BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Sharon Houghton, Charging Party, vs. **Medtrans of Montana** d/b/a **American Medical Response, Inc.**, Respondent.	**Human Rights Act Case No. 9901008749** *Final Agency Decision*

I. Procedure and Preliminary Matters

Sharon Houghton filed a complaint with the Department of Labor and Industry on December 4, 1998. She alleged that the respondent corporation discriminated against her on the basis of sex (female) and religion (Mormon) when it subjected her to a sexually hostile and offensive work environment beginning in May 1997 and continuing until she took a leave of absence beginning June 22, 1998. On July 12, 1999, the department gave notice her complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties mutually agreed to permit the department to retain jurisdiction of this case for more than 12 months after the complaint filing.

The department held the contested case hearing in this case on December 16, 17 and 18 in Billings, Montana and on December 20, 1999, by telephone, for the rebuttal testimony of Houghton.[1] Houghton was present with her attorney, Kenneth D. Peterson, Peterson and Schofield. The corporation attended through its designated representative, Kimberly Ann Norman, with its attorney, Dena B. Calo, Obermater, Rebmann, Maxwell & Hippel, LLP.[2] The hearing examiner excluded witnesses on the corporation's motion. Houghton, Ann Lang Adair, Ph.D., Nels Kolstad-Houghton, Ronald A. Dulaney, Ph.D., Lynde Gurcheck, Allen Hutton, Sean Biggins, Troy Charbonneau, Kirk Wehmeyer, Eric Fisher and Kimberly Ann Norman attended and testified under oath. Susan Munoz testified through a

[1] The parties stipulated to telephonic rebuttal testimony, for their mutual convenience and on the grounds that the hearing examiner had already observed Houghton testifying, and could make the necessary credibility determinations.

[2] For good cause shown, the hearing examiner relieved local counsel, Michael P. Heringer, Brown Law Firm, PC, of the obligation to attend the hearing.

videotaped deposition. A copy of the hearing examiner's exhibit docket accompanies this final decision.[3]

Houghton filed her closing argument on January 3, 2000. The corporation filed its closing argument on January 14, 2000. Houghton filed her reply on January 24, 2000, the date of submission for decision.

II. Issues

The issues in this case are (1) whether Houghton's immediate supervisor, James Ackerman, harassed Houghton at work because she was a woman and a Mormon; (2) whether the corporation is liable for that harassment and (3) whether the corporation's last offer of reemployment to Houghton was a sufficient reasonable effort to redress or end harms resulting from Ackerman's conduct. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Charging party Sharon Houghton was born on October 26, 1961. She is married to Nels Kolstad-Houghton and has four children, including a daughter, Andrea, who was 18 years old at the time of hearing. Houghton is a devout member of the Church of Jesus Christ of Latter Day Saints (Mormon). Testimony of Houghton.

2. Houghton became interested in the field of medical services, and enrolled and successfully completed an Emergency Medical Technician (EMT) class in 1993. She began working as an EMT for Arrow Medical, an ambulance service in Billings, Montana, in 1993. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 1; testimony of Houghton.

3. Houghton remained in the employ of Arrow until respondent Medtrans of Montana d/b/a American Medical Response, Inc. (the corporation) bought Arrow, in approximately 1994. Thereafter, she continued in the medical services field, now working for the corporation. She progressed through the successive levels of EMT work and qualification. In 1996, she completed paramedic school and graduated at the top of her class. She passed the paramedic testing, both national and local, on her first attempts. Consequently, she attained the highest level of EMT credentials in 1996, and

[3] The parties offered Exhibits 4, 108 (SH0220-0221), 102 (SH0341-0342) and 102 (SH0322-0338), and the hearing examiner defered ruling. The hearing examiner now admits all four exhibits, for completeness of the record.

attained the job status of a paramedic for the corporation in October 1996. Testimony of Houghton.

4. During her employment, Houghton was aware of the corporation's sexual harassment policy and was aware that the corporation had a corporate Human Resources Department. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 4.

5. James Ackerman came to the corporation's Billings operation in spring 1997 as the operations manager. The field operations supervisors reported to Ackerman. Ackerman reported to David Baumgardner, the corporation's regional manager. Baumgardner's office was located in Billings. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 3; testimony of Houghton.

6. On May 1, 1997, Ackerman promoted Houghton to a Field Operations Supervisor position. She was the only female field supervisor in the Billings operation. Houghton, as one of the three field operations supervisors in the corporation's Billings, Montana, ambulance service, was responsible for the day to day operations of the field crews. Her normal shifts were 7:00 in the morning to 7:00 the following morning, first on Monday, Thursday and Saturday, then on Monday and Wednesday for the next two weeks. During time not on shift, Houghton shared with the other corporation paramedics "call shifts" when she had to be available to staff an ambulance if the duty staff was already responding to prior calls. These "on call" shifts covered times (generally nights) when fewer staff were on duty to respond to ambulance calls. As a supervisor, Houghton was also subject to call at any time, although when she was neither on duty nor on call, she did not frequently receive calls. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 2 (as amended at hearing); testimony of Houghton.

7. In May 1997, Houghton attended a Chamber of Commerce function with Ackerman. Ackerman became inebriated and began introducing her as his wife. When she told him to stop because she knew many of the people attending, he became angry. Testimony of Houghton.

8. Houghton told Baumgardner that Ackerman had introduced her as his wife at a Chamber of Commerce function. She did not ask him to act and she did not fill out an incident report. Baumgardner did not act. After the Chamber incident, Ackerman began assigning other supervisors' duties to Houghton to complete. Testimony of Houghton.

9. In June 1997, Ackerman insisted that Houghton introduce him to a female flight nurse that he wanted to date. Houghton refused, because the request made her uncomfortable. Within days after that conversation, Ackerman came to where Houghton was working, pulled her off the job and took her to Deaconess to make the introduction. When they arrived, he gave Houghton a direct order to obtain the nurse's home telephone number. Houghton did so, but told the nurse what she was doing, and why. Both Houghton and the nurse were embarrassed. The nurse reported Ackerman's conduct to her supervisor. Testimony of Houghton.

10. During the summer of 1997, Houghton's daughter Andrea, then 16, occasionally visited her at the office. Ackerman told her that her daughter was "getting some nice hooters." When Houghton responded angrily to the comment, Ackerman talked about dating her daughter. Thereafter, Ackerman periodically referred to dating Houghton's daughter. Testimony of Houghton.

11. From summer 1997 until her leave of absence (June 1998), Ackerman subjected Houghton to unwelcome and unsolicited sexual remarks. Ackerman accused her of having a certain power over men and told her she could make them lick an ashtray if she wanted. Ackerman told Houghton that the doctors and firemen cooperated with her because they wanted to get into her pants. He accused her of having an affair with an EMT, and tried to counsel her on how to go about having an affair. He talked to other employees about this alleged affair. Testimony of Houghton.

12. Ackerman also accused Houghton of having a sexual relationship with another woman in the office, clinical coordinator Lynde Gurcheck. He called Houghton a "carpet muncher" and made licking motions with his tongue whenever he referred to Gurcheck. Testimony of Houghton.

13. In late 1997, Houghton told Baumgardner about Ackerman's conduct. She took Gurcheck with her. Baumgardner did not act. In the following months, Baumgardner experienced a family tragedy and became distant from the staff, relinquishing most of his authority to Ackerman. Houghton tried to contact Baumgardner through Ackerman, but Ackerman said Baumgardner was unavailable to the staff. Testimony of Houghton.

14. In late 1997, Houghton attended DDI training in Aurora, Colorado. Two and a half hours of the training addressed prevention and identification of sexual harassment in the workplace. Houghton did not discuss the harassment by Ackerman with anyone during that training and visit. Kim Norman provided the DDI training. That training included orientation about the corporation's harassment and sexual harassment policies. Final Prehearing

Order, "IV. Facts and Other Matters Admitted," par. 5 (as amended at hearing); exhibit 104; testimony of Houghton and Norman.

15. From 1997 until her leave of absence (June 1998), Ackerman made disparaging remarks about Houghton's religion. Ackerman told Houghton that he had dated a "Mormon girl" and said "Mormon girls" were "the horniest." Ackerman told Houghton he would like to be Mormon so that he could marry more than one woman. Ackerman continually talked about a movie he had seen in which a Mormon colony was blown up. He especially liked the annihilation scene and stated he wished all Mormons were blown up. He called Houghton a "Brigham lover" and asked when the Mormons were going to live on their own planet. Testimony of Houghton.

16. Ackerman gave Houghton a performance evaluation in February 1998. She acknowledged in writing that it was a "fair and honest review." Testimony of Houghton.

17. On March 28, 1998, Houghton volunteered to cover (as part of the ambulance crew standing by at the site) the groundbreaking ceremony for the new Mormon Temple in Billings, Montana. When she returned to the office, she saw that her assignment recorded in the logbook as a "cult" standby. Houghton believed a fellow employee made the notation, not Ackerman. She notified Ackerman and requested that the notation be removed and be properly recorded. He laughed and did not act. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 6; testimony of Houghton.

18. In May 1998, Ackerman called Houghton's home on a day she had neither duty nor on call status. Ackerman questioned Houghton's daughter, Andrea, at length about her whereabouts. Andrea, very upset, reported to Houghton that Ackerman had suggested to Andrea that Houghton was meeting the EMT to carry on the alleged affair. Testimony of Houghton.

19. Houghton told Baumgardner that she was going to speak with Ackerman because of the conversation with Andrea. Baumgardner asked her if she wanted someone to accompany her and she indicated that Gurcheck would go with her. Gurcheck did go with her, and after the conversation Ackerman ultimately apologized for his conduct. Testimony of Houghton.

20. In June 1998, Ackerman told Houghton to check the supplies and contents of an off-site ambulance maintained for possible violence at the Yellowstone County Courthouse. Checking the supplies and contents of that ambulance was a routine daily task at the time. Houghton requested subordinate staff members to perform the task. Ackerman heard the

dispatcher relay her order. He immediately countermanded the order in front of staff, and told the EMTs that he wanted Houghton to check the ambulance and that they did not have to listen to Houghton or do what she asked. One of the staff members relayed Ackerman's comments to Houghton, as a "joke." Testimony of Houghton.

21. Houghton gave up. She concluded that her working relationship with her boss would continue to deteriorate, and that any complaints about his harassment would exacerbate the situation. On June 8, 1998, the next day, she submitted her resignation to Ackerman. He told her that he wanted her to keep her mouth shut, not to "hold court" with the employees and to leave quietly. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 7; testimony of Houghton.

22. Houghton was angry and embarrassed. She liked her work and planned to make a career in the field of emergency medical care. Since the corporation had a monopoly on ground ambulance emergency medical care jobs in Billings, her resignation meant a career change. Instead of "going quietly," as Ackerman demanded, Houghton gave another notice of resignation to Baumgardner a week later, citing her problems with Ackerman as the reason. Baumgardner asked her not to resign, offering some alternatives. He suggested that she could voluntarily demote so that Ackerman would not be her direct supervisor; she could take a leave of absence and Baumgardner would hire another person between Houghton and Ackerman to supervise Houghton; or she could stay and let Baumgardner try to straighten out the situation. Houghton decided to take a leave of absence. She began her leave of absence on June 22, 1998. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 8; Testimony of Houghton.

23. At no time while an employee of the corporation did Houghton ever submit a written complaint of sexual or religious harassment by Ackerman. She considered the policy regarding such complaints to apply to non-management employees. Testimony of Houghton.

24. In April 1998, Shauna Watson, another female employee of the corporation, filed a complaint of sexual harassment against Ackerman. Houghton did not hear of this complaint until after she took her leave of absence. Testimony of Houghton.

25. While Houghton was on leave she heard that the Human Resources Office was investigating Watson's complaint against Ackerman. She participated in an interview on July 14, 1998, with Susan Munoz, the corporation's Human Resources investigator for that complaint. Houghton

confirmed that Ackerman harassed Watson and reported that Ackerman had harassed Houghton herself. She also told Munoz that she probably had referred to Ackerman as a pedophile, in response to his comments about dating her daughter. Munoz considered Houghton's statements as support for the conclusion that Ackerman engaged in unprofessional conduct. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 9 and 10; exhibit 101[4]; testimony of Houghton and Munoz.

26. Munoz discussed several options with Houghton during her leave, including returning to her previous supervisory position, becoming a full time or part time field professional or quitting her employment. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 11 (as amended at hearing).

27. The corporation never investigated Houghton's complaints, although it considered her complaints to Munoz in acting on the Watson complaint. As a result of the Watson complaint, the corporation suspended Ackerman for 30 days without pay, required him to seek EAP counseling, attend sexual harassment training, review the Supreme Court's decisions in *Faragher* and *Ellerth* and prepare a sexual harassment training and prevention program. Ackerman performed all the required disciplinary steps. The corporation also revised its sexual harassment policy and procedure in July 1998 and required its employees to undergo further sexual harassment training. Ackerman remained a supervisory employee. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 12; exhibit 101A[5]; testimony of Houghton and Munoz.

28. Baumgardner quit while Houghton was on leave. Ackerman then became the highest level of local authority. Houghton's leave expired on September 22, 1998. Houghton talked with Munoz and told her that she was very concerned about returning, with Ackerman still her supervisor and now without any higher local supervision. Munoz advised Houghton that the corporation had disciplined Ackerman for his sexual harassment of Watson. Munoz told Houghton that the corporation had to fill the supervisor position, and unless Houghton returned to work, someone else would fill that position.

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[4] Exhibit 101, Munoz' handwritten notes of the interview, read and approved as her communcation to Munoz, included references to many of the incidents to which Houghton testified at hearing, but not all of them. For example, it omitted reference to the accusations of a lesbian affair. It included reference to Houghton as the only female supervisor, and multiple references to sexual comments, harassment and disparate treatment by Ackerman.

[5] The original notes of Munoz comprise exhibits 101 and 101A. The hearing examiner reviewed the entirety of Munoz' notes. The evidence, by testimony and exhibit, is crystal clear that the corporation undertook no investigation of Houghton's complaints.

Houghton obtained an extension of her leave until September 29, 1998, to consider her options. Her options still included resigning or taking a demotion so that Ackerman would not be her direct supervisor. Testimony of Houghton and Munoz.

29. Munoz acknowledged to Houghton that the discipline of Ackerman was for his harassment of Watson. The corporation had not disciplined Ackerman for his actions toward Houghton. Houghton concluded that the corporation was not taking her complaints seriously. Because she concluded that the corporation did not support her or her concerns, she decided not to return as a supervisor, and told Munoz of her decision on September 29, 1998. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 14 and 15 (both as amended at hearing); testimony of Houghton and Munoz.

30. Effective October 13, 1998, Ackerman promoted Eric Fisher to fill the supervisor position vacated by Houghton. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 16; testimony of Houghton.

31. After Houghton learned of Fisher's promotion to fill her supervisor position, she contacted her attorney to proceed with her Human Rights complaint. After learning that Houghton had retained counsel, Ackerman resigned effective November 13, 1998. The corporation then contacted Houghton and offered her a field supervisor position. Houghton declined the offer. Houghton believed that she had no future with the corporation and that she only received the offer because she had hired an attorney. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 17 and 18; testimony of Houghton and Norman.

32. On December 4, 1998, Houghton filed a Charge of Discrimination with the Montana Department of Labor and Industry, Human Rights Bureau. At that time, both Ackerman and Baumgardner no longer worked for the corporation. Final Prehearing Order, "IV. Facts and Other Matters Admitted," par. 20; testimony of Houghton and Norman.

33. During her leave, Houghton obtained interim employment in telephone solicitation that generated income approximating her income with the corporation. She was unhappy with the work. She has since returned to school, pursuing additional nurse training, and working at Deaconess Hospital. In order to maintain their financial position, Houghton and her husband refinanced their home in February 1999. Exhibit 7; testimony of Houghton.

34. From the time she resigned in June 1998 through November 1998, Houghton's lost earnings, less her interim earnings, were $2,312.00 in wages

and benefits. Exhibits 6 and 124; testimony of Houghton, Ann Lang Adair and Ronald A. Dulaney.

35. Interest on the lost income accrues at $.633 per day. Interest to date (May 3, 2000) is $309.54.

36. Houghton suffered emotional distress. She gave up an established career which she found rewarding. She came to believe that the corporation, thorough its human resources staff as well as its management either did not believe or did not care about the harassment she had suffered. Her emotional distress had an impact upon her home life and her work. The sum necessary to compensate her for her emotional distress is $25,000.00. Testimony of Houghton and Nels Kolstad-Houghton.

IV. Opinion

The Montana Human Rights Act prohibits discrimination in terms and conditions of employment because of sex or religion. §49-2-303(1)(a) MCA. 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 religious belief. If bias against any of the protected classes enumerated in the statute generates harassment sufficient to alter of the terms and conditions of employment, it is illegal.

1. Liability

Houghton had the burden to prove that the corporation discriminated against her because she was a woman and a Mormon. Houghton met this burden. She proved by clear and convincing evidence that her supervisor, James Ackerman, subjected her to on-going harassment at work (and even away from work) because she was a woman and a Mormon. Within the 180 days before she filed her complaint, Ackerman treated her improperly (the ambulance stocking incident). Within the 180 days before she filed her complaint, Ackerman attempted to silence Houghton about the reasons for her resignation. Within the 180 days before she filed her complaint, the corporation persuaded her to take an paid leave of absence so that Ackerman's supervisor could take some action to address her complaints, but the corporation took no action on her complaints. Within the 180 days before she filed her complaint, the corporation told her that unless she came back to her

old job under Ackerman, with no action taken against Ackerman because of her complaint, the corporation would give someone else her job. Within the 180 days before she filed her complaint, the corporation did give someone else her job. Within the 180 days before she filed her complaint, the corporation told her again that she could take a demotion or come back to work under Ackerman with no action taken on her complaint.

Given his pattern of harassment, the illicit motivation for Ackerman's treatment of Houghton is patent. His on-going displays in front of Houghton of hostility toward Mormons and his pattern of sexual harassment of Houghton were both manifest motives for embarrassing and haranguing Houghton on June 7, 1998. Her status changed from a full-time employee to an on-leave employee on June 22, 1998, as a result of Ackerman's hostility. Her status changed from that of an on-leave employee to that of a former employer as a result of the failure of the corporation to act against Ackerman, including failure to investigate her complaints against him.

After Houghton accepted leave rather than resigning, the corporation did not act on Houghton's complaints. Ackerman's supervisor, David Baumgardner, knew of Houghton's complaints about some of Ackerman's conduct and promised to act. Susan Munoz, the Human Resources coordinator from Denver who investigated a sexual harassment complaint against Ackerman by another Billings employee, interviewed Houghton. Munoz heard some of the complaints Houghton had about Ackerman's conduct. Despite the information Baumgardner and Munoz had, the corporation took no action regarding Ackerman's conduct toward Houghton.

The result of such a failure to act is clear under federal law. Montana follows federal discrimination law if the same rationale applies under Montana's HRA. *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). The federal law provides appropriate guidance to the department in this case:

> [A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer. ***See,*** *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2292-93, 141 L.Ed.2d 662 (1998); *Torres*, 116 F.3d at 636; *Snell*, 782 F.2d at 1104; 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have

known of the conduct, unless it can show that it took immediate and appropriate corrective action."). Moreover, the knowledge of corporate officers of such conduct can in many circumstances be imputed to a company under agency principles. ***See*** *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2265-71, 141 L.Ed.2d 633 (1998). As a result, an employer must consider not only the behavior of the alleged offender, but also the response, if any, of its managers. Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at a victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment. ***See*** *Faragher,* 118 S.Ct. at 2283. . . . .

Malik v. Carrier Corp., ___ F.3rd ___, 2000 WL85200, *7 (2nd Cir. 2000).[6]

2. Affirmative Defenses

The corporation contended that the statute of limitations barred Houghton's complaint. A person alleging illegal discrimination under the Human Rights Act must file a complaint of illegal discrimination within 180 days of the alleged discriminatory conduct. §49-2-501(4)(a) MCA.

As already noted, Montana follows federal discrimination law if the same rationale applies under Montana's HRA. Houghton presented proof that Ackerman continued to violate her human rights. ***See***, *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990). Her evidence of prior discriminatory acts also established a pattern or routine relevant to illegal motive. ***See, e.g.***, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Since Houghton proved that one of the continuing acts of harassment occurred within the 180 days before she filed her Human Rights Act complaint, she defeated the statute of limitations defense.

The corporation interposed a number of notice defenses. It argued that because Houghton resigned, it had taken no adverse action, and therefore could defend 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

[6] The *Malik* quotation includes incomplete cites to two other federal cases. Those cases are*: Torres v. Pisano*, 116 F.2d 625, 636 (2d Cir. 1997) ("[A]n employer may not stand by and allow an employee to be subjected to...harassment by co-workers. [O]nce an employer has knowledge of the harassment,...the employer [has] a duty to take...steps to eliminate it."); and *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986).

such a hostile environment. The employer can only interpose this defense if it took no tangible employment action against the complaining employee.[7]

The defense comprises two necessary elements: (a) proof that the employer exercised reasonable care to prevent and correct promptly any sexually 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. Here, the corporation established that there were policies against harassment and sexual harassment. These policies established the standards of conduct for the corporation as well as Houghton.

The corporation proved that Houghton failed to follow the letter of the policies. Houghton did not file a written complaint regarding Ackerman. However, two members of management, Baumgardner and Munoz, had notice of the harassment through conversation or interview with Houghton, and both failed to follow the harassment policy requirement of a written report by any management employee aware of a complaint of harassment. Exhibit 104.

The corporation, acting through the involved management personnel, did even less than what Houghton did--she never made any written report, but at least she reported some incidents of harassment to her superiors. Baumgardner and Munoz apparently never reported Ackerman's harassment of Houghton to anyone, and undertook no investigation of Houghton's complaints. The department will not hold Houghton to a higher standard than the corporation, and therefore the *Faragher* defense fails.

The *Faragher* affirmative defense fails for another reason as well. It is not available if the supervisor's harassment causes a tangible employment action, such as discharge. *Burlington Industries*, ***op. cit.***, 118 S.Ct. at 2270, *Faragher*, ***op. cit.***, 118 S.Ct. at 2293. Baumgardner persuaded Houghton to take leave rather than to resign. Taking unpaid leave *at management's behest* to avoid harassment constituted tangible employment action. Both options Baumgardner offered Houghton as alternatives to remaining under Ackerman's direct supervision involved tangible negative consequences for Houghton.

After Houghton accepted one of those negative options (unpaid leave), the corporation failed to take any action regarding Ackerman's harassment of Houghton. This inaction, contrary to the provisions of the harassment and

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[7] *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).

sexual harassment policies, also constituted a tangible employment action. While Houghton was on leave, losing her income from employment with the corporation, the corporation did nothing about her complaint of harassment. It did not even document the complaint, as both Baumgardner and Munoz were required to do by the company's policies. Inaction can be a tangible employment action when it fails to address the harassment, particularly when it leads to the employee's resignation.

Thus, the inaction of Baumgardner and Munoz is both failure to exercise reasonable care and a tangible employment action. Under either analysis, the affirmative defense fails. Mentioning some of Houghton's concerns in the course of investigating another employee's complaint does not constitute taking reasonable care to protect Houghton from discrimination. The corporation failed to establish the first element of the defense, and failed to establish its entitlement to interpose the defense.

3. Relief

(a) "Reasonable Measures" to Make Houghton Whole Involve Damages until the Final Offer of Reemployment the Corporation Made in November 1998

The law allows the department to require any reasonable measure to rectify any harm Houghton suffered. §49-2-506(1) MCA. At the end of November 1998, both Baumgardner and Ackerman had left employment with the corporation. Counsel for the corporation proffered Houghton's job to her. Houghton refused.

Houghton's refusal at this point was not reasonable. Her concerns about safety from harassment no longer could rest upon the presence of the harasser, Ackerman, or upon the presence of the man who promised to act but did not, Baumgardner. Her only remaining cause for concern was the failure of the corporation to investigate. The corporation's action in re-offering her job to her should have convinced any reasonable person that the corporation now took her complaints seriously.

A mitigation analysis reaches the same conclusion. Houghton must make reasonable efforts to mitigate harm from discrimination by seeking other comparable employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The corporation has the burden of proving a lack of reasonable diligence in mitigating damages from lost wages and benefits by at least a preponderance of the evidence. *P. W. Berry, Inc. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132 (1987). The requirement is not that Houghton exhaustively seek out all

possible employment opportunities. She may exercise reasonable discretion in pursuing offers of work. Factors such as whether the opportunity is in her chosen field of work, whether it is comparable to the opportunity lost as a result of discrimination, and whether it is economically feasible in light of the charging party's actual circumstances, can be considered. *Ford Motor Co.*, ***supra***, 458 U.S. at 231 ("the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position..."); ***accord***, *Hullett v. Bozeman School Dist. #7*, ***supra***.

Houghton quit her job because Ackerman still worked in the Billings office. She had relied upon Baumgardner to act to make the job environment safe for her. He had failed to take any such action. When the end of her leave arrived, Houghton felt she had no choice but to quit, since she would be returning to work under Ackerman.

Instead of accepting the finality of her resignation, when Ackerman resigned the corporation again offered Houghton the chance to return to the career field she wanted. This offer effectively ameliorated the corporation's failure to investigate Houghton's complaint. The offer was made in good faith, and provided Houghton with the opportunity to mitigate her damages. Her refusal of that offer ended her damage entitlement.

(b) Lost Income and Interest to Houghton

In order to rectify any harm Houghton suffered as a result of the corporation's illegal discrimination (§49-2-506(1)(b) MCA), the department must award her the income lost because she had to find other work while on leave and after resigning, up to the date of the final re-employment offer in November, 1998. Offsetting her earnings in other jobs against her projected earnings with the corporation yields the figure of $2,312.00.

Pre-judgment interest on the lost income is properly part of the department award of damages. *P. W. Berry Co.*, ***op. cit.***, 779 P.2d at 523; *Foss v. J.B. Junk*, Case No. SE84-2345 (Mont.HRC, 1987).

(c) Houghton's Home Refinancing

Since the damages to Houghton ceased when she refused a good faith offer to return to work in November 1998, the refinancing of the Houghton home in February 1999 did not result from the corporation's illegal discrimination, and is not a proper item of damage. §49-2-506(1)(b) MCA.

(d) Emotional Distress Damages to Houghton

Since §49-2-506(1)(b) MCA requires "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against," the department properly requires compensation for proven emotional distress. *Vainio v. Brookshire*, ***op. cit.***, 852 P.2d at 601. Damages in discrimination cases are broadly available precisely so that the awards rectify all harm suffered. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d at 523; *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825 (1981); ***see also,*** *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2372 (1975). Recovery for emotional distress is appropriate upon proof that emotional distress resulted from the illegal discrimination. *Campbell v. Choteau Bar and Steak House*, HRC#8901003828 (3/9/93)[8].

Under federal civil rights law, "compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, *whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms*." *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994) (emphasis added) (increasing award of $125.00 to $3,500.00 for overt racial discrimination). This make-whole remedy is different from the standard used for assessing whether emotional distress is compensable in common law tort cases[9], but it is consistent with the principles announced in the Montana cases. ***See*** *Choteau Bar and Steak House*, ***supra***, pp. 3-7 and 39-50.

Montana law expressly recognizes a person's right to be free from unlawful discrimination. §49-1-101, MCA. Violation of that right is a *per se* invasion of a legally protected interest. The enforcement and remedial provisions of the Montana Human Rights Act make clear that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Vainio*, ***op. cit.***; *Choteau Bar and Steak House*, ***supra***; *Johnson v. Hale*, ***op. cit. and supra***. Thus, in Human Rights Act cases, emotional distress becomes a potential element of damages, and thereby recovery, without the high burden of proof present in other kinds of torts. Infliction of illegal discrimination can *per se* result in

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[8] ***See*** *Carey v. Piphus*, 435 U.S. 247, 264, 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 (7thCir.1974); *Brown v. Trustees*, 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 Civil Rights Commission*, 453 N.W.2d 512, 525 (Iowa, 1990).

[9] Emotional distress can be compensable in tort claims where there has been both a substantial invasion of a legally protected interest and a significant impact upon the wronged party. ***See***, ***e.g.***, *First Bank of Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989) ***and*** *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984).

emotional distress, and the testimony of the victim can prove the emotional distress. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (reversing refusal to award emotional distress damages). The trier of fact can infer that emotional harm resulted from illegal discrimination. *Carter* ***and*** *Seaton*, ***op. cit. note 8***; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass.App.Ct. 172 (1985); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or. App. 253, 261-262, ***rev. denied***, 287 Ore. 129 (1979); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 114 (1970).

In this case, Houghton lost more than just a career. She convincingly testified that she lost a career for which her interests and talent uniquely suited her. Her feelings of hurt, loss, betrayal and loss of worth were genuine and severe. Consistent with the existing cases, the department is within its discretion to award Houghton $25,000.00. The department bases this award upon the impact Houghton suffered, not upon the corporation's conduct. Emotional distress damages are compensatory, not punitive.

(e) Injunctive Relief

During Houghton's leave of absence, the corporation proceeded to improve its policies on sexual harassment. The evidence adduced supports a conclusion that the corporation need now only follow the policies it has to prevent further discrimination. Thus, a general injunction against further discrimination is both mandatory and satisfactory to protect other employees against future harassment. §49-2-506(1) MCA.

V. Conclusions of Law

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

2. Medtrans of Montana, d.b.a. American Medical Response, Inc., unlawfully discriminated in employment against Sharon Houghton because of her sex and religion when it subjected her to a hostile and offensive work environment beginning in May 1997 and continuing until she took a leave of absence beginning June 22, 1998. §49-2-303(1)(a) MCA.

3. The corporation must pay to Houghton $2,312.00 for lost wages.

4. The corporation must pay to Houghton $309.54 in prejudgment interest. Post judgment interest accrues by operation of law.

5. The corporation must pay to Houghton $25,000.00 for her emotional distress.

6. Pursuant to §49-2-506(1)(a) and (c) MCA, the corporation must consistently and rigorously enforce its July 1998, policy regarding sexual harassment and investigation.

7. Pursuant to §49-2-505(7), MCA, Houghton is the prevailing party.

VI. Order

1. Judgment is found in favor of Sharon Houghton and against Medtrans of Montana, d.b.a. American Medical Response, Inc., on the charge that the corporation unlawfully discriminated in employment against Houghton because of her sex when it subjected her to a sexually hostile and offensive work environment beginning in May 1997 and continuing until she took a leave of absence beginning June 22, 1998.

2. The corporation must pay to Houghton the sum of $27,621.54, for lost wages ($2,312.00), pre-judgment interest ($309.54) and emotional distress ($25,000.00). Interest on this judgment accrues by law.

3. The corporation is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 6.

Dated: May 3, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry