BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Yvonne S. Houle, **Billie Jo Oppelt**, **Sarah Schmasow**, and **Kim R. Smith**, Charging Parties, vs. **Great Falls Native American Center**, Respondent.	**HRC Case Nos. 0009008982, 0009008954, 9901008915, 0009008964** *Final Agency Decision*

I. Procedure and Preliminary Matters

Charging parties each filed a separate complaint with the Department of Labor and Industry. Yvonne S. Houle filed her complaint on July 28, 1999. Billie Jo Oppelt-Sunderland filed her complaint on July 6, 1999. Sarah Schmasow filed her complaint on June 8, 1999. Kim R. Smith filed her complaint on July 15, 1999. Each charging party alleged the respondent, Great Falls Native American Center, discriminated against her on the basis of sex. On February 14, 2000, the department gave notice Houle's complaint would proceed to a contested case hearing. On February 11, 2000, the department gave notice Oppelt's complaint would proceed to a contested case hearing. On January 13, 2000, the department gave notice Schmasow's complaint would proceed to a contested case hearing. On February 11, 2000, the department gave notice Smith's complaint would proceed to a contested case hearing. The Cascade County Sheriff's office served respondent with all four notices of hearing on February 25, 2000.

The department appointed Terry Spear as hearing examiner in all four cases. On March 10, 2000, the hearing examiner issued scheduling orders in all four cases, giving each case the same prehearing schedule, and setting hearing in all four cases on May 23, 2000. On March 24, 2000, Larry LaFountain, a member of the board of directors of respondent filed appearances and preliminary prehearing statements of respondent in all four cases. LaFountain, an attorney admitted to practice in Montana, represented to the hearing examiner that he could not represent the corporation, because of his full-time employment by Cascade County as an attorney.[1] On April 25, 2000, the hearing examiner consolidated all four cases for all purposes, including hearing.

[1] The hearing examiner ruled that because the respondent, a corporation, could only appear through counsel, this preliminary prehearing statement, filed by an attorney who could not appear for the corporation, was a nullity.

On May 16, 2000, Jeffrey T. McAllister, Conklin, Nybo, LeVeque & Lanning, P.C., filed an appearance contingent upon obtaining a continuance for the corporation in the consolidated cases, together with a motion to continue. McAllister represented that he could not prepare adequately for the May 23, 2000, hearing date and would withdraw unless the hearing examiner granted a continuance. The hearing examiner denied the motion for continuance on May 19, 2000, at the same time entering respondent's default and defining the scope of the May 23, 2000, hearing. On May 22, 2000, McAllister moved to withdraw and the hearing examiner granted that motion.

This consolidated contested case hearing convened on May 23, 2000, in Great Falls, Cascade County, Montana, in the 3rd floor jury room, Cascade County Courthouse. Houle, Oppelt, Schmasow and Smith were present, with their attorney, Elizabeth A. Best, Best Law Offices, P.C. No individual or attorney attempted to attend or appear for the respondent. Houle, Oppelt, Schmasow, Smith and Dr. Ronald M. Peterson testified. The hearing examiner's exhibit docket accompanies this decision.

Charging parties filed proposed findings and conclusions at hearing, and filed proposed judgments on May 25, 2000. Based upon the evidence adduced, the hearing examiner now makes the following findings of fact and conclusions of law, and issues the following final order.

II. Findings of Fact

1. Respondent hired Yvonne Houle as a Licensed Professional Nurse in October 1997, Kim R. Smith as Clinical Director in December 1998, and Billie Jo Oppelt-Sunderland as a medical assistant on February 16, 1999. All three employees are women.

2. On or about March 15, 1999, Sarah Schmasow, an enrolled member of a federally recognized Native American Tribe, applied with respondent for the job of Executive Director. At that time, the job was available and respondent was seeking applicants. Schmasow met or exceeded all of the minimum qualifications, for the job. She is a woman.

3. Respondent rejected Schmasow. After respondent rejected her, the job remained open and respondent continued to seek applications from persons of her qualifications, and from persons who did not have the minimum qualifications for the position.

4. In about 1982, Schmasow had filed a complaint with the Human Rights Commission alleging that respondent had discriminated against her by failing to hire her then as Executive Director. In about 1996, Schmasow had filed a Human Rights claim against Respondent in District Court for failure to hire her as Executive Director despite her entitlement to Indian Preference in favor of a male allegedly not entitled to preference. *Cascade County Eighth Judicial District Cause No. ADV-96-572.* Schmasow did not prevail in this case, although the Indian Health Service eventually cut off funding for respondent because the male Executive Director was not an enrolled member of a federally recognized Native American tribe (the respondent then fired that Executive Director). In August 1998, Schmasow had filed a Human Rights claim alleging that respondent discriminated against her on the basis of her race and in retaliation for her human rights activity when it failed to hire her as a counselor, despite her entitlement to an Indian preference, and hired a white applicant. *HRB Cause No. 9809008457.*

5. Schmasow has a Master's Degree in Human Services with an emphasis on drug and alcohol counseling. She obtained this degree with assistance from the Indian Health Service (IHS). This assistance required her to "pay back" the IHS with at least two years' work for an organization that serves a customer base which is at least 25% Native American. This "payback" requirement served as an additional hiring preference, in addition to her Native American status, when she applied for the job with respondent.

6. In 1999, the minimum qualifications for the job of Executive Director were a Bachelor of Science or Arts degree in Human Services, Business Administration, Public Health or related field, or an equivalent combination of education and experience. The applicant had to be Native American. Sarah Schmasow met or exceeded all of these minimum qualifications.

7. The respondent hired a male applicant for the job of Executive Director who did not possess the education or experience requirements and who was not an enrolled member of a recognized Native American tribe.

8. Respondent refused to hire Schmasow because she was female and in retaliation for her prior complaints against it. Board member Lawrence LaFountain admitted to Schmasow that the board decided not to hire her because she "is a troublemaker and sues everybody."

9. Respondent's conduct subjected Schmasow to lost wages for 15 months, lost future earnings and emotional distress. It is not reasonable to require Schmasow to work for respondent after the treatment she received.

10. Respondent budgeted the Executive Director position $28,500.00 as a base amount for an Executive Director with minimum qualifications. A successful applicant with Schmasow's qualifications would have earned a salary of not less than $33,000.00 annually. Despite diligent attempts to find employment after respondent's discriminatory rejection of Schmasow, she has been unable to find employment. To date (June 12, 2000) she has lost $40,982.70, 14.9032 months' wages. Interest accrued to date on her lost wages totals $2,426.25.[2] Schmasow's total out of pocket losses to date are $43,408.95.

11. Schmasow will continue to lose $2,750.00 per month in wages, less any earnings she obtains should she find comparable work. Those loses will continue through March 14, 2003.

12. Beginning in December 1998, respondent's Executive Director, George Cozino, subjected Houle, Smith and Oppelt (after her hiring) to unwelcome sexually offensive comments, advances, requests for sexual favors and touching. Some members of respondent's board of directors participated in the sexually offensive and unwelcome comments and touching, including Board Chairman Dan Laverdure.

13. Houle, Smith and Oppelt complained repeatedly to Cozino and the board of directors, in accord with respondent's policies, about the unwelcome conduct. The respondent, with notice to its board and executive director of the conduct, did not act to stop the conduct, instead disciplining the women for complaining.

14. The unwelcome sexually offensive comments, advances, requests for sexual favors and touching were pervasive, altering the terms or conditions of the employment of Houle, Smith and Oppelt and creating an abusive employment environment.

15. On about May 3, 1999, with the permission and approval of Medical Director Dr. Ronald Peterson, Smith closed respondent's clinic pending correction and elimination of the sexually offensive and hostile work environment. Smith instructed Houle and Oppelt not to return to work until respondent's board resolved the problems of the hostile environment. Dr. Peterson attempted to meet with the board to resolve the problems on May 3, 1999, but the board refused to meet with him. Smith remained at work for

[2] $2,750.00 per month times .1 per annum, divided by 12 for monthly interest accrued times 105.9032 {14 plus 13 plus 12 plus 11 plus 10 plus 9 plus 8 plus 7 plus 6 plus 5 plus 4 plus 3 plus 2 plus 1 plus .9032} (months of interest accrued at the monthly rate for the 14.9032 months of lost wages from March 15, 1999, through June 12, 2000).

two hours after closing the clinic, but respondent did not communicate with her. On May 4, 1999, respondent fired Houle, Smith and Oppelt.

16. Respondent's conduct subjected Houle, Smith and Oppelt to lost wages and emotional distress, and subjected Smith to lost future earnings and costs of seeking new employment. It is not reasonable to require Houle, Smith and Oppelt to return to work with respondent after the treatment they received.

17. On May 4, 1999, Houle earned $16,848.00 per year. Despite diligent attempts to find new employment, she did not find such employment until October 1999. She lost $7,020.00, five months' wages. She found comparable employment and did not have to move. Interest accrued to date on her lost wages totals $663.28.[3] Houle's total out of pocket losses are $7,683.28.

18. On May 4, 1999, Smith earned $35,568.00 per year. Despite diligent attempts to find new employment, she did not find employment in Montana and sought employment out of state. She found a position in Alaska approximately five months after her firing. Her monthly salary for Respondent, was $2,964.00 ($35,568.00 divided by 12). She lost $14,820.00 in wages during the five months without work. She incurred $7,500.00 in moving related expenses to relocate to Alaska. Although she is earning a comparable wage in Alaska, her cost of living has tripled as a result of her relocation, and she therefore has replaced two thirds of her wages. She continues to lose $11,858.00 annually ($988.00 per month). To date (June 12, 2000), she has lost earnings of $7,169.80 ($988.00 times 7.267 months) since accepting employment in Alaska, for a total wage loss to date (June 12, 2000) of $21,989.80. Interest accrued to date on her lost wages totals $1,663.90 ($1,365.25[4] plus $298.65[5]).

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[3] $1,440.00 per month times .1 per annum, divided by 12 for monthly interest accrued times 55.273 {13 plus 12 plus 11 plus 10 plus 9 plus .2733} (months of interest accrued at the monthly rate for the 5 months of lost wages from May 4, 1999, through June 12, 2000).

[4] $2,964.00 per month times .1 per annum, divided by 12 for monthly interest accrued, times 55.273 {13 plus 12 plus 11 plus 10 plus 9 plus .2733} (months of interest accrued at the monthly rate for the 5 months of lost wages from May 4, 1999, through June 12, 2000).

[5] $988.00 per month times .1 per annum, divided by 12 for monthly interest accrued, times 36.2733 {8 plus 7 plus 6 plus 5 plus 4 plus 3 plus 2 plus 1 plus .2733} (months of interest accured at the monthly rate for the 8.2733 months of lost wages from October 4, 1999 through June 12, 2000).

19. Smith's future earning losses from June 12, 2000, through May 3, 2003 will be $32,407.91 ($11,858.00 times 2.733 years). That future loss is equal to $25,447.17 (the amount today that would earn the future loss at 10% annual simple interest over 2.733 years). Smith's total out of pocket losses are $49,100.87.

20. On May 4, 1999, Oppelt earned $14,976.00 per year. Despite diligent attempts to find new employment, she did not find such employment until October 1999. She lost $6,240.00, five months' wages. She found comparable employment and did not have to move. Interest accrued to date on her lost wages totals $574.94.[6] Oppelt's total out of pocket losses are $6,814.94.

21. Houle, Smith and Oppelt each suffered emotional distress in three ways. First, they were each subjected to the unwelcome sexually offensive comments, advances, requests for sexual favors and touching, which were sufficiently pervasive to alter the terms or conditions of their employment. On its face, this resulted in emotional distress over a period of six months. Second, when they sought redress by following the complaint/grievance procedures of their employer, the employer subjected them both to escalated hostility in the workplace and to disciplinary action. On its face, this resulted in further emotional distress over a period of at least three to four months. Finally, the employer discharged them when they continued to resist the unwelcome sexually offensive comments, advances, requests for sexual favors and touching. This also on its face resulted in further emotional distress, at and following the wrongful firings. Houle, Smith and Oppelt are each entitled to recover $25,000.00 for compensation for their individual emotional distress.

22. Schmasow suffered emotional distress in three ways. First, she was subjected to discriminatory rejection, with the resulting loss of employment, with its financial benefits and increase to self-esteem. This on its face resulted in emotional distress. Second, the pattern of rejection despite qualifications she experienced from respondent continued in this rejection, resulting on its face in greater emotional distress. Third, she observed the respondent disregard the law (including the job qualifications), thereby discounting her worth as a potential employee and person; she also observed the respondent place its funding (and thereby its services to the Indian patients of the clinic), at risk rather than hiring her. This also resulted in further emotional distress.

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[6] $1,248.00 per month times .1 per annum, divided by 12 for monthly interest accrued times 55.273 {13 plus 12 plus 11 plus 10 plus 9 plus .2733} (months of interest accrued at the monthly rate for the 5 months of lost wages from May 4, 1999, through June 12, 2000).

Schmasow is entitled to recover $25,000.00 for compensation for her emotional distress.

V. Conclusions of Law

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

2. Charging parties Houle, Smith and Oppelt have proved, by direct evidence, that the respondent subjected them to a sexual harassment so that they endured a sexually hostile and oppressive work environment, thereby discriminating against them on the basis of sex (females). §49-2-303(1)(a) MCA.

3. Charging parties have each established a *prima facie* case that (1) they each are members of a protected class, i.e., women; (2) they each were either qualified for or performing satisfactorily positions with the respondent; (3) respondent either denied or terminated their employment; (4) either for a less qualified applicant who was not a member of the protected class or while seeking other applicants of the same qualifications as charging parties. They have, by establishing their *prima facie* cases, created a presumption that respondent illegally discriminated against them in employment by reason of their sex. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Montana adopted *McDonnell Douglas* as the appropriate standard of proof for indirect evidence of disparate treatment. *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Johnson v. Bozeman School Dist. #7*, 226 Mont. 134, 734 P.2d 209 (1987); *Martinez v. Yellowstone Cnty Welf. Dept.*, 192 Mont. 410, 626 P.2d 242 (1981).

4. Charging parties also proved that respondent took adverse employment action against each of them after they had exercised their rights by complaining of illegal discrimination. There is both direct and indirect evidence that their exercise of their rights triggered subsequent adverse action against them. Charging parties have also proved that respondent illegally retaliated against them because they opposed practices forbidden under the Montana Human Rights Act and (in the case of Schmasow) because she filed complaints and participated in proceedings under the Act. §49-2-301 MCA.

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5. The respondent must pay to Schmasow $68,408.95 for past lost wages, prejudgment interest on past lost wages[7] and emotional distress.[8] In addition, on the 15th of each calendar month beginning on July 15, 2000, and ending on March 15, 2003,[9] upon timely receipt of a notarized statement by Schmasow of her gross earnings from the 15th of the previous month through the 14th of the current month, the respondent must immediately pay to Schmasow the sum of $2,750.00 less the amount of her gross earnings according to her notarized statement. Post judgment interest accrues by operation of law.

6. The respondent must pay to Houle $32,683.28 for past lost wages, prejudgment interest on past lost wages[7] and emotional distress.[8] Post judgment interest accrues by operation of law.

7. The respondent must pay to Smith $74,100.87 for past lost wages, prejudgment interest on past lost wages[7] the present value of future lost wages[9] and emotional distress.[8] Post judgment interest accrues by operation of law.

8. The respondent must pay to Oppelt-Sunderland $33,814.94 for past lost wages, prejudgment interest on past lost wages[7] and emotional distress.[8] Post judgment interest accrues by operation of law.

9. Pursuant to §49-2-506(1)(a) and (c) MCA, affirmative relief is necessary. The respondent must within 60 days of this decision submit policies prohibiting and policing unwelcome sexually offensive comments, advances, requests for sexual favors, touching and retaliation by management employees and board members, to the Department of Labor and Industry (Human Rights Bureau), adopt those policies (including any amendments the department directs to the draft policies) within 60 days of department approval, and consistently and rigorously enforce those policies after adoption. If the respondent fails to follow this entire order, it must immediately cease doing business as an employer in the State of Montana.

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[7] Pre-judgment interest on lost wages is properly part of an department award for lost wages. *P. W. Berry, Inc. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Foss v. J.B. Junk*, Case No. SE84-2345 (Mont.HRC, 1987).

[8] The $25,000.00 emotional distress award is 50% of the individual emotional distress awards to Paddy and Patricia Griffith, for being subjected to emotional distress through retaliation for at least twice as long. *Griffith v. Palacios*, HRC Nos. 9802008368 & 9802008369 (March, 1999).

[9] Four years of lost wages is a "reasonable measure . . . to rectify" pecuniary harm to charging parties for lost wages. §49-2-506(1)(b) MCA; ***see also*** §39-2-905(1) MCA (4 years of lost wages the limitation upon recovery for such losses under the Montana Wrongful Discharge from Employment Act).

10. Pursuant to §49-2-505(7), MCA, charging parties are the prevailing parties.

VI. Order

1. Judgment is found in favor of Charging Parties Yvonne S. Houle, Billie Jo Oppelt, Sarah Schmasow, and Kim R. Smith and against Respondent Great Falls Native American Center on the charges that respondent illegally discriminated against the charging parties in employment on the basis of sex (female) and illegally retaliated against the charging parties in employment.

2. Respondent must pay (1) to Schmasow $68,408.95, and for the time and on the conditions specified in Conclusion of Law No. 4 herein, the sum of $2,750.00 per month less the amount of Schmasow's gross earnings for that month; (2) to Houle $32,683.28; (3) to Smith $74,100.87; and (4) to Oppelt-Sunderland $33,814.94. Post judgment interest accrues by operation of law.

3. The respondent is enjoined from further discriminatory acts and ordered to comply with all of the provisions of Conclusion of Law No. 8.

Dated: June 12, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry