

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

<hr/> <b>Nina Benjamin,</b>	)	
Charging Party,	)	<i>HRC Case Nos. 0001009023 &amp; 0001009034</i>
vs.	)	<i>Final Agency Decision</i>
<b>Jerry Anderson; Richard and</b>	)	
<b>Darinda Williams d/b/a</b>	)	
<b>Joker's Wild Bar and Restaurant,</b>	)	
<hr/> Respondents.	)	

**I. Procedure and Preliminary Matters**

Nina Benjamin (formerly Lande) filed a complaint with the Department of Labor and Industry on September 17, 1999 and an amended complaint on October 4, 1999. She withdrew her motion to file a second amended complaint adding Michael (Mike) Williams as an additional respondent. Benjamin alleged that the respondents discriminated against her because of gender (female) when they subjected her to a sexually hostile and offensive working environment beginning in December 1998 and continuing until her discharge on March 29, 1999. Respondents are Jerry Anderson and Richard (Dick) Williams and Darinda Williams (doing business as Joker's Wild Bar and Restaurant). On April 21, 2000, the department gave notice Benjamin's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on January 23-27, 2001, in Missoula, Montana. Benjamin attended with her attorneys, Lucy T. France, Garlington Lohn & Robinson PLLP and Timothy C. Kelly. Anderson attended with his attorney, Shane Vannatta, Worden Thane & Haines.<sup>1</sup> Dick and Darinda Williams attended with their attorney, Richard Buley, Tipp & Buley. Jerry Anderson, Nina Benjamin, Lawrence Martin, M.D., Janice Howard, Darinda Williams, Linda Halvorson, Dick Williams, Bud Benjamin, Mike Williams, Denise Blankenship, Sharon Blund, Phyllis Williamson, George Beasley, Bruce Wages, Vicki Ward, Gloria Mandella, Carol Muir, Nicole Crisafulli, Tammy Brown, Mike Watson, Crystal Mickey, Valerie Stevens and Karen Nelson testified. Copies of the hearing examiner's file docket and hearing docket accompany this decision. Benjamin filed the last post-hearing

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<sup>1</sup> After hearing, Vannatta withdrew as counsel for Anderson, and Buley became counsel for Anderson in addition to serving as counsel for Dick and Darinda Williams.

argument on May 9, 2001, and the case was submitted for department decision.

## **II. Issues**

The key issues in this case are whether respondents subjected Benjamin to unlawful sexual harassment and whether Darinda Williams is liable for Anderson's conduct in December 1998 and thereafter and for subsequent management decisions about Benjamin's work. A full statement of issues appears in the final prehearing order.

## **III. Findings of Fact**

1. Nina Benjamin was an employee at Joker's Wild Bar & Restaurant, in Missoula, Montana from September 17, 1998, through March 29 or 30, 1999. Initially, Nina Benjamin was hired to help with banquets. Within a few months, her primary job became that of a cocktail waitress. She worked primarily in this capacity for the balance of her employment. Darinda Williams, Michael (Mike) Williams and Jerry Anderson were her supervisors.

2. Joker's Wild sells liquor and food to the public, using employees to serve its customers. It is a place of public accommodation, offering its goods, services and facilities to the general public.

3. During the time that Benjamin worked at Joker's Wild, Darinda Williams owned the establishment and supervised the employees. She exercised the authority to make final discipline and discharge decisions regarding all of her employees. She was Benjamin's employer.

4. During the time that Benjamin worked at Joker's Wild, Jerry Anderson worked for the establishment as a manager. He began his employment with Joker's Wild in December 1997. He had no previous experience in the casino business. He had retired from the insurance business and was looking for a new career and a possible investment opportunity when he commenced work at Joker's Wild. He supervised Benjamin and other employees on behalf of Joker's Wild, as an agent of Darinda Williams, the owner.

5. Richard (Dick) Williams is Darinda Williams' husband. During Benjamin's employment at Joker's Wild, Dick Williams was an active advisor to his wife and her managers, who relied upon his expertise. At all times pertinent to this case he held an ownership interest in the assumed name "Joker's Wild." Dick Williams has been involved in the gaming industry for 23 years. He was the president of the Montana Gambling Industry Association

in 1998. Since 1998, he has held an ownership interest in three casinos (not including the establishment in this case) and acted as an advisor and consultant to two other casinos owned by members of his family. Darinda Williams made no ownership decisions of import regarding Joker's Wild without consultation with her husband.

6. Dick Williams was involved in Joker's Wild personnel matters, including dealing with complaints of sexual harassment. Darinda Williams usually obtained Dick's advice and guidance with regard to complaints of sexual harassment. For example, Linda Halvorson, a waitress at Joker's Wild, sought help from Dick Williams in 1998 regarding harassment by a male employee, rather than reporting the matter to Darinda Williams, Mike Williams or Anderson. When Halvorson had a complaint about Anderson's conduct toward her in August 1999, she again sought out Dick Williams about the problem. Dick Williams had authority to conduct business for Joker's Wild with or without consulting with Darinda Williams.

7. Mike Williams is the son of Darinda Williams and Dick Williams. Mike Williams began working as a manager at Joker's Wild in 1991, planning eventually to buy the establishment from his parents. Until she entered into a contract for sale in 1998, Darinda Williams (with the concurrence of her husband) had planned to sell Joker's Wild to Mike Williams. During the entirety of Benjamin's employment, Mike Williams supervised Benjamin and other employees as an agent of Darinda Williams, the owner and employer.

8. During Benjamin's employment at Joker's Wild, there was no sexual harassment policy in writing at the establishment and no written procedure for investigating complaints of sexual discrimination or sexual harassment. Joker's Wild did not have a written grievance procedure. Darinda Williams believed that if an employee had a problem, that employee would talk with Anderson, Mike Williams, Dick Williams or Darinda Williams. No one told employees that was the procedure. Employees had to figure out what to do on their own.

9. Benjamin's regular shift was as the evening cocktail waitress in the lounge. She worked with Nicole Crisafulli, the regular evening bartender. She also continued to work some banquets as her employer assigned them to her in addition to her shifts as a cocktail waitress.

10. On August 27, 1998, Anderson and Mike Williams entered into a partnership agreement; the partners contracted to purchase Joker's Wild from Darinda Williams for \$1.5 million, to be paid over time. In August 1998, they applied for a transfer to them of the Joker's Wild all-beverage liquor license, no. 04-801-5268-002. Conditions precedent to the purchase of Joker's Wild

were that Anderson and Mike Williams would obtain state approval for that transfer and for transfer to them of the Joker's Wild gaming license.

11. Mike Williams' potential income as an owner far exceeded his salary as a manager. He had worked for the opportunity to purchase the business for 6 years. His parents wanted him to take over the business when he was ready and able to run the business and pay them for the purchase. His partnership with Anderson brought Mike Williams much closer to his goal of owning the business.

12. In December 1998, Joker's Wild held a Christmas party at the restaurant for its employees. The party began shortly after 10:00 p.m. Joker's Wild had an open bar to provide free liquor to attending employees and their guests at the party. Benjamin and her then-husband, Tim Lande, attended after she had finished her cocktail waitress shift.

13. When the party began, Darinda Williams was the on-duty manager. She dispensed bonuses and gifts to employees, including a \$100.00 bonus to Benjamin. Darinda Williams announced during the party that Mike Williams and Anderson were purchasing the business.

14. Darinda Williams left the business premises during the party, leaving Anderson as the on-duty manager. Anderson was the working manager during the entire party. He spent part of his time at the party, but did not consume any alcohol. He tended bar at the party so the hired bartender could have at least two breaks.

15. Joker's Wild had a policy that employees or customers who become intoxicated at the establishment must not drive themselves home. The policy required managers to make sure that such persons were kept safe after becoming intoxicated on the premises. During the Christmas party, Anderson helped Crisafulli to drive her boyfriend home, because he was too drunk to drive. Anderson brought Crisafulli, who was not intoxicated, back to the party.

16. Tim Lande left before the end of the party. Benjamin remained. At the end of the party, she was too intoxicated to drive. Her intoxication and her limited ability to govern her own behavior were apparent to employees still on the premises. Several employees urged her not to drive herself home.

17. Anderson also observed Benjamin's intoxication and behavior. He offered to take her home since he was going to be driving in the direction of her home. Benjamin refused rides from other employees because Anderson could most conveniently give her a ride home. Anderson's offer to provide

Benjamin a ride home was in apparent accord with Joker's Wild policy to keep intoxicated employees or customers safe.

18. Anderson left the direct route to Benjamin's home, a through street, and drove onto side streets that did not lead there. He stopped the car either three or four times to pursue sexual contact with Benjamin, who was not in possession of her faculties. Benjamin's efforts to rebuff Anderson were scattered and ineffective. Despite his knowledge of her extremely intoxicated state, Anderson took her ineffective efforts to rebuff him as an invitation to continue making sexual contacts with her.<sup>2</sup> While Benjamin repeatedly lost consciousness, Anderson kissed her, forced his tongue into her mouth, fondled her through her clothing, stuck his finger in her mouth, unfastened her clothing and touched her inside of her unfastened clothing, and attempted to remove more of her clothing to make more still intimate sexual contacts with her. Eventually, after Benjamin told Anderson she was going to be ill, Anderson took her home.

19. The day after the Christmas party, Benjamin was both too ill and too ashamed to go to work. She had scattered recollections of Anderson's sexual contacts with her despite her protests during the ride home from the Christmas party. She felt violated, and even uncertain of how intimate Anderson had become with her during her losses of consciousness. She felt Anderson had taken advantage of her. She could not understand why he had acted as he had, and feared that she was somehow to blame for his conduct, even though she could not remember encouraging him and did not believe she had. Benjamin called in sick again the next afternoon. She was also afraid to face Anderson at work.

20. Anderson knew that his conduct with Benjamin in his car after the Christmas party was inappropriate and potentially actionable. He knew that Benjamin might now feel uncomfortable working with him. He knew that if she reported his conduct, it would have a serious impact upon his prospective ownership of the business (*see* finding 50, *infra*).

21. Benjamin returned to work three days after the Christmas party. At the beginning of her shift, on her first day back to work after the incident, Anderson asked Benjamin to "have a bite to eat" with him. Benjamin refused because she did not want to have any contact with him. At work, Benjamin felt very uncomfortable, because she believed that Anderson was hovering near her and staring at her. He was. Concerned about the trouble she might make

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<sup>2</sup> Anderson later fabricated elaborate accounts of how Benjamin had initiated, encouraged and actively participated in the sexual contacts in his car.

for him, Anderson proceeded to press Benjamin to discuss the matter with him, hoping to make certain that she would not complain or otherwise mention his conduct to anyone else.

22. Benjamin was afraid to be alone with Anderson, so when she gave in to his pressure, she suggested a meeting at a table in the bar area of the restaurant where other people could observe them. During that meeting, Benjamin told Anderson that she had no personal interest in him and that their relationship was professional only. She told him that she felt he had violated her trust by what he had done to her in the car. She said that she did not know how she became so intoxicated at the Christmas party. She told him that she wanted to make sure that “[i]t will never happen again.”

23. Benjamin had great difficulty talking with anyone about events of that late night car ride. She was even less able to speak with Anderson about it. Her inarticulate efforts to express her feelings to Anderson about what he had done to her suggested to him that she would be unwilling or unable to make an issue of his conduct. He tried to minimize the importance of her feelings. He joked about the degree of her intoxication and its cause. He hinted that his sexual contacts with her had gone even further than Benjamin remembered. He insinuated that she had been a willing participant. He concluded their meeting by instructing her not to tell anyone about what had happened between them. Benjamin felt sick, devastated and helpless. At the end of her shift, Benjamin confronted Anderson and told him that she wanted him to leave her alone.

24. Benjamin did not know to whom she could talk about the matter. She discussed the occurrence in very general terms with Crisafulli and Janice Howard (both of whom she considered friends), without sharing her specific recollections. She did not seek out any of the Williamses to discuss the matter, both because she knew Anderson and Mike Williams were buying the establishment from Darinda Williams and because without encouragement she could not bear to talk about the details of what had happened. She discussed it guardedly with Anderson only because he pressed her to have the discussion.

25. Benjamin, without providing any concrete details, made negative comments, with facial expressions and body movements, to both Crisafulli and Howard, suggesting that Anderson had made inappropriate advances toward her during the ride home after the Christmas party. Since Benjamin was unwilling to discuss the details of what had happened, her confidantes surmised what had actually transpired. Gossip about a salacious encounter between Anderson and Benjamin began to spread at Joker’s Wild.

26. Benjamin was on vacation in late January and early February of 1999. While she was on vacation, Howard told Dick Williams that there had been a problem between Anderson and Benjamin at or after the Christmas party. The details Howard provided were the product of either gossip or her imagination. Howard and Dick Williams told Darinda Williams that there had been a problem. Darinda and Dick Williams contacted Mike Williams and asked him to speak with Benjamin about it when she returned from vacation. They told Mike Williams only that there had been an incident between Anderson and Benjamin at the Christmas party. Dick and Darinda Williams took no further action of any kind to find out what had happened between Anderson and Benjamin at the Christmas party.

27. When Benjamin returned from her vacation in February 1999, Howard told her about the conversation with Dick and Darinda Williams. Mike Williams contacted Benjamin the next day, when Benjamin returned to Joker's Wild, and arranged a meeting with Benjamin at the 4-Bs Restaurant in Missoula. Benjamin believed the meeting would be about the occurrence with Anderson after the Christmas party. She was fearful and upset.

28. During the meeting at the 4-Bs, Williams acted as if he already knew the ugly details of the car ride. In reality, he knew nothing about the occurrence, was uncomfortable asking about it and did not want to find out any details about it. Since Benjamin did not want to discuss the details of the occurrence, she welcomed his insinuation that he already knew the details. She tried to express her feelings about the occurrence without recounting actual details

29. Benjamin told Mike Williams that things had happened that she did not want to happen and that Anderson did not take her home. Mike Williams told Benjamin that he would "take care of it, that it wouldn't be tolerated," and that Benjamin's job was not in jeopardy. Mike Williams also apologized, saying that he was very sorry that "this" had happened. The meeting ended without any discussion of pertinent facts or inquiry into what actions, if any, that Benjamin wanted from Joker's Wild or that Mike Williams would undertake or consider.

30. Mike Williams next talked to Anderson. Williams told Anderson he had already talked to Benjamin and hinted that he had already learned what had happened. Anderson responded by admitting that he had made sexual advances toward Benjamin, and that there had been sexual contact between them. Anderson carefully phrased his comments to suggest that the sexual contact was entirely consensual. He did not admit that Benjamin was an unwilling recipient of his sexual advances. Knowing that Benjamin had been

extremely intoxicated that night and that Anderson had given her the ride because it was unsafe for her to drive, Mike Williams told Anderson that Joker's Wild could not have repeat instances of such conduct and that Anderson "had to leave Nina alone." Anderson and Mike Williams finished their conversation without discussing what had actually happened. Both thereafter avoided talking further about the occurrence.

31. Joker's Wild took no further action toward Anderson because of his conduct with Benjamin, and took no further action to investigate what Anderson had actually done. Since all three of the Williamses now knew that something had happened with Benjamin, Anderson stuck to his limited admission that there had been sexual contact during the car ride, with the implicit suggestion that it had been mutually consensual. Darinda and Dick Williams asked no questions to obtain further details from anyone, but accepted Anderson's brief statements and accompanying tacit claim of mutually consensual sexual contact at face value.

32. Mike Williams, the manager assigned investigation of Anderson's conduct with Benjamin after the Christmas party, could have obtained a detailed written statement from Benjamin about Anderson's conduct. He could have obtained the assistance of his wife, or another female employee, to make it easier for Benjamin to provide such a statement (*see* finding No. 54, *infra*).

33. In response to an earlier sexual harassment complaint by a different female employee, Joker's Wild held a meeting between Darinda Williams, Anderson, Mike Williams and the male employee who was the alleged harasser. Joker's Wild then sent the two male managers and the alleged harasser to a training workshop on avoiding harassment claims. Darinda Williams decided to send those three male employees to the workshop because "they were handling the complaints and problems" and she thought "it might be good for them." Neither Anderson nor Mike Williams could recall anything they learned from the workshop. Joker's Wild took no other action against the alleged harasser, who remained an employee.

34. Anderson avoided Benjamin for a few weeks after her vacation. As time passed and nothing further transpired regarding the occurrence, Anderson began to interact more freely and frequently with her, as her supervisor. Benjamin's hope of avoiding him permanently faded and her fear and shame returned. When Anderson first began actively supervising her, he treated her respectfully. After a few days, he began ogling her and using his supervision of her as an excuse to brush up against her and touch her unnecessarily. She tried to avoid him. Since Joker's Wild had taken no action against Anderson as a

result of her report of the Christmas party occurrence, she was afraid to talk to Joker's Wild management about what was now beginning to happen. She did not seek relief from Joker's Wild from Anderson's unwanted attentions. Anderson continued his surreptitious inappropriate contacts with Benjamin in course of his supervisory interactions with her. Except for Bud Benjamin,<sup>3</sup> customers and co-employees did not notice anything out of the ordinary between Benjamin and Anderson. Joker's Wild management other than Anderson avoided observations of interactions between the two, while scrutinizing Benjamin's job performance more closely than before her complaint about Anderson's conduct after the Christmas party.

35. Darinda, Dick and Mike Williams had been respondents in a previous sexual harassment complaint, which resulted in a financial settlement. They feared that a harassment complaint against Anderson could delay or compromise completion of the sale of the establishment.

36. Darinda Williams knew that sexual contact between a manager and an employee under his supervision, occurring when the manager was giving the very intoxicated employee a ride home from the employee Christmas party, could constitute sexual harassment. She knew that many of the other employees ("the girls") were talking about the incident. She focused on the fact that Benjamin had not come to her directly either to describe what had happened or to complain specifically of sexual harassment. She and Mike Williams rationalized that the occurrence had been off-premises, and therefore was not employment-related. But for the pending sale of the business to Anderson and Mike Williams, Darinda Williams would have taken further steps to investigate the occurrence, either on her own or at the recommendation of Dick Williams. But for the pending sale, Mike Williams would have taken further action to investigate the occurrence. (*See*, finding 54, *infra*).

37. During Benjamin's employment at Joker's Wild, Darinda Williams, Mike Williams, Anderson and Crisafulli as well as customers complimented her on her work. As late as February 15, 1999, Darinda Williams acknowledged that customers liked Benjamin. Until mid-February 1999, after the Williamses belatedly discovered the Christmas party incident, Benjamin had good working relationships with Mike, Dick and Darinda Williams. Thereafter, co-workers reported to her that Darinda Williams was accusing her of having a "flirtation problem." Darinda Williams avoided any conversations with Benjamin. Dick

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<sup>3</sup> Bud Benjamin was a regular customer at Joker's Wild from October 1998 until Benjamin's discharge. They became close friends while she still worked at Joker's Wild. They married in July 1999.

Williams seemed to be staring at her without speaking to her. Mike Williams was watching her every move. Benjamin overheard Mike Williams tell a group of people sitting close to her that, "I shouldn't be saying things like that because I might get sued—you know, that sexual harassment thing." Mike Williams acted coldly and rudely toward Benjamin.

38. During the last two months of her employment at Joker's Wild (February and March 1999), Benjamin's job performance suffered. She shied away from customers she did not recognize, and spent more time close to Bud Benjamin whenever he was in the casino. These changes in job performance resulted from Anderson's increased sly physical contacts with her and his behavior around her. She no longer perceived of her work environment as safe. Other employees did complain to management about her job performance during that time period.

39. Dick Williams met with state investigators in late February or early March 1999 regarding problems about the Mike Williams and Anderson license transfer application. By mid-March Dick Williams knew of an adverse report from the state regarding the transfers, and of other possible adverse reports to come. None of these problems related to Anderson's conduct with Benjamin, which remained unacknowledged and uninvestigated.

40. As a general security practice, surveillance cameras ran regularly at Joker's Wild. In late March 1999, Mike and Darinda Williams began watching surveillance tapes of Benjamin. The surveillance tapes did not provide any objective evidence of poor performance by Benjamin. Mike and Darinda Williams never watched surveillance tapes of Anderson.

41. On Sunday morning, March 20, 1999, Benjamin had agreed to substitute in for an employee who could not work that shift. Benjamin agreed to work because she knew Anderson was not usually on that shift. She would not have agreed to work that Sunday if she had known Anderson would be there. Anderson did work the shift. He was more aggressive in his physical contacts and inappropriate behavior with Benjamin, and she tried to avoid him during her shift. Anderson reported to Darinda Williams that Benjamin had not done a good job during her shift.

42. Within a week after March 20, 1999, Mike Williams talked with Benjamin about failing to provide service to a customer. She tried to tell him that she was afraid of the customer, starting to explain why. He cut her off and yelled at her in front of others in the casino. This was the only time from March 20 until her discharge that she received any notice from Joker's Wild management that her performance was considered unsatisfactory. Mike

Williams did not give her a written warning or tell her that a written warning would be placed in her employment file.

43. Within a week after March 20, 1999, Dick Williams met with Darinda Williams about Benjamin's performance. On March 28, 1999, Anderson, Mike Williams and Darinda Williams met to discuss the discharge of Benjamin. All three participated in the decision to fire her. On March 29, 1999, Mike Williams telephoned Benjamin at her home in the evening and informed her that her employment with Joker's Wild was terminated. He told her that the reason for her firing was that there had been several customer complaints and that Bud Benjamin was taking up too much of her time.<sup>4</sup>

44. Around the time he notified Benjamin of her discharge, Mike Williams placed handwritten notes in Benjamin's personnel file, purporting to document three incidents of unsatisfactory job performance that week. The dates he wrote on the notes did not match with his testimony at hearing regarding the alleged unsatisfactory performances, nor did the notes and his testimony match with the testimony of other witnesses regarding the incidents. No one told Benjamin prior to her termination that any written statements of deficiencies were being put in her personnel file.

45. After the termination of Benjamin's employment, Darinda Williams wrote and placed a note in Benjamin's personnel file about Anderson's sexual contacts with Benjamin after the 1998 Christmas party. The note provided no details about the occurrence, instead outlining prospective defenses to any potential claim of sexual harassment by Benjamin. In her note, Darinda Williams collected her various rationalizations for disregarding the incident and taking no action to investigate it. She wrote that Benjamin did not report the incident, that there were no witnesses and that the incident did not happen on the business premises. She added that Benjamin's job "was not affected" and that Benjamin did not pursue any claim of harassment at the time of the incident. She then noted that Joker's Wild had fired Benjamin on March 29, 1999. Her note cited no reasons for firing Benjamin.

46. Darinda Williams usual practice was to apply progressive discipline with Joker's Wild employees. Her procedure was first to give an oral warning

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<sup>4</sup> Testimony that Mike Williams alone made the decision to terminate Benjamin was incredible. Anderson participated in the decision. Dick Williams gave counsel regarding Benjamin's termination, in his consulting role. Darinda Williams, the owner, was the ultimate authority on hiring and firing. She participated in the decision and permitted and directed Mike Williams to carry it out.

of unacceptable conduct when she observed it or heard<sup>5</sup> about it, instructing the employee not to do it again. For a second instance of the same behavior of an employee, Darinda Williams gave a written warning and told the offending employee that she was putting the written warning in the file. The third step in the procedure depended on the circumstances and severity of the repeated offense, and could be either an additional written warning or discharge.

47. Ordinarily, an employee had to receive at least one written warning prior to being fired. In March 1999, Joker's Wild had several written warnings in the files of other waitresses. A number of those warnings originated with Anderson's criticisms of their job performance. Joker's Wild had not fired any of those waitresses.

48. Joker's Wild managers usually spoke directly to the employee about performance problems when they occurred, such as a waitress being slow or inattentive in bringing a customer a cup of coffee. The purpose of the practice was to find out what happened and to try to help the employee avoid any recurrence of the problems.

49. Darinda Williams never spoke to Benjamin about any of the complaints allegedly leading to Benjamin's discharge. She relied upon reported problems by Mike Williams and Anderson for her conclusion that Benjamin's performance was unsatisfactory.

50. A denial by the state of the Mike Williams and Anderson transfer request for the Joker's Wild liquor license could impair the ability of Darinda Williams to transfer the license for five years under §16-4-413(1) MCA. The sale agreement included a provision that if it appeared the state was going to deny the application, the partnership would immediately withdraw its application. Concern that claims by Benjamin might create problems for the Anderson and Mike Williams partnership motivated Darinda Williams, Mike Williams and Anderson to avoid any meaningful investigation of the occurrence between Anderson and Benjamin after the Christmas party. The same concern motivated them to fire Benjamin without following the normal procedure for Joker's Wild in firing an unsatisfactory employee.

51. Joker's Wild never used progressive discipline procedures with Benjamin before firing her. Based on the usual practices of Joker's Wild, Benjamin's work performance throughout her employment never became so deficient as to merit immediate discharge without progressive discipline.

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<sup>5</sup> As owner, she heard about performance problems regarding employees from Mike Williams and Anderson.

52. On June 1, 1999, the State of Montana approved the transfers of the liquor and gaming licenses to Mike Williams and Anderson and Darinda Williams' sale of Joker's Wild to their partnership closed. Mike Williams and Anderson continued to use the Joker's Wild name owned by Darinda and Dick Williams.

53. In August 1999, Anderson gave another female employee of Joker's Wild a ride home from the establishment because that employee was too intoxicated to drive. Anderson had sexual contact with that employee while she was in his car. The employee was less intoxicated than Benjamin the night of the Christmas party, and the sexual contact was less prolonged and less invasive than with Benjamin. Within days after that occurrence, Anderson pursued further sexual contact with the same employee while they were both at work. He also admitted to that employee that he knew she could end his career with Joker's Wild by reporting his conduct.

54. Having already obtained state approval of the sale of the establishment, the Williams family no longer needed to protect Anderson. Immediately upon learning of the sexual contacts between Anderson and the female employee, Mike Williams enlisted his wife, also an employee of the enterprise, to obtain written statements of the events from the female employee. Those statements documented Anderson's unwelcome sexual contacts in detail.<sup>6</sup> On August 24, 1999, just days after Mike Williams obtained the statements, Anderson signed an agreement terminating his interest in Joker's Wild and in the partnership of Williams and Anderson.

55. No one reprimanded Anderson for his sexual conduct toward employees of Joker's Wild during the period of December 1998 through August 1999.

56. From the night of the Christmas party until the day Joker's Wild fired Benjamin, Anderson engaged in a continuous course of conduct aimed at exploiting Benjamin, sexually harassing her and preventing her from taking any effective action to render him accountable for his conduct that night and

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<sup>6</sup> The contrast between the written statements and the same employee's testimony at hearing illustrates the importance of obtaining contemporaneous statements. At hearing, the employee minimized the sexual contacts and displayed a desire not to cause anyone, including Anderson, any embarrassment or harm, attempting to avoid confirmation of her prior written statements. She testified that she wrote the statements, which she denied giving to anyone, to assuage her own feelings of guilt and embarrassment, to "look victimized" instead of being responsible for her own bad choices and actions and to avoid looking "bad." The witness had a perceptible bias in favor of the Williams family, which may have skewed her testimony at hearing in favor of all of the respondents. Without the original statements, proof of Anderson's conduct in the incident would have been all but impossible.

thereafter. From the time they first knew or should have known that Benjamin was complaining of sexual harassment by Anderson, Darinda Williams and Mike Williams engaged in a continuous course of conduct aimed at avoiding any investigation or action regarding Anderson's conduct toward Benjamin, and thereby permitted him to continue to harass her. Anderson, Mike Williams and Darinda Williams engaged in their continuing courses of conduct through March 29, 1999. Anderson and Mike Williams acted as Darinda Williams' agents from December 1998 through March 29, 1999, while she was still the owner of the enterprise.

57. After the car ride with Anderson after the Christmas party, Benjamin had nightmares of being attacked by Anderson. Although she had experienced other difficulties in her life prior to the occurrence with Anderson, she had been able to get through those difficulties. She tried to "just get through it," with regard to the after effects of the occurrence with Anderson, while pursuing her work at Joker's Wild. The refusal of Joker's Wild to pursue the investigation of her complaint, coupled with her eventual discharge, left her in shock. She lost the energy and confidence to continue to "just get through it." She did not have the physical or mental ability to seek immediate employment.

58. Benjamin and her current husband, Bud Benjamin, moved to Washington State in October 1999, to get away from Missoula and relocate to a place where Benjamin had previously had positive experiences. The move was an attempt by Benjamin to get "a fresh start and to get away from all of this." Although she had moved away from Montana before with no difficulty, this time she did not feel the excitement and energy that had manifested on previous occasions when she went to a new place. Instead, she felt inhibited from meeting new people and afraid.

59. Before and after her move to Washington, Benjamin suffered from sleep disturbances, low energy, lack of motivation and initiative, inability to experience pleasure or interest in things, cessation of her usual activities, apathy, guilt, shame, a decline in self esteem, lack of self confidence (compared with what she exhibited before Anderson's sexual contact with her), memory and concentration difficulties and weight gain. She also struggled with repeated experiences of intrusive memories of Anderson's sexual contacts with her, both the contacts the night of the Christmas party, and the subsequent surreptitious contacts at work. She has been unable to put the experiences aside. It has intruded into her life through nightmares and flashbacks. It has assailed her with severe feelings of not being herself (of not being "right"). She is assailed with feelings of "hyperarousal," *i.e.*, being acutely aware of her surroundings and in fear of some unknown threat to her immediate safety.

She has experienced substantial anxiety. She has been unable to trust people, and therefore has distanced herself from others. She has reduced her activities because of these feelings and sensations, which she has been unable to shake off.

60. After Benjamin and her husband relocated to Washington, her condition did not improve. They eventually recognized that she was not going to get better on her own and that she needed medical attention. They waited until Bud Benjamin became eligible for health insurance coverage and medical benefits at his new job so they could afford to obtain the medical help Nina needed. Once eligible, Benjamin sought evaluation and treatment from a psychiatrist and a therapist.

61. As a result of the continuing conduct of Anderson and Darinda Williams toward her from December 1998 through March 29, 1999, Benjamin developed clinical depression and post traumatic stress disorder ("PTSD").

62. Even with professional help and medication, it took Benjamin several months before she could report the details of what she recalled from the car ride with Anderson. Her therapist also observed that Benjamin continued to exhibit physical reactions to speaking about those details. Revisiting the events by speaking about them or reading about them aggravates the PTSD. Participating in this proceeding aggravated her symptoms. Enduring the hostile treatment of her employer and ultimately being fired aggravated her PTSD symptoms up through March 1999, and caused her deepening and enduring depression thereafter.

63. Benjamin's behavior after the events during the car ride with Anderson after the Christmas party, both throughout her subsequent employment with Joker's Wild and thereafter, is consistent with her diagnosis as a victim of a traumatic occurrence. It is characteristic for victims of PTSD to attempt to repress memories of the bad experience and to hope they will get better. At the time of the hearing, more than two years after the December 1998 Christmas party at Joker's Wild, Benjamin still exhibited visceral reactions, such as involuntary shudders, hand-wringing and ducking her head to hide her face, when trying to describe what she could recall of the events during her car ride with Anderson. She was still visibly upset and still had considerable difficulty putting what she could recall into words.

64. Benjamin can return to gainful full-time employment by January 2002. She will not suffer any permanent loss of earning capacity. She has already been able to resume recreational activities and enjoy her life intermittently. Her emotional problems still do return, but are not with her every hour of every day. She will never forget what happened to her at Joker's

Wild during the period from the time of the 1998 Christmas party through her termination. Although the acute emotional impact will no longer affect her by the time she returns to full employment, future episodes of increased difficulty may arise, triggered by new negative events or perceptions in her life that would not, but for the emotional problems resulting from respondents' conduct, precipitate her into such difficulty.

65. The continuation of her therapy sessions, past and future, through her return to full-time work will cost Benjamin \$6,360.00. Appropriate discontinuation of the use of Zoloft involves a six-month tapering off period rather than abrupt cessation of use. Therefore, the cost to Benjamin of her prescription medication from the inception of her use through December 31, 2001, and for six months thereafter is \$2,912.00. The cost to Benjamin of continuing to see her psychiatrist until she ceases use of Zoloft, including past as well as future visits, is \$1,280.00. Her total health care expenses are therefore \$10,552.00.

66. Benjamin earned a base wage as a cocktail waitress of \$5.15 per hour, for an average of five 6-hour shifts per week. Her reported tips were approximately \$20.00 a shift.<sup>7</sup> She additionally earned about \$75.00 per week for a banquet assignment. Her average weekly earnings were \$329.45.

67. Benjamin's earning losses subsequent to her discharge from Joker's Wild proximately resulted from the continuing course of conduct by Anderson and Darinda Williams from December 1998 through March 29, 1999. Benjamin reasonably mitigated her earning losses by returning to employment as soon as possible on a part-time basis in November 2000. She earned an average of \$150.00 per month from mid-November through hearing. Benjamin is motivated to recover and will properly mitigate her damages after hearing by pursuing her treatment regimen. As a result, from hearing until January 2002, she will experience (or by issuance of this decision, has experienced) an increasing ability to function in the workplace, resulting in an increasing earning capacity. Her earning capacity will (or has) increased from \$150.00 in November 2000 through January 2001, up to \$310.00 per month for October through December of 2001, in regular increments. Her earning loss through the end of December 2001, is \$33,920.75. Interest accruing on Benjamin's lost wages at 10% per annum simple, totals \$5,882.21 through January 3, 2002 (*see* attached "Table of Lost Earnings and Interest Accrued").

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<sup>7</sup> Benjamin testified to higher tips, but agreed that reported tips were in this range. Her explanation of having higher tips than she reported was garbled and uncertain, and no other witnesses supported her figures. The hearing examiner therefore relies upon the reported tip figure.

68. Benjamin has suffered extreme emotional distress as a proximate result of the continuing conduct of Anderson and Darinda Williams from December 1998 through March 29, 1999 (*see* findings 64-70). The value in dollars of that emotional distress is \$75,000.00.

69. Anderson still holds a record interest in Joker's Wild, although he has surrendered that interest to Mike Williams. Anderson may also be continuing to seek new business careers and investment opportunities in Montana. His conduct at Joker's Wild raises the possibility that he will engage in similar conduct in other such endeavors.

70. Darinda Williams continues to hold ownership and security interests in casinos operating in Montana, including Joker's Wild in Missoula. Her conduct in this matter raises the possibility that she will engage in similar conduct with other female employees in those casinos.

71. Dick Williams' role in the conduct of Joker's Wild toward Benjamin from the time of the 1998 Christmas party through March 29, 1999, was not sufficiently directed toward avoiding any investigation or action regarding Anderson's conduct toward Benjamin to justify finding him an agent of Darinda Williams. His conduct and apparent authority were not sufficient to render him a co-owner and operator of the enterprise, for whom Mike Williams and Anderson acted as agents.

#### IV. Opinion

Montana law prohibits employment discrimination based on sex. §49-2-303(1), MCA. An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), *aff'd sub. nom. Vanio v. Brookshire*, 852 P.2d 596 (Mont. 1993); *see also Houghton v. Medtrans of Montana*, HR Case No. 9901008749, "Final Agency Decision," pp. 7-8 (May 3, 2000).

#### Proving Sexual Harassment Sufficient to Create a Hostile Environment

The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

A charging party establishes a *prima facie* case of sexual harassment with proof that she was subject to “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 879 (9<sup>th</sup> Cir. 1991). “Harassment need not be severe and pervasive to impose liability; one or the other will do.” *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7<sup>th</sup> Cir. 2000) (emphasis added, citations omitted). A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. *at* 23; *see also Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998).

An isolated incident of unwelcome sexual conduct cannot result in discriminatory changes in the terms and conditions of employment unless the incident is extremely severe. *Faragher, op. cit. at* 788. A sufficiently intrusive unwelcome single incident of sexual harassment can create a hostile work environment. *Richardson v. N.Y.S. Dept. of Corr. Services*, 180 F.3d 426, 437 (2d Cir.1999); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 (10<sup>th</sup> Cir. 1998); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7<sup>th</sup> Cir.1996); *Becker v. Ulster County*, 167 F.Supp.2d 549, 555 (N.D. N.Y. 2001); *Fall v. Indiana University Board of Trustees*, 12 F.Supp.2d 870, 879-80 (N.D. Ind. 1998).

The standard for finding a hostile environment must be “sufficiently demanding to ensure that [anti-discrimination law] does not become a ‘general civility code.’” *Faragher, supra, citing Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). The correct standard when properly applied will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Oncale, supra, quoting* Lindemann & Kadue, *Sexual Harassment in Employment Law* 175 (1992). In other words, only extreme conduct can discriminatorily alter the terms and conditions of employment. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances. *Oncale, supra, quoting* *Harris*, 510 U.S. *at* 23. It is appropriate, when assessing the objective portion of a charging party’s claim, to assume the perspective of the reasonable victim. *See Ellison, op. cit. at* 879.

Unwelcome, intentional touching of a charging party’s intimate body areas can be sufficiently offensive to alter the conditions of her working environment, according to the EEOC’s Policy Guidance on Sexual Harassment,

(see 8 BNA FEP Manual 405:6681, 405:6691, Mar. 19, 1990); *accord*, *Barrett v. Omaha Nat. Bank*, 584 F. Supp. 22, 23-24, 30 (D. Neb. 1983) *aff'd*, 726 F.2d 424 (8<sup>th</sup> Cir. 1984). Unwelcome intentional touching of a woman's intimate body parts constitutes a sexual assault under Montana's criminal law. §45-5-502 MCA. However, the gravamen of the question in this case is not whether there was a sexual assault, a question far beyond the jurisdiction of the department,<sup>8</sup> but whether the single incident so altered the terms and conditions of employment as to render the work environment hostile.

The conduct of Anderson after the Christmas party achieved the extreme degree of offensiveness such as that found in the federal cases, *Lockhard, op. cit. at* 1067<sup>9</sup> or in *Fall, op. cit. at* 873 and 878-80<sup>10</sup>, where single incidents were sufficient to establish a hostile work environment. In this case Anderson, Benjamin's supervisor and the on-duty manager at Joker's Wild during the Christmas party, volunteered to take her home. He followed the dictates of business practice and policy at the casino, known to employees and supervisors alike, to protect intoxicated customers and employees. Far from protection, Anderson appears to have premeditated sexual contact, agreeing to take Benjamin home knowing her intoxicated condition and counting on having her effectively trapped in his vehicle.

Anderson knew from his observations and interactions with Benjamin during the evening that she was extremely intoxicated, to the point that she not only could not drive, but also could not govern her own behavior. Having isolated her in his car, under his control, he proceeded to make repeated sexual contact with her, despite her lack of consciousness during some of the contacts and her attempts to stop him during others. The degree of the contact involved unbuttoning her clothing and touching her intimate body parts as well as prolonged kissing and caressing. He attempted to go further. This single incident was extremely severe and sufficiently intrusive and unwelcome

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<sup>8</sup> The appropriate public officers prosecute criminal offenses in the courts, and must prove each element of such offenses beyond a reasonable doubt. The hearing examiner has therefore avoided any finding that Anderson either did or did not commit a sexual assault.

<sup>9</sup> Male customers at the restaurant had previously told the waitress they "would like to get into" her pants. Required to wait on them again, the waitress was told that she smelled good and was asked what kind of cologne she was wearing. When she responded that it was none of the customer's business, he grabbed her by the hair to sniff her. Required still to continue to wait upon the customers, she was again grabbed by hair by one of the two men, who then put his mouth on her breast.

<sup>10</sup> The University chancellor used a pretext to lure the plaintiff into his office, where he closed the door and grabbed her, kissed her, forced his tongue in her mouth, and forced his hand down her blouse far enough to grope her breasts. The Plaintiff escaped the office and immediately had to vomit in a nearby restroom.

to create a hostile work environment. Benjamin's direct evidence established that the terms and conditions of her employment were altered and became a hostile work environment.

Direct evidence "speaks directly to the issue, requiring no support by other evidence," proving the fact in question without either inference or presumption. *E.g.*, *Black's Law Dictionary*, p. 413 (5th Ed. 1979); *see also*, *Laudert v. Richland County Sheriff's Department*, 301 Mont. 114, 7 P.3d 386 (2000). Direct evidence of discrimination establishes a violation unless the respondents proffer substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert, supra; see also*, *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985).

When a charging party establishes a *prima facie* case of sexual harassment with direct evidence, the burden is then on the employer to prove, by a preponderance of evidence, "that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief." 24.9.610(5) A.R.M., *applicable to complaints filed after July 1, 1997*, 24.9.107(1)(b) A.R.M.; *cf.*, *EEOC Compliance Manual*, "EEOC: Policy Guidance on Sexual Harassment", No. 137, No. 4046-47, pp. 104-05 (BNA, April 1990).

The credible evidence established that Benjamin did not incite the sexual contact and that she regarded it as undesirable (and conveyed that opinion to Anderson).<sup>11</sup> His sexual contact with her in his car that night was unwelcome. *See* 29 C.F.R. §1604.11(a) (defining the elements of unwelcome sexual contact). *See, e.g.*, *Burns v. McGregor Elec. Ind., Inc.*, 955 F.2d 559, 565 (8<sup>th</sup> Cir. 1992), *quoting Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8<sup>th</sup> Cir. 1988); *Rooney v. Capital Dist. Trans. Auth.*, 109 F. Supp. 2d 86, 93 (N.D. N.Y. 2000).

In addition, Anderson's knowledge of her extreme intoxication and his role as the sober manager on duty preclude him from claiming that she was a willing participant in the events that occurred in his car. Benjamin was far too

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<sup>11</sup> Anderson's testimony that Benjamin initiated and willingly participated in the sexual contact is incredible. Anderson's facile ability to recreate events to exonerate himself can be illustrated by his testimony that at his meeting with Mike Williams in February 1999 he learned that Benjamin was accusing him of sexual harassment. Williams would sooner have been tortured with hot irons than utter the phrase "sexual harassment" about his business partner, at a time when such a charge might have caused problems and delay in effectuating transfer of the gaming and liquor licenses. Anderson's account of Benjamin's behavior in his car that night is not worthy of belief.

drunk to consent to sexual contact. *State v. Gould*, 273 Mont. 207, 219-20, 902 P2d 532, 540-41 (1995) (voluntary intoxication can incapacitate a woman and render her incapable under Montana law of giving her consent to sexual intercourse). The *Gould* case involved a criminal conviction pursuant to Title 45, in which the victim of the sexual intercourse without consent was so intoxicated that she was unconscious during the intercourse and died of alcohol poisoning within hours thereafter. The language of the Supreme Court decision leaves no doubt that voluntary intoxication can render a person incapable of consenting to sexual intercourse without the necessity of the person being unconscious, let alone being in an alcoholic coma on the verge of death. The same principle applies to incapacity to consent to sexual contact. By her conduct at the party, Benjamin was clearly incapable of giving her consent to the sexual contact that occurred in Anderson's car.

For purposes of determining whether the single instance of contact constituted sexual harassment sufficient to establish a hostile work environment, Benjamin proved that in December 1998 Anderson engaged in unwelcome, intentional touching of her intimate body areas. She proved that Anderson, her supervisor on-duty at the time and place of the Christmas party, subjected her to unwelcome and extremely offensive sexual contact after she relied upon him to convey her home from the party in her intoxicated state. Thus, she proved a *prima facie* case of sexual harassment creating, in December 1998, a hostile work environment for her.

#### Faragher Defenses Unavailable

An employer has no vicarious liability to an employee for an actionable hostile environment created by that employee's immediate supervisor if the employer exercises reasonable care to protect employees from such a hostile environment; however, only an employer who has not taken any tangible employment action against the complaining employee can interpose the defense. *Faragher, op. cit.; Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Here, firing the employee clearly constitutes an adverse employment action that precludes the defense. Even without the discharge, Darinda Williams could not interpose the defense. She did not exercise reasonable care to prevent and correct promptly Anderson's sexually harassing behavior, and the enterprise had no sexual harassment policies published and in place for Benjamin to utilize. Darinda Williams, like Anderson, has failed to prove any defense to Benjamin's *prima facie* case.

#### Employer Liability for a Supervisor's Sexual Harassment of an Employee

The Human Rights Act prohibits discriminatory conduct by an employer. The Act defines “employer” to include an agent of the employer. §49-2-101(11) MCA. Therefore, an agent of the employer may be liable for sexual discrimination in employment under §49-2-303(1)(a) MCA. “Agent” in this context has its ordinary meaning, since the legislature did not otherwise define it within the Act. *Fandrich v. Capital Ford*, 272 Mont. 425, 430, 901 P.2d 112, 115 (1995). An agent is one who acts for another in dealings with third persons. §28-10-101 MCA. Anderson, as a supervisor at the casino, was an agent of the employer, Darinda Williams. Within the scope of his authority, he acted for her. He is liable for wrongs committed while he so acted, and, unless she can interpose an affirmative defense, Darinda Williams is also vicariously liable for his discriminatory acts, because he was one of her management employees. *Vainio v. Brookshire*, 258 Mont. 273, 279, 852 P.2d 596, 600 (1993); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9<sup>th</sup> Cir. 1989).

Darinda Williams had sufficient notice through Howard and through Mike Williams of possible sexual harassment of Benjamin. She had the obligation to investigate. *Houghton, op. cit., citing Malik v. Carrier Corp.*, 202 F.3d 97 (2<sup>nd</sup> Cir. 2000) and other federal cases. Comparing the facts in this case to an Illinois case illustrates the compelling factual basis for Benjamin’s present claims. *Hawkins v. Maximus, Inc.*, 2000 WL 1898494, 84 F.E.P. Cases (N.D. Ill. 2000) (report by employee that harasser was following her home, that she was “spooked” by it, and that harasser was complimenting her insufficient as a matter of law to establish notice). Darinda Williams had notice, unlike the management in *Hawkins*, that one of her managers had engaged in some kind of sexual behavior toward Benjamin. Here, unlike *Hawkins*, Benjamin told Mike Williams as well as Anderson that Anderson’s attentions were unwanted.

The conduct of Joker’s Wild toward Anderson in August 1999, when rumors arose of sexual contact between Anderson and another intoxicated female employee, demonstrated that the employer could and would investigate promptly and thoroughly upon receipt of such information, with less notice than was available regarding the incident with Benjamin.<sup>12</sup> Darinda Williams’ failure to take comparable action upon notice of the earlier occurrence between Benjamin and Anderson is culpable under the Human Rights Act. That failure

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<sup>12</sup> The subsequent occurrences of Anderson’s sexual contacts with another female employee are admissible and probative to establish that Darinda Williams, through Mike Williams, could have investigated in February as Mike Williams did in August. Rule 404(3)(b) M.R.E. (evidence of other acts inadmissible to prove character admissible for other purposes, such as power and opportunity to investigate).

continued actively to impact Benjamin, as Anderson resumed his supervision of her and then began to engage in further harassing activities as her supervisor. The blind eye Darinda Williams turned toward Anderson, personally and through her agents, encouraged and permitted his continued harassment.

### Timeliness of Benjamin's Complaint

Because Benjamin did not file her complaint within 180 days after the 1998 Christmas party, the primary affirmative defense interposed by the respondents is that of the statute of limitations. Failure to file the complaint within 180 days of unlawful discrimination by the employer bars the claim. §49-2-501(4) MCA; *Skites v. Blue Cross/Blue Shield of Montana*, 297 Mont. 156, 161, 991 P.2d 955, 958, (1999). Obviously, the department has jurisdiction over a complaint that does allege employer acts of unlawful discrimination within the 180 days. The statute of limitations issue is whether timely allegations of unlawful acts also confers jurisdiction upon the department to decide whether Darinda Williams and Anderson engaged in violations of the Act that began before the pertinent statute of limitation and continued into the 180 days.

The Montana Supreme Court has not directly addressed the issue of continuing violations under the Human Rights Act. Neither *Skites*, *supra*, nor *Hash v. U.S. W. Communications Serv.*, 268 M 326, 886 P2d 442 (1994), resolve the issue. In both instances, discovery or occurrence of the last act of alleged discrimination took place more than 180 days before complaint filing. While the Court has not addressed the issue, the Human Rights Commission has. *Kundert v. City of Helena*, No. 9301005512 (Mar. 31, 1995)(adopting findings regarding conduct of employer for 17 months prior to the complaint filing); *Dernovich v. City of Great Falls*, HRC No. 9401006004 (Nov. 28, 1995)(citing *Kundert* for adoption of continuing violation theory and overruling objection to consideration of discriminatory acts occurring more than 180 days before complaint filing).

As already noted, the Montana Supreme Court has approved resort to federal discrimination law interpretations if the same rationale applies under Montana's Human Rights Act. *Crockett, op. cit.*; *Johnson v. Bozeman Sch. Dist.*, 226 Mont. 134, 734 P.2d 209 (1987). The Commission decisions are consistent with well-reasoned federal cases from the Ninth Circuit. *E.g.*, *Morgan v. N.R.P.C.*, 232 F.3d 1008 (9<sup>th</sup> Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973 (9<sup>th</sup> Cir. 2000); *Anderson v. Reno*, 190 F.3d 930, 936 (9<sup>th</sup> Cir.1999); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9<sup>th</sup> Cir.1998); *Sosa v. Hiraoka*, 920 F.2d 1451 (9<sup>th</sup> Cir. 1990). Since the Commission decisions are consistent with the federal cases, the hearing

examiner will apply the Ninth Circuit analysis of continuing violations. California takes the same approach to continuing violations as the federal courts. *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 29 P.3d 175 (2001).

Benjamin showed a series of related acts, several of which were within the limitations period--a “serial violation.” She proved that Darinda Williams and Anderson engaged in a continuing course of conduct to avoid investigation and ignore the occurrence after the Christmas party, culminating in her discharge. Until her discharge, she struggled to maintain her employment, hoping that the employer would protect her from contact with Anderson.

Her hope went unrealized. For the short period after her vacation and before she was fired, Anderson went from avoiding her at work to supervising her at work and then to harassing her at work (carefully, to avoid observation). Her work days became a vicious game of cat and mouse, as Anderson stalked her and she tried to avoid him.<sup>13</sup> Her employer, Darinda Williams, and her employer’s other agent, Mike Williams, failed to investigate her original complaint, and carefully avoided observation of Anderson’s continuing conduct.

Benjamin had no reason to expect that complaining again to management would do anything except worsen her situation. When Mike Williams, who lead her to believe he knew the details of Anderson’s predatory conduct toward her after the Christmas party, “assured” her that being Anderson’s victim would in no way jeopardize her job, the message to Benjamin about what help she could expect from her employer was clear. When Anderson began to sneak further harassment into his on-the-job contacts with her, she reasonably believed that management would do nothing, since Mike Williams’ previous vague promises to her had not been true.

The acts of discrimination occurring outside of the limitations period--the original acts of sexual harassment by Anderson and the commencement of the employer’s failure and refusal to act--were sufficiently related to those occurring within the limitations period, *see, Fielder, supra at* 988, rather than isolated, sporadic, or discrete acts, *see, Draper, supra at* 1107-10, and *Sosa*,

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<sup>13</sup> Anderson denied the continuing harassment, but Benjamin’s testimony of it was credible. Anderson’s motivation for this bizarre behavior is apparent in two ways. First, his willingness to engage in such illicit conduct with female employees, despite the risks, is abundantly clear from the entire record. Second, his awareness of his vulnerability to complaints from women he harassed appears to have increased his appetite to continue his pursuits at work, with Benjamin and with the subsequent object of his attentions. The only reason there were only two women subjected to this common pattern is that the Williamses acted after the second series of occurrences.

*supra at* 1456. In accord with Commission and 9<sup>th</sup> Circuit authority, the Montana Act does authorize imposition of liability upon Darinda Williams and Anderson for the entire effect of the continuing violations.

Anderson never had another opportunity to engage in the brazen unwelcome sexual contact that occurred during the ride home after the Christmas party. He did his worst, within the confines of the public environment of the work place, to continue to obtain unwelcome sexual contact with Benjamin, coupling his touching with innuendo and hidden leering. Benjamin successfully avoided being alone with him at work, unlike his subsequent target, so Benjamin was able to keep subsequent sexual contact with Anderson to a minimum. But her employer had sufficient notice and ample opportunity to investigate and prevent the on-going harassment. Just as the employer turned a carefully blind eye to the conduct of Anderson during the ride home after the Christmas party, the employer maintained that blindness throughout the balance of Benjamin's employment. Indeed, Benjamin's declining (though still acceptable) job performance due to Anderson was yet another indicator of the continuing problem. Anderson's indulgence of his insatiable appetite to harass and Williams' implacable refusal to investigate and discover what was happening were both continuing violations.

## Damages

### 1. Generally

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

### 2. Back Pay

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

the hearing.

### 3. Front Pay

Benjamin's additional wage losses are "front pay" since they occur after hearing, even though the end of her lost earnings occurs contemporaneously with issuance of this decision. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is a temporary measure until the charging party can reestablish her position in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Express Company*, 777 F.2d 1155, 1158 (6th Cir. 1985); *Rasmussen v. Hearing Aid Inst.*, HRC Case #8801003988 (March 1992). Benjamin should reasonably reestablish that position by the end of 2001. Until she does, the liable respondents are responsible for her lost wages.

### 4. Mitigation

Benjamin must make reasonable efforts to mitigate harm from discrimination by seeking other employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The liable respondents have the burden of proving a lack of reasonable diligence in mitigating damages from lost wages and benefits by at least a preponderance of the evidence. *P. W. Berry, Inc. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132 (1987). The requirement is not that Benjamin exhaustively seek out all possible employment opportunities. She must only be reasonable in pursuing offers of work. Here, due to her debilitated emotional condition, there was a reasonable delay in her return to work. When she was able to return on a part-time basis, she did, even though she need not have done so. *Ford Motor Co.*, *supra*, 458 U.S. at 231 ("the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position..."); *accord*, *Hullett*, *supra*. Benjamin reasonably mitigated her damages.

### 5. Pre-Judgment Interest

Pre-judgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, *op. cit.*, 779 P.2d at 523; *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). Benjamin's "front pay" award accrued after the hearing but before this decision. She is entitled to interest on that award as it has accrued.

## 6. Emotional Distress

The law requires “any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against,” §49-2-506(1)(b) MCA. The department has the clear power and duty to award money for proven emotional distress. *Vainio op. cit. at* 280-81, 852 P.2d *at* 601. As already noted, damages in discrimination cases are broadly available precisely to rectify all harm suffered. *P. W. Berry, Inc., op. cit.; Dolan, op. cit.; Albermarle Paper Co., op. cit.* Benjamin proved that she suffered severe emotional distress because of the continuing conduct of Anderson and Darinda Williams. She is entitled to recovery for that distress.

Montana has a single applicable standard for the recovery of emotional distress damages. *Sacco v. High Country Ind. Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995).

The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved . . . .

*Sacco at* 234, 896 P.2d *at* 426, quoting *Restatement(2d) of Torts* §46, comment (j).

While *Sacco* overruled the prior case law regarding standards of proof of emotional distress, the Court continued to use the prior case law to explicate the meaning of “serious or severe emotional distress.” In *Maloney*, the Court discussed the *Sacco* requirement that compensable emotional distress be serious or severe. Commenting on the *Restatement* quote from *Sacco*, the Court noted:

Measuring this element requires a careful consideration of the circumstances under which the infliction occurs, and the party relationships involved, in order to determine when and where a reasonable person should or should not have to endure certain kinds of emotional distress.

*Maloney at* 230, 994 P.2d *at* 1135 (emphasis added).

In *Sacco*, the Court established that the fact finder decided whether the claimant had suffered serious or severe emotional distress, and decided that proof of such distress did not necessarily require expert testimony:

The requirement that the emotional distress suffered because of the defendant's conduct be “serious” or “severe” ensures that only genuine claims will be compensated. . . . [A] jury is capable of

determining whether the emotional distress claimed to have been sustained is “serious” or “severe.” As stated in *Molien*, citing *Rodrigues*:<sup>14</sup>

“In cases other than where proof of mental distress is of a medically significant nature, [citations] the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case. [Citation.]” (472 P.2d at p. 520.) This standard is not as difficult to apply as it may seem in the abstract. As Justice Traynor explained in this court's unanimous opinion in *State Rubbish [Collectors] Assn. v. Siliznoff*, *supra*, 38 Cal. 2d. [330] at page 338, 240 P.2d 282, the jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. In addition, there will doubtless be circumstances in which the alleged emotional injury is susceptible of objective ascertainment by expert medical testimony.

*Molien*, 616 P.2d at 821. (Citation omitted.)

*Sacco at* 233, 896 P.2d *at* 425.

Because a fact-driven analysis is necessary to decide whether a particular claimant has proved serious or severe emotional distress, similar levels of emotional distress can sometimes be severe and other times not, as the Montana Supreme Court noted in *Maloney at* 230-31, 994 P.2d *at* 1135-36:

Thus, the very same descriptive terms that have been used to characterize compensable emotional distress in some circumstances have also described emotional distress that has been denied recovery. *Compare Zugg v. Ramage* (1989), 239 Mont. 292, 298, 779 P.2d 913, 917 (affirming emotional distress damages for “chest pains,” worries over financial stability, and “sleepless nights” resulting from tortious misrepresentation in sale of resort) *and Niles v. Big Sky Eyewear* (1989), 236 Mont. 455, 465, 771 P.2d 114, 119-20 (concluding that such evidence as a personality change and marital problems was sufficient to raise jury issue on negligent infliction of emotional distress) *with Lence v. Hagadone Inv. Co.* (1993), 258 Mont. 433, 444-45, 853 P.2d 1230, 1237 (concluding that evidence of one visit to a hospital emergency room “for stress and heart-related problems and circulatory problems” insufficient for recovery) *and McGregor v. Mommer*

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<sup>14</sup> *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 837, 616 P.2d 813, 819 (1980); *Rodrigues v. State*, 472 P.2d 509, 518 (Hawaii, 1970).

(1986), 220 Mont. 98, 111-12, 714 P.2d 536, 545 (concluding that financial problems resulting from tortious conduct, which “bothered” plaintiff “a lot” and “at times, it would show up at home,” were not sufficiently serious to warrant jury instruction for emotional distress damages). *See also First Bank*, 236 Mont. at 206, 771 P.2d at 91<sup>15</sup> (disapproving of recovery for loss of sleep and nervous tension).

Montana law expressly recognizes a person's right to be free from unlawful discrimination. §49-1-101, MCA. Violation of that right is a *per se* invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Vainio, op. cit.*; *Campbell v. Choteau Bar and Steak House*, HRC#8901003828 (Mar. 9, 1993); *Johnson v. Hale*, 13 F.3d 1351 (9<sup>th</sup> Cir. 1994).

In *Johnson v. Hale, op. cit.*, two black plaintiffs sought recovery for a denial of housing based upon race. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord’s refusal to rent to them because of their race occurred with no one else present to witness their humiliation. They were able to find other housing. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the court increased an award of \$125.00 to \$3,500.00 each for the overt racial discrimination.

In contrast, Benjamin offered lay testimony and expert testimony to establish her severe emotional distress. In Griffith, the department awarded \$50,000.00 each to a married couple subjected to retaliation by false claim, frivolous lawsuit, false report of child abuse and stalking. The department noted the consistency of that decision with comparable federal recoveries:

An award of \$50,000.00 to each of the Griffiths is consistent with other awards for emotional distress resulting from illegal discrimination. The Eleventh Circuit has affirmed an award of \$35,000.00 each to an unmarried black couple denied housing, based on claimant’s testimony of devastation, humiliation, and intense anger, stress on the couple’s relationship and their inability to find satisfactory housing. *Banai v. HUD*, 102 F.3d 1203 (11<sup>th</sup> Cir. 1997). The same Circuit Court affirmed an award of \$100,000 to the plaintiff in a racial discrimination case based on emotional stress, loss of sleep, marital strain and humiliation that occurred over several years. *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11<sup>th</sup> Cir. 1995). A federal district court awarded

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<sup>15</sup> *First Bank of Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989).

\$50,000.00 for emotional distress resulting from a discriminatory layoff, based solely on the claimant's testimony of humiliation and anguish. *Hughes v. Reeverts*, 967 F.Supp. 431 (D.C. Col. 1996). Another federal district court awarded \$100,000.00 in a retaliation case, based on testimony of humiliation and embarrassment, loss of time with children and strain on a marital relationship. *Dickerson v. HBO & Co., et. al.*, 1995 U.S. Dist. LEXIS 19213 (D.D.C.).

*Griffith v. Palacios*, "Final Agency Decision," p. 13, Nos. 9802008368 and 9802008369 (Mar. 25, 1999).<sup>16</sup>

Benjamin's credible lay and expert testimony established her severe emotional distress. Based upon the credible evidence of record, Benjamin's emotional distress exceeded that of the Griffiths. Because Anderson and Darinda Williams failed and refused to act to address the aftermath of the December 1998 occurrence, Benjamin eventually was unable to continue to "try to make it through" and after she lost her job developed serious psychological problems. From the evidence adduced, the continuing course of conduct of the liable respondents proximately caused Benjamin's emotional distress. \$75,000.00 is a reasonable and even moderate award for her harm, far greater than that of the victim in *Vainio*, and ever greater than that suffered by Paddy Griffith in *Griffith*.

#### Affirmative Relief

When the department finds that illegal discrimination occurred, the law requires that it impose affirmative relief, enjoining further discriminatory acts of the kind found and, as appropriate, prescribing conditions on the discriminator's future conduct relevant to the type of discriminatory practice found. §49-2-506(1)(a) MCA. That obligation impels the imposition of affirmative relief upon Anderson and Darinda Williams. The department must impose general and specific injunctive relief, upon Anderson to prevent the recurrence of the discriminatory practice with female employees in other endeavors, and upon Darinda Williams to prevent the recurrence of the discriminatory practice with other female employees in casinos in which she holds ownership interests. The department also will report, by copy of this final order, Anderson's acts of discrimination to the Montana Department of Revenue and Montana Department of Justice Gambling Division for their use in any future applications for licensing by Anderson.

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<sup>16</sup> On appeal, the Commission reduced the emotional distress award by 50% and increased the affirmative relief. Later, a district court consent decree restored the original department award of \$100,000.00 (\$50,000.00 to each claimant) for emotional distress.

## V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Anderson and Darinda Williams illegally discriminated against Benjamin by subjecting her to sexual harassment in her employment by
  - (a) Anderson engaging in sexual harassment of Benjamin while acting as the employer and as an agent of the employer and concealing his harassment and attempting to prevent Benjamin from obtaining relief from it, and by
  - (b) Darinda Williams relying upon and supporting Anderson and personally and through her agents failing and refusing to investigate and redress sexual harassment when she knew or should have known of it, during the time from December 1998 through March 29, 1999, in a continuing course of conduct.
3. Anderson and Darinda Williams were both employers of Benjamin pursuant to the statutory definition of “employer.” §49-2-101(11) MCA. Darinda Williams is liable for her acts and those of her managers.
4. Anderson and Darinda Williams are jointly and severally liable to Benjamin for her lost wages through December 31, 2001, in the sum of \$33,970.25, for prejudgment interest upon her lost wages in the sum of \$5,882.21, and for the value of the extreme and severe emotional distress suffered by Benjamin, in the sum of \$75,000.00. §49-2-506(1)(b) MCA.
5. Dick Williams did not illegally discriminate against Benjamin. He is entitled to dismissal of the complaint as against him. §49-2-507 MCA.
6. The law mandates affirmative relief against Anderson. The department enjoins him from
  - a) discrimination against female employees by taking advantage of his position as an employer or agent of an employer to seek sexual contact with such employees, and from
  - b) engaging in sexual harassment of female employees and failing and refusing to report, investigate, verify and address sexual harassment when he knows of its existence.

Within 60 days of this final order, Anderson must file with the Human Rights Bureau a written statement of any and all employment and business endeavors in which he is currently involved, and follow any directions from the Bureau regarding changes for assurance of non-discrimination in the manner in which he conducts those activities. Should he fail timely to file such a written statement, the department hereby orders that Anderson cease and desist from

any employment or business endeavors in the state of Montana until such time as he shall comply with the terms of this injunction. §49-2-506(1) MCA.

7. The law mandates affirmative relief against Darinda Williams. The department enjoins her from

- a) discrimination against female employees by relying upon and supporting supervisors engaging in sexual harassment of female employees, and by personally and from
- b) through her agents failing and refusing to investigate, verify and address sexual harassment when she knows of or should have ascertained its existence.

Darinda Williams must also immediately

- a) impel the casinos in Montana in which she holds ownership or seller's security interests to adopt written policies against sexual harassment that
- b) identify for each such facility two separate management persons to whom an employee can present an internal complaint of harassment,
- c) require each facility promptly to investigate thoroughly and impartially any such internal complaint and to act to protect the complainant from any harassment disclosed in the investigation, and
- d) include the means of publication of the policies to the employees.

Darinda Williams must within 60 days of this final order

- a) cause the casinos in Montana in which she holds ownership or seller's security interests to file with the Montana Human Rights Bureau written proposed rules ready for adoption and publication upon approval by the Bureau or ready for amendment, adoption and publication should the Bureau recommend any amendments and
- b) submit to the Bureau a proposal of training for Bureau approval that will satisfy the training requirement for her.

Darinda Williams must also attend 8 hours of training in sexual harassment identification and prevention techniques. §49-2-506(1) MCA.

8. The department will send copies of this decision to the Montana Department of Revenue and the Montana Department of Justice, Gambling Division.

## VI. Order

1. The department grants judgment in favor of Nina Benjamin and against Jerry Anderson and Darinda Williams on the charge that they discriminated against her because of gender (female) when they subjected her to a sexually hostile and offensive working environment in 1999.

2. The department awards Benjamin the sum of \$114,852.46 and orders Jerry Anderson and Darinda Williams, jointly and severally, to pay her that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

3. The department enjoins and orders Jerry Anderson to comply with all of the provisions of Conclusion of Law No. 6.

4. The department enjoins and orders Darinda Williams to comply with all of the provisions of Conclusion of Law No. 7.

5. The department awards judgment in favor of Richard Williams and against Benjamin on the charges that he illegally discriminated against her, and dismisses all of Benjamin's charges of illegal discrimination against Richard Williams.

Dated: January 2, 2002.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

Montana Department of Labor and Industry