she found it, that she fainted while there, and that the job did not last. No credible evidence of earnings appears of record. The damages determination does not consider this position, which may have lasted a day or less.

Woodward. Exhibits 3 and 5; testimony of Riddle, Bryan Buchanan and Hansen.

38. After Riddle complained of Woodward's assault, Bryan Buchanan told her about "86ing" Woodward for harassing Hansen. He told Riddle that the corporation had overruled him and reinstated Woodward. Buchanan made a report to the corporation about this assault, and he pulled the videotape for the police investigation. Testimony of Bryan Buchanan and Riddle.

39. Bryan Buchanan attempted to influence Riddle against cooperating with the corporation's investigation of both her assault and her subsequent complaint against the corporation regarding that assault. He told Riddle he was afraid the corporation would blame him and asked her to let him deal with the corporation. He encouraged Riddle to pursue claims against the corporation. Riddle settled her claims against the corporation, and returned to work for the corporation. Bryan Buchanan had attempted to influence her not to settle with the corporation. Testimony of Riddle.[9]

40. On September 1, 1998, Hansen completed a "grievance," assisted by Bryan Buchanan, and sent it to the corporation. She was no longer an employee when she submitted this letter. This letter was the first account Hansen had given of her problems with Woodward to any corporation official other than Bryan Buchanan and Myles Buchanan. Exhibit 5[10]; testimony of Hansen.

41. After Riddle's complaints, Bryan Buchanan submitted to corporate counsel a written statement regarding Woodward. Buchanan included an account of an exchange he had with Wilkensen. According to Buchanan's account, he expressed concern that the corporation might be liable to Riddle because it let Woodward back in after prior incidents. Wilkensen responded that if Buchanan had filed a report the corporation probably would not have readmitted Woodward. Exhibit 8; testimony of Bryan Buchanan.

42. After quitting her job in August 1998, Hansen continued to struggle with her emotional reactions to the corporation's decision to allow Woodward to return. She felt "dirty, at fault, disgusted." She had not experienced these feelings while Woodward was harassing her at work, because she had not felt at fault. Now, she was sure the corporation blamed her. She began having nightmares. She had been the victim of childhood sexual abuse, and had

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[9] Bryan Buchanan's denial of these acts was not credible.

[10] Three different versions of this document are in the record—Exhibits 5, 14 and 15. The differences between the documents do not rebut Hansen's testimony regarding what the original document was and when she sent it to the corporation.

developed an eating disorder. She had received some counseling when young. Before quitting the casino attendant job, she was "satisfied with not remembering it [the sexual abuse and the emotional responses to it] all the time," and felt that it no longer bothered her. Now it began to surface again. She had nightmares, and headaches, and began to lose weight. She lost 15 pounds from August 15, 1998, until she saw a doctor in September 1998. The weight loss continued, until by March 1999 she had lost 30 pounds. She was unable to eat and had no appetite, because she felt "dirty and disgusting." Physical intimacy with her husband was difficult. She mentioned her weight loss to a physician, who (according to Hansen's report) did not see any cause for alarm. She did not otherwise seek any medical aid or counseling for these difficulties. Testimony of Myles Buchanan and Hansen.

43. Hansen found work as a certified nurse's aide at Glacier County Nursing Home, earning $6.55 an hour, in September 1998. She quit her job on July 23, 1999, due to her pregnancy. The manner in which she quit that job cost her another job with Glacier County Nursing Home as an activities aide. Testimony of Hansen and Tony Underwood, Director of Nurses, Glacier County Nursing Home.

44. Working at the casino, Hansen earned approximately $90.00 in tips for an average week of night shifts[11]. Combining her tips and her wages, during the time after she quit her job with the casino until she quit her job at Penney's, Hansen earned $80.00 less per week than her potential earnings at the casino. On the same basis, Hansen's earning potential at the casino was approximately $40.00 per week greater than her earning capacity at Glacier County Nursing Home subsequent to her job with the casino. Testimony of Riddle and Hansen.

45. Hansen lost $160.00 ($80.00 times two weeks) in wages in August 1998. She lost $2,085.72 per year in wages starting in September 1998. She will continue to lose $173.81 per month until August 14, 2002.[12] Lost earnings through January 14, 2000, are $3,023.64.

46. In March 1999, Hansen got pregnant. Although it is still a struggle to eat, she is doing better. No doctor has expressed medical concern about her weight loss. She has never mentioned her eating problems to her obstetrician. She still struggles with nightmares and sleep disturbance, "a few times a week," although she knows that Woodward has died. She has not sought professional

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[11] Hansen testified to a higher amount, but admitted reporting none of her tip income for taxes. Riddle testified to a lower amount. The hearing examiner concludes that an average of $90.00 per week ($18.00 a shift for 5 shifts) is reasonable based upon the entire record.

[12] See "Opinion" regarding 4 year reasonable limitation.

help for her emotional problems. Hansen is entitled to recover $10,000.00 for her emotional distress. Testimony of Hansen.

IV. Opinion

Montana law prohibits an employer from discriminating against employees in conditions of employment because of sex. §49-2-303(a) MCA. It is reasonable to conclude that this prohibition extends to protection of employees from harassment by customers. Absent Montana precedent, the department applies the federal standards for protection of employees. ***See***, *Folkerson v. Circus Circus Enterprise, Inc.*, 107 F.3rd 754, 756 (9th Cir. 1997); *Kopp v. Samaritan Health System, Inc.*, 13 F.3rd 264, 269 (8th Cir. 1983). An employer's failure to protect a casino attendant from sexual harassment by customers is illegal discrimination under the Montana Human Rights Act, if the employer knew or should have known of the harassment.

Hansen Proved Her Prima Facie Case and the Corporation Failed to Rebut It

Hansen proved that Woodward subjected her to sexual harassment. Her uncontroverted testimony established a pattern of unwelcome and unacceptable comments and actions over a period of months. Until the corporation overruled its casino manager and reinstated Woodward in August 1998, the corporation had taken proper action. Hansen testified that she was satisfied with the actions taken. The critical issue for this case is whether Hansen proved that the corporation knew of the harassment in August and "failed to take proper remedial action" (***e.g.*** *Kopp*) when it negated the remedial action of its manager by reinstating Woodward.

In early June 1998, Hansen gave casino management (Bryan Buchanan) notice that Woodward was harassing her to an even more outrageous degree. In giving that notice, Hansen did precisely what the corporation's written policies required of her: she told her boss.

The corporation's witnesses exhibited the attitude that the corporation could not be responsible to Hansen if anyone in the chain of command failed to follow policy. Wilkensen pointed to Bryan Buchanan's failure to file an incident report of Hansen's complaints. Scheett pointed both to Buchanan's failure, and to Wilkensen's failure to expand her investigation beyond Woodward and Buchanan (Wilkensen responded in kind, claiming Scheett influenced her to limit her investigation). Stacey Scott testified that since Hansen did not file her grievance until after she quit, the corporation could do nothing. Scott also testified that the "grievance" submitted to the department

and corporate counsel did not "appear a grievance" because it did not conform to the corporation's standards for form and content of grievances.[13]

The corporation argued that because there was no tangible employment action, it could avoid liability for harassment by a supervisor by proving both that it exercised reasonable care to prevent and correct promptly sexual harassment and that Hansen unreasonably failed to take advantage of the available protective or corrective opportunities that the corporation provided. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). *Burlington Industries* does not apply. Bryan Buchanan, the supervisor, was not the source of the harassment. The investigation did not involve reasonable care, in reaching only Buchanan and Woodward. Hansen reasonably despaired of obtaining relief from Woodward by pursuing a voluntary grievance to the persons who dictated Woodward's reinstatement. The corporation presented no credible evidence that Hansen knew of the corporation's alleged ignorance of the particulars of the incident. Finally the decision of the corporation to allow Woodward back into the casino was a tangible employment action. The corporation failed to prove the facts necessary to invoke the defense.

The corporation's polices regarding sexual harassment and grievances for departing employees are commendable when read as mechanisms to safeguard employees' rights. The corporation appropriately adopted these policies and procedures to become aware of potential problems and timely to address them. Nevertheless, the policies do not supercede the law concerning liability for human rights violations. Hansen followed the policies when she complained to Bryan Buchanan. She did what the law required when she talked to her boss.

Hansen did not waive her right to complain of harassment when she did not file a grievance before quitting on August 14, 1998. The form provided to her specifically stated that the corporation "has a procedure you *may* use to appeal" a "constructive discharge" (see Exhibit 1, first page, front and back). Setting aside whether Hansen understood what "constructive discharge" meant and whether she received this form before she quit, the corporation still cannot bar a discrimination complaint by proving that the complainant failed to follow a voluntary internal grievance procedure before quitting, particularly when she notified management of her complaint by telling her boss.

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[13] Scott also testified that she, as grievance coordinator, could address and resolve problems "during or after employment." Because of the contradictory testimony about the potential impact of a post-resignation grievance, the hearing examiner made no findings regarding Scott's testimony.

The corporation failed to prove by credible evidence that Hansen failed to file a grievance after she quit. However, even if she had failed ever to file the grievance, the corporation still has not proved it had no knowledge of the harassment. To escape imputation of knowledge of the harassment, it must avoid responsibility for the knowledge of its casino manager, Bryan Buchanan.

The corporation did contend that it should not be responsible for Bryan Buchanan's knowledge because a conspiracy existed between the Buchanans and Hansen to establish a claim against the corporation. The corporation did not prove that Buchanan actively deceived it. If Buchanan failed, negligently or even defiantly, to follow policy, he was still the manager. The corporation selected him, hired him and invested him with the power to manage the casino. Even if Buchanan had actively deceived the corporation, the corporation still selected him, hired him and invested him with the power to operate the casino. Unless Hansen were knowingly involved in a conspiracy to deceive and defraud the corporation would the department *must* impute the casino manager's knowledge to the corporation.

Bryan Buchanan was not a credible witness. His animosity toward the corporation for its treatment of him was patent in his demeanor and testimony. His explanations of his conduct were sometimes directly inconsistent. For example, he explained his failure to file an incident report on Hansen's complaints by testifying that his practice (appropriate for all he knew) was not to file an incident report unless he called the police. He later testified that the same day he called the police about Riddle's complaints, he filed an incident report because the corporation reprimanded him for not doing so "in the past." By his earlier testimony, he would have filed an incident report about Riddle's complaints without any reprimand, because he called the police.

Bryan Buchanan's demeanor and testimony at hearing revealed a deep resentment toward the corporation. It is plausible that this former employee, himself pursuing claims against the corporation, is influenced in his testimony by his bias against the corporation. His son Myles Buchanan apparently also now has legal conflicts with their common former employer. Nevertheless, the corporation at best presented a weak inference amounting to little more than speculation that the Buchanans both together sought to maximize the harm resulting to the corporation from the Hansen complaints.

The testimony and demeanor of the witnesses, together with the entire record, does not provide a valid evidentiary basis upon which the department can even speculate that Hansen was an active participant in this unproven conspiracy. Bryan Buchanan's hostility toward the corporation was palpable.

Myles Buchanan displayed no such palpable hostility, but even if he had, to impute unclean hands to Hansen, based on her father-in-law's attitude and her husband's attitude, would be unreasonable, and quite likely even illegal as discrimination based on marital status.

When asked why the corporation had not talked to Hansen when investigating the Woodward challenge to the "86ing," Bob Scheett and Karen Wilkensen pointed at each other. Scheett testified that he simply told Wilkensen to investigate. He denied telling Wilkensen to talk to Woodward and Bryan Buchanan. Wilkensen testified that he told her to talk to Woodward and Buchanan, which she interpreted to mean "talk only" to Woodward and Buchanan. Wilkensen testified that if Scheett had mentioned the employees, she would have talked to Hansen. Wilkensen testified in her deposition that Scheett did mention Hansen. Wilkensen also testified in her deposition that Hansen, rather than Scheett, initially told her about Woodward. While united in their suspicions that somehow Hansen had conspired with both Buchanans to "set up" the corporation, the two primary corporate witnesses contradicted each other at every turn.

The corporation offered testimony from Riddle that Hansen asked her to talk to Howard Strause and perhaps hire him to sue the corporation. Hansen's suggestion to Riddle that she also should hire Hansen's attorney and pursue a claim against the corporation does not prove that Hansen fabricated her claim. It likewise does not prove that Hansen was part of a conspiracy to pursue false or inflated claims against the corporation.

Bob Scheett testified to his belief that Hansen quit to "set up" the corporation for a claim. However, the primary factual basis for that testimony, according to Scheett, was his belief that a reasonable manager in Bryan Buchanan's position would have filed an incident report, called the district manager and saved the videotape if an employee reported the kind of harassment that Hansen claimed she reported to Bryan Buchanan. It is inherently incredible that Hansen would quit her job and go to work at J.C. Penney's for less compensation in the hopes of prosecuting a discrimination claim against the corporation. It is even more incredible that her boyfriend and his father would collude with her when she quit to fabricate a false claim of harassment in order that she could prosecute such a claim.

Bryan Buchanan may or may not have given a complete explanation of his reasons for "86ing" Woodward to his superiors. Bryan Buchanan may or may not have followed his reasonable understanding of corporation policies regarding the handling of harassment claims. Karen Wilkensen may or may not have truncated her investigation because of conflicts with Buchanan or

directions from Scheett. Whatever the motivations or precise actions of the management employees of the corporation, Hansen is not responsible for them unless, again, she actively participated in some conspiracy to "set up" the corporation.

The only other evidence offered in support of the corporation's conspiracy theory was testimony from Angela Riddle and her husband that Hansen as well as both Buchanans talked and even bragged about getting a large award from the corporation for Bryan Buchanan to use in starting his own casino. Angela Riddle admitted (although she also contradicted herself) that she had not talked to Hansen until after she started working at the casino. This necessarily means that Riddle could not have heard any conversations involving Hansen talking about claims against the casino until after Hansen quit. Riddle's husband could not even date the conversations as being before or after his wife's complaint about Woodward. The timing of the alleged discussions is at best uncertain. The content of the conversations, to the extent that Hansen was actually present, is less than clear. The degree to which Hansen may have participated in any such conversations, of uncertain timing and unclear content, is unproved. This evidence was of so little probative value that the department made no findings about it. The corporation failed to prove its conspiracy theory.

Hansen Proved an Entitlement to Lost Income and Emotional Distress Damages

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to correct the discriminatory practice and to rectify any resulting harm to the complainant. §49-2-506(1)(b). The department based Hansen's lost income damages upon the wages and tips she credibly testified she earned while at the casino. Hansen is not entitled to any inference that she would have earned the higher salary paid to Riddle. There is no evidence to support such an inference. Likewise, since Hansen found another job with the nursing home that she could have maintained during her pregnancy, then lost that job for reasons unrelated to her claims against the corporation, Hansen has no entitlement to enhanced lost income damages during her pregnancy.

The parties presented virtually no evidence of how long Hansen will continue to suffer this loss. The corporation argued against any loss. Hansen has requested front pay, with no evidence of the period over which such pay would properly extend. Absent a better yard-stick, and recognizing that casino attendant jobs are not typically career positions held for life, the department applies the four year limitation of the Montana Wrongful Discharge from Employment Act. §39-2-905(1) MCA. This limitation is not always

appropriate for a Human Rights Act case. In this particular instance, with limited evidence addressing the duration of front pay and with the damage theory for front pay framed on constructive discharge, the limitation applies.

Pre-judgment interest can properly be part of the award to compensate c claimant for past lost income. ***E.g.***, *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2nd 521, 523 (1989); *Foss v. J.B.Junk*, Case No.SE84-2345 (Montana Human Rights Comm., 1987). However, the theory of pre-judgment interest awards is that the employer had full knowledge of the amount of income lost. Lost income is, in that sense, a measure of liquidated damages. Here, the uncontroverted evidence established that the corporation did not know the amount of Hansen's tips. Pre-judgment interest is proper on the *wages* lost. Hansen's wages, exclusive of tips, are less than her wages at her subsequent employments. No pre-judgment interest accrued.

Neither party offered evidence regarding reduction of front pay to present value. The department therefore will require payment of front pay on a monthly basis as it accrues.

The power and duty of the department to award money for emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2nd 596 (1993). Hansen's testimony proved her distress. Her husband witnssed her distress. 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.[14] 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.[15] Here, the fact-finder need make no such inference. Hansen's demeanor during the hearing provided ample evidence that she suffered and still suffers from the emotional harm resulting from the illegal discrimination of the corporation.

Hansen argues, based on cases from other jurisdictions, that her emotional distress entitles her to an award of $50,000.00. The most pertinent

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[14] *Carey v. Piphus*, 435 U.S. 247, 264, at ftnt. 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.Ap. 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).

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

case, *Lockhart v. Pizza Hut, Inc.*, 162 F.3rd 1062 (10th Cir. 1998) involved a $200,000.00 award for emotional distress resulting from sexual harassment of a young waitress by patrons. The plaintiff had suffered from childhood sexual abuse, and some of her prior emotional problems were rekindled by the restaurant incident. The standard for determining whether to award emotional distress and if so, how much, to be whether the charging party establishes by the probative evidence that she suffered and continues to suffer such anguish as a result of the illegal discrimination that a specific dollar award is the necessary reasonable measure to rectify the harm. §49-2-506 MCA. In the present case, $10,000.00 is the appropriate sum.

Affirmative Relief Is Proper

The Human Rights Act mandates reasonable affirmative relief to correct discriminatory action. §49-2-506(1)(a) and (b) MCA. Injunctive relief is proper to address the risk of future illegal discrimination. The corporation also must submit, for the scrutiny of the Human Rights Bureau, its plan to remedy the apparent ignorance of some management employees regarding the necessity of documenting complaints of sexual harassment.

V. Conclusions of Law

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

2. Respondent Town Pump Corporation unlawfully discriminated in employment against charging party Lenise Hansen on August 14, 1998, when it overruled the decision of the casino manager in Cut Bank and permitted a patron who had sexually harassed Hansen to return to patronize the casino. §49-2-303(a) MCA.

3. Lenise Hansen is entitled to recover the sum of $3,023.64 for past lost earnings, the sum of $10,000.00 for emotional distress and front pay at the rate of $173.81 per month until August 14, 2002. Hansen is also entitled to recover post-judgment interest. §49-2-506(1)(b) MCA.

4. Affirmative relief is necessary. The department must enjoin the corporation from any further violations of the Human Rights Act, and require that the corporation develop a compliance plan to education management employees. §49-2-506(1)(a) and (c) MCA.

5. For purposes of §49-2-505(7), MCA, Hansen is the prevailing party.

VI. Order

1 Judgment is found in favor of Lenise Hansen and against Town Pump Corporation on the charge of illegal discrimination in employment because of sex.

2 Town Pump Corporation must pay to Lenise Hansen the sum of $3,023.64 for past lost earnings and the sum of $10,000.00 for emotional distress. Town Pump Corporation must pay, on the 14th calendar day or first business day thereafter of each month, the sum of $173.81 for additional lost earnings, commencing February 14, 2000, through August 14, 2002. Post-judgment interest accrues on any unpaid accrued portions of this judgment at 10% simple interest per annum from January 14, 2000, until paid.

3 Within 60 days of the date of this decision, Town Pump Corporation must submit to the department (Human Rights Bureau) a written plan of action to educate management employees of the necessity to document and report complaints of sexual harassment by employees. Upon approval of the plan by the Bureau (with any amendments directed by the Bureau) Town Pump Corporation must implement the plan of action and document to the Bureau (as the Bureau may specify) the implementation of the plan.

Dated: January 14, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry