

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

<hr/> Loraine Measure,)	Human Rights Act Case No. 0008009074
Charging Party,)	
versus)	<i>Final Agency Decision</i>
Flathead Valley Community College,)	
Board of Trustees,)	
<hr/> Respondent.)	

I. Procedure and Preliminary Matters

Loraine Measure¹ filed a complaint with the Human Rights Bureau of the Department of Labor and Industry on November 18, 1999 and an amended complaint on March 13, 2000. She alleged that the Flathead Valley Community College Board of Trustees retaliated against her for her work opposing wrongful sexual discrimination against students and employees by subjecting her to a hostile work environment, taking adverse employment action against her and eliminating her position at the college. On July 6, 2000, the department gave notice Measure's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on October 3, 2000, in Kalispell, Flathead County, Montana, continuing on October 4-6 and reconvening on October 17-18. Measure was present with her attorneys, Maureen H. Lennon and Robert C. Lukes, Garlington, Lohn & Robinson, PLLP. The college was present through its designated representative, President David Beyer, with its attorneys, Linda G. Hewitt and Todd A. Hammer, Warden, Christiansen, Johnson & Berg, PLLP.² The hearing examiner excluded witnesses on Measure's motion. The parties submitted the perpetuation depositions of Walt Nolte, Paul Sepp and Sharon Moses. Loraine Measure, Sharon Hall, P. J. Rismon-Beckley, Lynda Brown, Jane Karas, Maxine Lamb, Tom Dyer, Marlene Stoltz, Lenore McGarry, Faith Hodges, David Beyer, Dale Harvey and Lynn Farris testified. The hearing examiner's exhibit table accompanies this decision.

The college took and submitted post hearing evidentiary depositions of Sandy Reichoff and Steve Stahlberg. Measure submitted post hearing rebuttal depositions of Sepp and Barbara Hollmann. The parties filed post hearing

¹ In some documents and testimony, charging party is also called Loraine Bundrock.

² After hearing, counsel for the college gave notice of a new address, including identification of a new firm, Hammer, Hewitt & Sandler, PLLC, representing the college.

closing arguments after obtaining copies of the hearing transcript. Measure filed her final brief on January 9, 2001, submitting the case for decision. A copy of the department's docket for this contested case accompanies this decision.

II. Issues

The legal issue in this case is whether the college took adverse employment actions against Measure because she opposed sexual harassment the Montana Human Rights Act prohibits. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Loraine Measure resides at 545 Swan Hill Drive, Bigfork, Montana. Final Prehearing Order,³ Sec. IV, "Facts and Other Matters Admitted," No. 1.

2. The Flathead Valley College Board of Trustees governs Flathead Valley Community College. The college's address is 777 Grandview Drive, Kalispell, Montana. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 2.

3. The college is a corporate subdivision of the state of Montana. §20-15-101, MCA, *et seq.* The board is the college's governing body. §20-15-225, MCA. The college's administrative head is its President, David N. Beyer. The college has approximately 2,000 students. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 3; testimony of Measure and Beyer.

4. The college hired Measure on September 5, 1972. Except for a hiatus from 1975 through 1977 during which she finished school, Measure worked for the college without interruption, pursuant to a series of employment contracts, through December 31, 1999. In 1986 or 1987, Measure became Director of Student Services. Director of Student Services was the equivalent of the chief student affairs position on a traditional campus. Measure reported to the president and was responsible for all students' issues on campus. She supervised a number of areas related to students, and was also responsible for student discipline, student conduct and Title IX duties. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 4;

³ The final prehearing order, as the parties signed it at hearing, had a mislabeled footer calling it "Draft Final Prehearing Order." The parties also filed an addendum at hearing that deleted paragraphs 12 and 14 of the uncontested facts and replaced paragraphs 21 and 22 of the uncontested facts with a single paragraph. The findings of fact reflect those changes.

testimony of Measure and Beyer.

5. Measure has a Bachelor of Science Degree in Business from the University of Montana (with a Management major) and a Master's Degree in Educational Administration (emphasis in community colleges) from the University of Hawaii. Measure also attended sexual harassment workshops while an employee of the college. She most recently attended two sessions at the University of Montana called "Risky Business 1" and "Risky Business 2," taught by three attorneys from Stetson University from Florida. She attended workshops at National Association of Student Personnel Administrators annual regional meetings, including one or two sessions each meeting on sexual harassment. She attended sexual harassment workshops on campus at the college and around the state at conferences whenever possible. Testimony of Measure.

6. Effective February 18, 1992, the college adopted a policy regarding sexual harassment. "Policy 920.1 - Sexual Harassment." The policy designated the Director of Student Services to act as the affirmative action officer for student allegations of sexual harassment and the Director of Human Resources to act as the affirmative action officer for staff, employees and faculty. Measure had already acted as the affirmative action officer for student complaints of sexual harassment since 1987. Pursuant to the 1992 policy, Measure was to receive and respond to claims of discrimination from students. She also assumed responsibility to educate the students and faculty about sexual harassment. Another staff member, P.J. Rismon-Beckley, as Director of Human Services, was the affirmative action officer responsible for faculty complaints under the 1992 policy. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," Nos. 5 and 8;⁴ testimony of Measure; Exhibit 86.

7. In the summer of 1994, the college hired Beyer to replace the former president of the college, Dr. Fryett. Measure had an excellent working relationship with Fryett. Testimony of Measure.

8. Beyer had an undergraduate degree from the University of Iowa in history and social work, a Master's degree in counseling and social studies teaching from the University of Northern Iowa and a doctorate degree at Colorado State University in higher education (vocational education) with an emphasis in community college education. He had worked as a teacher, counselor and director of an adult vocational program for various high schools,

⁴ As amended by the addendum the parties filed at hearing. "Addendum to Final Prehearing Order."

as director of the Comprehensive Employment and Training Act program for a community college, as director of student services, continuing education director, director of instructional services and campus dean for a multi-location community college in Colorado. Beyer is a participating member of several boards and associations in the fields of community colleges and higher education. Testimony of Beyer.

9. Beyer's first year as president of the college was the 1994-95 school year. From the time he arrived at the college, Beyer looked for ways he could reduce administrative costs, including restructuring that reduced the number of administrative positions or eliminated high salary administrative positions in favor of new or consolidated positions at lower salary levels. One of the tools he used to evaluate possible restructuring was the development of current job descriptions for the administrative staff. During his first year, Beyer looked at many possible changes to the structure of the college, including reducing the number of administrators who reported directly to the president. Beyer told all of the administrators who reported to him that he was considering a restructuring that would reassign some of them to other direct supervision. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 5; testimony of Measure and Beyer.

10. When Beyer first arrived at the college he learned that a sexual harassment complaint originating on the Lincoln County campus of the college was approaching trial. From his briefing by counsel for the college, Beyer concluded that Measure's role in the investigation of that complaint had contributed to the development of litigation. Beyer questioned whether Measure's performance in that matter as affirmative action officer for student allegations of sexual harassment was beneficial to the college. He did not discuss this question with Measure. Testimony of Beyer.

11. In early 1995 the faculty advisor to the college's student newspaper, the *Mercury*, told Measure of maintenance staff concerns that the student editor of the paper was working at night in the office, accompanied by her minor children. On February 15, 1995, the student editor reported to Measure that members of the maintenance staff were harassing her over having her children in the newspaper office at night or early in the morning. Measure relied upon the student's report and concluded without further investigation that members of the maintenance staff were harassing the student because she was female and a student. Measure confronted maintenance staff member Tom Dyer about the complaint on February 15, 1995. The confrontation was the first conversation Measure had with any member of the maintenance staff about the student's complaint. Jack Roark, Dyer's immediate supervisor, and Larry Rasmussen, chief financial officer and supervisor of the maintenance

staff, were also present. Measure warned the three men that the *Mercury* editor might sue them, and threatened to instigate suit against Dyer herself, through the ACLU. Testimony of Measure and Dyer.

12. Dyer complained to Rismon-Beckley, who took his written statement and submitted it to Beyer. Dyer wanted an apology. Otherwise, he would pursue a harassment complaint against Measure. Roark also submitted a report of the incident to Beyer. After Beyer talked to Rasmussen and Measure about the incident, he ordered Measure to make a written apology to Dyer. On May 4, 1995, Measure gave Dyer a carefully worded written apology, still asserting that Dyer made inappropriate remarks to her during the incident. Testimony of Measure and Beyer; Exhibits 2, 3 and 4.

13. On May 2, 1995, Beyer sent a memo to faculty, staff and students at the college about sexual harassment. In it, he stated, that sexual harassment would not be tolerated at Flathead Valley Community College. The memo also encouraged attendance at seminars regarding sexual harassment, and promoted awareness and understanding of what constituted sexual harassment. Testimony of Beyer; Exhibit 103.

14. Beyer emphasized annual performance evaluations more than prior presidents at the college. Beyer evaluated Measure at the end of the 1994-95 school year. Before that evaluation, Measure had not received regular performance evaluations during her tenure at the college. In preparing the preliminary performance evaluations, Beyer used a small group performance evaluation report process in which he obtained comments from faculty and staff. The small group report for Measure included the following comments: "Sometimes crosses the line from being pro-female to being anti-male. Occasionally uses gender as a convenient excuse when no others are apparent. Needs to strive to eliminate gender bias." Testimony of Beyer; Exhibit 91.

15. Measure's preliminary performance evaluation contained an "areas for improvement" comment asserting that she had "created a perception among others in the College that she maintains a bias against faculty and males." The preliminary evaluation also suggested that Measure "use more positive talk when discussing gender issues and work with faculty. Be proactive." Beyer told her that these comments came from faculty. Testimony of Measure and Beyer.

16. Measure asked staff and faculty members about the comments Beyer attributed to faculty. Dale Harvey, a tenured English professor, told her that he had told Beyer she sometimes blamed men for most of the problems at the school and had called faculty "babies." He wrote Measure a letter confirming

that he made such comments, couched in terms that emphasized his friendship with Beyer. Harvey had not participated in the small group performance evaluation of Measure. Testimony of Measure and Harvey; Exhibits 1 and 91.

17. Measure had a romantic relationship with Harvey that ended in about 1980. Measure confronted Beyer about the propriety of incorporating casual comments from a former lover into her evaluation. Beyer did not know of the prior relationship between Measure and Harvey when he prepared the preliminary evaluation. Beyer removed the comment asserting a perceived bias against faculty and males, replacing it in the final evaluation with the comment, "Correct perceptions of others with respect to working relationships." The recommendation for more positive talk remained in the final evaluation. Measure and Beyer both signed the final evaluation on August 23, 1995. Testimony of Measure and Beyer; Exhibit 91.

18. Measure already considered Harvey a very influential member of the faculty. He had been one of the original professors when the college began. He was on the selection committee that recommended Beyer's hiring. She considered Harvey a favorite of faculty and students alike. After Measure signed her evaluation, Harvey told her that Beyer was upset with him for admitting to Measure that he had been the source of the negative comments. Measure feared Harvey could sway Beyer on matters of policy and preference. Testimony of Measure⁵; Exhibit 1.

19. In 1995, the college changed Measure's title to Associate Dean of Student Services. Her responsibilities as the affirmative action officer for student allegations of sexual harassment remained unchanged. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," Nos. 4, 5 and 8⁶; testimony of Measure and Beyer; Exhibit 86.

20. In June 1995, Beyer formally notified staff that he would proceed with his proposal for fewer administrators to report directly to him. Measure was one of the administrators who would no longer report directly to Beyer. She would instead report to the Vice-President, Dean of Instruction and Student Services. Measure considered the proposed change a demotion and

⁵ Measure never testified to Harvey's self-promotion. However, the testimony of several witnesses, including Measure, Nolte, Harvey, Beyer and Sharon Moses, a member of the staff at the college, together with Exhibit 1, authored by Harvey, provided an ample factual basis for the finding that Harvey was incessantly, albeit subtly, enhancing his stature by off-handedly claiming close personal relations with decision-makers and involvement in decision-making processes at the college.

⁶ As amended by the addendum the parties filed at hearing. "Addendum to Final Prehearing Order."

discussed it as a demotion with the staff she supervised. Before Beyer gave the formal notification, she had sought other employment, in part because of the proposed changes in organization at the college. Testimony of Measure; Exhibit 161.

21. The college adopted Beyer's proposed changes beginning in September 1995. Walt Nolte, the Vice-President and Dean of Instruction and Student Services, directly supervised Measure. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 5; testimony of Measure, Beyer and Nolte; Exhibit 86.

22. As part of Beyer's restructuring initiatives, the college assigned supervision of the athletic program to Measure, effective the beginning of the 1995-96 school year. The athletic program consisted of a soccer team and two cross-country teams. The program had developed in 1993 and 1994, under the supervision of Nolte. The budget for the entire program was \$15,000.00 in the 1995-96 school year. When Measure assumed supervision of the program it had a deficit of approximately \$5,000.00. Testimony of Measure and Beyer; Exhibit 171.

23. In April 1996, Measure distributed a handout concerning sexual harassment, advising staff members of certain activities that might violate the law. She did not clear the contents of the memo with Nolte or Beyer before distributing it. The memo stated that five allegations of sexual harassment had been brought to her attention in the prior two months, three involving student complaints against other students. She stated that lawsuits against schools and businesses had succeeded because those respondents had "ignored situations within their walls." Measure attached some materials from a sexual harassment workshop she had attended the previous year. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 6; testimony of Measure; Exhibit 7.

24. Beyer was unhappy with Measure for distributing the memo without prior administration approval. He was not aware of five allegations of sexual harassment in the preceding two months, and believed he should have heard about those allegations if they had occurred. He felt the memo implied that there were potential lawsuits against the college which were not being reported. He believed that Measure, a senior administrator, should have known better than to circulate a memo about a sensitive topic such as sexual harassment without prior administration approval. He knew that Measure had not cleared the memo with Nolte before circulating it. Beyer considered Measure to show poor judgment in circulating the memo. Testimony of Beyer and Nolte.

25. After Measure distributed the memo, Nolte told her that Beyer was

unhappy that she had not first obtained administration approval. Measure asked Nolte why Beyer thought she should have sought prior approval. Nolte attributed it to a complaint Beyer had received from a faculty member that the memo would stir up a “hornet’s nest on campus.” Nolte speculated that the faculty member was Harvey. Measure never discussed with Beyer the reasons for his displeasure. She asked Harvey if he had complained to Beyer about the memo, and Harvey said that he had. Testimony of Measure.

26. Effective for the 1996-97 school year, the Board of Trustees approved Beyer’s recommendation that the college eliminate two positions at the Lincoln campus (Campus Dean and Director of Student Services) and two positions at the Kalispell main campus (Controller and Chief Fiscal Officer, also known as Dean of Administrative or Management Services), while creating one new position at each campus (Campus Director for Lincoln and Director of Finance and Accounting Services at Kalispell). The board approved and acted upon the recommendation. The savings to the college from replacing two positions at each campus with one new position at each campus ranged from \$64,558 to \$74,054 on the Kalispell campus, and from \$64,558 to \$74,653 on the Lincoln campus. Larry Rasmussen lost his job in this reorganization. Testimony of Beyer; Exhibit 111.

27. In the reorganization, the college assigned supervision of the food service and the book store to Measure effective July 1, 1996. Measure’s job description was updated to reflect these additional responsibilities. Testimony of Measure and Beyer; Exhibits 32 and 171.

28. On January 13, 1997⁷, Christine Gordon, a student at the college, reported to Measure that one of her professors at the college had sexually harassed her. Under the 1992 sexual harassment policy, Measure remained responsible to receive and investigate student complaints of sexual harassment. After she began to talk to Measure about some of the details of the professor’s conduct, Gordon identified the harasser as Harvey. Gordon said she was afraid to come forward because Harvey was a senior professor and very popular. Gordon and Measure also discussed how investigating the complaint would be politically sensitive because Harvey was a friend of the president. Measure assured Gordon that she did not need to be concerned about that. Near the end of the initial interview, Measure told Gordon, that she had a potential conflict and would probably going have to involve someone else in the inquiry. Final Prehearing Order, Sec. IV, “Facts and Other Matters Admitted,” No. 7;

⁷ The evidence contains multiple references to January 12, 1997 (a Sunday), as the date of that meeting. On the entire record, it is more likely than not that the meeting actually occurred on Monday, January 13, 1997.

testimony of Measure; Exhibit 86.

29. Gordon arranged to meet with Measure again on January 17 to discuss in more detail the incidents with Harvey. Gordon reported to Measure that she had talked for several months to Christine Schimpff-Martini, a part-time faculty member, about the incidents with Harvey. Measure agreed that Schimpff-Martini could attend the January 17 meeting, to verify that Gordon had previously given her the same account of the incidents. This procedure varied from Measure's usual initial process for handling a student harassment complaint. Measure normally had one-on-one meetings, taking information separately from the complainant and any witnesses. Testimony of Measure.

30. Measure told Nolte about the complaint, and the next scheduled meeting with Gordon and with Schimpff-Martini. She also told Nolte of her prior romantic involvement with Harvey. Testimony of Measure and Nolte.

31. After her initial conversations with Gordon and Nolte, Measure told Sharon Moses, a college staff member, that she had received a student sexual harassment complaint against Harvey. When Measure shared with her the existence of the student complaint, Moses had already heard other rumors about a student complaint of sexual harassment against Harvey. Because it was common knowledge among long-term faculty that she and Harvey had been romantically involved, Measure feared that faculty members would perceive her involvement in any investigation of sexual harassment charges against Harvey as striking back at him. Testimony of Measure and Moses.

32. Measure still believed that Beyer and Harvey had become good friends. This increased Measure's concern that she would encounter problems with the administration if she participated in the investigation of Gordon's complaint. In fact, Beyer had a casual social acquaintance with Harvey, similar to his relationships with other faculty members and staff with whom he shared occasional social meals or drinks after work. Harvey often mentioned to others on campus that he socialized with Beyer, helping to foster the impression that he was a personal friend of the president, rather than a casual social acquaintance. Testimony of Measure, Beyer, Moses and Harvey.

33. On January 17, 1997, Schimpff-Martini met with Measure before Gordon arrived, and advised Measure of conduct by Harvey toward her that she believed constituted sexual harassment. When Gordon arrived, the three women discussed together Gordon's recollection of Harvey's conduct toward her and Schimpff-Martini's recollection of Harvey's harassing conduct toward her. They also discussed whether Harvey had reputedly subjected other women on campus to similar conduct in the past. Measure told Gordon and

Schimpff-Martini knew of her prior romantic involvement with Harvey and of her surmises and conclusions about Harvey's conduct with other young women on campus in the past. Both Gordon and Schimpff-Martini expressed fears about reactions against them on campus if investigation of their complaints went forward. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 7; testimony of Measure.

34. Measure discussed with Nolte the information she had obtained. They agreed that Measure should not be responsible for investigation of the Gordon complaint, because of her prior relationship with Harvey and because of the potential faculty complaint. However, because Measure reported good rapport with the complainants, Nolte and Measure agreed that she should remain involved in the process until the college had an accurate written statement of Gordon's complaints. Nolte directed Measure to draft a report of the complaints. Nolte also agreed to meet with Measure and Gordon, to hear first-hand Gordon's account of the incidents with Harvey, and commence the transition by which Measure would bow out of the investigation. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 9; testimony of Measure and Nolte.

35. Measure prepared a memo summarizing her contacts with Gordon and Schimpff-Martini. She dated the memo January 12, but completed it after the January 17 meeting with Gordon and Schimpff-Martini. In that memo, Measure included her initial conclusions about the merits of the complaints, speculations that Harvey had harassed other women previously and rumors Measure had heard from others about prior incidents involving Harvey. Measure provided complete copies of her memo to both Gordon and Schimpff-Martini. Testimony of Measure and Nolte; Exhibit 11.

36. Beyer reviewed the memo with Nolte. Beyer was very unhappy with the memo, because Measure had included her initial conclusions about the merits of the complaints, as well as speculations that Harvey had harassed other women previously and rumors about prior incidents involving Harvey. He was concerned that Measure apparently had prior notice of possible harassment by Harvey, had taken no action about the possible prior incidents, but now referenced her prior knowledge in the memo. Beyer ordered Nolte to direct Measure to revise the memo. Beyer was also unhappy with Measure for meeting with both complainants together and facilitating their sharing with each other their experiences with Harvey and sharing the knowledge of all three women about rumors regarding Harvey's conduct with others. He considered Measure's decisions about conduct of the initial investigation and preparation of the initial memo to display poor judgment for a senior administrator. Testimony of Beyer and Nolte.

37. On January 31, 1997, Measure and Nolte met with Gordon to discuss the allegations and actions that the college could or might take. Nolte confirmed that Gordon's accounts of the incidents were consistent with Measure's memo of Gordon's statements. Nolte also discussed various options Gordon might pursue. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 9; testimony of Measure and Nolte.

38. On January 31, 1997, after the meeting between Measure, Nolte and Gordon, Measure rewrote her memo. Measure followed Nolte's directions and deleted her comments about the merits of the complaints and reports of rumors about prior incidents involving Harvey. She addressed this memo to Beyer and dated it January 31, 1997. Nolte later wrote a memo of his recollection of the meeting, dating it February 19, 1997. Testimony of Measure, Beyer and Nolte; Exhibits 14, 16 and 23.

39. Through the end of January, Gordon contacted Measure frequently, coming to her office as a "drop in" on an almost daily basis. Measure tried to provide emotional support to Gordon by visiting with her and reassuring her. Testimony of Gordon.

40. On February 4, 1997, Nolte and Beyer met with the college's lawyer regarding the Harvey complaints. Because of Measure's prior relationship with Harvey and the concurrent faculty complaint by Schimpff-Martini, they decided to remove Measure from the investigation immediately. Testimony of Nolte.

41. On February 5, 1997, Beyer sent Nolte a confidential memo confirming that the college was removing Measure from further participation in the investigation of the sexual harassment complaints. Beyer placed Nolte in charge of the investigation, and gave him 30 days to complete the process. Nolte called Measure and told her of the decision. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 10; testimony of Measure and Nolte; Exhibit 15.

42. During the same week that the college removed Measure from the investigation, Gordon contacted Measure again. Gordon had met with Nolte and was concerned that the college had contacted its attorneys, that Nolte did not want to deal with her complaints and that Nolte wanted her to go away. Measure attempted to reassure Gordon. Testimony of Measure.

43. Gordon's contact with Measure continued after Beyer removed her from the investigation. Measure continued to listen to Gordon's complaints and concerns about the investigation. She encouraged Gordon to talk to those

investigating the complaint. Testimony of Measure.

44. Nolte recommended to Beyer that the college hire an independent investigator rather than committing his time to the investigation. Beyer authorized the hiring. In February 1997, the college hired Maxine Lamb, a member of the Flathead County Sheriff's Department, to investigate the claims. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 11; testimony of Nolte, Beyer and Measure; Exhibits 18, 20, 21 and 22.

45. In late February 1997, a member of the English department faculty began wearing a black armband in support of Harvey. The administration tried to dissuade the faculty member, suggesting that the public demonstration could have a chilling effect upon the student complainant (who had not been publicly identified). He continued to wear the armband. Other employees and students of the college began wearing black armbands. Testimony of Measure, Rismon-Beckley and Beyer; Exhibit 18.

46. On March 4, 1997, Lamb interviewed Gordon. In the course of the interview, Gordon told Lamb that Measure had encouraged her to proceed with her complaint, that Measure had told her both that Harvey "needs more than a talking to," and that Gordon was "absolutely right" that Nolte wanted Gordon to "just go away," to "disappear." Lamb tape-recorded the interview. The tapes and a transcription of them accompanied her final report, which she submitted to the college on March 18, 1997. Testimony of Lamb, Exhibits 92 and 180.

47. Beyer operated on the premise that the person responsible for the operation in which a problem developed was responsible for the problem. He typically blamed senior administrators for problems that arose in their areas even if the administrators did nothing that he could reasonably identify as wrong. Beyer considered Measure's conduct, as Gordon had reported it to Lamb, to be unprofessional and inconsistent with the best interests of the college. He concluded that Measure should have done more to exit the Gordon investigation sooner. He believed that Measure showed bad judgment for a senior administrator and that her decisions were not sufficiently protective of the college's interests. He did not discuss the incident with Measure. Testimony of Beyer.

48. In March 1997, the college suspended Harvey pending the outcome of Lamb's investigation. Harvey immediately began making public statements about the investigation. He claimed that the college did not timely notify him

of the complaints and denied him information about the complaints.⁸ He alleged that his friend Beyer cut him off. He complained that the college was not treating him fairly. Harvey portrayed himself as an innocent man wrongly accused and convicted without opportunity to confront witnesses or tell his side of the story. Testimony of Measure, Moses, Rismon-Beckley, Nolte and Beyer; Exhibit 25.

49. By spring 1997, some of the faculty, staff and students at the college had decided that the college was treating Harvey unfairly in its handling of the sexual harassment complaints. Students organized a sit-in in the main hallway of the administration building. Some faculty members and staff joined the sit-in. Some participants wore black armbands. The sit-in occurred in the hallway outside of Measure's office, suggesting to her that Harvey's sympathizers were singling her out and blaming her for the conduct of the investigation. Testimony of Measure and Moses; Exhibit 25.

50. Some of Harvey's sympathizers blamed Measure for the college's treatment of Harvey. Members of the English department had told others that Measure was behind the investigation and was manipulating the situation to hurt Harvey. Moses, in opposition to this gossip, told faculty members that Measure had been completely out of the investigation very early on, removing herself after the initial reports so that she had nothing to do with the process. The spread of gossip and conflicting reports and claims about what had happened permeated the campus. Because Measure was officially the affirmative action officer for student allegations of sexual harassment, the rumors that she was handling the investigation of Harvey and using it to take revenge gained credence. Testimony of Measure and Moses.

51. Some faculty and staff members behaved in a distant and hostile fashion toward Measure as a result of their suspicion that she was responsible for the investigation of Harvey. Measure did not make any statements clarifying her role, due to the confidentiality of the investigation. Measure began to view anyone who seemed unfriendly towards her as retaliating because of the Harvey investigation. Testimony of Measure.

52. Sympathizers of Harvey continued to wear black armbands during the spring (and again in the fall) of 1997. While some faculty and students

⁸ Nolte notified Harvey of the investigation on February 13, 1997. Nolte and Beyer did not contact Harvey sooner because they wanted first to have complete statements from the complainants and some verification of the accuracy of those complaints before contacting Harvey. The college did not provide details of the investigation to Harvey until May 1997. Exhibits 18 and 94.

who wore the armbands did blame Measure for the treatment Harvey received from the school, others simply wore the armbands to express their support for Harvey and their concern with whether the college had treated him fairly, without awareness of any role Measure allegedly played in the matter. The armband use led Gordon and Schimpff-Martini to complain that wearing of the armbands constituted attacks upon them. Testimony of Measure and Sharon Hall⁹; Exhibit 35.

53. Measure repeatedly complained to Nolte in February and March 1997 that she was a target of faculty, student and administration hostility for her perceived role in the Harvey investigation. Nolte told her that the conduct of the investigation was confidential and that the college could do nothing about the opinions and feelings of members of the college community. Measure consulted with a “sexual harassment person” at the University of Montana, and made a written demand on April 18, 1997, that the college “take action to protect [Measure] from the rumors circulating among faculty and staff and Mr. Harvey’s continuing allegations.” Testimony of Measure; Exhibit 28.

54. Gordon filed a complaint with the Montana Human Rights Commission and a sexual harassment complaint in federal court in April 1997 against the college.¹⁰ Beyer provided the board with a copy of the federal complaint on April 18, 1997. Final Prehearing Order, Sec. IV, “Facts and Other Matters Admitted,” No. 11; testimony of Nolte, Beyer and Measure; Exhibit 27.

55. After receiving her April 18 letter, Beyer met with Measure. He informed her that the college had told Harvey not to discuss the matter publicly while it was pending. He told Measure that there was nothing further that he could do. On April 30, after the meeting, Beyer gave Measure a written response to her demand that the college protect her. He reiterated that the college had advised Harvey to refrain from commenting on the matter. He noted that the college could not control “discussions or impressions of other employees about this situation.” Testimony of Measure and Beyer; Exhibit 29.

56. On May 16, 1997, the college provided to Harvey the investigative reports regarding the harassment complaints. On May 20, 1997, Nolte met

⁹ Hall, a college employee (assistant to the registrar in 1997, under Measure’s supervision), later heard from either Harvey or Measure that Measure “was blamed” for Harvey’s treatment during the investigation, but had no information about Measure’s involvement or blame during 1997.

¹⁰ Gordon filed her lawsuit as “Jane Doe,” for privacy reasons.

with Harvey and Harvey's attorney to hear Harvey's response. Harvey requested and obtained additional time to respond in writing and did so on June 2, 1997. This was almost four months after his suspension, and over three months after Harvey had gone public about the investigation. Exhibits 30 and 31.

57. On June 25, 1997, Nolte recommended disciplinary action against Harvey. The college took the action on or about July 11, 1997. Harvey took exception to the disciplinary action, pursuing a grievance. Ultimately, the college terminated Harvey's employment because of the sexual harassment claims, the findings of Lamb's investigation and Harvey's refusal to accept the disciplinary action. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 11; testimony of Measure; Exhibits 18, 22, 31 and 94.¹¹

58. At the end of the 1996-97 school year, Nolte left the college to take a position at another school outside of Montana. In the 1997-98 school year, Kathy Hughes became interim Vice-President, Dean of Instruction and Student Services, directly supervising Measure. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 5; testimony of Measure, Beyer and Nolte.

59. Beyer planned to embark upon an evaluation of the functioning of student services, to determine whether a more cost-effective organization might be feasible. Nolte and Beyer had discussed consolidating student service functions under a single administrator who would report to Nolte. Initially, Nolte considered Measure a candidate for that position, but by the spring of 1997, Nolte had decided that she was not the appropriate person to assume the expanded role of the administrator directly supervising consolidated student services. Nolte's thinking about Measure changed because of his concerns about her performance and because of resistance to the consolidation by the branch of student services that was not currently under Measure's supervision. In the spring of 1997, when Beyer had the student services staff write their current job descriptions, neither he nor Nolte considered Measure a solid senior administrator within the college. Testimony of Beyer and Nolte; Exhibit 33.

60. In September of 1997, Beyer sent a memorandum to selected faculty and staff members requesting that they participate in a committee to review

¹¹ Some evidence suggests that Harvey actually did resign or retire after the college conditioned his return from the suspension upon his admission that he had engaged in sexual harassment. The parties stipulated for purposes of this proceeding that the college terminated his employment. See No. 11, "Facts and Other Matters Admitted."

institutional policy regarding sexual harassment. Beyer did not include Measure in those invited to serve on the committee, nor did she serve on the committee formed. When she discovered the existence of the committee, she requested inclusion, but never was a participant in the review. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 13; testimony of Measure and Beyer; Exhibit 36.

61. In September 1997, Beyer spoke at a meeting of faculty and staff discussing the Harvey investigation and Gordon's federal harassment suit. The *Mercury* quoted Beyer as saying that college was guilty of sexual harassment. Testimony of Beyer; Exhibit 100.

62. In September or October 1997, Beyer removed Measure as the affirmative action officer for student allegations of sexual harassment. He did so because he lacked confidence in her ability to perform the duties of affirmative action officer. His lack of confidence was based upon his understanding of her involvement in the Libby investigation before he came to the college, his dissatisfaction with her handling of the 1996 campus memo on harassment and his view that she had made mistakes during the initiation of the Harvey investigation. Testimony of Beyer and Measure.

63. In December 1997, Measure suggested a different on-campus recruiter within student services. Beyer replied that since he was considering changes to the structure of student services, changes would be limited to job descriptions, titles, responsibilities and reporting relationships until the assessment was finished. Testimony of Beyer; Exhibit 37.

64. Throughout the 1997-98 school year, Beyer sought information from student services personnel regarding their jobs, with the aim of further reorganizing student services. Without a permanent replacement for Nolte, he was unable to move as quickly as he wanted regarding that reorganization. However, by June 1998 he had implemented some of the organizational changes. Testimony of Beyer; Exhibits 39 and 42 (and 43, identical to 42).

65. During the 1998-99 school year, Faith Hodges became interim Vice-President, Dean of Instruction and Student Services, and supervised Measure. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 5; testimony of Measure, Beyer and Hodges.

66. By the end of calendar 1998, Measure began to look for another job. She believed that she had no future at the college. She experienced what she considered ostracism from some faculty and staff members. She knew that Beyer had no confidence in her administrative judgment. She was beginning to look for another job. Testimony of Measure and Moses.

67. In the fall of 1998, the college soccer team qualified to compete in a national tournament. In November, the college advanced cash to the soccer coach for trip expenses. The advance erroneously included cash to cover railroad tickets already purchased by the college, so the coach received approximately \$2,500.00 more than necessary for the trip. On the trip, funds were lost or stolen. On November 24, 1998, after the trip, the coach reported to Measure that he could not find the unspent money, but was still looking. The coach later reported losing all his receipts and notes about money spent on the trip. He submitted a handwritten report about the loss on January 11, 1999. The college had a 10 day time limit for submitting expense reports and reimbursements after such trips. Measure did not report the missing money until January 1999, after the coach finally admitted that he did not have the missing money. Testimony of Measure and McGarry; exhibit 49.

68. In January 1999, Measure submitted a reconstruction of the expenses, using duplicate receipts and telephone information regarding where the team had stayed and what they had done. In her reconstruction, she proposed use of per diem calculations as a means of determining expense. Those calculations reflected more money spent than had been advanced, with a \$231.55 reimbursement due to the coach. Testimony of Measure; Exhibits 48, 50 and 51.

69. In January 1999, Lenore McGarry, interim chief financial officer for the college, met with Measure. Measure suggested use of the per diem to account for the missing money. McGarry was not comfortable with the use of per diem, because the coach had reported a loss, and because a food expense consistent with actual food expenses¹² instead of per diem resulted in a balance due back to the college of \$3,391.60. Testimony of Measure, Beyer, McGarry and Rismon-Beckley; Exhibits 48, 50 and 51.

70. The administrators inquiring into the soccer money loss advised Beyer of the situation in January 1999. Beyer then held meetings with the staff. The day before his first meeting with Measure regarding the loss, Beyer requested a report from her outlining the sequence of events regarding the loss. Measure never provided such a report, although she did prepare an accounting of how the trip might be reported (see previous finding). Testimony of Measure and Beyer.

71. Beyer met with Measure, McGarry and Rismon-Beckley about the

¹² The actual food expense information was not necessarily complete, but did cover most of the meals during the trip.

lost money on January 15, 1999. Beyer accused Measure of suggesting the per diem calculation to cover up the loss, which Measure denied. Measure asked what she should have done differently. Beyer did not suggest what she might have done differently but asked what she now suggested to correct the matter. Measure had no suggestions about how to correct the situation. Testimony of Measure, Beyer and Rismon-Beckley; Exhibit 53.

72. During the January 15 meeting, Beyer told Measure that she might be subject to disciplinary action for the monetary loss. On January 19, Measure sent Beyer a memo, in which she again denied any attempt to cover up the loss, and suggested that the business office personnel involved in advancing the funds helped to create the situation in which the money was erroneously disbursed and lost. In the final two paragraphs of her memo, she stated that she did not understand why she would be disciplined since she did not handle the money and the problem could not have occurred without business office error. Testimony of Measure; Exhibit 54.

73. On February 4, 1999, Beyer issued a disciplinary warning memorandum to Measure regarding the loss of soccer money. Beyer cited inappropriate actions regarding the Gordon sexual harassment complaint and continued failure to improve the operations of Student Services as other significant examples of poor judgment and inadequate performance. Beyer prohibited out of state travel by Measure for the balance of the academic year. He concluded that failure to improve would lead to other corrective actions, including but not limited to dismissal. On or before February 9, 1999, Beyer met with the soccer coach, who admitted his responsibility for the missing money and volunteered to work on fund-raisers to replace the money. Beyer wrote to the soccer coach, commending him for his honesty and initiative, and asking for a status report about the fund-raising the coach suggested. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 15; testimony of Measure and Beyer; Exhibits 55 and 56.

74. After receipt of the disciplinary warning, at a meeting before February 19, 1999,¹³ Measure told Beyer that she could not please him no matter what she did and that she thought that the only thing that would make him happy would be if she left the college. Rismon-Beckley attended the meeting. Measure requested that Rismon-Beckley not remain, but Beyer refused to exclude her. Testimony of Measure and Beyer; Exhibit 57.

¹³ Measure could not identify the date of this meeting. On February 19, 1999, Rismon-Beckley made notes regarding tasks Beyer wanted to accomplish. Since her notes reference the interchange between Measure and Beyer, it occurred before February 19.

75. In spring 1999, Measure and her staff heard that the college would be reviewing the structure of administration and evaluating the efficiency of having an Associate Dean of Student Services. Given her deteriorating working relationship with Beyer, Measure reasonably concluded that her future as an administrator at the college was in jeopardy. Testimony of Moses and Measure.

76. On April 2, 1999, Beyer announced in a memorandum that the college had adopted a special retirement program. Beyer had previously tried to interest Measure in participating in the program and retiring. At a series of meetings in February and March 1999, they talked about what incentives might encourage Measure to resign or retire. Beyer had Rismon-Beckley attempt some rough calculations of the loss in retirement benefits Measure would suffer if she retired in 1999. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 16; testimony of Beyer, Rismon-Beckley and Measure; Exhibit 90.

77. The hostility between Beyer and Measure reached a head on March 23, 1999, when Measure told Beyer that she had talked with Maxine Lamb about whether Lamb thought Measure had done anything wrong during the Harvey investigation. Beyer wrote a memo to Measure confirming this discussion, criticizing Measure for contacting Lamb and telling her she had no authority to discuss legal matters with individuals contracted by the college. Beyer further characterized Measure's conduct during the meeting as generally unacceptable and unprofessional. He directed Measure to provide a written proposal of acceptable exit conditions (retirement or resignation) by April 12, 1999.¹⁴ On April 6 he sent a follow-up memo reminding her of the deadline and directing her to make an appointment with him for April 13, the day after that deadline. Testimony of Measure and Beyer; Exhibits 58, 59 and 60.

78. On April 8 Measure responded in writing, accusing Beyer of telling the board that she caused problems in the Harvey investigation. She asserted that Beyer bullied her and made untrue statements about her conduct. She denied that it was improper for her to contact Lamb. She responded to the February 4 disciplinary warning, denying any fault and labelling the disciplinary action unfair and highly prejudicial. She disputed Beyer's criticism of her operation of social services. She questioned the propriety of banning her from out of state travel. She wrote that she did not know "what I could do to improve in your eyes short of die or drop off the face of the earth and am not

¹⁴ Beyer and Measure referred, in the memos they exchanged, to "negotiated items." The "negotiated items" of which they spoke and wrote referred precisely to what kind of benefit and payment package Measure would require in order to retire or resign voluntarily.

willing to do either of those.” She indicated that she was interested in an exit arrangement but not until the issues of the disciplinary warning and the March 23 memo were resolved. She asked that a third person agreeable to both Measure and Beyer attend their further meetings. Testimony of Measure; Exhibit 61.¹⁵

79. On April 13, Measure met with Beyer. Measure brought her supervisor, Faith Hodges, with her. Beyer was angry that Measure brought Hodges with her. He told her that Rismon-Beckley and no one else would be present for future meetings. He was also angry that Measure had sent him her letter of April 8, but had not provided her exit conditions in writing, as he had requested. Beyer refused to discuss the matters Measure addressed in the letter. He told her that she had to provide her list of acceptable exit conditions by April 22, 1999. Measure insisted she needed more time, but Beyer was adamant. Testimony of Beyer and Measure; Exhibit 63.

80. Measure developed a list what she wanted from the college in return for her voluntary departure. She wanted an employment contract through June of 2000, elimination of the February 4 and March 23 letters from her personnel file (together with any other “negative stuff” in her file), a positive letter of recommendation from Beyer, a promise of no negative references from Beyer or the board to any prospective employers, correction of the impression she believed Beyer had given the board of her role in the Harvey investigation, purchase of four years of retirement together with Medicare and Medicaid benefits, medical insurance coverage for up to three years until she obtained full coverage elsewhere and payment to her of \$150,000.00 plus any legal costs incurred. Testimony of Measure; Exhibit 64.

81. On April 21, 1999, Measure wrote a memo to Beyer. She asserted that the April 13 meeting had been to dispute erroneous allegations about her conduct regarding the Harvey investigation, the soccer money loss and her job performance. She also listed the exit conditions she had developed (see Exhibit 64), except that in lieu of \$150,000.00 plus legal costs incurred she requested three years’ salary after her resignation (at her 1998-99 salary that was \$180,000.00). She sent a second memo to Beyer on April 21, requesting that counselor George Shryock attend the April 22 meeting, noting that it might be necessary to reschedule the time of the meeting. Testimony of Measure; exhibits 65 and 66.

¹⁵ Measure testified that the exhibit was a draft of the letter she actually sent. No other version is in evidence.

82. On April 28, 1999, Beyer replied, refusing Measure's conditions. He wrote that he would proceed with a study of the college's need for an associate dean of student services. He said the study could be completed in six months and he would recommend that Measure receive a six month contract, with further employment dependent on the study's outcome. Since the college opened in 1967, it always had a single position encompassing the job duties of the Associate Dean of Student Services, except during a short period in the 1970s. Testimony of Measure and Beyer; Exhibits 68 and 69.

83. In April 1999 Beyer also requested that Measure submit suggestions for evaluation of the utility of her position and a proposed revised job description for her position. He requested the information by June 16. On May 23, 1999, Measure provided a brief suggestion that one of the first steps in evaluating her position would be to determine whether the changes in student services in the last few years made elimination of her job reasonable.¹⁶ On June 14, 1999, Measure advised Beyer that she had been unable to complete her "comments" on her job description and asked for more time. Beyer replied that she needed to give the draft of her position description a high priority and complete it by the prior deadline. Testimony of Measure and Beyer; Exhibits 69, 71 and 98.

84. In May 1999 Beyer agreed to lift the disciplinary ban on out of state travel to allow Measure to attend the annual conference of the N.A.S.P.A., in order to provide Measure with a means of seeking other employment. After attending the conference, Measure submitted copies of the minutes of the conference. Beyer was unhappy with this submission, since he had allowed Measure to attend the conference so she could look for another job and incidentally gather information about alternative student services structures. Testimony of Beyer; Exhibit 73.

85. In 1999, Measure's discretionary fund was no longer accessible to her. Measure had used her discretionary fund (totaling about \$7,000.00) for budget shortfalls in athletics resulting from extraordinary expenses. In 1999, the fund was no longer available for athletics, and Measure could not use it for student services expenditures without permission from her supervisor. By June 25, 1999, despite the availability of the discretionary fund, the athletic department had an operating deficit of \$11,920.00, over twice the deficit extant when Measure began supervising athletics in the fall of 1997. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 17.

¹⁶ Measure provided a lengthier argument for maintenance of her position in November 1999 (Exhibit 145).

86. In July 1999, Beyer sent Measure a revised job description, based in part upon the draft revision Measure had now provided. Testimony of Measure and Beyer; Exhibit 73.

87. Jane Karas joined the staff of the college at the beginning of July 1999, as Vice-President, Dean of Instruction and Student Services. She became Measure's direct supervisor until the date of the expiration of Measure's final employment contract on December 31, 1999. She participated in the study to determine whether Measure's position would be eliminated. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 5; testimony of Measure, Beyer and Karas.

88. During the 1997-98 and 1998-99 school years, Beyer removed a number of duties from Measure, in addition to affirmative action duties regarding student complaints. In October 1997, Measure supervised admissions and records (including registration), financial aid (including veteran's services, work study and grants) and student development (including health, student life and service learning). She was responsible for oversight of the food service and supervised multicultural affairs, job placement, the book store and recruitment and marketing, including new student orientation. She supervised the book store, and had responsibility for student appeals and athletics. Between October 1997 and October 1999, Beyer removed the book store and food service responsibilities Measure had assumed in 1996. He removed the recruitment and marketing supervision. He also reduced the number of staff members in admission and records and in financial aid who reported to Measure. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 5; testimony of Measure and Beyer; Exhibit 127, *see also* Charging Party's Demonstrative Exhibit 6.

89. On July 6, 1999, Beyer submitted a contract to Measure for July through December 1999. Measure signed the contract. It provided an annual salary of \$60,000.00 per year. By letter dated July 6, 1999, Beyer told Measure that a study underway of the need for the position of Associate Dean of Student Services would determine whether the college would employ her beyond the contract period. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," Nos. 4 and 18; testimony of Measure and Beyer.

90. In August of 1999, the Montana Legislature increased funding to community colleges by approximately 12%, the largest increase in Montana history. Beyer still viewed reduction of administrative costs as one of his priorities. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 19; testimony of Beyer.

91. In August and early September 1999, Beyer and Karas arranged to meet with staff members in student services and other administrative and support staff who worked with Measure. They discussed job duties, actual work performed and reporting and supervision. Staff was generally supportive of Measure during these appointments. Testimony of Measure and Karas.

92. On November 17, 1999, Measure filed her Complaint for discrimination with the Montana Human Rights Bureau. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 20.

93. On November 30, 1999, the college notified Measure that it was eliminating the position of Associate Dean of Student Services and that it would not renew her employment contract when it expired on December 31. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," Nos. 4, 21 and 22.¹⁷

94. The college did not renew Measure's final employment contract upon its expiration on December 31, 1999. She received standard employee termination benefits upon the termination of her employment on December 31, 1999. There were administrative positions open during the 1999-2000 school year, but Measure did not apply for any of them, and the college did not consider her for any of them. Final Prehearing Order, Sec. IV, "Facts and Other Matters Admitted," No. 4, 18 and 23; testimony of Measure and Beyer.

95. Beyer made substantially all of the decisions leading up to and including the elimination of Measure's position. Although Beyer technically could only recommend eliminating her position, the board relied upon his recommendations, in the case of Measure as it had in other instances. Testimony of Beyer.

IV. Opinion

The Montana Human Rights Act prohibits retaliation against a person because he or she has opposed illegal discrimination under the Act or has participated in any manner in a human rights investigation or proceeding. §49-2-301 MCA. This prohibition also appears in the Human Rights Commission's regulations, at 24.9.603(1) ARM:

It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant

¹⁷ As amended by the addendum the parties filed at hearing. "Addendum to Final Prehearing Order."

adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation.

“Protected activity” includes opposition to illegal discrimination and participation in a Montana Human Rights Act investigation or proceeding. §49-2-301 MCA. Measure’s claim is for retaliation because of opposition to illegal discrimination rather than because of participation in a Human Rights Act proceeding.

Participation in the college’s investigation of an internal harassment complaint is not participation in a Montana Human Rights Act proceeding. *See, E.E.O.C. v. Total Systems Service, Inc.*, 221 F.3d 1171, 1174, *rehearing en banc den.*, 240 F.3d 899 (11th Cir. 2000). Measure filed her Human Rights Act complaint before the college officially eliminated her position, but there was no evidence that her filing influenced a decision making process already speeding toward that outcome. The bare presumption of retaliation because of proximity in time between her filing and the elimination of her job (discussed later in this opinion with regard to her opposition claim) is insufficient to establish retaliation because of participation.

To prove unlawful retaliation for opposition to illegal discrimination Measure must prove that (1) she opposed illegal discriminatory activities; (2) the college subjected her to an adverse employment decision and (3) the adverse action occurred because of her opposition to illegal discrimination. *Foster v. Albertson's, Inc.*, 254 Mont. 117, 127, 835 P.2d 720 (1992), *citing Holien v. Sears, Roebuck and Co.*, 689 P.2d 1292 (Or. 1984); *Schmasow v. Headstart*, HRC Case #8801003948 (June 26, 1992); *accord, Laib v. Long Construction Co.*, HRC Case #ReAE80-1252 (August 1984), *quoting Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982). *See also Payne v. Norwest Corporation*, 113 F.3d 1079 (9th Cir.1997); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); *and Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 195 (7th Cir. 1994). Measure carries the ultimate burden of proving that the respondent took the adverse employment actions because of her opposition to illegal discrimination. *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone County Welfare Department*, 192 Mont. 42, 626 P.2d 242, 246 (1981).

Opposition must be to a practice that the Human Rights Act prohibits. *Evans v. Kansas City Missouri School District* 65 F.3d 98, 101 (8th Cir. 1995) *and*

Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411-12 (9th Cir. 1987).¹⁸ The college argued that since it did not promote or permit sexual harassment, Measure could not prove opposition to such prohibited conduct. The college cited no authority for this argument, and the department will not require Measure to prove that the employer endorsed sexual harassment as an element of her proof that she engaged in opposition to sexual harassment. Discarding that argument, Measure's opposition to sexual harassment on campus is not in genuine dispute. Sexual harassment for which the college is responsible is illegal discrimination under the Human Rights Act. Action to curtail or prevent such conduct constitutes opposition to a practice the Act prohibits.

There is no dispute that the college took adverse employment action against Measure, both disciplining her and then eliminating her position. Although there is case law declining to consider job elimination as adverse action¹⁹, the facts of this case render the elimination of Measure's position sufficiently analogous to discharge to establish it as adverse action.²⁰ The dispute in this case is about the motives of President David Beyer in taking the disciplinary action and recommending elimination of her position. Measure proffered both direct and indirect evidence in support of her claim that Beyer's motive was retaliatory. However, the evidence admissible to prove retaliatory motive was insufficient to establish it.

Measure argued that Beyer's retaliatory motive appeared in three facets of his conduct: (1) his conduct toward Measure regarding the *Mercury* incident and the 1996 educational memorandum on sexual harassment; (2) his treatment of her regarding the Harvey investigation and (3) his concoction of false reasons for faulting her job performance and eliminating her job. Finally, she argued (4) that it was after her opposition to sexual harassment that Beyer began to find fault with her. She did not support her arguments with substantial and credible evidence of record.

¹⁸ Montana follows federal law if the same rationale applies. *Crockett and Johnson, supra*.

¹⁹ *LaCroix v. Sears, Roebuck & Co.*, 240 F.3d 688 (8th Cir. 2001) (national restructuring that resulted in loss of particular local job was not an "adverse employment action," summary judgment proper for employer).

²⁰ Not every employment action is adverse. *Strother v. So. Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996). Non-trivial negative employment actions, including discharge and disciplinary action, are adverse. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000); *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000); *see also* *O'Day v. McDonnell Douglas Heli. Co.*, 79 F.3d 756, 763 (9th Cir.1996); *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir.1997); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.1987) *and* *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir.1986); *contrast* *McAlindin v. San Diego County*, 192 F.3d 1226, 1238-39 (9th Cir.1999); *Nunez v. Los Angeles*, 147 F.3d 867, 875 (9th Cir.1998).

1. Evidence of Retaliatory Motive—the Mercury Incident and the Sexual Harassment Memorandum

The evidence regarding the *Mercury* incident established that a student told Measure the maintenance staff was treating her badly. Measure did not begin the intake process for a complaint (as she later did with the Gordon complaint). Instead, she confronted the maintenance staff and threatened them with the possibility that Measure as well as the student might sue them if they did not cease doing what the student alleged they were doing. There was no evidence that Measure had the authority as a senior administrator to commence litigation against other staff members instead of processing a student complaint of discriminatory acts. There was evidence that Measure handled the confrontation with the maintenance staff poorly. The evidence did not support Measure's contention that Beyer manifested retaliatory animus in requiring Measure to write an apology. Beyer could reasonably consider the incident in evaluating Measure's value to the college.

The evidence adduced regarding the 1996 educational memorandum on sexual harassment established that Beyer was upset to learn for the first time about sexual harassment complaints in a campus wide distribution. Beyer was reasonably concerned that the tone of Measure's comments in that memo suggested that the college might be aware of sexual harassment and taking no action to stop it. Measure surmised that Harvey had prompted Beyer's concern, but offered no credible admissible evidence to support that speculation. Measure provided testimony that her supervisor at the time, Nolte, had no problem with the memorandum. However, since Measure did not obtain Nolte's approval of the memorandum before its distribution, Beyer's displeasure toward her instead of Nolte did not evidence any retaliatory animus. It was reasonable both for Beyer to expect to know about sexual harassment complaints before public reference to them by the affirmative action officer and to expect that Measure would clear such public references in advance with her supervisor.

2. The Harvey Investigation

The evidence adduced regarding the Harvey investigation involved more complex events. Measure presented a three-pronged argument regarding this evidence: (a) Beyer showed retaliatory animus in faulting her handling of the investigation; (b) Beyer scapegoated her with the college community despite her proper conduct and (c) Beyer refused to curb campus conduct and comment about the investigation. Despite counsel's able presentation and argument in support of Measure's arguments, the admissible evidence adduced does not support a finding of retaliatory motive.

2(a). Measure's Handling of the Investigation and Beyer's Criticisms of It

Beyer and Nolte made the decision to leave the initial intake of the Gordon complaint in Measure's hands despite her prior intimate relationship with Harvey. They did so because Measure reported rapport with the student complainant and the complainant might more readily give a complete initial statement. Hindsight suggests that this decision may have contributed to the subsequent backlash against the college, but in light of the information available to Nolte and Beyer at the time, the decision was reasonable.

Despite participating in the decision to have Measure complete the initial intake of the complaint, Beyer later decided that Measure demonstrated a lack of judgment in not exiting the investigation sooner. Blaming a subordinate for following the directions of supervisors was not unusual for Beyer. His rationale for this faultfinding was that if Measure could not complete the intake properly, she should have insisted upon her removal from the investigation before completing the intake. Beyer evaluated his administrators by their successes. In the context of his express goal of using restructuring to reduce the overall cost of administration, Beyer viewed lack of success for whatever reason in any significant undertaking as good cause to consider whether the administrator was a necessary part of the college staff.

Measure took significant actions during her brief involvement in the Harvey investigation. She decided to complete her initial conference with the student complainant even after she discovered that Harvey was the harasser. She reported to the college that the student complainant was reluctant to provide details about the harassment but that she had good rapport with the student. She discussed the complaints with both complainants at the same time. She shared with them both information about prior complaints against Harvey and campus gossip about other possible incidents involving Harvey. She included these matters in her initial memo of the student complaint, with further comments about Harvey's past conduct. She shared her entire draft memo with the complainants.

Measure admitted it was a mistake to share the entire draft memo with the complainants. Her testimony also suggested that she considered the mistake to result from haste in preparation and presentation of the memo to the complainants, and therefore not to be a mistake for which she was particularly culpable. She argued that all her other actions in the investigation were reasonable and proper.

It may be true that Measure acted as she did in order to encourage the student to pursue the complaint and to inform the college of the seriousness of the allegations. It probably is likewise true that Measure's actions helped to

obtain for the college sufficient information to take action against Harvey for his conduct. It is also true that she provided Harvey with ammunition for defense against the harassment charges and for claims against the college because of the manner in which Measure conducted the initial investigation. That does not mean that Measure was wrong in deciding to talk to both complainants together, or even in her choices regarding the scope of that discussion. It simply means that her actions were subject to legitimate criticism regarding the risks to the college involved in those actions. Measure presented evidence, through her expert witness (Lynda Brown) and through Lamb, in support of her contention that her conduct during the investigation was entirely proper. The issue for this case is not whether Measure was right or wrong, but whether Beyer could reasonably question her conduct during the investigation.

Beyer learned during the investigation that the student complainant feared the college wanted her to drop her complaint and go away, and that she believed Measure shared these perceptions. To Beyer, this indicated a failure on Measure's part to perform her duties. Beyer reasonably concluded that had Measure done a better job for the college in dealing with the student complainant, that student would not have decided that the college wanted her to drop her complaint and go away. Beyer at least was reasonable in concluding that Measure failed adequately to express to the student the college's intolerance for sexual harassment. Measure was obligated to assure the student of the college's commitment to investigating and redressing sexual harassment. Measure admitted that no college administrator, from Beyer and Nolte on down, ever evidenced any tolerance for sexual harassment. Measure had no reasonable basis for encouraging the student to believe otherwise.

Measure denied emphatically ever encouraging the student to believe that Nolte was not committed to pursuing the truth regarding her harassment complaint. However, Measure's testimony also suggested that she questioned Nolte and Beyer's commitment. Measure believed that Nolte did not want to be involved in the investigation, and she distrusted Beyer. It is plausible that Measure let the student complainant see these feelings. Thus, Beyer's belief that Measure failed to perform her duties with regard to addressing the student's perception of the college's commitment to the investigation was consistent both with the student's report to Maxine Lamb and with Measure's own mixed feelings about the college's commitment to the investigation. Beyer could reasonably question Measure's handling of the initial stages of the investigation.

If Beyer had questioned Measure's decision-making solely regarding her actions on the Harvey complaints, the evidence of retaliatory motive would

still be insufficient. Some courts hold that if a statement reflects a discriminatory animus and directly reflects on the challenged employment decision, it is not a mere stray remark. However, mere statements that the claimant is not a loyal employee do not manifest the requisite animus. *Compare Clancy v. Preston Trucking Co.*, 967 F.Supp. 806 (D.Del. 1997) (supervisor's statement referring to plaintiff as "older than dirt," not merely a stray remark because it was related to statement that supervisor intended to make her quit, and could be construed to be a statement of the reason for that intention) *with Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 516 (3rd Cir. 1997) (statement that plaintiff's "loyalties do not rest with the Company's best interests" not sufficient to prove retaliation was motivating factor in decision to terminate employee). In this case, Beyer (and Nolte, before he left) did not question Measure's loyalty so much as her grasp of the context within which she acted for the college as affirmative action officer. Beyer's critical comments to Measure about her handling of the investigation were explicable and reasonable, rather than evidence of retaliatory motive.

2(b). Beyer's "Scapegoating" of Measure

To analyze the evidence Measure presented of Beyer's alleged comments to third parties blaming Measure for problems in the Harvey investigation, it is necessary to review the basic evidentiary law of hearsay. Both sides offered considerable testimony about what the witness heard someone else say. Frequent hearsay objections are of record. Each side offered such testimony, and each side objected to the opponent's offers of such testimony.

Measure's evidence that Beyer did tell staff, faculty and the board that Measure made a mess of the Harvey investigation consisted virtually entirely of such testimony. However, Measure did not present credible and substantial testimony from staff, faculty and the board who heard Beyer blame Measure. Instead, she presented the testimony of someone (often herself) who heard someone else report that Beyer had made such statements.

Hearsay is an out of court statement offered into evidence to prove its truth. Rule 801(c) M.R.E. When a witness testifying at trial states either "I said that the car was blue," or "I heard him say that the car was blue," the assertion of the car's color is hearsay. In plain language, hearsay is rumor and gossip--second hand information about what somebody said or wrote some other time and place. Hearsay is inadmissible. Rule 802 M.R.E. Reasonable people, in the conduct of their own affairs, do not usually rely upon second hand information to decide what is really true. Reliance upon hearsay is reliance upon rumor and gossip. Rumor and gossip are not a valid basis for deciding the facts in a contested case or trial. The opposing party has no opportunity to question the people who made the statements, since the witness

is repeating what was said elsewhere at another time. The people who made the statements do not testify under oath as to their belief in the truth of the statements. No one has the opportunity to inquire into their basis for believing the truth of the statements, if they do. No one has the opportunity to inquire into the accuracy of the witness' recitation of what the people said they had heard. There is no fairness in reliance upon rumor and gossip.

Measure testified that she heard several people say that Beyer was casting blame on her for the furor surrounding the Harvey investigation, suspension and discharge. The people who allegedly heard Beyer make these statements to staff, faculty or the board did not testify. The college had no opportunity to question those people. Measure herself did not hear the statements, she simply believed what others told her Beyer had said.²¹ The hearing examiner cannot substitute Measure's faith in her sources for the crucible of examination under oath.²² It would be exactly akin to permitting the plaintiff in an auto accident case to testify to what she heard people who saw the accident (but were not witnesses at the trial) say about what happened. Thus, hearsay testimony about somebody else said that Beyer said to staff, faculty or the board is not admissible to prove that Beyer said it.

Removing the hearsay evidence of Beyer's alleged scapegoating of Measure, Measure did not provide substantial evidence that Beyer did so. Beyer clearly did fault Measure for her conduct during the Harvey investigation. He did consider her conduct in making decisions about her judgment as a senior administrator. He expressed his opinion of her judgment to Measure, in scolding terms. But there is no substantial and credible evidence that Beyer inappropriately expressed, in any forum at the college, his

²¹ Measure's testimony was potentially relevant to establish her frame of mind, pertinent both to explain why she acted as she did and to address the issue of emotional distress. The hearing examiner could not exclude this hearsay testimony at the time of the hearing, since proof that Measure heard others say that she was being blamed for the Harvey investigation could help establish emotional distress.

²² The hearsay rule has multiple exceptions. Rules 803 and 804, M.R.E. No combination of those exceptions permits the charging party to repeat what someone else told her the respondent's CEO said, to prove that the CEO actually did say it.

negative opinion of Measure's conduct during her involvement with the Harvey investigation.

Rumor and gossip fueled perceptions in the college community about Measure's role in the Harvey investigation. Measure proved that some members of the college community did blame her for the conduct of the Harvey investigation. Measure testified that the president of the faculty senate (who did not testify), at some unspecified time in 1997, accused her of having mismanaged the Harvey investigation, having a private agenda and being responsible for Harvey's suspension. This uncontroverted testimony proved that the faculty senate president made the statement, but there is no substantial and credible evidence of the basis upon which the faculty senate president reached the conclusions he asserted in that statement.

Because Beyer criticized Measure to her face, she argued that he must also have been the source of the rumor and gossip. However, she did not present substantial and credible evidence that Beyer was a source of any of that rumor and gossip. There was no legal basis to make the leap from Beyer's direct criticism Measure to Beyer's alleged responsibility for the rumor and gossip. Measure failed to provide a factual bridge across that gap. She failed to prove that Beyer did make her a scapegoat for the aftermath of the Harvey investigation.

2(c). Failure to Curb Conduct and Comment about the Investigation

Measure presented substantial evidence of the raging controversy about the college's investigation and subsequent discipline of Harvey. Clearly, the college considered whether it could take action regarding conduct and comment on campus. In addition to cautioning Harvey not to discuss the matter without success, the college consulted with its counsel about what it could do, and urged restraint to members of the community about wearing armbands and making intemperate statements. Measure contended the college had an obligation to go further, and offered its refusal to go further as evidence of retaliatory motive. The college argued that it could not properly act to constrain the free speech of the community members.

The parties argued this issue without citation to pertinent authority. The members of the college community questioning the propriety of the Harvey investigation and subsequent discipline were raising an issue of possible government misconduct. Such speech is at the core of the First Amendment's protection. *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), *citing Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 838 (1978) *and Wood v. Georgia*, 370 U.S. 375, 388-89 (1962). Restraining such speech is often illegal. A professor tearing down handbills from university bulletin boards violates his

colleague's First Amendment rights and is not protected by qualified immunity. *Gibel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001).

The college might have taken further action and defended any resulting claims of unconstitutional restraint on protected speech by asserting that the need for efficient administration allowed the restraint on employee discussions. *Fales v. Garst*, 235 F.3d 1122 (8th Cir. 2001); *Downes v. L.A. Unif. Sch. Dist.*, 228 F. 3d 1003 (9th Cir. 2000), *cert. den.* __ U.S. __, 121 S.Ct. 1653 (2001). But Measure has not demonstrated that the college had an affirmative obligation to push the legal envelope on restraint of protected speech. The college correctly argued that it reasonably declined to muzzle the debate regarding the Harvey matter.

Measure also argued that the college had an obligation to participate in the debate, at least to the extent of advising the community of her limited involvement in the investigation. The college argued that it maintained silence about the particulars of the investigation in order to protect the confidentiality of the parties to the complaints. Again, the parties argued this issue without citation to pertinent authority. Again, Measure has not demonstrated that the college had an affirmative obligation to disclose her limited role in the investigation while maintaining the confidentiality of the parties. Indeed, disclosing her limited role might have encouraged rumor and gossip about who else might have been somehow responsible for the college's actions toward Harvey. The college reasonably maintained its silence about the particulars of the investigation.²³

3. Beyer's Other Reasons for Faulting Measure's Performance and Eliminating Her Job

The college provided ample justification for Beyer's loss of confidence in Measure's judgment as a senior member of the administration. Had Measure's conduct during her brief involvement with the Harvey complaints been the only area where Beyer could reasonably question her decision-making, the inference of retaliatory animus in subsequent adverse actions might be stronger. Here, Beyer already questioned her judgment because of reports from counsel about problems with a prior discrimination investigation on the

²³ Measure's argument that Beyer's comments to the press in September 1997 are inconsistent with maintenance of confidentiality was unpersuasive. To the extent that Beyer's comments addressed the investigation, he relied upon the investigation in stating that the college appeared to be "guilty" (i.e., responsible) for the alleged harassment. At worst, this comment was supportive of the investigation, not critical of it, and made no reference to Measure at all. Beyer's comments do not prove that the college could or should have simultaneously gone public about Measure's limited role in the Harvey matter.

Lincoln campus, because of the *Mercury* office incident and because of the dissemination of the harassment memo. In each instance, the crux of Beyer's concern was not Measure's opposition to or investigation of discriminatory acts, but rather Measure's choice of methods.

In addition, Beyer found fault with Measure's job performance in student services. His push to reorganize student services began before the Harvey investigation, and was consistent with his efforts to reorganize other areas of the administration. He always looked to reduce the number of senior administrators with large salaries. Measure was not the only senior administrator who lost a job due to such reorganizations. She was not the only administrator assigned additional duties because of reorganizations. Whenever Beyer found an administrator whose job performance was lackluster or whose job was not essential, that administrator's position was at risk.

In the last two years of Measure's employment, Beyer did subject her performance to close scrutiny. During that same time, Beyer did begin to strip some of Measure's duties from her. However, he did so because of his concerns about her performance of her duties and her choice of methods in performing her duties, not because she opposed sexual harassment at the college. Thus, this close scrutiny did not evidence either retaliatory animus or fabrication of reasons for eliminating her job.

Measure's handling of the soccer money loss also reasonably justified criticism. Measure argued because she was not directly responsible for the loss Beyer necessarily selected her as blameworthy because of her opposition to sexual harassment. The facts did not support her argument. Measure explained her role in the inquiry into the loss in precisely the same fashion as she explained her role in the *Mercury* incident and in the 1996 harassment memorandum. She responded in like fashion to Beyer's call for better leadership in student services and his questions about her handling of the Harvey initial interviews and statements. She denied responsibility for any mistakes. She responded to requests for suggestions or reports with questions about what she should do or should have done. She suggested that others in the administration were at least equally culpable and probably more culpable than she. She sought to shift the inquiry from her conduct to the conduct of others. She answered criticism of her role with accusations that Beyer was treating her unfairly.

The evidence regarding the soccer coach's conduct suggested that he panicked when he found the money missing and delayed any reporting. However, once he did report that the money was gone, he admitted responsibility for the loss and suggested ways that he might assist the college in

obtaining funds to replace it. While Beyer's kid glove treatment of the coach was in stark contrast to his harsh scrutiny of Measure's conduct, the evidence also reflected a striking contrast between Measure's efforts to avoid any responsibility for either the loss or the time spent in ascertaining the loss and the coach's admissions of responsibility. Given the higher level of Measure's position, Beyer could reasonably find her conduct after the fact of the loss less appropriate than that of the coach. Thus, again, the evidence supported the college's argument that its conduct regarding the soccer loss was reasonable and did not evidence any retaliatory animus toward Measure.

4. Presumption of Retaliation Based on Timing

Proof of proximity in time between the protected activity and the adverse action raises a presumption of retaliatory motive, even without the Human Rights Commission's regulation (24.9.603(3) A.R.M.) formally adopting that rebuttable presumption. *See, Love v. Re/Max of America*, 738 F.2d 383 (10th Cir. 1984). The weight of the presumption is a fact question when contrary evidence is also part of the record. "A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption." Rule 301 M.R.E. When there is contrary evidence, the fact finder may give the presumption such weight in the face of that contrary evidence as is appropriate. *See, e.g., Crissey v. State Highway Commission*, 147 Mont. 374, 379, 413 P2d 308 (1966); *Roseneau Foods Inc. v. Kohlman*, 140 Mont. 572, 577, 374 P2d 87 (1962); *Williams v. Swords*, 129 Mont. 165, 173, 284 P2d 674 (1955); **and also** *Lewis v. New York Life Ins. Co.*, 113 Mont. 151, 162, 124 P.2d 579 (1942).

The presumption is insufficient in this case to establish a participation case, because by the time Measure filed her Human Rights complaint, the process of eliminating her job was complete except for formal adoption by the board of Beyer's recommendation. The college could not have taken the actions and made the decisions that led to elimination of Measure's job because of her Human Rights complaint when it had taken those actions and made those decisions before she filed.

With regard to Measure's opposition case, most of the employer's allegedly retaliatory actions occurred after the inception of the Harvey investigation. Thus, Measure was entitled to the rebuttable presumption. The progression of events that led to elimination of her job certainly accelerated after the inception of the Harvey investigation. However, the college presented substantial and credible evidence that the employer actions Measure alleged were retaliatory resulted from Beyer's reasonable concerns and doubts about

Measure's conduct as a senior administrator, some of which arose before the Harvey investigation, and all of which related to judgment and performance issues rather than Measure's opposition to sexual harassment. The preponderance of the evidence overcame the presumption of retaliatory animus.

Conclusion

Proof of a substantial difference between the college's treatment of Measure and that of other senior administrators similarly situated who did not oppose sexual harassment could be another method of proving retaliation. *See Simmons v. Campden County Bd. of Ed.*, 757 F.2d 1187 (11th Cir.), *cert. denied* 106 S.Ct. 385 (1985). Measure offered evidence that the college placed some other administrators in new jobs. However, Measure did not prove that Beyer questioned the judgment of those other administrators. Measure was not similarly situated to the other administrators because Beyer reasonably questioned her judgment, even apart from her conduct of the initial Harvey investigation.

Measure could also have presented other credible evidence sufficient for the fact finder to conclude that the adverse treatment was due to the protected activity. She was not limited to the above categories of proof. *See, e.g., Cohen v. Fred Meyer Inc.*, 686 F.2d 793 (9th Cir. 1982). However, she failed to present substantial and credible evidence that established the necessary causal nexus between adverse employment action and her opposition to sexual harassment.

Measure did not carry her ultimate burden of proving a causal connection between adverse employment action and her opposition to sexual harassment. Therefore, the college did not have the burden to prove by a preponderance of the evidence either that it would have taken the same action without a retaliatory motive or that a retaliatory motive played no role in its adverse employment actions pursuant to *Laudert v. Richland Cty Sheriff's Dept.*, 7 P.3d 386, 2000 MT 218, ¶41 (2000).

Although Beyer may be every bit the irascible and unforgiving boss Measure portrayed, the evidence in this case supports an ultimate finding that Beyer led the college to take adverse employment actions against Measure for reasons other than retaliatory animus because of her opposition to sexual harassment. Measure failed to prove her case.

V. Conclusions of Law

1. The department has jurisdiction over this complaint of illegal retaliation. §49-2-509(7) MCA.
2. Flathead Valley Community College, Board of Trustees, did not retaliate against Loraine Measure by taking adverse employment action for her work opposing wrongful sexual discrimination against students and other employees by subjecting her to a hostile work environment, disciplining her and eliminating her job. §49-2-507 MCA.

VI. Order

1. Judgment is found in favor of Flathead Valley Community College, Board of Trustees and against Loraine Measure on the charges of illegal retaliation against Measure in violation of the Montana Human Rights Act.
2. The complaint is dismissed.

Dated: September 17, 2001.

/s/ TERRY SPEAR
TERRY SPEAR, HEARING EXAMINER
Montana Department of Labor and Industry