

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

Anna Stipp, Charging Party, vs. Frontier Personal Care Center, Inc.) and Marvin Shiver, Respondents.)	Human Rights Act Case No. 9901008827 <i>Final Agency Decision</i>
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I. Procedure and Preliminary Matters

Anna Stipp¹ filed a complaint with the Department of Labor and Industry on March 3, 1999. She alleged the respondents, Frontier Personal Care Center, Inc. (“Frontier”) and Marvin Shiver discriminated against her because of gender (female) and disability when they terminated her employment on October 20, 1998. She amended her complaint, and later withdrew her disability discrimination claim. On October 14, 1999, the department gave notice Stipp’s 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. On January 10, 2000, the hearing examiner ordered that until any party other than Shiver gave Shiver’s counsel written notice of intent to seek to recover from Shiver, Shiver would not participate further in this proceeding. On January 19, 2000, the hearing examiner denied Stipp’s motion for summary judgment. On January 21, 2000, Stipp moved to join Melchor Balazs and the alleged successor corporation to Frontier as additional respondents. The hearing examiner refused the proposed amendment and joinder, ruling that the additional respondents had not agreed to retention of department jurisdiction for more than 12 months, that hearing was now set for more than 12 months after the complaint filing, and therefore that joinder would defeat the department’s jurisdiction.

The hearing officer conducted this contested case hearing on May 11-12, 2000, in Livingston, Park County, Montana. Stipp was present with her attorney, Tim Kelly. Frontier was present through its designated representative, Melchor Balazs, with its attorney, Robert L. Jovick. Shiver did not attend.

¹ Stipp originally filed her complaint as “Jane Doe,” but after later amending her claim substituted her name into the caption.

Anna Stipp, Sharon A. Terpenning, Katherine Kountz, Betty Jean Lampton, Richard Payne, James Morrow, Jr., and Melchor Balazs testified at hearing. During the hearing, on the timely motions of the parties, the hearing examiner sealed portions of the testimony and excluded the public to protect the privacy of non-parties. The hearing examiner's exhibit docket accompanies this decision. The parties gave closing oral arguments on May 22, 2000, and the hearing examiner deemed the case submitted for decision.

II. Issues

The legal issue in this case is whether Frontier and Shiver unlawfully discriminated against Stipp because of her sex, violating §49-2-303(1), MCA, by terminating her employment on October 20, 1998. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Anna Stipp, the charging party, is a resident of Livingston, Montana. Final Prehearing Order, Sec. IV, Facts and Other Matters Admitted, No. 1.

2. Respondent Frontier Personal Care Center, Inc., is a Montana corporation. At all times relevant to Stipp's complaint, Frontier's principal business was to operate a "personal care facility" as defined in §50-5-101(39), MCA, in Livingston, Montana. Final Prehearing Order, Sec. IV, Facts and Other Matters Admitted, No. 2.

3. Sharon Terpenning was the administrator of Frontier's Livingston personal care facility from October 1997 through August 1998. Melchor Balazs, the chief executive officer of Frontier, hired her. Terpenning had full authority to discharge employees of Frontier, except with regard to employees already on staff before Terpenning's employment. To fire such employees Terpenning needed authorization from Balazs. Respondent Marvin Shiver, Jr., was the administrator from September 1998 through some time after January 1999. Final Prehearing Order, Sec. IV, Facts and Other Matters Admitted, No. 3; testimony of Terpenning.

4. Terpenning was the administrator when Frontier hired Stipp as a housekeeper on or about October 30, 1997. Terpenning had accepted the administrator position with Frontier in October 1997. After accepting the position, Terpenning went to California to see her grandchild. She returned during the second week in November 1997. After her return, Stipp told Terpenning that she was an alcoholic. Terpenning warned Stipp, as she did all new hires, not to come to work under the influence of alcohol. Terpenning

knew that Stipp still drank alcohol when she was not working. Testimony of Terpenning.

5. Terpenning initially kept a close watch on Stipp. She observed that Stipp performed above and beyond her designated duties as a housekeeper. Within a period of weeks, Terpenning promoted Stipp to the assistant to the maintenance supervisor. The maintenance supervisor, Michael Relaford, was ill, and could not keep up with his duties at the personal care facility. Testimony of Terpenning and Stipp.

6. Stipp earned \$5.15 per hour as a housekeeper at Frontier. She continued to earn \$5.15 per hour as assistant to the maintenance supervisor. Testimony of Stipp.

7. Frontier had policies regarding abusive behavior and intoxication at work by employees. Both types of conduct were grounds for job termination. Abusive behavior included calling names, directing obscenities toward another, threatening harm and shouting at or insulting someone. Testimony of Terpenning; Exhibits 9 and 103.

8. In November and December 1997, Frontier gave a male patient aide multiple write-ups, written warnings and written discipline regarding poor patient care, patient abuse and verbal abuse of other staff members, including physical threats toward them. Frontier did not discharge this patient aide for these acts. In December 1997, Frontier gave this patient aide a three-day suspension for insubordination, and subsequently fired him when he was twice a “no call/no show” absentee. Testimony of Terpenning [sealed testimony]; Exhibit 8 [sealed exhibit].

9. Relaford wanted to leave Frontier for self-employment. Terpenning offered Stipp the maintenance supervisor position after Stipp had worked for a few weeks as assistant to Relaford. Although she worried about undertaking the additional responsibilities, Stipp accepted the position. Her wage as maintenance supervisor was \$5.65 per hour. Testimony of Terpenning and Stipp.

10. As maintenance supervisor, Stipp was responsible for supervision of the housekeeping staff and the laundry crew. She was also responsible for fixing or causing to be fixed anything broken or malfunctioning at the facility. She was responsible for the salt-water softener, the heating system (boiler, fans, vents and piping), the lifts and the other mechanical equipment at the facility. She was responsible for ordering, storing, keeping records of and maintaining supplies. She was responsible for painting, for changing screens and storm

windows, for other periodic maintenance and generally for all of the physical maintenance of the entire facility. She was responsible, in the maintenance arena, for the facility's compliance with OSHA and other federal and state regulations. Testimony of Terpenning and Stipp.

11. As she had when Stipp first worked as a housekeeper, Terpenning again kept a close watch on Stipp after she became maintenance supervisor. Stipp satisfactorily performed her duties and responsibilities as maintenance supervisor. Stipp's father, Richard Payne, and others taught her aspects of the job she did not know. Testimony of Terpenning.

12. Stipp also provided transportation for patients. She took them to clinic appointments, hair appointments and to the hospital or rehabilitation center. She usually used her own car, usually without mileage reimbursement. She also sometimes drove the Frontier van, although using her own car was easier. She took residents to the park and to the cemetery, and to other outside events. She did this without objection because she loved the residents. She prevailed upon her father, a musician, to perform with her for the residents. Testimony of Stipp.

13. Terpenning had no authority to give any employee a raise without approval from Balazs. She asked him about a further raise for Stipp, but he refused to authorize such a raise at that time. Balazs did subsequently agree to pay, from a separate account "off the books," an additional \$.35 per hour to Stipp. This brought her actual wage to \$6.00 per hour. Testimony of Stipp and Balazs.

14. During her first nine months of employment, Stipp had two absences. This was a very low rate of absenteeism for Frontier employees. Testimony of Terpenning; Exhibit 7.

15. Frontier had no written rules regarding vacation. Terpenning considered two weeks of vacation per year appropriate. For a new employee, one week would accrue after six months of work, and the second week accrue at the end of the first year of employment. In June 1998, more than six months after she commenced employment at Frontier, Stipp requested vacation time and had surgery while on her week of vacation. She returned a day early. She told Terpenning of her temporary lifting restrictions and of the possibility she might need to leave work early due to fatigue. Terpenning accommodated Stipp, who continued to work as maintenance supervisor. Testimony of Terpenning.

16. In July 1998, Terpenning fired a male patient aide for two consecutive “no call/no show” absences. Before the firing, the patient aide had missed multiple days’ work on two or three different occasions because he was in jail. He had also come to work multiple times under the influence of alcohol and Frontier sent him home. On two of the occasions that he came to work intoxicated, he was threatening and abusive toward staff, patients, or both. After a previous “no call/no show” absence for an entire weekend (during which he was scheduled to work both days), Frontier gave him a week off with pay to “relax and get his thoughts together.” The documents from his file show four different days on which this employee came to work intoxicated and was sent home. In addition to losing the workdays, he received one three-day suspension over the four episodes. One of the episodes occurred in 1999, after Frontier rehired the former employee despite his previous discharge. Testimony of Terpenning [sealed testimony]; Exhibit 8 [sealed exhibit].

17. In August 1998, Stipp had three consecutive absences. Terpenning called her to find out what was wrong. Stipp told Terpenning that she was still recuperating from her surgery in June and had attempted to do too much. Terpenning encouraged Stipp to take a few more days off work and call when she could come back. Stipp came back “within a couple of days” after that telephone conversation. Terpenning did not consider these absences a violation of any Frontier policy. Testimony of Terpenning and Stipp; Exhibit 7.

18. In August 1998, Terpenning observed a male patient aide feeding a resident who needed a clothing change. The resident’s clothing was wet and cold, having been fouled some time earlier. The same day, Terpenning received a report from another employee that the patient aide had physically abused the same resident. The patient aide had a prior written warning for providing inadequate care to another resident. Terpenning suspended the patient aide, who resigned before the disciplinary process could proceed. Terpenning discussed this employee’s possible firing with Balazs, who did not want Frontier to fire him. Balazs took the patient aide’s file after the firing. On subsequently reviewing the file, Terpenning found much of the documentation of disciplinary actions missing. Testimony of Terpenning [sealed testimony]; Exhibit 8 [sealed exhibit].

19. On August 18, 1998, Terpenning gave Stipp a written evaluation. Terpenning gave Stipp 8 average scores and 5 above average scores out of the 13 numerical scores. Testimony of Terpenning; Exhibit 4.

20. In September 1998, Frontier designated Stipp as the employee of the month for the facility. She was excited and proud; she had never been

highlighted in any publication, let alone one sent to 600 people. In addition, her wage increased, now “on the books” to \$6.25 per hour. Testimony of Terpenning and Stipp; Exhibits 2 and 14.

21. Stipp enjoyed her job, despite the challenges it posed for her. Her previous employment had been in bars. She enjoyed the successes she was now having in her work. She enjoyed interaction with the residents (so much so that she prevailed upon her father to come and perform with her for the residents without compensation). Her low sense of self-worth was improving because of her work. She felt she had found a place where she could work long-term. She considered the facility a “second home” to her. Testimony of Stipp.

22. By early September, Terpenning had left her job as administrator of Frontier’s Livingston facility. Balazs hired Marvin Shiver as her successor. Shiver observed that Stipp, a female, was the maintenance supervisor. He had some concerns about a woman being the maintenance supervisor. He preferred a man in the maintenance supervisor position. Testimony of Terpenning, Stipp and Balazs; Exhibit 1.

23. On September 8, 1998, Stipp was working sweeping a restricted basement area that contained asbestos. Balazs, who was on the premises that day, directed her to work in the basement. Stipp was concerned about working in an area contaminated with asbestos, but Clara Gillard (a former owner of the facility who was assisting in Shiver’s orientation) wanted the entire area mopped. While still administrator, Terpenning had instructed Stipp to stay out of the area. Stipp reported to LoAnne Frisk that she was not feeling well, and Frisk² told her to go home. Testimony of Stipp.

24. In early September 1998, a male employee of Frontier appeared at the facility although not scheduled to work. The male employee was intoxicated and threatened physical violence toward Shiver in the presence of other employees. Betty Jean Lampton was one of the employees present, and she reported the incident to Shiver. Frontier took no action against this employee (the same employee discussed in Finding No. 17). Testimony of Lampton [sealed testimony]; Exhibit 8 [sealed exhibit].

25. In September 1998, a male employee got into a loud argument with another employee in the dining room. Stipp and Lampton were present, and Stipp asked the two arguing employees to be quiet. The male employee

² LoAnne Frisk identified herself as Frontier’s office manager when she signed a response to a Human Rights Bureau information request in May 1999. Exhibit 15.

responded, "Fuck off." The incident was reported to Shiver. Frontier took no disciplinary action. Testimony of Lampton and Stipp [sealed testimony]; Exhibit 8 [sealed exhibit].

26. On Sunday, October 18, 1998, Stipp was not at work. Sunday was a day off for her that pay period. Around 9:00 p.m. that evening, she called Frontier to inform her employer that she was sick and would not be coming to work on Monday, October 19, 1998. In fact, she had been cutting logs with her son, Jim, and a friend. She was drinking, not feeling well, and did not think she would feel well enough to go to work the next morning. A fellow employee, James Morrow, took the call. Testimony of Stipp.³

27. Morrow was staying at the facility, in an empty resident room, because of marital difficulties with his wife. His car had been vandalized, and he believed the vandal was someone acting on behalf of his wife. Morrow was staying at the facility to be safe from further hostile acts by unknown persons he believed were acting on behalf of his wife. Morrow was upset and afraid. He believed that unknown persons in the community, perhaps even fellow employees at Frontier, were conspiring to commit further hostile acts against him, because of his marital difficulties. Testimony of Morrow.

28. Stipp did not know Morrow's wife. She had no reason to feel animosity toward Morrow, who she knew from work. She had no reason to verbally abuse whoever answered the phone when she called to report that she would be off sick on Monday. Stipp did tell Morrow that she would not be at work on Monday, October 19, 1998. She did not make any threats against Morrow. Testimony of Stipp.

29. Morrow could tell Stipp had been drinking. He thought she sounded belligerent and threatening. He decided she must be responsible for the prior vandalism and might be coming to the facility to assault him. Morrow moved from one vacant room at the facility to another, so that Stipp could not find him. Testimony of Morrow.

30. On the morning of October 19, Stipp called Frontier again to be sure that her message had reached the administrator. She talked to Shiver, who acknowledged her message. He told Stipp that it was a very busy day, and asked her if she was sure she could not come to work. She told him she was ill. He did not indicate any further problem with her absence. Testimony of Stipp.

³ Stipp did not know at the time of her call that the employee to whom she spoke was Morrow, but there is no dispute that Morrow took the call.

31. On October 19, Morrow reported to Shiver his perception of the telephone conversation with Stipp. Morrow also quit his job at Frontier. Shiver had already discussed with a male job applicant, Kevin Coon, the possibility of an opening at Frontier. Shiver had Coon's employment application on October 19. Shiver decided to fire Stipp. One of the motives for this decision was his desire to hire a man as maintenance supervisor. Testimony of Kountz; Exhibits 1 and 12.

32. Stipp reported to work on Tuesday, October 20, 1998. Shiver met with Stipp and told her he was firing her for calling "Jim" and threatening to "kick his ass." Shiver's statement confused Stipp. She thought at first that Shiver was talking about some alleged altercation with her adult son, Jim. She repeated to Shiver, "Jim?" Shiver then explained to her that he referred to Jim Morrow. Stipp knew Morrow only as "James." She had talked to Morrow two or three times since he came to work at Frontier. She still did not understand what Shiver was saying. Shiver then told her she was fired for threatening another employee, an act that constituted abuse. He then asked her if she had anything to say. She said she did not, since she was already fired. She told Shiver she had to go get her coat and turn in her time. Testimony of Stipp.

33. Shiver did not show Stipp any statements, forms or other papers. He did not ask her to sign any papers. He did not ask her any further questions. Stipp gave Shiver her keys. He thanked her, saying, "I don't want to see you back in the building." Stipp left the office and called her mother. Stipp and her father had arranged to play music for the residents that evening, and her mother planned to attend. Stipp wanted to make sure her mother did not come to the facility expecting the performance to occur. She also told her father that she could not make it to play at the facility. Testimony of Stipp.

34. Before he fired Stipp, Shiver had never given her any kind of disciplinary warning. Before he fired her, Shiver had never had any performance problems with Stipp. Testimony of Kountz.

35. Having fired Stipp, Shiver hired Coon, a man with less experience, training and skills, at a starting rate of pay higher than Stipp's starting rate. Stipp did not earn the male replacement's starting wage until she had at least six months of experience and training in the job. Testimony of Kountz and Stipp; Exhibit 12.

36. The week following her firing, Stipp called Balazs to ask that Frontier reconsider. Balazs told her, "Skip [Shiver] is the administrator. I got to do what he says." Testimony of Stipp.

37. Stipp applied for unemployment insurance, and Frontier challenged her entitlement, citing her alleged abuse of Morrow. Stipp was embarrassed by Frontier's report to the department regarding her unemployment insurance application. She believed that because Frontier classified her as an employee fired for abuse she was not eligible to work at any care facility or hospital. She began to stay at home and isolate herself from people. She grew depressed. Testimony of Stipp.

38. Shiver prepared written documentation of the firing of Stipp. He characterized her behavior as "abusive physical behavior," even though he fired her for an alleged threat in a telephone call. He dated the first discussion of the alleged threat (presumably with Morrow) as occurring on October 17, 1998, the day before Stipp's telephone conversation with Morrow and two days before Shiver's conversation with Morrow. Shiver included in his report the statement: "Anna was reported to be extremely intoxicated." However, Stipp was neither on duty nor on the premises at the time. He dated both the report and his signature on that report as October 19, 1998, the day before he fired Anna. Exhibit 111.

39. Like Terpenning before him, Shiver ordinarily utilized progressive discipline with employees. He did not apply progressive discipline to Stipp. Testimony of Terpenning and Kountz.

40. Stipp began looking for work after her depression eased at the end of 1998. She did not work for pay in 1998 after Frontier fired her. In 1999, she did some work for a friend, earning approximately \$500.00. In the last week of September 1999, Stipp obtained employment at Albertson's grocery store in Livingston. Her rate of pay at hiring was \$6.00 per hour. During her first 20 weeks of work with Albertson's, she received no benefits. Thereafter, she received the usual benefit package for Albertson's employees. For the week ending February 15, 2000, Albertson's increased Stipp's rate of pay to \$6.15 per hour. Her Albertson's earnings for 1999 were \$2,463.34. Her total earnings in 1999 were \$2,963.34. Her Albertson's earnings in 2000 were \$3,596.60 for the 17 weeks through April 29, 2000. Her average weekly wage in 2000 was \$211.56. She planned to continue to work at Albertson's. Her earnings in 2000, from April 30 through September 17, will be \$4,231.20. Testimony of Stipp; Exhibits 14, 17 and 118.

41. Had Frontier not fired Stipp, she would have earned \$250.00 per week through May 2, 2000, and beyond. For the remaining ten weeks of 1998 she would have earned \$2,500.00. In 1999 she would have earned \$12,035.75. Her earning loss for 1999 is \$10,072.41 (\$12,035.75 minus \$2,963.34). Through September 17, 2000, she would have been \$8,550.00.

Her lost earnings in 2000, through September 17, 2000, are \$722.20 (\$8,550.00 minus the sum of her 2000 earnings at Albertson's through September 17, \$7,827.80). Her total lost earnings through September 17, 2000 are \$13,294.61. After September 17, 2000, her lost wages continue at \$38.44 per week. Testimony of Stipp; Exhibits 14 and 17.

42. Interest on Stipp's lost earnings, at 10% per annum, through September 17, 2000, totals \$1,809.68 (\$12.75 for 1998, \$852.50 for 1999 and \$944.43 for 2000 through September 17).

43. Because of respondent's discriminatory actions, Stipp also sustained compensable emotional harm (see Finding Nos. 12, 20, 21, 31, 32 and 36). She also feared that Frontier's statements about her being intoxicated on both September 8 and October 18, 1998, harmed her reputation. The amount appropriate to remedy her emotional distress is \$15,000.00.

44. Frontier no longer operates the facility in Livingston. Testimony of Balazs.

45. If Frontier reinstates Stipp, her additional loss of wages will be \$38.44 per week from September 17, 2000, to the date of reinstatement (see Finding No. 41). If Frontier fails or refuses to reinstate Stipp, the future loss of wages and the continuing emotional distress she will suffer entitle her to an additional \$7,500.00 for future wage loss and an additional \$12,500.00 for continuing emotional distress (see Finding Nos. 40 and 42).

IV. Opinion

Liability

Montana law prohibits discrimination against a person in employment because of sex when the reasonable demands of the position do not require a distinction based on sex. §49-2-303(1)(a) MCA. Stipp has proffered direct evidence of discriminatory motive. Shiver's sworn statement is that he, acting on behalf of Frontier, was motivated in part by his desire to have a male maintenance supervisor when he fired Stipp. (Exhibit 1).

Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979). Direct evidence of an illegal discriminatory for the adverse action establishes a civil rights violation unless the respondent presents substantial and credible proof rebutting the proof of discrimination or demonstrating a legal justification for the adverse action.

Blalock v. Metal Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985); *see also*, *Foxman v. MIADS*, HRC Case #8901003997 (6/29/992) (race discrimination); *Edwards v. Western Energy*, HRC Case #AHpE86-2885 (8/8/90) (disability discrimination); *Elliot v. City of Helena*, HRC Case #8701003108 (6/14/89) (age discrimination). When a charging party proves a *prima facie* case by direct evidence, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. 24.9.610(5) A.R.M.

Frontier's rebuttal of Shiver's sworn statement consisted of the suggestion that Shiver had a motive to lie under oath in return for Stipp's covenant not to execute and her dismissal of Shiver from a civil action Stipp filed against Frontier and Shiver, alleging wrongful termination and defamation.⁴ Frontier argued that this motive, coupled with Shiver's prior statements, undercut the sworn statement. Shiver had given his prior statements when he at least faced potential liability for discrimination against Stipp, even if she not yet named him as a respondent. When he later admitted illegal actions under oath, he exposed himself to opprobrium, and ultimately to a requirement of training in gender discrimination before he can supervise other employees again. Even though he received a covenant not to sue and a dismissal, his sworn statement was still an admission against his interests. That statement would be admissible even if it was hearsay (it was not) and he was unavailable as a witness (he was not). Rule 804(b)(3) M.R.E. That statement was more credible than his prior unsworn statements, given in furtherance of his own interests in avoiding any liability or criticism for discrimination against a female employee.

⁴ The docket in this contested case shows that the Human Rights Bureau certified the case for hearing on October 8, 1999. On October 18, 1999, after the conclusion of the Human Rights Bureau investigation on her Human Rights Act complaint, Stipp filed a civil action against Frontier and Shiver, alleging wrongful termination and defamation. On October 28, 1999, Shiver's attorney wrote to Frontier's attorney, requesting that Frontier defend Shiver. Frontier never agreed to provide such a defense. On November 11, 1999, after the conclusion of the Human Rights Bureau investigation on Stipp's Human Rights Act complaint, Shiver signed a verified stipulation and response in this contested case, by which he admitted (a) that when he assumed the job of Frontier administrator in September 1998, he had some concerns about a woman being the maintenance supervisor; (b) that he would have preferred a man in the maintenance supervisor position; and (c) when he decided to fire Stipp in October 1998, one of the motives for his decision was his desire to hire a man as maintenance supervisor. On November 17, 1999, Stipp gave Shiver a covenant not to execute on any judgment resulting from this contested case. On November 22, 1999, Stipp dismissed Shiver as a defendant to the civil lawsuit. Exhibits 1, 107, 108, 110 and 114.

Once the hearing examiner accepted the sworn statement, Shiver's dating of events in his prior statements to the Human Rights Bureau investigator and in documents he created about firing Stipp became much less credible. The parties presented much evidence and more argument about the dating of the events surrounding Stipp's firing. Stipp even amended her contentions at the beginning of the hearing to conform them to the dates and days of the week, inconsistent with the dates and days of the week Shiver put in the documents he created about the firing. In weighing the credibility of the various dates, the hearing examiner gave more weight to Stipp's dating because Shiver repudiated his own prior statements regarding motive in his sworn statement. As a result, his prior statements were also not credible regarding other matters. §26-1-303(3) MCA.

Shiver's admission of discriminatory motive was not the only evidence that Frontier had such a motive in firing Stipp. Frontier, with administrators hired and directed by Balasz, including Shiver, enforced its policies for known or proven misconduct by male employees in a manner that did not result in immediate discharge and permitted continued employment by the male employees. The uniform application of progressive discipline (when there was any discipline at all) for male employees supports Stipp's contention that Frontier treated her differently because she was a woman.

Frontier, through its chief executive Melchor Balazs, afforded unfettered discretion to Shiver to take adverse action against Stipp. Balazs supported the action. Yet, Balazs had protected male employees from discretionary discharge by a female administrator, during the same time that he kept Stipp's wage below that Shiver later paid a male maintenance supervisor.

Morrow believed that Stipp had threatened him during their telephone conversation. However, Morrow was already in an agitated and confused mental state.⁵ Testifying at hearing, Morrow continued to insist that Stipp had seriously threatened to "come down there and kick [his] ass." However, he also admitted that he probably overreacted to his perception of the content of the conversation. Morrow was not a credible witness, and the hearing examiner discounted his testimony.

Balazs testified that part of the reason he considered Shiver's action of firing Stipp appropriate was that he had previously personally observed Stipp at work with alcohol on her breath. He testified that this occurred on

⁵ Morrow suffers from a mental disorder as well as a seizure disorder, requiring medication, contributing to his unreliability when agitated regarding the actual content of the telephone conversation.

September 8, 1998 (he said in his deposition it occurred on September 9, 1998). He testified that he told Shiver, on that occasion, to send Stipp home. However, evidence adduced at the hearing established Shiver made no mention of any such incident when the Human Rights Bureau investigator interviewed him. In fact, he told the investigator that before he fired Stipp he had given her no disciplinary warnings. When the investigator, Katherine Kountz, interviewed Shiver, he had not yet found out that Frontier would refuse to defend him. Shiver had every reason, at the time of that interview, to substantiate Frontier's defense. He still failed to mention and such prior episode of alcohol-related problems. The lack of any corroboration for Balazs' account of the prior incident undercut Balazs' credibility, and the hearing examiner discounted his testimony.

Out of court statements by Shiver and LoAnne Frisk to the Human Rights Bureau investigator are properly admissible. Shiver remains a party respondent, and his statements, offered by the charging party, are not hearsay. Rule 801(d)(2)(A) M.R.E. Frisk, as Frontier's office manager, signed Frontier's response to an information request by the Human Rights Bureau about this case. As someone authorized by Frontier to make statements about this case, her statements to the investigator are not hearsay. Rule 801(d)(2)(D) M.R.E. The investigator properly testified to these statements, thereby proving that Shiver and Frisk made the statements. The statements were not hearsay, and therefore were proof of the truth of the matters stated therein, if credible.

The question of Shiver's credibility is critical to this case, and Shiver did not testify. Shiver was in Livingston during the hearing. He and his attorney were present briefly at the hearing site, apparently to confer off the record with one or the other of the parties participating in the hearing. Both Stipp and Frontier elected to rely upon the documents rather than subpoena Shiver to testify. Based on the documents and the appearance, demeanor and testimony of the witnesses who did testify, the hearing examiner concluded that Shiver's statement under oath merited more credence than his prior unsworn statements regarding the matter while still either an employee of Frontier or an aspirant to a defense at Frontier's expense.

Frontier also attempted to prove that Stipp, a self-diagnosed alcoholic, caused her own problems by drinking. As a defense to a claim of disability discrimination based upon alcoholism, Frontier's argument may have been well taken, if proved. In this case, however, Stipp abandoned her disability claim. Frontier also failed to present credible evidence of any pattern of behavior by Stipp that could justify her summary discharge. The suggestion by counsel, in questioning Stipp, that she might have been absent on earlier occasions

because of drinking was insufficient to prove its truth. Stipp denied under oath that drinking had ever interfered with her work at Frontier. Her denial, unrebutted by any substantial and credible evidence, stands.

Damages

The damages the department may award include any reasonable measure to rectify any harm Stipp suffered. §49-2-506(1)(b) MCA. The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); *accord*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).⁶

By proving discrimination, Stipp established a presumptive entitlement to lost wages. *Albermarle Paper Company, supra*, 422 U.S. at 417-23 (1975). Stipp must prove the amount of wages she lost, but not with unrealistic exactitude. *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 607 (7th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3rd Cir. 1984); *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award).

If Stipp still suffers lost wages, then front pay may be appropriate. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a "rightful place" in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *Rasmussen v. Hearing Aid Inst.*, HRC Case #8801003988 (March 1992).

Front pay is appropriate only if it is impossible or inappropriate to reinstate Stipp because of the hostility or antagonism between the parties. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir.1987) (upholding front pay award based on "some hostility" in spite of testimony that plaintiff and defendant were still friends); *see also*, *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *E.E.O.C. v. Pacific Press Publ. Assoc.*, 482 F.Supp. 1291, 1320 (N.D. Cal.) (when effective employment relationship cannot be reestablished, front pay is appropriate), *affirmed*, 676 F.2d 1272 (9th Cir. 1982).

⁶ The Montana Supreme Court has approved the use of analogous federal cases in interpreting application of Montana's Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. MDU Co.*, 198 Mont. 56, 643 P.2d 841 (1982).

Stipp need not request reinstatement as a prerequisite to obtaining front pay where the evidence reveals such hostility. *EEOC v. Prudential Fed. S&L Ass'n*, 763 F.2d 1166, 1173 (10th Cir.), *cert. denied* 474 U.S. 946 (1985); *Thorne, supra*, 802 F.2d at 1137 ("failure to seek reinstatement would not preclude front pay if excessive hostility exists"). Stipp does seek reimbursement, but Frontier is no longer operating the facility in Livingston. Thus, Frontier may reinstate Stipp (since Frontier appears to have some relationship with the present operator) or pay her a lump sum for front pay and continuing emotional distress. *Cf., Carson v. City of Billings*, Commission Order, Case No. 9801008365 (March, 2000).

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

Because §49-2-506(1)(b) MCA requires "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against," the power and duty of the department to award money for proven emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596, 601 (1993). As already noted, damages in discrimination cases are broadly available precisely so that the awards rectify any and all harm suffered. *P. W. Berry, Inc., op. cit.*; *Dolan, op. cit.*; *Albermarle Paper Co., op. cit.* Emotional distress recovery is appropriate upon proof that Stipp suffered emotional distress as a result of the proven illegal discrimination. *Campbell v. Choteau Bar and Steak House*, HRC#8901003828 (3/9/93)⁷.

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 for assessing whether emotional distress is compensable in common law tort cases, but it is consistent with the principles announced in the Montana Human Rights cases. *See, Choteau Bar and Steak House, supra*, pp. 3-7 and 39-50.

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. *First Bank of Billings v. Clark*, 236 Mont. 195,

⁷ *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 (7th Cir. 1974); *Brown v. Trustees*, 674 F.Supp. 393 (D.C.Mass. 1987); *Portland v. Bureau of Labor and Industry*, 61 Or.App. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475 (1984); *Hy-Vee Food Stores v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 525 (Iowa, 1990).

771 P.2d 84 (1989) *and Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984). Infliction of illegal discrimination can *per se* result in emotional distress, based upon the testimony of the victim. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (reversing refusal to award emotional distress damages). The trier of fact can infer that the emotional harm did result from the illegal discrimination. *Carter, op. cit. at note 7; Seaton, op. cit. at note 7; 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).

The law expressly recognizes a person's right to be free from unlawful discrimination. §49-1-101, MCA. Unlawful discrimination is a *per se* invasion of a legally protected interest. The enforcement and remedial provisions of the Human Rights Act make clear that Montana does not expect a reasonable person to endure any harm, including emotional distress, resulting from a violation of the right to be free from unlawful discrimination. *Vainio, op. cit.; Choteau Bar and Steak House, op. cit.; 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.⁸

Like every emotional distress award, the department bases this award upon the impact Stipp suffered, not upon the heinousness of the corporation's conduct. Emotional distress damages are compensatory, not punitive. With the exception of housing cases (§49-2-510 MCA), there are no damages under the Human Rights Act that rest upon the conduct of the respondent rather than the harm the charging party suffered.

A charging party is required to make reasonable efforts to mitigate damages from discrimination by seeking comparable, alternative employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The burden of proving a lack of reasonable diligence in mitigating damages from lost wages and benefits is on the respondent and must be proved by at least a preponderance of the

⁸ Unlike most civil cases, in a Human Rights Act case the award of damages for emotional distress is purely a matter of whether the evidence adduced convinces the fact-finder that the claimant did suffer serious emotional distress. In other civil cases, the issue often involves whether the plaintiff proved the elements to establish liability for intentional or negligent infliction of emotional distress. *See, Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995). Liability in discrimination cases does not arise from those free-standing torts. It flows directly from proof of the illegal discrimination, as an element of damages. Thus, the pure fact question for emotional distress recovery involves the degree of actual harm suffered by the claimant, not the degree of egregious conduct on the part of the respondent.

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). A charging party is not required to seek all possible employment opportunities, but 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*.

Stipp reasonably mitigated her damages by seeking work once the initial shock and depression eased. She also testified to her belief that because Frontier discharged her for "abuse," work in care facilities or hospitals was foreclosed. Under the facts of this case, Stipp adequately sought to mitigate her damages.

Affirmative Relief

Stipp's proof of illegal discrimination against her triggers injunctive and affirmative relief against Frontier. §49-2-506(1) and 1(a) MCA. Frontier did not establish that it now was and would remain uninvolved in operating personal care facilities in Montana. Constraints upon its future conduct are necessary.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Frontier Personal Care Center, Inc., and Marvin Shiver unlawfully discriminated in employment against Anna Stipp because of her sex when they terminated her employment on October 20, 1998. §49-2-303(1)(a) MCA.
3. The corporation must pay Stipp \$13,294.61 for lost wages through September 17, 2000.
4. The corporation must pay Stipp \$1,809.68 in prejudgment interest. Post judgment interest accrues by operation of law.
5. The corporation must pay Stipp \$15,000.00 for her emotional distress.

6. The corporation must either reinstate Stipp as maintenance supervisor at the personal care facility in Livingston within 90 days after this decision at or above her prior rate of pay (paying Stipp an additional \$38.44 per week for the time between judgment and reinstatement) or pay Stipp \$7,500.00 for future wage loss and \$12,500.00 for future emotional distress.

7. Pursuant to §49-2-506(1)(a) and (c) MCA, the corporation is enjoined against illegal discrimination in employment, and must adopt and rigorously follow a policy regarding non-discrimination in employment irrespective of gender. Within 90 days of this decision, the corporation must submit a proposed policy to the department's Human Rights Bureau, and within 30 days of receipt of approval by the HRB of the policy with any suggested changes, the corporation must adopt the policy (with such suggested changes) and implement it. Unless the corporation satisfies these requirements, it is enjoined from doing business of any kind in Montana. This bar to operations in Montana is effective once the department's Human Rights Bureau notifies the corporation that it has failed to satisfy these requirements.

8. Pursuant to §49-2-506(1)(a) and (c) MCA, Shiver is enjoined against illegal discrimination in employment, and from working in Montana as a supervisor of other employees until he completes a training course of at least four hours on gender equity. The department's Human Rights Bureau is ordered to give Shiver notice of this injunction and directions of how to satisfy this requirement. The injunction is dissolved once the department's Human Rights Bureau notifies Shiver that he has satisfied the requirement.

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

VI. Order

1. Judgment is found in favor of Anna Stipp and against Frontier Personal Care Center, Inc., and Marvin Shiver, on the charge that the respondents unlawfully discriminated in employment against Stipp because of her sex when they terminated her employment on October 20, 1998.

2. The corporation must pay to Stipp the sum of \$30,104.29, for lost wages through September 17, 2000, pre-judgment interest and emotional distress. Interest on this judgment accrues by law.

3. The corporation must reinstate Stipp as maintenance manager of the personal care facility in Livingston, Montana 90 ninety days of this order, or immediately thereafter pay to Stipp the additional sum of \$20,000.00 for future lost wages and continuing emotional distress.

4. The corporation is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 7.

5. Shiver is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 8.

Dated: September 18, 2000.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry