BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Laura Lynch, Charging Party, vs. **Eugene Hughes**, Respondent.	)	**Human Rights Act Case No. 9801008459**
	)	*Final Agency Decision*

I. Procedure and Preliminary Matters

Laura Lynch filed a complaint with the Department of Labor and Industry on February 4, 1998. She alleged that Dr. Eugene Hughes discriminated against her because of her gender (female) when he subjected her to a sexually offensive and hostile work environment throughout her employment and continuing until her discharge. She filed an "addendum" to her complaint on August 4, 1998, while the matter was still before the department's Human Rights Bureau, alleging retaliation by Hughes. On October 21, 1998, the department gave notice Lynch's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. On November 12, 1998, Hughes appeared in the contested case proceeding. On November 18, 1998, Lynch acknowledged service. The parties agreed the department could retain jurisdiction for more than 12 months after the complaint filing.

This contested case hearing proceeded on May 2-5, 15-16 and 24, 2000, in Butte, Montana, except that by agreement of the parties the conclusion of hearing, on May 24, 2000, convened in Helena, Montana, and Lynch did not attend. With that exception, Lynch was present throughout hearing with her attorney, Timothy W. McKeon, of Carey, Meismer & McKeon, PLLP. Hughes was present with his attorney, Bill Hanson, of Bill Hanson, Attorney PLLC. The hearing examiner excluded witnesses on a joint motion from the parties. Katherine Henderson, Faye Ronco (Braun), Mariam Young, Robert Rodgers, Rodney J. Wimmer, Patrick Dudley, Fred Diegert (M.D.), Neal Rogers (M.D.), Frank C. Seitz, Ph.D., Charlene King (Turner), Laura Lynch, Mary Ann Pendergast, Linda Triniman, Peggy Wolstein, Lee Rhodes, Eugene Hughes (M.D.) and Valerian Chyle (M.D.) testified at hearing. Spencer Davis testified by deposition. The parties stipulated (or interposed no objection) to the admission of exhibits 14, 21.1, 22, 33, 34, 35, 36, HH1[1], HH2[2], HH3, HH4 and HH5. The hearing examiner admitted Exhibit 8 over a hearsay objection.

[1] Exhibit HH1 is sealed and is not part of the public record.

[2] Respondent originally offered research prepared by Diegert as exhibit HH2, later withdrawing that exhibit and offering the professional resume of Seitz as exhibit HH2.

Lynch filed her closing argument and memorandum on June 26, 2000. Hughes filed his post-hearing brief on July 21, 2000. Lynch filed her reply brief on August 1, 2000.

II. Issues

The legal issues in this case are (1) whether Hughes was either an employer or agent of an employer when he engaged in the alleged sexual harassment and (2) whether Hughes can be liable for retaliation if he is neither an employer nor an agent of an employer. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Laura Lynch, the charging party, resided in Butte, Silver Bow County, at the time of the incidents involved in this case. She worked at St. James Community Hospital, Butte, Montana, in the Radiation Oncology Department at the Cancer Treatment Center as a Radiation Therapy Technologist from November 1996 to May 1998. Eugene Hughes, M.D., the respondent, resided at all pertinent times in Butte, Silver Bow County, Montana. Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, Nos. 1, 2 and 3.

2. Hughes worked at St. James Community Hospital as a Radiation Oncologist in the Cancer Treatment Center at all times that Lynch worked at St. James Community Hospital. Hughes was the physician responsible for the treatment of patients in the hospital's Radiation Oncology Department. Lynch and all other members of the Radiation Oncology Department were employees of the hospital who delivered medical services to patients receiving treatment in the Radiation Oncology Department and performing associated clerical and record-keeping tasks. Hughes had no employees of his own at the hospital. Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, No. 4; testimony of Lynch and Hughes.

3. The hospital hired the employees who worked with Hughes in the Radiation Oncology Department, including Lynch. The hospital also purchased the services of a temporary employment service to provide temporary employees for the Radiation Oncology Department. Before the hospital hired her in 1996, Lynch had worked as a temporary employee in the department. She worked as an employee of the temporary employee service whose services her employer sold to the hospital. Hughes liked her, and was satisfied with her work as a temporary employee. At the request of the

hospital, Hughes negotiated the termination of her placement through temporary employee service, resulting in financial savings for St. James Community Hospital. Testimony of Lynch, Faye Ronco (another radiation therapy technician), Hughes and Pat Dudley (the hospital's Director of Human Relations).

4. After Lynch concluded her work as a temporary employee at the hospital, she left Montana. In course of seeking subsequent employment, she discovered that the hospital had an opening for a hospital employee in the Radiation Oncology Department where she had worked as a temporary employee. The hospital usually obtained Hughes' prior approval before it hired new employees to work in Radiation Oncology. If Hughes recommended a qualified applicant for a position in Radiation Oncology, the hospital generally hired that applicant. Hughes recommended hiring Lynch and the hospital did hire her in 1996. The hospital hired Lynch after other applicants declined the position. Testimony of Lynch, Ronco, Hughes and Dudley.

5. The Radiation Oncology Department was a small, highly specialized department. The hospital relied upon Hughes, as the Radiation Oncologist, for the operation and management of the department's delivery of services to patients. The hospital employed the staff that worked with Hughes in the department. The hospital controlled the terms and conditions of the staff's employment. Hughes directed delivery of services to patients. Staff members had the power to refuse an order from Hughes that was not within the scope of their job descriptions. Testimony of Dudley.

6. When Hughes became the Radiation Oncologist at St. James Community Hospital, the hospital's Board of Directors granted him privileges to practice medicine at the hospital. Hughes was a member of the medical staff. He signed the medical staff by-laws that the hospital's board approved. He agreed to conduct his practice in accordance with the hospital's policies and procedures. Neither he nor the hospital considered Hughes an agent or employee of the hospital, with administrative authority over the hospital staff in Radiation Oncology. Testimony of Hughes, Young and Rodgers.

7. Hughes did not have an exclusive contract with the hospital during 1997-98. During that time, the hospital provided him with a personal office in the hospital. Hughes also had use of the services of the hospital and exclusive use of the radiation oncology equipment. Hughes exercised control over the scheduling of patients. The Radiation Oncology staff that worked with Hughes adjusted their schedules around Hughes' schedule in order to be available to deliver patient services in accord with his directions. Hughes also used the hospital phones while at the department for personal and outside business as

well as for his practice at the hospital. Testimony of Lynch, Ronco, Hughes and Dudley.

8. After Lynch became a full-time employee in the Radiation Oncology Department in late 1996, Faye Ronco heard some complaints about Lynch from other staff members regarding long lunches and not helping enough in the secretarial area. Hughes objected to the therapists (radiation therapy technologists) in Radiation Oncology doing secretarial work. However, the therapists continued to help with secretarial tasks, particularly while the department was short a secretary, because the hospital asked that they do so. Testimony of Ronco.

9. In the late fall and winter of 1996 and the spring of 1997, Ronco and Lynch heard an increasing number of complaints from patients about Hughes. These complaints pertained to how much time Hughes spent with the patients, and whether he was answering their questions. Hughes at this time was having problems regarding his private flying business. He appeared to spend more time than previously addressing those problems. Ronco met with other members of the Radiation Oncology staff to discuss their concerns about Hughes' relations with his patients. In spring 1997, Ronco, with Lynch and radiation oncology nurse Mary Ann Pendergast, brought to Hughes a list of seven patients with complaints about his relations with them. Hughes did not consider either the list or the complaints significant. The staff remained concerned about Hughes' conduct and relations with patients, but he did not share their concern. Testimony of Ronco, Pendergast and Lynch.

10. In April 1997, the hospital assigned supervision of the hospital staff working in Radiation Oncology to Mariam Young, Director of Specialty Services. Testimony of Mariam Young.

11. In July 1997, Ronco talked with Young about the staff concerns regarding Hughes' relations with his patients. Lynch and Pendergast joined with Ronco in expressing these concerns to Young. Testimony of Ronco, Young and Pendergast.

12. Hughes often expressed himself to staff and patients through crude and explicit humor and comment. Kathy Henderson, an employee at St. James Hospital in the Radiation Oncology Department in 1993-95, had complained to the hospital administration about Hughes' comments and conduct. Hughes was angry and offended, and sought both to confirm that Henderson was the source of the complaint to the hospital and to find out exactly what she had said in her complaint. Henderson continued to work at St. James for 18 months after she made her complaint. The hospital laid her off in March 1995. She had no knowledge or information that the hospital laid her off

because of any comment or act by Hughes. Testimony of Henderson, Ronco and Hughes.

13. Lynch delivered medical services to cancer patients receiving treatment from the Cancer Treatment Center. Hughes directed Lynch's delivery of medical services in the Radiation Oncology Department. During the course of her employment, Lynch saw and heard Hughes make comments and engage in behavior that she interpreted as sexual innuendoes, explicit sexual comments and inappropriate efforts to establish sexual contact with her. Lynch also observed or was the recipient of physical contact that she interpreted as sexual. Lynch found Hughes' comments, behavior and contact unwelcome. Until August 1997, she did not discuss her feelings about Hughes' conduct with any hospital employee except for an occasional comment to Ronco or Pendergast about particular incidents. Testimony of Lynch.[3]

14. Ronco and Pendergast were also sometimes uncomfortable with Hughes' comments or behavior, but did not think he was engaging in sexual harassment of Lynch or any other employee. They believed Lynch used Hughes' apparent fondness toward her to manipulate him. They did not give credence to her occasional comments about unwelcome behavior by Hughes. Testimony of Ronco and Pendergast.

15. In August 1997, Young again met with Lynch, Ronco and Pendergast, to discuss their concerns about Hughes. In addition to complaints about Hughes' relationship with his patients, the staff also expressed concerns about Hughes' communications with them and his behavior in front of patients. The staff members thought his communications and behavior sometimes suggested the staff did not have professional status. They said he sometimes seemed to encourage patients to treat them like waitresses instead of health care professionals. Testimony of Young.

16. In September 1997, Hughes was performing a simulation procedure on a patient, identified in this case only as "Jane Doe," for treatment of her breast cancer. Hughes had Jane Doe's written consent to touch her breast and to draw on it as part of his treatment of her. Simulation procedures identified areas to receive radiation treatment, and confirmed accuracy before the commencement of a series of irradiations of the patient. Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, Nos. 5 and 6; testimony of Ronco and Hughes.

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[3] For a particularized list of the kinds of harassment alleged, ***see***, "Laura Lynch's Written Closing Argument And Legal Memorandum," June 26, 2000.

17. Hughes drew on Jane Doe's breast, making marks on it that related to the simulation procedure, with indelible markers. He also drew marks on Jane Doe's breast, around the nipple, representing eyes and a mouth, so that a drawing like a "smiley face [:•)]" was discernible. Hughes did not advise Jane Doe of his intent to draw the figure and did not ask her for permission to do so before he drew it. Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, No. 7; testimony of Ronco and Hughes.

18. Ronco was present in the treatment room when Hughes drew the face on Jane Doe. Lynch was not present. This was not the first time Ronco had seen Hughes draw faces on cancer patients while marking their bodies for radiation therapy. Hughes considered this a way to "lighten up" the grim process of radiation therapy. He drew a face on a patient when he considered it might relax the patient by interjecting some humor into the process.[4] Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, No. 8; testimony of Lynch, Ronco and Hughes.

19. Ronco was uncomfortable with this practice. She had observed Hughes draw faces on approximately 8 patients over the 12 years she had worked with him. She had not objected to the practice at first. However, approximately six months earlier, the last patient before Jane Doe who received such a drawing had told Ronco that it was unprofessional and immature. Lynch, who was aware of Hughes' drawing practice from prior patients, had been present to hear that patient's complaints. Ronco told Hughes about the comments. He told her he would "think about" what the patient had said. Seeing Hughes again draw a face on a patient, Ronco said to the patient (when Hughes was not in the room), "I wish he hadn't done that." Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, No. 8; testimony of Lynch, Ronco and Hughes.

20. In every case of a simulation of a breast cancer patient, the Radiation Oncology staff took a color Polaroid© photograph of the breast after simulation marking, for the patient's medical record.[5] Final Prehearing Order, Sec. IV, Facts and Other Matters Which Are Admitted, No. 9; Exhibit HH1 (sealed).

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[4] Two other radiation oncologists expressed opinions of such drawings. Dr. Fred Diegert sometimes drew on oncology patients to interject humor into the process and "treat the whole person." Dr. Valerian Chyle testified that he had not and would not do so, because such a drawing could strain or damage the doctor-patient relationship.

[5] The drawing, as it appears in the photograph, does appear to be a face, although the lines representing the "mouth" are straight rather than curved into a "smiley" shape.

21. Patients or staff with complaints about Hughes could file those complaints with the hospital for its review. During 1997, neither Lynch nor Ronco filed any such complaints against Hughes. Testimony of Lynch, Ronco, Hughes and Dudley.

22. On a subsequent visit for treatment, Jane Doe visited with Lynch and Ronco about the smiley face on her breast. She told the two that she was flabbergasted, upset and very unhappy about the smiley face. Ronco told the patient that she would be unhappy, too. Jane Doe asked Lynch if "she would like it done to her." Lynch said she would not. Lynch and Ronco told Jane Doe that she could make a complaint to the hospital about Hughes' conduct. They offered to put her in touch with the right people at the hospital for such a complaint. They had similar conversations on several of Jane Doe's subsequent visits, identifying the hospital patient advocate as the person to whom Jane Doe could make a complaint. They never suggested that Jane Doe tell Hughes how she felt. Ultimately, Jane Doe discontinued her treatment before it was completed. She later had lunch with Ronco and told her she had finished her treatments in Helena. Testimony of Ronco and Lynch.

23. Ronco spoke with Hughes about Jane Doe's complaints, within a day of the first conversation in which Jane Doe voiced her feelings to Ronco and Lynch. Hughes expressed to Ronco his theory that humor could win a patient over and make her feel more comfortable with the photograph taken of her marked, naked breast. Testimony of Ronco.

24. While having their conversations with Jane Doe during her treatment visits, Lynch and Ronco (with Pendergast) met again with Young to express their concerns about Hughes. These discussions expanded beyond concerns about Hughes' relations with patients. The staff members told Young again that Hughes' informality sometimes encouraged patients to consider the staff as not health care professionals. At this meeting, on or about September 17, 1997, Lynch mentioned that she had consulted the employee assistance person to discuss Hughes' conduct, and according to Lynch that person had said that Hughes' conduct "almost seemed like" sexual harassment.[6] Testimony of Lynch, Ronco and Young.

25. On September 22, 1997, Young called Pat Dudley, Director of Human Resources, to ask about a "possible sexual harassment situation" involving Hughes as the possible harasser and members of the Radiation

[6] Because the determinative issue regarding Lynch's sexual harassment claim is whether Hughes was an employer or agent of an employer, the findings do not include details of the conduct alleged by Lynch to be sexual harassment.

Oncology staff as the victims. Young provided no specific details about the situation. Dudley encouraged her to get details. He reviewed the hospital's sexual harassment policies with her. He also reported the possible problem to Robert Rodgers, Senior Executive Officer at the hospital. Exhibit 21.1; testimony of Dudley.

26. On or about September 24, 1997, Jane Doe made a complaint to the hospital about the smiley face drawing. That same day, Lynch and Ronco met with Mariam Young's supervisor, Hospital Vice President Kathy Oakland, to discuss staff complaints about "not being secretaries." During that meeting, Young came in and informed Oakland that Jane Doe had made her complaint. Young directed the Radiation Oncology staff not to discuss the incident with anyone. Lynch, Ronco and Pendergast expressed concerns about how Hughes would react to the patient complaint. Testimony of Lynch, Ronco and Young.

27. Hughes was furious about the complaint. He suspected that some of the Radiation Oncology staff had encouraged Jane Doe to pursue the matter. He believed that staff members who did so had been disloyal. He also believed that encouraging the patient to harbor and pursue a grievance against the oncologist interfered with the doctor-patient relation and the treatment. As he had done with the earlier staff complaint by Henderson, Hughes tried to force staff to tell him who had played any role in Jane Doe's complaint. He rationalized that he needed to "clear the air" and that the staff had an obligation to help him protect himself against the complaint. When no one would voluntarily give him the information he sought, he tried to use intimidation, through veiled threats and anger, to elicit the information from the Radiation Oncology staff. He made sure they heard him say that he was an "eye for an eye kind of guy." He made repeated comments about having a "war" with staff that did not support him, specifically Lynch. Testimony of Ronco, Pendergast, Lynch and Hughes.

28. Young met with the Radiation Oncology staff away from the hospital to discuss both how staff should respond to the situation resulting from the complaint of Jane Doe and how they should deal with Hughes. She did not hear any of member of the staff complain about being the victim of sexual harassment. She reported to Dudley that she had reviewed the formal sexual harassment policy and that no one wanted to proceed with a complaint against Hughes. Because Hughes was a member of the medical staff rather than a hospital employee and because he believed no employee wanted to proceed with a complaint, Dudley took no further action. He deferred to the medical staff any further investigation of Hughes' conduct toward staff. Testimony of Young and Dudley.

29. Hughes demanded that Pendergast, Lynch and Ronco write diaries of all their conversations and interactions with Jane Doe. Asked about Hughes' demand, Young told the trio, "They didn't have to if they didn't want to." Robert Rodgers confirmed and reiterated Young's directions to the staff members. He told them that Hughes could not compel them to document their interactions with Jane Doe. He said that they could provide the documentation Hughes asked if they wished, but were under no obligation to do so. The staff refused to provide Hughes with the documentation he demanded. Hughes commented that the workplace "would not be fun anymore." Testimony of Ronco, Lynch, Rodgers, Young and Hughes.

30. The Jane Doe complaint created difficulties for Hughes. He faced both a state licensing board investigation and an inquiry by the hospital. As a result, he apologized to Jane Doe, with Mariam Young present. He also faced civil litigation. To address the questions he faced because of these inquiries and investigations, Hughes took time away from the hospital to participate in training that was part of a settlement of some of the investigations. He was gone initially for about two weeks, in late December 1997 and early January 1998. After only a few days back at the hospital, he was again gone for approximately a month. Testimony of Hughes and Young.

31. On January 5, 1998, at the end of Hughes' first absence, Lynch made a written request for administrative leave unless the hospital could guarantee Hughes would not be on the premises. She made the request in writing to Pat Dudley, Director of Human Resources, on January 3, 1998. She said she was afraid of Hughes. Dudley deferred to Young's determination of the need for leave. Young did not think Lynch seemed genuinely afraid of Hughes. Dudley refused the leave request. Young suggested that Lynch could use vacation time. Lynch used her vacation time for 3 days' absence. She later provided supporting documentation from her counselor and the hospital considered the 3 days as sick leave. Exhibits 22 and 35; testimony of Young, Dudley and Lynch.

32. Lynch sought counseling from A. Spencer Davis, a licensed professional counselor in Butte, Montana, with a Ph.D. in counseling and education. She saw Davis 4 times, on January 15, 20 and 27 and February 5, 1998. Lynch reported to Davis that she suffered from anxiety and panic attacks due to sexual and emotional harassment from Hughes at work. She described the harassment as both being sexual and including threats to her job and future employment. She reported to Davis that she was having difficulty sleeping and eating and so much difficulty functioning on a day to day basis that she was almost paralyzed. Davis referred Lynch to an M.D., who prescribed anti-anxiety and sleep-assisting medication. He encouraged her to

file a complaint against Hughes. He also encouraged her to find other employment, because of the severe impact Hughes' reported conduct had on Lynch. Part of Lynch's anxiety resulted from her fear that should she leave her job with the hospital, Hughes would prevent her from getting any positive recommendations for other employment in her professional field. Testimony of Lynch and Davis.

33. When Davis last saw Lynch, on February 5, 1998, she told him that if Hughes returned to work at the hospital, she would leave her employment. She had also decided to file her Human Rights complaint against Hughes. Davis did not see her after February 5, 1998, but his records confirmed that Lynch continued thereafter to see the M.D. in Butte, who continued to provide medication for Lynch. Clinical psychologist Frank Seitz evaluated Lynch and reviewed her records in 1999. Testimony of Davis and Seitz.

34. Lynch suffered from an adjustment disorder with mixed disturbance of emotions and behavior. This disorder manifested as a direct result of Hughes' conduct toward Lynch. Lynch met "most of the criteria" (according to Davis) for post traumatic stress disorder, but she did not have the requisite exposure to actual trauma for PTSD. In addition, her symptom levels were not high enough and, despite her perception to the contrary, Lynch continued to function normally. Testimony of Davis and Seitz.

35. During Hughes' second absence, Ronco and Lynch asked Young for advance notice of when Hughes would return. Young was able to give them about 6 hours' warning of his return. Testimony of Young and Lynch.

36. Upon his return, Hughes had a meeting with the Radiation Oncology staff, Young and other hospital administrators and officers. At that meeting, the hospital established ground rules for conduct in the department. Those ground rules included identification of "monitors" (including Pendergast) to observe Hughes' behavior with staff as well as patients. The hospital required Hughes to meet with his monitors periodically, to review his conduct toward staff and patients.[7] Testimony of Young, Hughes and Pendergast.

37. On February 8, 1998, after Hughes returned to the hospital from his second absence, Lynch filed her Human Rights complaint against Hughes and the hospital.[8] She still worked in the Radiation Oncology department at the

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[7] This requirement may have been part of a settlement between Hughes and the state medical licensing board, but the hospital actively participated in this monitoring requirement.

[8] She later settled her claims with the hospital, leaving her claims solely against Hughes for this proceeding.

hospital at that time. Hughes knew of the complaint within 10 business days.[9] Testimony of Lynch.

38. Angry and hurt by what he considered the staff's "disloyalty," particularly that of Lynch, Hughes attempted to carry out the actions he had threatened against Lynch. He tried to damage her professional reputation and status. He tried to cause her trouble with the hospital. Hughes told Young he was concerned that staff would "defame" or "bad mouth" him to patients. Hughes also confronted Rodgers about the conduct of the Radiation Oncology staff. Hughes said that he feared patient safety might be in jeopardy because the hostility of Lynch toward him might cause her to expose a patient to too much radiation. Rodgers had no evidence or concern that Lynch would deliberately harm patients. However, Rodgers did decide to have the two radiation technicians, Ronco and Lynch, check each other's work.[10] Testimony of Rodgers and Hughes.

39. Hughes also told Young that he feared Lynch would make derogatory or inflammatory comments about him to patients. He also asked Young if she thought Lynch might harm patients. Young did not think Lynch would harm patients, and Hughes failed to convince Young to assign Lynch away from patients. He also asked Young, as supervisor of the Radiation Oncology staff, to have Ronco and Lynch double-check each other's work. She interpreted Hughes' inquiry about double-checks to be a request for better safety standards. In accord with Rodgers' directive, Young instructed Lynch and Ronco to do so. Testimony of Young.

40. Lynch correctly perceived that Hughes was particularly angry with her. She avoided contact with Hughes as best she could, despite working with him daily. Hughes limited his direct contacts with Lynch, giving directions to other staff members as much as possible. Whenever Lynch saw that Hughes was meeting with other staff members in private, as the hospital now required him to do, she felt excluded. Her feelings led her to believe that other staff members were somehow "shunning" her. Testimony of Lynch.

41. Ronco and Pendergast were angry that Lynch, by filing the discrimination claim, had increased the tension in the department. They did not believe Hughes had sexually harassed Lynch. They felt Lynch was making their jobs harder by pursuing her claims. They were less friendly toward

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[9] §49-2-504(1)(a) MCA requires the department to notify a respondent of the filing of discrimination complaint within 10 business days. The parties provided no evidence that the department did not comply with the statute.

[10] Hughes also asked both Ronco and Pendergast whether Lynch might harm patients.

Lynch. Hughes did not direct or control their attitudes toward Lynch. Testimony of Pendergast and Ronco.

42. Lynch suffered under the increased stress of working with Hughes. She knew that Hughes was trying to harm her professionally. She feared that he was watching her. She feared he might try to harm her physically. She began to suffer anxiety attacks and had trouble sleeping. In May 1998, she gave notice and quit her job with the hospital. Testimony of Lynch.

43. Lynch's anxiety and emotional distress did not increase after she filed her Human Rights complaint, except with regard to financial and emotional problems resulting from quitting her job. Testimony of Lynch.

44. Once Lynch left the hospital, her adjustment disorder resolved. Her symptoms suggestive of PTSD resolved. Unless she returns to work with Hughes or someone like him, she is not likely to have further symptoms. Testimony of Davis and Seitz.

45. Hughes does not think he has done anything wrong. He remains convinced that he had every right to retaliate against Lynch. There is a substantial risk that Hughes will engage in the same kind of behavior in the future toward anyone who files a Human Rights complaint that threatens Hughes' perceived interests. Testimony of Hughes.

IV. Opinion

A. Sexual Harassment/Discrimination

Montana law prohibits discrimination by an employer against a person in employment because of sex. §49-2-303(1)(a) MCA. Under the Montana Human Rights Act, an "employer" employs one or more persons, without reference to employing the aggrieved party:

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

The Montana Human Rights Act articulates the state's compelling interest in combating illegal discrimination. The Act prohibits discrimination within certain limits. Lynch alleged discrimination in employment and retaliation. The Act prohibits employers and agents of employers from

discrimination in the terms and conditions of employment because of membership in a protected class. Unless Hughes fits within the "employer" category, either as an employer or as "an agent of the employer," Lynch has no claim against Hughes for sexual harassment under the Act.

1. Liability of Hughes as an Employer

Absent existing Montana case law, the department follows federal discrimination law if the same rationale properly applies under the Montana Human Rights Act. ***See*** *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988) ***and*** *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987). The department previously relied upon federal case law to determine whether a respondent other than the actual employer was an "employer" for purposes of the Human Rights Act. The department held that a business with its own employees that purchased the services of temporary workers from a temporary employee service was an "employer" for Human Rights claims by two of those temporary workers. *Childs v. Evergreen Butte H & R Center*, H.R.A Case No. 9901008859 (8/8/00). The same rationale applies for the analysis in this case.

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

St. James Community Hospital treated Lynch as its employee during the entire time Lynch worked with Hughes. During the initial time she worked with Hughes, the hospital purchased her services from a temporary employee service. The temporary service employed her to work for the hospital. By the time of the alleged acts of discrimination by Hughes, Lynch was a direct employee of the hospital. Lynch settled her claims against the hospital, the actual employer, and she has not alleged here that the hospital was responsible for Hughes' conduct. She has alleged, in part, that Hughes was acting as her employer when he sexually harassed her and then took hostile action towards her and encouraged other hospital employees to do the same.

Under the rationale of *Childs*, Lynch could pursue allegations of discrimination by Hughes if he controlled the terms and conditions of her employment and had employees of his own in the work environment. *Childs*, ***supra***; *Pardazi v. Cullman Med. Cntr.*, 838 F.2d 1155, 1156 (11th Cir.1988);

Doe ex rel. Doe v. Saint Joseph's Hospital, 788 F.2d 411, 422-25 (7th Cir.1986); *Gomez v. Alexian Brothers Hospital*, 698 F.2d 1019, 1021 (9th Cir.1983); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1340-43 (D.D.C.1973); *King v. Chrysler Corporation*, 812 F. Supp. 151, 153 (S.D.Mo. 1993). On this basis, Lynch argued that she could pursue a Human Rights Act claim against Hughes, even though the hospital employed her.

Some federal courts construe the term "employer" in a functional sense, to encompass persons who are not formally employers, but who control some aspects of the plaintiff's terms, conditions or privileges of employment. These courts conclude that the complainant can be the employee of more than one "employer." They analyze the circumstances of the work relationship to decide whether the defendant was an "employer," with the emphasis on the extent of the defendant's right to control the manner and means of the complainant's work. ***See***, *Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500, 507-10 (E.D.Va. 1992). Under this Title VII analysis, an employee of a temporary service can bring a discrimination claim against the business that bought her services from her employer. *Amarnare v. Merrill Lynch*, 611 F.Supp. 344, 347-48 (S.D.N.Y., 1984), ***aff. without op.***, 770 F.2d 157 (2d Cir. 1985). Lynch argued that Hughes exercised sufficient control over her manner and means of work so that he was an employer, against whom she could pursue her claims.

If the entity controlling the work environment and the offending persons could escape liability because it did not employ the complainant, it could allow or encourage a hostile work environment to exist for someone else's employees, although it could not do so for its own employees. ***See*** *King*, ***op. cit.***, ***and*** *Sibley*, ***op. cit.*** at 1341. Such an outcome would frustrate the Human Rights Act's public policy against discrimination in employment. Thus, there is good reason for the department to continue to follow federal precedent and impose employer liability upon such entities.

Unlike the defendants in *Childs* and the federal cases, however, Hughes was not a major employer within the premises where he worked. He delivered his services, for which his patients paid him. No one working at the hospital was his employee, in terms of such matters as salary, withholding and discipline. Hughes may have been an employer for purposes of his outside aviation business, but not within the context of the hospital, where Lynch worked. These facts are not congruent with *Childs*, in which Evergreen, the respondent, was in complete control of the environment in which the complainant worked, and had employees of its own within the same environment.

Despite Lynch's capable argument to the contrary, she did not prove that Hughes controlled the manner and means of her work. He directed the delivery of treatment to the patient, but he did not thereby become Lynch's employer for purposes of the Human Rights Act. While the hospital may have shaped Lynch's hours of work and job duties to make her available to deliver treatment in accord with Hughes' directions, the hospital remained in charge of the terms and conditions of her employment. When Lynch complained to the hospital about Hughes, the hospital acted to address the allegations of discrimination. When Lynch resisted Hughes' efforts to get information from her about communications with the cancer patient, Jane Doe, he first tried to order her to provide the information, and then tried to bully her into compliance. The hospital supported her resistance. Hughes did not control either the work environment or the other hospital employees he allegedly influenced against Lynch. He did not control Lynch to the point of being her employer. The hospital controlled Lynch.

This case is factually and conceptually dissimilar from *Childs*. The federal case law does not apply here to render Hughes an employer. Since he was not an employer, he does not have an employer's liability under the Human Rights Act for sexually harassing Lynch.

2. Liability of Hughes as an Agent of the Hospital

The Human Rights Act defines "employer" to include an agent of the employer. §49-2-101(11) MCA. Therefore, an agent of the employer may be liable for sexual discrimination in employment under §49-2-303(1)(a) MCA. Lynch maintained that Hughes was an agent of the hospital when he subjected her to sexual harassment, and was therefore individually liable for his conduct.

Hughes cited *Fandrich v. Capital Ford Lincoln Mercury*, 272 Mont. 425, 901 P.2d 112 (1995), for a definition of "agent" in the Human Rights Act:

> When we construe this language, we must first look to the plain language of the statute. ***See*** *Boegli v. Glacier Mountain Cheese Co.* (1989), 238 Mont. 426, 429, 777 P.2d 1303, 1305. The Legislature added the word "agent" without specifying which employees are to be considered agents. As a result of the Legislature's failure to specify the meaning of agent, we adopt the ordinary meaning of the word "agent."

Fandrich at 430, 901 P.2d at 115.

Hughes cited two medical malpractice cases in which the Montana Supreme Court found physicians not to be agents of the hospital. Both opinions addressed the issue of hospital liability for alleged physician

malpractice. These cases articulate the standard in Montana by which to determine whether a physician is an agent of the hospital for malpractice purposes. *Estate of Milliron v. Francke*, 243 Mont. 200, 203, 793 P.2d 824, 826 (1990) and *Hull v. North Valley Hospital*, 159 Mont. 375, 387-88, 498 P.2d 136, 142-43 (1972). *Milliron* states the standard succinctly:

> [L]iability based on ostensible agency is already specifically covered by statute, §28-10-103, MCA, which provides:
>
> > 28-10-103. Actual versus ostensible agency. An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him.

Lynch cited *Kober v. Stewart*, 148 Mont. 117, 123, 417 P.2d 476, 479 (1966), in which the Montana Supreme Court held that when fact issues arose about whether a radiologist was an agent of the hospital, summary judgment was improper. All three Montana cases support the use of the statutory definition of agency to decide whether Hughes was an agent of the hospital.

The hospital carefully avoided making Hughes its actual agent. His relationship with the hospital is akin to that of the doctors with Montana State Prison in *Kyriss v. State of Montana*, 218 Mont. 162, 174-76, 707 P.2d 5, 13-14 (1985). Like the prison doctors, Hughes decided what services were appropriate, while the facility provided its premises, nursing support, other support services and a place for examination and treatment of the patients. In *Kyrss*, the personal liability of the prison doctors for malpractice was possible only because they were not state employees, and therefore had no sovereign immunity protection. *Kyriss* at 176, 707 P.2d at 14. Like the prison doctors, Hughes was not an employee of the facility in which he delivered medical treatment. He was an independent contractor, similar to the doctors in *Kyrss*. As an independent contractor, Hughes did not automatically become an agent of the hospital.

Lynch cited *Sparks v. Regional Medical Center Board*, 792 F.Supp. 735 (N.D.Ala. 1992), as a case holding that an independent contractor physician accused of creating a hostile working environment for a hospital employee could be an agent of the hospital if the doctor exercised sufficient control over hospital personnel decisions. This was not the actual holding in *Sparks*. The order in *Sparks* granted summary judgment for the hospital on the sexual harassment claim. Although the opinion analyzed the claim against the hospital as if the physician may have been an agent or employee of the

hospital, the ultimate decision was that whatever the physician's status, the hospital had no liability to the plaintiff. Footnote 1 to the decision states the issue as whether the hospital was liable for the doctor's conduct, not whether the doctor was an agent of the hospital. That issue involved the conduct of the hospital, rather than the conduct of the physician:

> The parties have raised the issue of whether Garland [the physician] is an "employee" of the Hospital defendants. This issue, however, does not affect the outcome of the case. As provided in the EEOC guidelines:
>
> > An employer may also be responsible for acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.
>
> 29 C.F.R. 1604.11(e).
>
> *Sparks*, ***op. cit.*** at 738.

Lynch cited *Simmons v. St. Clair Memorial Hospital*, 332 Pa.Super. 444, 481 A.2d 870 (1984), a malpractice case in which the appellate court ruled there was a jury question about whether the hospital had "held out" the physician (not a party to the lawsuit) as its agent. The case involved whether the hospital was liable for the physician's conduct under an "ostensible agent" doctrine developed by the Pennsylvania courts as an exception to the general rule that hospitals were not liable for malpractice committed by independent contractor physicians. *Simmons* at 452-53, 481 A.2d at 874-75. The court ruled that enough fact conflict existed to present the question to the jury. *Simmons* at 453, 481 A.2d at 874.

Lynch did not prove the facts necessary to invoke the Pennsylvania rule. The Pennsylvania rule requires the aggrieved party to prove both that she looked to the institution rather than the individual physician for care, and that the hospital "held out" the physician as its employee/agent. ***Id.*** Lynch did, indeed, look to the hospital to govern her employment, so Lynch's analogy holds for the first of the two elements of the Pennsylvania rule. However, Lynch did not prove that the hospital "held out" Hughes as its agent for employment matters. In fact, her fears of Hughes' retaliation were not fears that he would fire her. She feared that because he could not fire her or even change her job duties, he might go further than he did go to try to harm her.

Lynch also cited *Vanaman v. Milford Memorial Hospital*, 272 A.2d 718 (Del. 1970), for the proposition that a doctor who did not receive his pay from the hospital might still be an agent of the hospital. The Delaware Supreme Court held in *Vanaman* that summary judgment in favor of the hospital was

improper because there was a conflict of fact as to whether the doctor acted as a private physician in treating the plaintiff, or whether he treated the patient on behalf of the hospital while staffing the emergency room. In connection with this inquiry, the method of payment to the doctor was not alone determinative. 272 A.2d at 722.

Lynch also cited *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443 (1979) for the holding that the method of payment and source of supplies or tools were factors to consider in determining whether a physician was an independent contractor or an agent of the hospital. The New Jersey court held in *Arthur* that summary judgment for the hospital on the medical malpractice claim was not proper because there were conflicting facts about the doctor's status, including facts regarding method of payment and source of tools or supplies. 169 N.J.Super at 584, 405 A.2d at 445.

All of these cases from other jurisdictions focus upon the status of the physician, but the cases involve attempts to render the hospital liable rather than the doctor. Since the cases also all involve questions of state laws in states other than Montana, they are not binding authority for this case. Nor are they particularly on point.

In *Harmon v. Deaconess Hospital*, 191 Mont. 285, 290-91, 623 P.2d 1372, 1375 (1981), the Montana Supreme Court found the emergency room doctor to be the actual agent of the involved hospital:

> While still on shift duty and wearing the uniform of a nurse's aide, claimant reported to emergency room personnel that her back hurt. Dr. Larsen authorized X-rays to be taken. It is at that point that an agent of Deaconess Hospital had actual knowledge of claimant's alleged industrial accident.
>
> Dr. Larsen was the emergency room physician on duty for Deaconess Hospital. §28-10-103 MCA provides: "An agency is actual when the agent is really employed by the principal." §28-10-604 MCA provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Thus, Deaconess Hospital had notice of claimant's alleged industrial accident on the day it occurred through Dr. Larsen, its managing agent.

Harmon is not particularly helpful in resolving the present issue. Nowhere in the *Harmon* opinion is there any explanation of the reasoning by which the court concluded that the physician was an agent of the hospital, other than the bare statement that agency is actual when the principal really

employs the agent. The court's holding addressed whether the hospital's compensation insurer was liable for the worker's injury because the hospital received notice of the injury through the physician. The department can only speculate about why the court treated the physician as an actual hospital employee.

In the final analysis, Hughes' actions could never constitute him an agent, actual or ostensible, of the hospital. Under §28-10-103, MCA, the hospital had to either employ Hughes as its agent or cause Lynch to believe him to be its agent. The conduct of the hospital, not that of Hughes, determined whether Hughes had the status of an agent. Although the hospital considered Hughes' preferences in hiring hospital employees to work with him and his satisfaction with those hospital employees in retaining them, the hospital never ceded to Hughes the power to hire, fire, supervise or evaluate the hospital employees who worked with him. While he directed their delivery of medical services to patients, he never became their supervisor for the terms and conditions of their employment.

When Lynch complained of Hughes' conduct, the hospital investigated, and took action to address the problem. When Hughes attempted to force Lynch to comply with his demands for information about the incident with Jane Doe, the hospital supported Lynch. The evidence is clear and convincing Hughes could not and did not speak for the hospital to its employees.

This evidence was very clear in the aftermath of Jane Doe's complaint and Lynch's Human Rights Act complaint. Hughes' efforts to harm Lynch were those of a person who could not exercise the power of the employer. He could not discipline, transfer, suspend or fire her. Lynch may have had a claim that the hospital failed adequately to protect her from Hughes, among the claims she settled with the hospital. She did not prove that the hospital endorsed or authorized Hughes' efforts at retribution toward her.

The hospital never ratified Hughes' conduct toward Lynch. Both before and after the events, the hospital retained its identity as the employer of Lynch. At no time did it clothe Hughes with its authority as employer, by either action or inaction. Its conduct never "held out" Hughes as its agent for personnel matters of any kind. Hughes was not the agent of the hospital for setting or altering the terms and conditions of Lynch's employment. Since he was not an agent of the employer, Hughes does not have an agent's liability under the Human Rights Act for sexually harassing Lynch.

B. Retaliation

Montana law prohibits retaliation by any person because an individual has

opposed a practice forbidden under by the Montana Human Rights Act, filed a complaint under the Act or assisted in a proceeding under the Act. *Mahan v. Farmers Union Central Exch., Inc.*, 235 Mont. 410, 422, 768 P.2d 850, 857-58 (1989); §49-2-301 MCA. The plain language of the statute does not require Hughes to be the employer or an agent of the employer, but only a "person." The prohibited acts of retaliation are to "discharge, expel, blacklist, or otherwise discriminate" against the individual engaging in protected activity.

1. Statute of Limitations for Lynch's Retaliation Claim

Lynch filed her retaliation complaint on August 4, 1998. The department properly treated it as an amendment of her original complaint. *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990) (doctrine of relation back applies to amendment of human rights complaint adding retaliation claim filed more than 180 days after alleged discrimination). Hughes' argument that acts occurring more than 180 days before the filing of the amendment are time-barred fails. The retaliation claim stands.

2. Hughes' Liability for Retaliation

This is a case of first impression. The question is whether the word "person" in the retaliation statute indicates a legislative intent to apply the retaliation prohibition more broadly than the other anti-discrimination provisions of the Human Rights Act.

Montana cases only address retaliation by covered entities under other provisions of the Act, such as employers and housing providers. ***See, e.g.***, *Foster v. Albertson's, Inc.*, 254 Mont. 117, 835 P.2d 720 (1992); *Griffith v. Palacios*, Case Nos. 9802008368 and 9802008369 (HRC, Oct. 1999). Federal Title VII cases, by statute, limit retaliation liability to the claimant's employer. *Miller v. Maxwell's Intern, Inc.*, 991 F.2d 583 (9th Cir., 1983), ***cert. den. sub. nom.*** *Miller v. La Rosa*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994). These cases are not helpful in applying the Montana retaliation statute.

The Americans with Disabilities Act contains a retaliation provision that resembles Montana's statute:

> 42 U.S.C. §12203(a): No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act. [Emphasis added.]

> §49-2-301 MCA: It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter. [Emphasis added.]

A California federal court first decided the issue of expanded retaliation liability under the ADA retaliation statute. In that case of first impression, the district court ruled the statute meant what it said:

> Unlike § 12112 [prohibiting the discrimination which the plaintiff resisted, triggering the alleged retaliation], which refers to the liability of an "employer," the retaliation provision directs that "no person shall discriminate against any individual...." . . . . Since the plain meaning of "person" includes individuals, and since I "must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992), it follows that plaintiff may sue the individual defendants under the anti-retaliation provision of the ADA.

Ostrach v. Regents of the University of California, 957 F.Supp. 196, 200 (E.D.Ca. 1997).

Since *Ostrach*, two circuit courts as well as district courts within and outside of the Ninth Circuit have disagreed, finding that the statute means something narrower than its express terms. They reasoned that the ADA retaliation statute at issue covers three specific areas of discrimination (employment, public services and public accommodations). Retaliation remedies under the statute vary depending upon which area of discrimination the individual complaining of retaliation opposed. The courts concluded that Congress did not intend the use of the word "person" in the retaliation statute to extend liability beyond covered entities within each of the three areas. ***See, e.g.,*** *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999); *Stern v. Calif. State Archives*, 982 F.Supp. 690 (E.D.Cal.1997); *Cable v. Department of Developmental Services*, 973 F.Supp. 937 (C.D.Cal.1997); *Kautio v. Zurich Ins. Co.*, No. 97-2411-JWL, 1998 WL 164623 (D.Kan.1998).

Federal cases involving the Fair Housing Act also address a similar issue. 42 U.S.C. §3617 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any

other person in the exercise or enjoyment of, any right granted or protected [under the Fair Housing Act regarding sale or rental of housing property]." The courts have applied this prohibition to neighbors and even to strangers, so long as the motive is discriminatory animus and the conduct aims to deprive persons of their housing rights. ***See, e.g.,*** *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991); *Egan v. Schmock*, 93 F.Supp.2d 1090, 1093 (N.D.Ca. 2000); *Byrd v. Brandeburg*, 922 F.Supp. 60, 64-65 (N.D.Ohio 1996); *U.S. v. Weisz*, 914 F.Supp. 1050, 1054-55 (S.D.N.Y. 1996); *Johnson v. Smith*, 810 F.Supp. 235, 238-39 (N.D.Ill.1992).

Administrative regulations under the Human Rights Act define prohibited retaliation to involve a significant adverse act. 24.9.603(2) A.R.M. "Significant adverse acts" include damaging acts impacting each of the rights protected under §§49-2-302 through 49-2-311 MCA, such as material adverse employment actions, actions adversely impacting access to public accommodation, actions adversely impacting housing opportunities and actions adversely impacting access to credit, financing, insurance, educational or governmental services, benefits or opportunities. 24.9.603(2)(b) through (2)(e) A.R.M. Each of these categories involves acts within the confines of a particular kind of prohibited discrimination.

If the entire definition of "significant adverse acts" addressed solely acts within the confines of particular kinds of prohibited discrimination other than retaliation, the ADA cases disagreeing with *Ostrach* might be more persuasive. However, the pertinent definition of "significant adverse acts" includes "violence or threats of violence, malicious damage to property, coercion, intimidation, harassment . . . or other interference with the person or property of an individual." 24.9.603(2)(a) A.R.M. This provision does not limit significant adverse acts to any particular category of discrimination. Thus, the regulations appear to contemplate regulating the conduct of persons who are not within the scope of the prohibitions of the other anti-discrimination provisions of the Act.

The Montana Human Rights Act bars acts discriminating against individuals, based upon race, sex and so forth, by persons with particular kinds of power--employers, landlords, government agencies, schools and so forth. Thus, illegal discrimination under the Act's other provisions involves both an adverse act against a member of a protected class and one of several specific relationships between the discriminator and the complainant (employment, housing, public services, education and so forth). In each instance, the relationship places the discriminator in a position of power with respect to the complainant, as an employer, a landlord and so forth.

The Montana retaliation statute bars vindictive acts toward individuals who stand up against such illegal discrimination. Logically, the bar against retaliation does apply to the same persons with power as the rest of the Act's prohibitions. The plain meaning of the retaliation statute also extends the bar to all other persons who engage in adverse acts against individuals who stand up against illegal discrimination. The plain meaning of the statute controls when choosing between either the narrow approach of most ADA retaliation cases or the broad approach of the Fair Housing cases and *Ostrach*. ***E.g.***, *Montanans for Resp. Use of School Trust Fund v. State ex rel. Bd. of Land Comm.*, 296 Mont. 402, 416-17, 989 P.2d 800, 808-09 (1999); *In re E.A.T.*, 296 Mont. 535, 542, 989 P.2d 860, 864 (1999); §1-2-101 MCA.

Limiting the meaning of the word "person" absent a manifest legislative intent for such a limit is an unwarranted truncation of the scope of the Act. Hughes was a "person" within the scope of the retaliation statute when he took the actions Lynch proved.

Montana cases involving retaliation claims apply the *McDonnell Douglas* method of evaluating discrimination claims. However, the cases involve retaliation by covered entities under the other anti-discrimination provisions of the Act. Thus, the articulated burden of proof addresses cases in which the retaliator was the employer, for example, and thus the retaliatory action was adverse employment action:

> To prove retaliatory discharge, the appellant would have to show that (1) she was discharged, (2) she was subjected to sexual harassment during the course of employment, and (3) her employer's motivation in discharging her was to retaliate for her resistance to those sexual harassment activities. *Holien*, 689 P.2d at 1300.

Foster, ***op. cit.*** *at* 127, ***citing*** *Holien v. Sears, Roebuck,* 689 P.2d 1292 (Or. 1984).

For this retaliation complaint, 24.9.603 A.R.M. provides a clearer statement of Lynch's burden of proof. She must prove that: (1) she aided or encouraged others to exercise rights under the Act or participated in a proceeding under the Act; (2) Hughes subjected her to significant adverse acts, such as violence or threats of violence, coercion, intimidation or other interference with her person or property and (3) Hughes took the adverse acts because of her protected activities.

Lynch engaged in protected activity within the scope of §49-2-301 MCA when she filed her Human Rights Act complaint. On the other hand, Lynch failed to prove that Jane Doe's complaint alleged sexual harassment or any

other discriminatory grounds the Human Rights Act prohibits. Hughes argued that the Montana Human Rights Act did not prohibit drawing the smiley face on Jane Doe's breast.[11] However, the legal question is not whether Hughes' act of drawing was discriminatory, but whether Jane Doe's act of filing an internal complaint with the hospital was protected activity. Hughes did not commence his campaign against Lynch because she disapproved of the smiley face. When Ronco voiced her discomfort with such drawings to Hughes, he took no action. What triggered Hughes' retaliation toward Lynch was that she encouraged the patient to file the internal complaint.

According to the testimony of Lynch and Ronco, Jane Doe considered Hughes' conduct in drawing the smiley face unprofessional and immature. The testimony does not include any verification of the nature of the complaint Jane Doe filed about Hughes' conduct. The record does not include evidence that the internal complaint of Jane Doe asserted that Hughes' conduct was sexual and unwelcome, or otherwise illegally discriminatory under the Montana Act.[12]

Lynch proved that Hughes subjected her to significant adverse acts.[13] He used his position as the physician for Radiation Oncology patients to question her competence and suggest that she might harm patients. He caused her to fear for her job and her professional standing. He displayed such hostility that Lynch began to worry that he might be stalking her. His continuing efforts at intimidation made her work situation intolerable to her.

This is not a case involving simple verbal abuse. Isolated instances of verbal abuse are not adverse action.[14] Hughes subjected Lynch to a campaign

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[11] The opposition must be to a practice that the Human Rights Act prohibits. *Evans v. Kansas City, Missouri School Dist.*, 65 F.3d 98, 101 (8th Cir. 1995) and *Jurado v Eleven-Fifty Corp.*, 813 F.2d 1406, 1411-12 (9th Cir. 1987).

[12] Had Lynch proved that Jane Doe asserted illegal discrimination, she could have argued that the Act prohibits discrimination in public accommodations. §49-2-304 MCA. The services of health care professionals are public accommodations. ***E.g.***, *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).

[13] Hughes offered the testimony of Neal Rogers, another physician, to argue that a hospital employee who encouraged a patient to file a complaint against a treating physician was behaving improperly. Since Hughes was not the employer, this evidence is irrelevant. The hospital did not consider Lynch's actions regarding Jane Doe improper. The hospital supported Lynch for her action vis-à-vis Jane Doe.

[14] "[M]erely being yelled at by your supervisor does not rise to the level of an adverse employment action." *Russ v. Van Scoyoc Ent.*, 122 F.Supp.2d 29, 32 (D.D.C. 2000); ***see also*** *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Flaherty v. Gas Research Institute*, 31 F.3d 451, 456 (7th Cir.1994); *Brown v. Brody*, 199 F.3d 446, 452, 457 (D.C.Cir.1999); *Smart v. Ball State U.*, 89 F.3d 437, 441 (7th Cir.1996).

of intimidation and coercion, provoking her fear and feeding it as best he could. The testimony regarding his threatening comments, unrebutted and largely admitted by Hughes, amply demonstrates that Hughes went far beyond the limits of civilized behavior to visit retribution upon Lynch.

The causal nexus between Lynch's encouragement of Jane Doe's complaint and Hughes' subsequent treatment of her is clear, but Lynch failed to prove that by encouraging Jane Doe to file the complaint, Lynch was opposing illegal discrimination. Thus, Lynch failed to prove that Hughes engaged in illegal discrimination when he subjected her to adverse acts because of the Jane Doe complaint.

The causal nexus between Lynch's human rights complaint and Hughes' intimidation of her and continued efforts to damage her professional standing within the hospital is clear. If Hughes continued his hostile acts because he learned of the human rights complaint, then Lynch proved all three elements of her retaliation claim from February 1998, when Hughes learned of her complaint, until Lynch left the hospital in May 1998. When the respondent takes the adverse action with knowledge of the pending claim, the department presumes retaliatory motive. 24.9.603(3) A.R.M. Thus, Lynch proved the elements of her retaliation claim for the time after Hughes learned of her human rights complaint.

Because Lynch's case involved indirect evidence, Hughes had the opportunity to prove that he had a legitimate business reason for his acts. This is the second tier of the applicable prima facie case analysis.[15] Hughes' testimony that he feared for the safety of his patients and needed to "clear the air" with the staff was not credible. He failed to prove a legitimate business purpose for actions against Lynch after he learned of her complaint.

3. Proper Relief to Address the Retaliation

Because Hughes illegally retaliated against Lynch, the department can award Lynch the amount reasonably necessary to rectify any harm, pecuniary or otherwise, to her, resulting from the retaliation. §49-2-506(1)(b) MCA. The question is whether Lynch suffered harm because of the retaliation, rather than because of Hughes' attempts at revenge for her encouragement of Jane Doe's internal complaint.

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[15] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); ***adopted***, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); ***see also*** *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); ***and*** *Martinez v. Yellowstone Co. Welf. Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981).

Hughes is not liable for Lynch's decision to leave her employment with the hospital. Notwithstanding his strenuous efforts to interfere with her employment, he had no power to do so. If Lynch's work environment was so hostile that she could not reasonably continue to work for the hospital, the hospital was responsible. The hospital had both the power and the duty to protect her from such intolerable third-party conduct at work. *Childs*, ***op. cit.***; ***see also*** *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998). In addition, Lynch decided before she filed her human rights complaint to leave her job if Hughes returned to the hospital after his second absence.

Hughes is liable for Lynch's emotional distress resulting from his treatment of her because she filed her human rights complaint. While only the employer and the employee had the power to alter the terms and conditions of employment, Hughes definitely had the opportunity to interact with Lynch at work. He took that opportunity to wage a campaign of intimidation and coercion against her.[16]

The department has the power to require "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against." §49-2-506(1)(b) MCA. The department properly requires compensation for emotional distress. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596, 601 (1993). Damages in discrimination cases are broadly available precisely to rectify all the harm suffered. *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). 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).[17] Lynch must prove that her emotional distress resulted from the retaliation due to her filing of the Human Rights complaint.

The evidence in this case does not establish that Lynch suffered emotional distress due specifically to retaliation resulting from her human rights complaint. Both Seitz and Davis agreed that Lynch suffered from an adjustment disorder before she filed her human rights complaint. While Hughes' conduct triggered that disorder, that happened before Lynch filed her

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[16] Lynch settled with the hospital. There is no issue here regarding whether the hospital did enough to protect Lynch from Hughes' coercion and intimidation of her.

[17] ***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).

complaint. Davis confirmed that Lynch had already decided to leave her job before she filed the Human Rights complaint. Thus, the non-compensable causes of Lynch's emotional distress were already operating before Hughes could have retaliated for the filing of the complaint.

Lynch's emotional distress continued after she filed her Human Rights complaint, based upon her own testimony. While that testimony is credible, it does not provide a basis to differentiate between the impact of illegal retaliatory conduct of Hughes and the impact of the continuing hostile conduct of Hughes because of Lynch's prior (unprotected) acts.

Lynch proved that she suffered severe emotional distress because of Hughes' hostile conduct toward her, from the time he learned of the Jane Doe filing until Lynch left employment at the hospital. She did not prove that Hughes' conduct continued or worsened <u>because of</u> her human rights complaint. In short, she failed to prove that after she filed her human rights complaint Hughes did anything other than continue to behave as he already had been behaving. Thus, the evidence does not support a finding or conclusion that Hughes, by retaliatory conduct triggered by the human rights complaint, caused more or different emotional distress than the distress he was already causing with retaliation for Lynch's encouragement of Jane Doe. Thus, Lynch did not suffer any damages because of Hughes' illegal retaliation. Her damages resulted from conduct that, while reprehensible, was not within the prohibitions of the Act.

Because Hughes illegally retaliated against Lynch, the department must order Hughes to refrain from further retaliation. §49-2-506(1) MCA. The department also can prescribe conditions on Hughes' future conduct, requiring any reasonable measure to prevent further retaliation. §49-2-506(1)(a) MCA. Hughes' recalcitrance in the face of any suggestion that he did not have perfectly sound and proper reasons for his actions is instructive. He does not grasp the concept of retaliation, and without further understanding will likely retaliate again, should someone else engage in protected action that he considers harmful to his interests. The department must address this risk by requiring training.

V. Conclusions of Law

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

2. Lynch did not prove that Hughes acted as her employer or an agent of her employer when he allegedly subjected her to a sexually offensive and hostile work environment in her employment. Therefore, Hughes did not discriminate illegally against Lynch because of her sex. §49-2-303 MCA.

3. Lynch did not prove that Hughes illegally retaliated against her for opposing illegal discrimination during her employment. §49-2-301 MCA.

4. Lynch proved that Hughes illegally retaliated against her for filing a Human Rights complaint during her employment. §49-2-301 MCA.

5. Lynch did not prove that she suffered harm because of Hughes' illegal retaliation. §49-2-506 MCA.

6. Hughes must refrain in the future from engaging in any retaliatory conduct toward any individual initiating or participating in any proceeding under the Montana Human Rights Act. He must also participate in a training course designated and/or approved by the Montana Human Rights Bureau. Within 60 days of this final decision, Hughes must submit a proposal to the Bureau for such training. The training shall consist of at least 12 hours of time spent learning that retaliation is illegal and studying practical examples of retaliation and how to avoid engaging in it. §49-2-506 MCA.

VI. Order

1. Judgment is found in favor of Eugene Hughes and against Laura Lynch on the charges that Hughes discriminated against Lynch because of her sex and retaliated against her because she opposed illegal discrimination during her employment at St. James Community Hospital, Butte, Montana, in the Radiation Oncology Department of the Cancer Treatment Center as a Radiation Therapy Technologist from November 1996 through May 1998.

2. Judgment is found in favor of Laura Lynch and against Eugene Hughes on the charges that Hughes retaliated against Lynch because she filed a Human Rights Act complaint against him in February 1998 during her employment at St. James Community Hospital, Butte, Montana, in the Radiation Oncology Department of the Cancer Treatment Center as a Radiation Therapy Technologist. No damages resulted from the illegal retaliation.

3. Hughes is enjoined from further illegal acts of retaliation and ordered never again to violate the Montana Human Rights Act. In addition, he his ordered to comply with the provisions of Conclusion of Law No. 6.

Dated: January 22, 2001.

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Terry Spear, Hearing Examiner