BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Leann Gillespie, Charging Party, versus **Phil Schneider d/b/a Overland Express Restaurant**, Respondent.	)	*HRC Case No. 0011009526*
	)	*Final Agency Decision*

I. Procedure and Preliminary Matters

Leann Gillespie filed a complaint with the Human Rights Bureau of the Department of Labor and Industry on December 26, 2000 against Phil Schneider, doing business as Overland Express Restaurant in Belgrade, Montana. She alleged that Schneider discriminated against her on the basis of sex (female) when he subjected her to a sexually hostile and offensive work environment beginning in December 1997 and continuing until she quit on December 12, 2000. On July 24, 2001, the department gave notice Gillespie's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on October 29, 2001, in Bozeman, Gallatin County, Montana, continuing on October 30. Gillespie was present with her attorney, John Frohnmayer. Schneider was present with his attorney, Daniel J. Roth. The hearing examiner excluded witnesses on Gillespie's motion. Leann Gillespie, Roger Gillespie, Brandy Sowa, Amelie Kuglin, Carrie Bockness, Steve Jenkins, Joe Hedrick, Phil Schneider, Jim Schneider and Trixie Askerlund testified. The hearing examiner admitted exhibits 1,2, 3 (sealed), 5, 6, 7 and 101, and refused exhibit 4. A copy of the contested case file docket is enclosed.

II. Issues

The legal issues in this case are whether Schneider, through his cooks and a supervisory employee, subjected Gillespie to unlawful sexual harassment and if so, the extent of liability and damages for that harassment. A full statement of issues appears in the final prehearing order.[1]

[1] Gillespie also asserted a retaliation claim, which Schneider opposed on legal as well as factual grounds. Failure of proof of retaliation mooted the legal defenses to this claim.

III. Findings of Fact

1. Leann Gillespie worked as a waitress for Phil Schneider, doing business as Overland Express Restaurant in Belgrade, Montana, for approximately three years from December 1997 through December 2000. Schneider owned and operated a number of restaurants in various communities.

2. During Gillespie's employment, Schneider did not provide to the employees at the Belgrade restaurant any personnel policy, sexual harassment policy or reporting procedure for sexual harassment at work. Because of a sexual harassment complaint by a female employee at Schneider's Bozeman restaurant 10 years before, Schneider had adopted and published such policies and procedures for that restaurant.

3. Jim Schneider was the manager of the restaurant while Gillespie worked there until September 2000. Thereafter Steven Jenkins managed the premises.

4. From the time Gillespie started working at the restaurant until early 1998, she heard the cooks engage in crude and explicit sexual comments and refer to women (employees and customers) in derogatory terms. The cooks who most frequently made such comments and references were Joe Hedrick and Mike Snyder. Gillespie and other female employees were targets of the behavior. Hedrick was the primary instigator of such behavior. He called Gillespie and other females a variety of derogatory terms, the crudest of which was "filthy gash." He engaged in what he considered playful behavior, such as sticking sausages in his pants and talking about male genitalia. Hedrick had difficulty governing his behavior so that he did not direct anger toward women in the workplace. The behavior of the cooks was objectionable to Gillespie, and her response to it was reasonable. On some occasions, she broke down and cried after work when recounting to her husband the events and atmosphere that day.

5. Gillespie confronted Hedrick about his vulgar references to her twice, and he apologized to her both times. His conduct did not change as a result of either apology. Gillespie complained to Jim Schneider about Hedrick. Jim Schneider told her that she and Hedrick would have to work it out. Twice while Gillespie worked at the restaurant Schneider told the cooks to "tone it down," because of concern about customers overhearing the comments. In neither instance was he responding to complaint from any woman at the restaurant.

6. Joe Hedrick left his job at the restaurant in early 1998. He returned to work in April or May 1999. When the restaurant rehired Hedrick, Gillespie went to Jim Schneider and complained about Hedrick's prior conduct. Jim Schneider again told her that she had to work out her problems with Hedrick.

7. Gillespie was upset over the prospect of Hedrick once again leading the cooks in negative and hostile comments toward women. In addition to complaining to Jim Schneider about Hedrick's return, she discussed it with her husband.

8. Despite her complaints about Hedrick, both to Schneider and to her husband at home, Gillespie maintained a friendly relationship with Hedrick. She attempted to defuse the sexually derogatory and hostile comments by joking with Hedrick and the other cooks. She was not comfortable with the results.

9. Jim Schneider hired Amelie Kuglin to work in the restaurant in December 1999. Management never formally appointed her as a supervisor, but before Jenkins took over as manager, Kuglin prepared the schedules for the staff. As a result, she had more scheduling experience than Jenkins, who allowed her to continue to schedule after he became the manager.

10. Kuglin was self-possessed and confident and her scheduling duties gave her the appearance of being a member of management. The cooks did not as freely engage in crude and explicit sexual comments and derogatory references to women in her presence. Kuglin observed the cooks make some crude and explicit sexual comments and derogatory references to women, and observed them direct some of that behavior toward Gillespie. She did not observe Gillespie resist or display signs of offense.

11. Schneider hired Jenkins to replace Jim Schneider in September 2000. Jim Schneider left to work as operations manager in another restaurant in Billings, Montana. Jenkins, who was the same age as Schneider's sons, was a longtime family friend. Jenkins spent a few days in the restaurant for orientation during August 2000, and assumed management duties in September. He managed the restaurant through January 2001. Jenkins' strengths were in kitchen work, rather than operation management. He had no prior training in discrimination law as applicable to management, and received neither training nor orientation to sexual harassment policy and prevention in the restaurant.

12. Jim Schneider had never actively participated with the cooks in any crude and explicit sexual comments and derogatory references to females. Jenkins did participate in such comments and references. He participated with

the cooks in discussions and gestures about relative penis sizes and sexual exploits. He considered it harmless male banter. Gillespie never complained to Jenkins about the cooks' conduct, since he participated in it.

13. After Jenkins became manager, Gillespie was discussing work with him when Hedrick came up behind her. Jenkins observed Gillespie suddenly turn "beet red." Hedrick backed up. Gillespie turned and said to Hedrick, "Oh my God, I cannot believe you'd do that." Jenkins understood that Hedrick had pressed something against Gillespie's backside which felt to her like an erect penis.[2] Jenkins told Hedrick it was "the sickest thing he had ever seen." He did not discipline Hedrick.

14. Kuglin and Gillespie worked together and were on friendly terms until Kuglin confronted her about tardiness and absences without notice. Kuglin told Gillespie that she believed that Gillespie was not being honest about her reasons for missing work and being late for work. After that confrontation, which occurred after Jenkins became manager in September 2000, Gillespie and Kuglin were no longer on friendly terms. Gillespie's distress over the atmosphere in the restaurant due to the crude and explicit sexual comments and derogatory references to women continued. However, she now also was distressed over Kuglin's critical comments about her work.

15. After that confrontation, Kuglin, in late October or early November, reduced the work hours of several employees because of a decrease in business. Kuglin decided to reduce Gillespie's regular work schedule by one day because Gillespie had missed that work day for the prior two weeks without advance notice, reporting vehicle problems and illness. Kuglin was unaware of any objections Gillespie had to the conduct of Jenkins and the cooks.

16. Gillespie responded angrily to the reduction in hours, denouncing Kuglin to her face. Gillespie then called Schneider, and pleaded for the restoration of her hours. She did not complain to Schneider about the crude and explicit sexual comments and derogatory references to women in her presence. Schneider directed Jenkins to restore Gillespie's hours, and Jenkins told Kuglin to do so. Jenkins and Kuglin then met with Gillespie, and Jenkins castigated Gillespie for going over his head to Schneider. This meeting took place less than a month before Gillespie quit.

17. On December 12, 2000, Gillespie was scheduled to work the

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[2] Jenkins testified that he "heard" Hedrick had held a potato under his apron and pressed against Gillespie. He was not specific about how he heard, when he heard, or from whom he heard about the potato. Gillespie variously reported that she thought it was a potato and that she believed it was an actual erection.

opening shift. Kuglin was also working, and Hedrick was the cook. Gillespie did not show up for work and did not call. Jenkins came in to help, because Kuglin and Hedrick were unable to keep up with the necessary work by themselves. Gillespie came to work later, reporting that her car would not work and her cell phone was not working. Kuglin angrily directed her to start busing tables. Jenkins asked her to provide proof that her cell phone was malfunctioning. Gillespie exploded in anger and quit.

18. Gillespie filed her Human Rights complaint on December 26, 2000. Thereafter, Schneider prepared and provided an appropriate written sexual harassment policy and employee reporting procedure for the Belgrade restaurant.

19. After quitting, Gillespie sought counseling from a minister. She attributed most of her emotional distress to the hostile environment at the restaurant. However, a substantial part of her emotional distress resulted from her conflict with Kuglin over scheduling, and her feelings that Kuglin and Jenkins unfairly "picked on her" for complaining to Schneider and for failing timely to show up for work. Financial problems and feelings of inadequacy resulting from her quitting contributed to her emotional distress after she quit.

20. Gillespie suffered emotional distress due to the conduct of the cooks and Jenkins in engaging in crude and explicit sexual comments and derogatory references to women, the conduct of Jim Schneider in failing and refusing to investigate her complaints and in failing and refusing effectively to address the conduct of the cooks, the conduct of Hedrick in making unwelcome physical sexual contact with her, and the conduct of Jenkins in failing and refusing effectively to address the unwelcome physical sexual contact by Hedrick which he witnessed. She is entitled to recover $3,500.00 for that emotional distress.

IV. Opinion

The Montana Human Rights Act prohibits discrimination in terms and conditions of employment because of sex. §49-2-303(1)(a) MCA. An employer directing or allowing the direction of 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 working environment. *Brookshire v. Phillips*, HRC#8901003707 (April 1, 1991), ***affirmed sub. nom.*** *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). Montana follows federal discrimination law if the same rationale applies under the Montana Act. *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).

1. Sexual Harassment–Hostile Environment

To prove her hostile environment claim, Gillespie had to establish a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment. *Nichols v. Azteca Restaurant Ent., Inc.*, 256 F.3d 864, 872-73 (9th Cir. 2001), ***citing*** *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104, 1108 (9th Cir.1998). She had to prove that her workplace was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998). Gillespie also had to prove that the hostile workplace resulted from her sex, from being female. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79 (1998). The test for a hostile workplace is whether "the harassment of such a quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse," not whether hostile conduct renders the job unendurable or intolerable. ***See***, ***e.g.***, *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 70 (2nd Cir. 2000), ***quoting*** *Torres v. Pisano*, 116 F.3d 625, 632 (2nd Cir.), ***cert. denied***, 522 U.S. 997 (1997).

The United States Court of Appeals for the Ninth Circuit has a succinct statement of the measuring criteria for establishment of a hostile environment:

> (1) [Whether the complainant] was subjected to . . . verbal or physical conduct of a [harassing] nature, (2) [whether] this conduct was unwelcome, and (3) [whether] the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Ellison,* 924 F.2d at 875-76[3] (citing *Jordan,* 847 F.2d at 1373[4]).
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> *Nichols*, ***supra at*** 873 (footnote 14) (9th Cir. 2001).

Pervasive use of derogatory or insulting sexual language when an employer is dealing with an employee and addressed to her because she is a woman is evidence of a hostile environment. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990). ***See***, *Anthony v. Cyphers*, HRC Case #9401006105 (1995). Misogynistic epithets facially demonstrating gender bias are evidence of a hostile environment. *Hall v. Gus Construction Co.,* 842 F.2d 1010 (8th Cir. 1988); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780 (ED Wis. 1984); *Reynolds v. Atlantic City Convention Ctr.*, 53 FEP Cases 1852 (D.N.J. 1990).

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[3] *Ellison v. Brady,* 924 F.2d 872 (9th Cir.1991)
[4] *Jordan v. Clark,* 847 F.2d 1368 (9th Cir.1988)

Gillespie's testimony, supported by that of other women who worked in the restaurant, proved a pervasive pattern of offensive comment and behavior by the cooks and Jenkins, meeting her burden of proof to establish a hostile environment. Gillespie established that her complaints did not involve merely violations of a "general civility code." *Faragher*, ***op. cit.***, ***citing*** *Oncale,* ***op. cit. at*** 81-82. She established she endured more than "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).[5] Weighing the objective severity of the behavior of Jenkins and the cooks, considering all the circumstances[6], a reasonable woman[7] would have found the stream of comment and conduct sufficiently hostile so that enduring it altered the terms and conditions of employment. Subjectively, Gillespie did find the conduct objectionable, hostile and unacceptable.

Gillespie endured the objectionable behavior of Jenkins and the cooks without much overt protest. She may even have participated in some of the comments, in an effort to defuse the situation. These facts do not rebut Gillespie's hostile environment proof. Like Title VII, the Human Rights Act proscribes more conduct than only that which damages a victim's psychological well-being, and the fact that some of Gillespie's interactions with her harassers were friendly does not mean that none of them were hostile.[8]

Gillespie proved that the restaurant subjected her to verbal and physical conduct of a harassing nature, from the cooks and to some extent from Jenkins. She proved that this conduct was unwelcome. She proved that the conduct was sufficiently pervasive to alter the terms and conditions of her employment and create an abusive working environment. Contrary to the allegations of Schneider, Gillespie did not regularly join in "as one of the guys," thereby signaling that the conduct of Jenkins and the cooks was welcome. She did not ultimately file her complaint as a vehicle for vindicating petty slights she perceived because she was hypersensitive.

Schneider cannot defeat Gillespie's claim by interposing affirmative defenses that she failed to complain to Jim Schneider and that he and Jim Schneider were unaware that Gillespie was subjected to unwelcome sexual conduct in the work place. Gillespie credibly testified that she complained to Jim Schneider about Hedrick's conduct, and told him her concern with

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[5] ***See also***, *Snell v. MDU Co.*, 198 Mont. 56, 643 P.2d 841, 845 (1982).
[6] *Oncale*, ***supra***, ***quoting*** *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23 (1993).
[7] ***See*** *Ellison*, ***op. cit. at*** 879.
[8] ***See***, *Harris,* 510 U.S. at 22; *Ellison,* 924 F.2d at 878.

Hedrick's return to the restaurant. Jim Schneider both times told her that it was her problem. Aside from refusing to act upon Gillespie's specific complaints, Jim Schneider made a few ineffective and insincere remarks to the cooks in the interests of avoiding customer problems. He had ample information upon which to commence inquiry and action to address the hostile environment complaints. Jim Schneider failed to act.[9] Since he had no published policy advising his employees how to pursue a complaint after the immediate supervisor rejected it, Schneider is responsible for Jim Schneider's failures.

Schneider also cannot defeat Gillespie's claim by interposing affirmative defenses that she failed to complain to Jenkins and that he and Jenkins were unaware that Gillespie was subjected to unwelcome sexual conduct in the work place. Jenkins witnessed an incident involving unwelcome physical contact. He did nothing aside from an ineffective remark. Jenkins participated in offensive behavior with the cooks. Jenkins had more than sufficient notice of the unwelcomeness of that behavior to trigger inquiry and action instead of participation. Since he had no published policy advising his employees how to pursue a complaint involving the immediate superior as well as fellow employees, Schneider is responsible for Jenkins' failures and conduct.

For the same reasons, Schneider cannot interpose affirmative defenses that the supervisors took effective action to prevent or stop any known unwelcome sexual conduct directed toward Gillespie or that Gillespie unreasonably failed to take advantage of preventive or corrective opportunities provided by Schneider or otherwise to avoid her alleged harm. The supervisors did not take effective action and Gillespie reasonably concluded she had no option to enduring the offensive conduct because Schneider had no policy or procedure. The one time she did go directly to Schneider, the relief she obtained came at the price of a browbeating from Jenkins, which clearly conveyed the message that her job was at risk if she went over Jenkins' head again.

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[9] Jim Schneider's supervision of Gillespie extended for over two months into the 180 days before she filed her complaint. His failure to act on her complaints prior to that 180 day period is also relevant to ascertain the course of continuing conduct by the supervisors in the restaurant. *Kundert v. City of Helena*, HRC No. 9301005512 (Mar. 31, 1995) (adopting findings regarding conduct of employer for 17 months prior to the complaint filing date); ***followed***, *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); ***see also***, *Ashmore v. Hilands Golf Club*, HRC No. 9103004707 (Jun. 10, 1994) (respondent's historic treatment of women directly relevant and probative to issue of intent and acts of discrimination against women as a class).

An employer can avoid vicarious liability to an employee for an actionably hostile environment created or allowed by that employee's immediate supervisor. The employer must prove the exercise of reasonable care to protect the employees from such a hostile environment. The defense has two necessary elements: (a) proof that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) proof that the complaining employee unreasonably failed to take advantage of the preventive or corrective opportunities the employer had provided for the employees to avoid harm. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The substantial evidence of record proved that Schneider knew how to write and publish sexual harassment procedures and policies but did not do so for the Belgrade restaurant until after Gillespie filed her complaint. Schneider placed first Jim Schneider and then Jenkins in control of the restaurant, without training them or providing them with guidance about harassment. His availability by phone did not constitute the exercise of reasonable care to prevent and correct promptly any sexually harassing behavior. He can plead neither ignorance nor due care.[10] He remains responsible for the conduct of his supervisors.

Schneider's supervisors each failed to act upon known instances of inappropriate conduct by the cooks. Even without Jenkins' participation in the inappropriate conduct, both supervisors had sufficient notice to trigger, at the very least, a duty to investigate. The result of failure to perform that duty is clear under federal law. The federal law provides appropriate guidance to the department in this case:

> [A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer. ***See*** *Faragher v. City of Boca Raton,* 524 U.S. 775 [parallel citations omitted] (1998); *Torres,* 116 F.3d at 636; *Snell*, 782 F.2d at 1104; 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective

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[10] ***See***, ***e.g.***, *Barret v. Radiant Energy Corp.,* 240 F.3d 262 (*4th Cir. 2*001) (when employer has a published anti-harassment policy, failure of the complaining employee to report the objectionable conduct of her immediate supervisor to anyone else establishes a due care defense, subject to rebuttal evidence that the policy was not adopted in good faith or otherwise was dysfunctional or defective).

> action."). Moreover, the knowledge of corporate officers of such conduct can in many circumstances be imputed to a company under agency principles. ***See*** *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 [parallel citations omitted] (1998). As a result, an employer must consider not only the behavior of the alleged offender, but also the response, if any, of its managers. Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at a victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment. ***See*** *Faragher* . . . .
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> *Malik v. Carrier Corp.*, 202 F.3d 97, 105-06 (2d Cir. 2000).[11]

Schneider, standing in the shoes of his supervisors, is responsible for the hostile working environment of Gillespie.

2. Retaliation

The Montana Human Rights Act prohibits retaliation because an individual opposes illegal discrimination or participates in a proceeding under the Act (including filing a complaint). §49-2-301 MCA. An employer who takes significant adverse employment action against an employee because of the employee's protected activity violates that employee's right to be free from retaliation. 24.9.603 A.R.M.

To establish her prima facie case of unlawful retaliation, Gillespie must prove three elements. First, she must prove that she engaged in activities protected by the Act (opposition or participation). Second, she must prove that the restaurant subjected her to significant adverse acts. Third, she must prove that there was a causal connection between the significant adverse acts and her protected activities. 24.9.603(1) A.R.M.[12]

Gillespie did not file her Human Rights Act complaint until after she quit her job for Schneider. Thus, she did not engage in any participation

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[11] The *Malik* quotation includes incomplete cites to two other federal cases. Those cases are*: Torres v. Pisano*, 116 F.2d 625, 636 (2d Cir. 1997) ("[A]n employer may not stand by and allow an employee to be subjected to...harassment by co-workers. [O]nce an employer has knowledge of the harassment,...the employer [has] a duty to take...steps to eliminate it."); and *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986).

[12] Sub-chapter 6 of the Commission's rules applies to this contested case before the department, including section 603. 24.9.107(1)(b) A.R.M.

under the Montana Act during her employment. Schneider could not have retaliated against her for conduct in which she would only later engage. Thus, the only kind of retaliation claim Gillespie can assert is retaliation for opposition to sexual harassment.

The substantial evidence of record does not support a finding that Gillespie opposed sexual harassment and thereby triggered adverse action. The only culpable adverse action of the employer would be failure to protect her from the hostile environment, which constitutes employment discrimination based on sex, not retaliation. Otherwise, Kuglin cut her hours because of her absenteeism and tardiness, not any opposition to harassment. Jenkins scolded her for going to Schneider about the cut in hours, not about any opposition to harassment. Kuglin was curt with her and Jenkins demanded proof that her cell phone was not working on December 12 because she was late without notice, not because of any opposition to harassment. Kuglin failed to establish any causal connection between the only potential significant adverse acts and her opposition to the hostile environment. Therefore, she failed to present probative evidence of retaliation. For this reason, the legal defenses interposed by Schneider to the retaliation claim are moot.

3. Damages

The department may order any reasonable measure to rectify any harm Gillespie 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). The only harm that resulted to Gillespie was that she suffered emotional distress, which is the only basis for an award.

Gillespie alleged that Schneider constructively discharged her by failing to protect her from the hostile work environment. Whether Schneider's failure to protect her from the hostile environment forced her to quit her job is a question of fact. The finding of sexual harassment constituting a hostile work environment does not automatically mandate a finding of constructive discharge:

> "There is no clear standard for constructive discharge in a Title VII case. In some situations where 'an employee involuntarily resigns in order to escape intolerable and illegal employment requirements,' a constructive discharge may be found. *Young v. Southwestern Savings and Loan Association*, 509

> F.2d 140, 144 (5th Cir. 1975). Contrary to plaintiff's theory, however, the conclusion of constructive discharge does not automatically arise whenever employment discrimination is followed by the victim's resignation. ***See e.g.***, *Muller v. U.S. Steel Corporation*, 509 F.2d 923 (10th Cir. 1975), ***cert. denied***, 423 U.S. 825 [parallel citations omitted] (1975); *Cullari v. East-West Gateway Coord. Council*, 457 F.Supp. 335 (E.D.Mo.1978). A determination of constructive discharge depends on the totality of circumstances, and must be supported by more than an employee's subjective judgment that working conditions are intolerable." *Nolan v. Cleland* (N.D.Cal.1979), 482 F.Supp. 668, 672.
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> It is a matter of degree, a question of fact for the trial court, whether by encouraging, participating in or allowing a known pervasive pattern of discrimination, against an employee or a class of employees, the employer has rendered working conditions so oppressive that resignation is the only reasonable alternative.
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> *Snell v. MDU Co.*, ***op. cit***.

Gillespie did not prove that resignation was the only reasonable alternative available to her. This is not a "mixed motive" case, in which the charging party presents direct evidence of discriminatory motive, but the parties disagree on the reason for the employment action; a respondent in such a case can escape liability with proof that it would have made the same decision even without the discriminatory motive. ***E.g.***, *Laudert v. Richland County Sheriff's Office*, 301 Mont. 114, 122, 7 P.3d 386, 392 (2000). Here, the restaurant did not take an adverse action at all on December 12, 2000, the date that Gillespie quit. Her efforts to tie the hostile environment to her decision to quit were not supported by substantial credible evidence.

Gillespie's resignation resulted from her conflicts with Jenkins and Kuglin. Jenkins' hostility was prompted by Gillespie's complaint to Schneider about lost hours. Gillespie did not complain to Schneider about the hostile environment. Thus, when Jenkins offended Gillespie by demanding proof that her cell phone was inoperative on December 12, the exchange did not involve the hostile environment. Kuglin's hostility was prompted by Gillespie's tardiness, following prior late arrivals and no shows. Whether justifiable or not, Kuglin's hostility toward Gillespie on December 12 was unrelated to the sexually hostile environment. Therefore, when Gillespie quit, it was not because of the sexually hostile environment. It was because she resented the treatment from Kuglin, and to a lesser extent from Jenkins, regarding her

absences and tardiness. The triggering event for Gillespie's resignation was not related to the illegal hostile environment, and she cannot recover lost wages or other damages resulting from the ending of her employment.

Gillespie's emotional distress resulting from the hostile environment before she quit is compensable. ***See***, *Vainio*, ***op. cit.*** A claimant's testimony can, by itself, establish entitlement to damages for compensable emotional harm, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The illegal discrimination itself can establish an entitlement to damages for emotional distress, because it is self-evident that emotional distress does arise from enduring the particular illegal treatment. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C.Cir.1984) (42 U.S.C. §981 employment discrimination); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. §1982 housing discrimination based on race); *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass.App.Ct. 172 (1985) (finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions); *Fred Meyer v. Bur. of Labor & Industry*, 39 Or.App. 253, 261-262, ***rev. denied***, 287 Ore. 129 (1979) (mental anguish is direct and natural result of the illegal discrimination); *Gray v. Serruto Builders, Inc.*, 110 N.J.Super. 314 (1970) (indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

Gillespie testified to her emotional distress. The more restrictive burden of proof under *Sacco v. High Country Independent Press*[13] is not applicable under the Human Rights Act. *Vortex Fishing Systems v. Foss*, 38 P.3d 836, 2001 MT 312 (2001). Gillespie proved her right to recover for emotional distress. In this case, her distress was not greater than that of Foss, who did not endure a prolonged hostile environment but who did lose his job as a direct result of the employer's discrimination. Much of Gillespie's emotional upset resulted from her decision to leave her job because Kuglin and Jenkins treated her with anger and disbelief when she arrived at work late on December 12. Since she did not prove that her departure had any causal relation to the sexually hostile environment, she can recover only for her distress related to that illegal discrimination and not for her distress related to quitting her job. Therefore, $3,500.00 is a proper award to remedy Gillespie's emotional distress.

Affirmative Relief

When the department finds that illegal discrimination occurred, the law requires that it impose affirmative relief, enjoining further discriminatory acts

[13] 271 Mont. 209, 896 P.2d 411 (1995).

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 Schneider. The department must impose general and specific injunctive relief to prevent the recurrence of the discriminatory practice with other female employees, both by enjoining the practice and by requiring that Jenkins and Jim Schneider, if they still work for Schneider, attend training on sexual discrimination in the workplace. Schneider has already adopted a policy to remedy that lack, so no other affirmative relief is appropriate.

V. Conclusions of Law

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

2. Phil Schneider, doing business as the Overland Express Restaurant in Belgrade, Montana, illegally discriminated against Leann Gillespie by reason of sex (female) when he, acting through his supervisors, failed and refused to protect her from a sexually hostile work environment due to the conduct of male employees engaging in crude and explicit sexual comments, derogatory references to females (employees and customers) and making unwelcome physical sexual contact with her during the 180 days of her employment prior to December 12, 2000. §49-2-303(1)(a) MCA.

3. As a proximate result of Schneider's illegal discrimination, Gillespie suffered emotional distress. The amount reasonably necessary to rectify the compensable emotional distress suffered by Gillespie as a result of the illegal discrimination is the sum of $3,500.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against Schneider. The department enjoins him from subjecting female employees to sexually hostile work environments by allowing male employees to engage in crude and explicit sexual comments, make derogatory references to females (employees and customers) or make unwelcome physical sexual contact with female employees.

5. If Steve Jenkins and Jim Schneider work for Schneider, then Schneider must also within 60 days of this final order file with the Bureau a proposal of training for Bureau approval under which each of those employees will attend 4 hours of training in state and/or federal sex discrimination in employment law, including preventing such discrimination in the workplace. §49-2-506(1) MCA.

VI. Order

1. Judgment is found in favor of charging party Leann Gillespie and against respondent Phil Schneider, doing business as the Overland Express Restaurant in Belgrade, Montana, on the charge that respondent discriminated against charging party on the basis of sex (female) when he subjected her to a sexually hostile and offensive work environment beginning 180 days before she filed her complaint and continuing until she quit on December 12, 2000.

2. Judgment is found in favor of Schneider and against Gillespie on all other and further charges presented in this proceeding.

3. The department awards Gillespie the sum of $3,500.00 and orders Schneider to pay her that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

4. The department enjoins and orders Schneider to comply with all of the provisions of Conclusions of Law Nos. 4 and 5.

Dated: March 21st, 2002.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry