BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Carolyn Hooper, Charging Party,	)	HRA Case No. 9809008523
vs.	)	*Final Agency Decision*
Butte-Silver Bow County Government, Respondent.	)	

I. Procedure and Preliminary Matters

Carolyn Hooper filed a complaint with the Department of Labor and Industry on April 21, 1998. She alleged that Butte-Silver Bow County Government discriminated against her because of her sex (female) when it subjected her to a hostile and offensive work environment beginning on or about January 15, 1997 and continuing to the present, and retaliated against her for complaining of discrimination and discriminatory practices by subjecting her to an unusual surveillance of her work performance. On December 15, 1998, the department gave notice Hooper's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties stipulated to extend department jurisdiction beyond 12 months after the complaint filing date.

The contested case hearing convened on March 12, 2001, in Butte, Silver Bow County, Montana. Hooper attended with her counsel, Joan Jonkel and Timothy Kelly. Respondent attended with its designated representative, Personnel Director Tim Clark, and its counsel, Donald C. Robinson and Tina L. Morin. Hearing proceeded on March 12-16 and 21-23, April 11, May 10-11 and 14-16, and July 19-20, 2001. The hearing examiner's exhibit and file dockets accompany this decision. Hooper filed the last post hearing argument on February 5, 2002.

II. Issues

The key issue is whether the respondent's investigation into Hooper's conduct over her entire supervisory career was discriminatory because of sex or retaliatory. A full issue statement appears in the final prehearing order.

III. Findings of Fact

1. Charging party Carolyn Hooper was, at all times pertinent to this case, a resident of Butte, Montana and an employee of Respondent Butte-Silver Bow Consolidated City-County Government (the county), a local

government agency as that term is defined in §49-3-201, MCA. Hooper began her employment with the City of Butte Police Department in 1972, as a meter maid. In 1974, she became the supervisor of the department's traffic office. When the form of local government changed in 1977, she became an employee of the county Law Enforcement Agency (the LEA), becoming the LEA's clerical supervisor. She assumed the additional duties of evidence officer in 1980. Effective July 1, 1998, her title was Law Enforcement Office Administrator.

2. Hooper graduated from Butte High School. For approximately two years she attended night classes at Montana Tech in personnel and labor relations, accounting and other business-related subjects. She did not obtain a degree. During her working life, she has attended Law Enforcement Academy courses in job related subjects such as civil process and evidence collection. She has also attended personnel seminars at the Professional Development Center in Helena as well as in-house training from her employer.

3. As the clerical administrator/evidence officer, Hooper supervised the work of all the non-deputized LEA personnel (the LEA clerical staff), including two detective secretaries, one bookkeeper, one warrant clerk, one civil process clerk, one records/data entry clerk and any interns, volunteers or other temporary staff. She was the only female administrator at the LEA for more than 24 years. She was also responsible for the collection, preservation and organization of evidence, and had responsibility to assist the Sheriff as he directed. Hooper did not ordinarily use a computer in performing her duties, and was not particularly proficient at computer usage. In 1997, Hooper's rate of pay was $28,312.00 per year, plus benefits.

4. Hooper's office was located on the second floor of the LEA, with a window that looked out on the clerical area, located a floor below. The entrance to the clerical area was by a secured door. The LEA required visual confirmation of the visitor's identity before release of an electronic lock to allow entry. That entrance was one of a number of secured doors which were critical for the maintenance of security at the facility.

5. The county's clerical employees, including the members of the LEA clerical unit, were members of the Montana Federation of State Employees (MFSE) collective bargaining unit. Under the MFSE contracts, the county clerical employees were entitled to representation regarding personnel matters, disciplinary procedures, and reprimands and grievances filed by them or against them in the course of their county employment.

6. The LEA is one of the county's departments. The county sheriff, an elected local government official, is the head of the LEA. The sheriff is the county official responsible for control and supervision of LEA staff. Hooper

reported directly to the sheriff, who was her immediate supervisor. Robert Butorovich was the sheriff from 1981 to 1993. John D. McPherson, Jr. was the sheriff from 1993 through April 1998.[1] As sheriff, McPherson addressed personnel matters concerning Hooper, the LEA clerical employees and Hooper's supervision of them.

7. The LEA is a paramilitary organization. All LEA staff, including administrators, deputy sheriffs, jailers, dispatchers and non-deputized support staff, followed a chain of command, operating within the lines of authority and supervision established throughout the sheriff's department. The LEA chain of command applied to Hooper and her staff throughout her tenure as an administrator. Following the chain of command was important to the administration of the LEA. The LEA required its employees to follow it. The sheriff was at the top of the LEA chain of command, with ultimate responsibility for the supervision, control and treatment of LEA staff.

8. Hooper took the chain of command seriously. She insisted that LEA clerical unit workers perform their own tasks, as assigned by her. She tried to prevent detectives and other LEA personnel who had tasks for clerical unit members from contacting those members directly. Instead, Hooper required that such tasks come to her for her assignment to clerical unit members. Hooper also insisted that clerical unit workers not swap tasks among themselves or help each other out without first obtaining her permission. She also attempted to control the number of times her clerical workers entered and left the unit for breaks, errands or personal tasks.

9. In 1991, Hooper filed a complaint with the Human Rights Commission alleging employment discrimination by the county and failure by the county to pay her equal wages because of her sex (No. 9101004748, Hooper's "equal pay claim"). Butorovich was the sheriff, Jack Lynch was the county's elected Chief Executive and Tim Clark was the county's personnel director. Hooper did not initiate any other legal action against the county before the start of the investigation involved in this case.

10. Clark became personnel director in 1978 following the Butte-Silver Bow consolidation. As personnel director, Clark represented the county as the chief negotiator in more than a dozen union contract negotiations. He negotiated the MFSE contract on an annual basis. His employment duties also included handling personnel related matters, unemployment claims, employee termination issues, and disciplinary actions concerning county employees. He

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[1] Hooper limited her claim to damages resulting from the county's conduct through April 1998. The identity and conduct of county officials after that cut-off are not relevant.

was also directly involved with position vacancies, employee transfers within the county, county job postings and position advertisements for all county jobs including those within the LEA clerical unit. Clark was responsible for advising and assisting department heads in carrying out and complying with county personnel policies. Clark was the principal author of the county's Personnel Policies and Procedures.

11. Lynch became chief executive in November 1990. His duties included participation in personnel decisions. He had direct involvement with formal union grievances and with union and non-union grievance appeals.

12. In 1993, Hooper's brother, Tom Russell, an employee of the LEA at the jail, filed a discrimination complaint with the Human Rights Commission (No. 9201005100) alleging denial of religious accommodation in employment by the county. Butorovich was the sheriff, Lynch was the chief executive and Clark was the personnel director.

13. Beginning in 1994, Hooper began to maintain supervisory logs or diaries on each employee she supervised. She learned to use the diaries at a training seminar ("Essentials in Management") for supervisory employees presented by the state Professional Development Center and taught by John Moore, Training Director for the Montana Department of Administration, Personnel Division. Hooper attended the seminar as the LEA clerical administrator and evidence officer, at the direction of her supervisor, with the course fees paid by the county. Moore conducted training and education sessions in recommended employment practices for more than two decades. He taught that maintenance of regular diaries was an essential management practice for supervisors. Supervisory diaries were not personnel or employment records, but contemporaneous work products of the supervisor, in handwritten or computer notes, documenting observations by the supervisor and interactions with employees. Moore taught that supervisory diaries were important tools for evaluation and discipline of employees.

14. The LEA hired Judy Strand in May 1995 as a records clerk in the clerical unit. Strand quit that job to work for the Montana Power Company in June 1995, but almost immediately asked Hooper for the opportunity to return to her job. Hooper consulted with McPherson and then authorized Strand to return to work in the clerical unit.

15. In July 1995, the Human Rights Commission staff issued a final investigative report, finding substantial evidence to support Hooper's equal pay claim. McPherson had only a limited involvement in the county's responses to the investigation. McPherson and Lynch each received copies of the final investigative report. The report stated that male administrators at the LEA

made derogatory statements about Hooper because she was a woman. According to the report, "ongoing crude comments of other male management employees confirm Hooper's contention that she is, and in their opinion, should be paid less than males." McPherson discussed with Lynch the issues raised by the report on Hooper's equal pay complaint, including the reference to the derogatory statements.

16. The county's personnel policies prohibited discrimination against women in the terms or conditions of employment. The county contested the report, and therefore took no action to inquire about or investigate the reported discriminatory statements or attitudes among male management employees. Lynch was involved in the county's handling of Hooper's equal pay claim after the report issued. He met with Hooper and McPherson about the claim and exchanged written settlement proposals with Hooper regarding the claim.

17. In November 1995, the Human Rights Commission staff issued a final investigative report, finding substantial evidence to support Russell's claim of denial of religious accommodation. Neither McPherson nor Lynch had been directly involved in the county's responses to the investigation. McPherson and Lynch each received copies of the final investigative report. The county contested the report.

18. In 1996, the county requested and obtained a right to sue letter, ending the administrative proceedings on Hooper's equal pay claim. Hooper then filed her equal pay claim in state district court, Montana Second Judicial District, Silver Bow County. *Hooper v. City and County of Butte Silver Bow*, Cause No. DV-96-23. In June 1996, Hooper testified at the hearing of her brother's complaint, *Russell v. Butte-Silver Bow Law Enforcement Agency*. Clark also testified, explaining how the county posted job openings and what positions were available. The testimony of Hooper and Clark did not play integral parts in either the administrative decision or the district court decision on judicial review.

19. In August 1996, Judy Strand applied for a promotion within the clerical unit, a transfer from the records clerk position to the warrants desk clerk position. Hooper and the sheriff had reservations about moving Strand to the position but nonetheless granted Strand the promotion.

20. In August 1996, Hooper withdrew her civil equal pay complaint after she reached a settlement with the county. The settlement provided that Hooper would be promoted from a Grade 13 to a Grade 19 on the county's pay scale and that the county would pay to Hooper the sum of $50,000, plus interest, in five equal installments beginning in 1996 and ending in 2000. On

August 14, 1996, the court dismissed the civil action (Cause No. DV-96-23) based on the parties' settlement agreement and stipulation. McPherson and Lynch were involved in budgetary decisions addressing the payment of the settlement installments.

21. County employees, including members of the LEA clerical unit, found out about the settlement in Hooper equal pay case. Some members of the clerical unit voiced their resentment toward Hooper for pursuing the claim and obtaining a recovery.

22. In the fall of 1996, Strand was having difficulties both at work and at home. The warrants desk clerk job was stressful. Failure properly to perform the job duties could result in failure of the LEA to execute warrants or execution of warrants that were no longer valid. The warrants desk clerk had to rely upon information relayed through other LEA employees, both within and outside of the clerical unit. Thus, sometimes records on warrants were inaccurate and the clerk could neither know of nor correct the inaccuracy, which could cause either invalid executions or failure to execute on warrants. There were potential legal consequences to either event.

23. At this same time, a minor child of Strand was embroiled in criminal proceedings and in need of counseling or treatment. This increased the stress on Strand.

24. In October 1996, Strand took time off from work to arrange placement of her child for treatment. Hooper recorded Strand's difficulties in meeting the requirements of the warrants desk in her supervisory diary for Strand. Hooper was adamant about the need for Strand to do better, and pressured her to complete her work in a more timely fashion.

25. In November 1996, LEA officers arrested a man on an outstanding warrant that was no longer valid, exposing the county to potential legal liability. Hooper confronted Strand and directed her to bring the warrants records up to date. On Hooper's recommendation, McPherson issued a formal reprimand letter to Strand about the incident. Hooper began to confront Strand on a daily basis about the status of the warrants records.

26. Hooper sometimes dressed down subordinates repeatedly as a means of exacting improved performance. In her confrontations with her subordinates, Hooper periodically became visibly angry. On occasion she resorted to threats of formal discipline or insulting comments about the inadequacy of the employee's performance. From time to time, Hooper confronted the target of her displeasure in the clerical area rather than in the privacy of her supervisory office. Sporadically she revisited an employee for

repeated confrontations about the problem on a single day or successive days, even if the employee had not yet had time to correct the problem.

27. Strand made an effort to go through the warrants records to ensure that everything was current and correct. Knowing the records were not current and correct, she reported to Hooper that she had identified and resolved the problems with the warrants records. She made the report in the hope that Hooper would stop confronting her about the status of the records. Hooper did not stop the confrontations.

28. On the weekend of November 30-December 1, 1996, LEA officers, in separate incidents, made two arrests on invalid warrants. As a result of these new unauthorized arrests, the LEA circulated a directive instructing dispatch officers and deputies to hold warrants until the system was current.

29. On December 2, 1996, the first work day following the two warrantless arrests, Hooper angrily confronted Strand about them. Hooper demanded that Strand immediately correct the problems at the warrants desk and bring the warrants records to current status. Strand was upset and agitated. During the morning she tried to find the reasons why the two invalid warrants were not properly recorded. Hooper came to Strand's desk several times to reiterate both her displeasure and the urgency of the situation.

30. Later that morning, Strand reported severe chest pains to coworkers and to Hooper. Strand and her coworkers believed she was having a heart attack. A 9-1-1 call brought medical assistance to the clerical unit. Emergency medical personnel wheeled Strand from the office on a gurney, transporting her by ambulance to the hospital. Because of the location and locked door status of the clerical unit, the entire LEA witnessed or heard about the collapse of Strand and her departure on a gurney. The visible uproar shocked LEA personnel and disrupted business. The hospital later released Strand, who had apparently suffered a severe episode of gastrointestinal distress rather than a heart attack. She was medically able to return to work by December 23, 1996.

31. On December 4, 1996, Strand submitted an incoherent and rambling resignation letter to the sheriff. Her letter was single spaced, five pages long and consisted of three very lengthy paragraphs. It contained misspellings, grammatical errors and incorrect time references. Strand recited many complaints about the LEA, such as claims that (a) the sheriff told dirty stories and used vulgar and offensive language; (b) a male administrator humiliated her with inappropriate criticism; (c) the sheriff imposed inconsistent disciplinary action, and (d) the LEA applied a double standard to men as opposed to women.

32. Most of Strand's December 4 letter was directed against Hooper, calling her names and making broad accusations against her. Strand's criticisms of Hooper included an attack on Hooper for pursuing her equal pay claim and obtaining the settlement. In a cover message to Lynch and Clark transmitting copies of her December 4 letter, Strand asked them to take action to eliminate Hooper, whom Strand referred to as a "horrible cancer." The extreme emotional tone of the letter, coupled with its incoherence, was in striking contrast to the normal conduct of Strand while she was an employee of the county. Strand's direction of copies of her letter to Clark and Lynch was abnormal for the county, and outside of the chain of command.

33. After she resigned, Strand talked to her union representative, Whitey Van Swearingen.[2] Van Swearingen told her that she should rescind the resignation and file a grievance. Strand wrote to McPherson asking to rescind her resignation. Relying upon Hooper's input, McPherson concluded that Strand was at fault for the warrants desk problems, and that he would have fired her if she had not quit. McPherson consulted with Clark and then refused to accept the rescission, on the grounds that he had accepted her resignation and would not reconsider that decision.

34. Strand filed a written grievance on December 11,[3] alleging that Hooper's mistreatment made her work conditions so intolerable that she had to resign. Strand also alleged Hooper regularly engaged in unfair and harassing treatment of subordinates, disparate and discriminatory application of work rules, inconsistent creation of work rules, hypercritical standards of conduct, retaliation against certain employees, abusive disciplinary reactions or conduct, and favoritism toward certain employees. Strand also alleged that the clerical unit had long-standing poor morale and other clerical employees had quit or threatened to quit their jobs as a result of Hooper's conduct. She demanded that an investigation be undertaken of Hooper's supervisory conduct. She threatened legal action against the county because of her alleged constructive discharge and the emotional distress caused her by Hooper.

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[2] The union later fired Van Swearingen, allegedly in part because of complaints regarding his conduct in the Hooper investigation. Of all of the hearing witnesses, he appeared the most neutral, because he patently distrusted all of the parties and was most concerned about making any disclosures that would prejudice his pending claims.

[3] Patsy Johnston, one of the officers in Strand's union, delivered the December 11 grievance to the LEA through the county's internal office mail system, using county stationery and paper. The county took no action against Johnston, who had never filed any human rights complaints against it, for this use of county internal mail and office supplies. In February 1998, Hooper received a written reprimand for using county internal mail and office supplies to serve her grievance on Lynch.

35. The collective bargaining agreement grievance procedure specified that the grievant's immediate supervisor initially respond. Hooper consulted with McPherson and Clark and responded on December 11, sending a letter to Johnston. The response was that Strand could not grieve treatment in the LEA clerical unit because she no longer worked there. Hooper's response was consistent with the advice and comments of McPherson and Clark.

36. Under the collective bargaining agreement, a grievant had a specific time after receipt of the initial county response to file a statement of the grievance with the next supervisory level, the department head (McPherson in this instance). McPherson then had a specific time within which to issue a written response. The grievant then had a specific time within which to file a statement of the grievance with the chief executive, who had a specific time within which to respond in writing. After that, the grievant could pursue formal arbitration.

37. Clark wanted a chance to resolve Strand's claim before she hired a lawyer and commenced any litigation. He believed that Strand might assert a constructive discharge and file suit. He believed that if the county correctly asserted that Strand had no right as an ex-employee to pursue a grievance then Strand was entitled to start civil litigation immediately. He recalled generally (without reviewing any county records) that there had been other comments and complaints to him over the years about Hooper's conduct as a supervisor. He thought also that the turnover of employees in the LEA clerical unit might have been relatively high. Without any detailed analysis of the merits of Strand's claim or any actual research in county records,[4] Clark concluded that defending a lawsuit by Strand would be costly and embarrassing, and that the county might have some exposure. Without investigating Strand's job performance, Clark concluded that it would be better to explore a settlement with Strand rather than begin to defend Hooper against Strand's accusations.

38. Clark and Van Swearingen met after Hooper's December 11, 1996, response to Strand's grievance. Strand wanted a job with the county, but not under Hooper's supervision. Clark decided that the county might resolve Strand's claims by finding her a new job and doing an investigation of Hooper. He agreed to waive grievance deadlines during informal exploration of settlement. He agreed that Strand could withdraw her grievance and later file a new grievance against Hooper. Clark often agreed to specific extensions of grievance deadlines, but had never agreed to an unlimited extension of

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[4] Clark was influenced by the December 2 incident that resulted in Strand leaving the LEA clerical area on an ambulance gurney, an incident that initially prompted both sympathy for her and concern about what her working conditions had actually been.

deadlines and withdrawal of a grievance for a later reformulated grievance.[5] Clark granted this unique waiver to Strand without first consulting Lynch or McPherson and obtaining their approval.

39. Prior to December 1996, Hooper had never been the subject of a disciplinary action, reprimand, work performance investigation or other adverse action by her supervisors at the LEA or by the county. She had regularly received positive evaluations and raises. She had been the subject of one employee complaint in her entire career as a county employee, a grievance filed in 1994 by Linda Redfern, a clerical department employee at the time.[6]

40. In December 1996, after Clark entered into the waiver agreement with Van Swearingen, Lynch and Clark discussed the Strand grievance. Clark urged Lynch to meet with Strand and seek informal resolution. Lynch agreed to meet with Strand and hear what she wanted the county to do. Lynch decided Hooper should not attend the meeting. Lynch believed that Hooper's presence would make any meeting of the minds with Strand less likely. Clark agreed.

41. On January 10, 1997, the county received notice of the hearing examiner's decision on the Russell complaint, a proposed decision for the consideration of the Human Rights Commission.[7] The decision found the county had failed to make religious accommodation, awarded Russell monetary damages and required that the LEA reinstate Russell as a deputized employee.

42. On January 15, 1997, Lynch convened a meeting in his office with McPherson, Clark, Strand and Van Swearingen, to address concerns regarding Strand's resignation letter and grievance.

43. Clark wanted an investigation of Hooper's conduct as a supervisor. One of his goals was to assuage Strand's concerns--Strand wanted the county to take action about Hooper as part of any resolution of her grievance.[8] Clark

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[5] The collective bargaining agreement did not provide for unwritten waivers of the grievance procedure or agreements that a grievance could be withdrawn and resubmitted at any time thereafter. The county presented no evidence indicating that the type of waiver Clark granted to Strand was ever extended to any grieving county employee.

[6] Redfern worked in the clerical area as a detective secretary from 9/91 to 7/94. She received a performance-related reprimand and filed a grievance. During the third level of grievance procedure, the county and Redfern settled the grievance.

[7] The Human Rights Commission adopted the proposed decision, overruling the county's objections. On judicial review, the district court set aside the decision and dismissed. Neither party obtained Supreme Court review of the district court decision.

[8] At hearing, Strand testified that she had not wanted an investigation of Hooper. Her testimony in this respect was not credible.

also felt an investigation was necessary because of the seriousness of Strand's allegations and the context of her resignation (leaving the workplace on a stretcher with symptoms allegedly resulting from stress caused by Hooper). His vague recollection of prior complaints about Hooper and high employee turnover deepened his concern that the county could face serious exposure and risk future claims if there were no investigation.

44. McPherson came to the meeting with copies of documents Hooper had prepared for him, to document Strand's failures at the warrants desk. He intended to argue that Strand's failure to perform her job duties justified Hooper's treatment of her, and that no further inquiry was necessary beyond confirmation of Strand's misconduct.

45. At the meeting, Strand and Van Swearingen made a series of accusatory statements about Hooper's supervisory conduct. McPherson suggested an investigation into Strand's performance at the warrants desk as the reason for Hooper's conduct. Lynch transformed the suggestion into a proposal to conduct a formal investigation into the conduct of Hooper as a county supervisory employee.

46. McPherson agreed to the investigation, believing the county would first address Strand's performance.[9] Lynch directed Clark to conduct the investigation, and directed that the investigation should extend to Hooper's entire career as a supervisor. This direction regarding the breadth of the investigation was unprecedented, unreasonable and unwarranted by the concerns presented at the meeting.[10]

47. Lynch led Van Swearingen and Strand to believe that if Clark's investigation resulted in adverse findings about Hooper then Strand would get a job with the county.[11] Van Swearingen's objective was to get Strand a job with the county outside the LEA. Lynch enlisted Van Swearingen to assist Clark in the investigation, in furtherance of getting Strand a new job. Van Swearingen had not had such access to an employer's "internal" investigation at any other time. Lynch's directive convinced Clark and Van Swearingen that

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[9] Lynch and McPherson had entirely different objectives. McPherson wanted to examine the inadequacy of Strand's performance, justifying Hooper's conduct and closing the inquiry. Lynch hoped to resolve Strand's claims by offering her another job while visibly investigating Hooper. Lynch ran the meeting and successfully imposed his agenda on the participants, including McPherson. Had McPherson opposed the investigation of Hooper, Lynch would have had serious difficulty pursuing it.

[10] See findings 106-109, ***infra***, regarding other investigations.

[11] Because she believed her possible return to work for the county might depend in part upon the Hooper investigation, Strand began to regularly call Lynch, and sometimes Clark, about the status of the investigation. She made these calls throughout the investigation.

all subsequent contacts about Strand's complaints and the Hooper investigation were part of the process of handling Strand's grievance.

48. Strand brought some documentation she had gathered to the meeting. No one asked her for it or about it. She did not provide the documentation to the county regarding her allegations about Hooper.

49. On January 16, 1997, Lynch gave Clark written directions to undertake the investigation of Hooper's conduct as a supervisor. Prior to the initiation of this investigation into Hooper's conduct as a supervisor, no county chief executive in the history of the Butte Silver Bow City County Consolidated Government ever asserted control over or interfered with the Sheriff's supervision and control of any LEA staff. Lynch's actions in 1997 regarding Hooper were the first instances of the assertion of such control. Lynch was able to make the assertion and go forward with the investigation because of McPherson's concurrence.

50. Lynch and Clark never considered investigating the warrants desk problems. The county never evaluated the strength of any defense it might interpose to Hooper's treatment of Strand, based upon Strand's job performance. Lynch and Clark never made any inquiries about Strand's allegations of misconduct by men. Strand never made resolution of her grievances and claims contingent upon the county investigating anyone other than Hooper.

51. McPherson did not tell Hooper about the decision to investigate her. Clark did not tell her, because he expected McPherson to tell her.

52. Clark had no experience or training regarding such an investigation. He wrote to the county attorney for advice about proceeding with the investigation. While awaiting a response from the county attorney, Clark asked Van Swearingen to help by putting together a list of current and former employees whom Clark should contact about complaints concerning Hooper.

53. Van Swearingen asked Strand to provide such a list for Clark. She prepared the list and gave it to Van Swearingen, who furnished it to Clark. Reading the list revealed its author, since the first name on the list was "me," with Strand's name and address added behind the pronoun. When she prepared the list, Strand had personal and economic incentives (including Lynch's implicit promise of a job) to provide negative information about Hooper and to avoid providing positive information. Clark used the list without referring to the county employment records to verify its accuracy and completeness. It included people who worked at the clerical unit (in various training and outreach programs) but were never employees of the LEA. It

omitted some present and former employees in the LEA clerical unit. This list was the only documentation Strand ever provided to the county during its investigation into Hooper's supervisory conduct.

54. By February 28, 1997, the county attorney had not responded to Clark's inquiry. Clark sent out a form letter he had drafted, soliciting information from the persons on the Strand list and advising them that Hooper was under investigation by the county. Clark drafted the letter so that the recipients would understand from reading it that if they responded the county might use their responses against Hooper and call them as witnesses in any subsequent formal proceeding against Hooper. He did not include any direction or request that the recipients maintain confidentiality regarding the investigation. The county did not notify Hooper that she was under investigation before Clark sent out the form letter.

55. The county erroneously sent the letter to at least one person with no present or past employment connection to the LEA clerical unit. In addition, some members and former members of the clerical unit talked with each other and with outsiders about the investigation. The fact that the county was commencing an investigation of Hooper's supervisory conduct for the past 20 years quickly became common knowledge, both within the clerical unit and outside of it.

56. On February 28, 1997, Clark wrote to McPherson and requested that he make available to Clark copies of personnel files of all employees who had worked under Hooper's supervision in the past 20 years, together with copies of and explanations about policies, discipline communications, complaints, chain of command diagrams, rules and procedures. Clark identified the requests as part of the "internal inquiry" regarding Hooper.

57. Hooper learned of the investigation from her hairdresser, whose sister (never an employee or worker at the clerical unit) had received the form letter. Learning of the investigation and the form letter from personal acquaintances who had no right to have the information left Hooper angry and humiliated.

58. On March 3, 1997, the day after learning of the investigation and the form letter, Hooper called Clark to ask about the investigation. She followed up with a letter the same day requesting copies of the employee list Clark had used, the form letter, any letters or written complaints against her Clark had found from the past 20 years and "any and all" other material related to the "internal inquiry."

59. On March 7, 1997, Hooper filed a grievance, alleging that both the

January 15, 1997, decision to investigate her and Clark's conduct of that investigation denied her due process (including not inviting her to the January 15 meeting) and violated county personnel policies. She requested counsel to represent her during the investigation, a statement of the basis for the investigation and the authority for it as well as a statement of the allegations or charges against her.

60. McPherson did not want to respond to Hooper's grievance. On March 12, 1997, Lynch directed him in writing to respond as Hooper's immediate superior. In his written directive, Lynch expressed concern about Hooper's grievance and "the resulting work climate situation" in the clerical unit, urging McPherson and his "supervisory staff" to work with "all [original emphasis] of the individuals involved in this matter including the clerical staff" and Clark. Aside from McPherson and his supervisory staff, the clerical staff and Clark were the only persons employed by the county who were involved in the investigation of Hooper.

61. On March 14, 1997, McPherson answered Hooper's grievance in writing. He said that he had wanted Hooper at the January 15 meeting but was overruled, that Clark was checking with the county attorney's officer about her representation, that the investigation resulted from Strand's accusations about her conduct as a supervisor, that McPherson had requested that "the issues relating to Judy Strand" be investigated and that Clark had not provided him with any information about the investigation.

62. On March 14, 1997, McPherson also wrote to Lynch and criticized Clark's conduct of the investigation. McPherson asserted that it was improper to proceed with the Hooper investigation without first reviewing the records of the LEA about the Strand resignation and the circumstances surrounding Strand's inability to perform at the warrants desk.

63. In 1988 through 1994, Dr. Timothy Casey, a psychologist, had treated Hooper for major depression and an anxiety disorder. On March 15, 1997, Hooper returned to Casey with a recurrence of those problems. She told Casey that her recurrence resulted from work-related distress. He treated her regularly (up to three times a month, with occasional months without a visit) from March 1997 through April 1998 for what he diagnosed as a depressive disorder.

64. On March 20, 1997, Hooper wrote a follow-up letter to Clark, reiterating the requests made in her March 7 letter. She also took the next step in the grievance procedure and submitted her grievance to Lynch in writing. She again asserted that the county was conducting a public investigation that denied her due process because the county had not given her

notice of the investigation and had not permitted her to participate in the January 15 meeting. She noted that despite her request the county had not provided her with counsel. She requested a citation of the authority for the investigation and an explanation of the basis for it, including disclosure of the allegations or charges and the person or persons making them. She included an allegation that the investigation was in retaliation for her equal pay claim.

65. On March 21, 1997, Lynch replied to McPherson's March 14 letter. Lynch told McPherson that Clark and Van Swearingen decided there was sufficient cause in the Strand letter and in a letter Lynch had received in January 1997 from former employee Linda Redfern to warrant investigation of Hooper's supervisory conduct without first reviewing Strand's performance. Lynch cited Strand's complaints, a high turnover rate in the clerical staff and "possible rumors and innuendoes" regarding both as reasons for the investigation.

66. During March and April 1997, Clark and Van Swearingen conducted interviews of current and former LEA clerical workers, at the union hall. They exclusively interviewed persons on Strand's list. Van Swearingen was present and participated in all of the interviews, whether of county employees, former employees or persons who had never been union members (*e.g.*, Claire Hernandez).

67. Clark received both positive and negative responses to his February 28 form letter seeking information about Hooper. Clark received letters in support of Hooper, from seven or more former and present LEA employees. Clark did not interview any of the people providing positive comment about Hooper.

68. Lynch denied Hooper's March 20, 1997, grievance on March 24, 1997. He acknowledged the need for due process, and indicated Hooper would have opportunity "for such" in the investigation, as warranted. He wrote that he had authorized the investigation, prompted by the Strand resignation letter of December 4, 1996, exercising his power to assure that supervisors take fair, just and proportional disciplinary actions against employees for unsatisfactory performance. He stated that no formal allegations or charges had been made against Hooper and that she was therefore not entitled to any notice of who had made the allegations or charges being investigated. He informed Hooper that she did not have the right to legal assistance from the county in responding to the investigation. He stated that he had not invited her to the January 15 meeting because it was requested by Judy Strand, who had requested the presence of the other county employees who attended that meeting. He denied that the investigation was retaliatory.

69. On March 25, 1997, Clark responded to Hooper's two March letters, forwarding copies of documents related to Strand's unemployment insurance claim and reporting that Strand had not pursued her grievance. During the interviews Clark and Van Swearingen conducted in March and April, Clark told the interviewees that the county was proceeding with the Strand grievance.[12]

70. On March 26, 1997, Lynch suggested to Clark that an outside party might more properly investigate Hooper. Lynch recognized that Clark was among the county management employees Hooper claimed were participating in retaliatory acts against her.

71. After Lynch's suggestion, Clark continued to prosecute the investigation. On March 27, 1997, Clark wrote to McPherson requesting that he and Hooper make themselves available with "pertinent files and procedures" for Clark to review on April 2 at 9:30 a.m. (or some alterative time) and that McPherson, Undersheriff Joe Lee, and Captain Butler contact him regarding interview dates and times. He indicated he had sent a separate letter to Hooper, asking that she provide interview dates and times also.

72. Hooper did not receive the March 27 letter from Clark. McPherson did not show his letter to her, so she was not aware of either the interview requests or the request to prepare files and procedures for Clark's review. McPherson never directed Hooper to gather pertinent documents regarding Strand or her supervision after the January 15 meeting in Lynch's office.

73. Hooper found out about Clark's proposed visit when he called her on April 1, 1997, to confirm the time in his letters. Hooper responded that she knew nothing about any proposed examination of documents. Clark had a copy of his letter hand-delivered to her on April 2. She responded in writing that she might want her lawyer present and would get back to him as soon as possible.

74. On April 10, 1997, Hooper filed a retaliation complaint with the Human Rights Commission, alleging that from January 15 through the complaint date the county had retaliated against her for her human rights activities by subjecting her to both unusual surveillance of her work performance and a hostile work environment. She named Clark individually in

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[12] In June 1997, Clark told the Human Rights Commission staff that the county had treated Strand's complaints as a grievance under the collective bargaining agreement and that the county was processing that grievance. At hearing, Clark said that he told Hooper that Strand was not proceeding on her grievance because he thought "everything was frozen in time" at the time when she asked.

the complaint.

75. On April 19, 1997, Hooper gave Clark the further response regarding an interview that she had promised on April 2. She responded that she did want her lawyer present and therefore wanted a list of dates and times when Clark would be available to interview her. Clark was at that time seeking his replacement for the investigation, and did not pursue his efforts to interview Hooper or to review documents in the LEA offices.

76. In May 1997, Clark received a confidential letter from Becky Woods, the newest worker in the LEA clerical unit, that was critical of the clerical staff and supportive of Hooper. Hooper had encouraged Woods to write the letter. Clark faxed a copy of the letter to the union, and other members of the clerical unit found out about the letter. Some of the LEA clerical unit workers ostracized Woods for a time.

77. Some members of the LEA clerical unit concluded from the Hooper investigation and the county's encouragement of their criticism of Hooper within that investigation that they could openly express hostility and insubordination toward Hooper with impunity. They met at least twice away from work to discuss ways they could attack Hooper and prompt the county to remove her. One reason for their hostility toward her was her supervisory style. Other reasons included her refusal to let them swap work assignments as they saw fit, her enforcement of the chain of command and their belief that she improperly played favorites and used county time for personal and political activities. They also blamed Hooper for the rules regarding her attempts to maintain the security of the clerical unit within the LEA building, and for the efforts of LEA to limit or eliminate fraternization (*i.e.*, dating between LEA employees). Individual members of the unit who had developed personal animosities toward Hooper fanned the flames of resentment toward her. A driving force in the increased activism was the belief of the participating unit employees that the county wanted to discipline or remove Hooper and welcomed their continuing complaints.

78. In May 1997, Lynch and Clark met with Robert McCarthy, the county attorney, about Hooper's 1997 Human Rights complaint. McPherson did not know about the meeting and was not present. Lynch and Clark had decided after McPherson's response to Hooper's grievance and his letter to Lynch (both of March 14) that McPherson opposed the investigation of Hooper, and would not willingly assist in it. They decided to proceed without him. They did not tell McPherson that they were proceeding without his participation. The county did not present evidence of any similar exclusion of an elected official or a department head from discussions about claims by a subordinate.

79. McCarthy agreed that Clark had an apparent conflict of interest in handling the Hooper investigation. Lynch directed Clark to find a replacement for the investigation. Clark selected Jeff Minckler, an independent investigator Clark had heard at a conference on employment matters, but did not otherwise know. Clark became the county's liaison with Minckler for the investigation.

80. From May 1997 through July 1997, Minckler conducted the county's investigation of Hooper's performance as a supervisor. He was the authorized agent of the county, acting on its behalf in conducting the investigation. Lynch provided written confirmation of Minckler's assignment on May 7, 1997. The county directed Minckler's to investigate Strand's allegations, Hooper's complaint of no due process in the investigation to date and Hooper's claim of retaliation.

81. On May 16, 1997, having discussed the complaints against Hooper with Clark, Minckler interviewed Hooper. Hooper had her attorney present for the interview. This was Minckler's first interview in his investigation. He advised Hooper that she could also be the last person he spoke with, through a follow-up interview at the end of the investigation. He agreed to provide her with the documentation he obtained during his investigation.

82. Minckler did not interview any former LEA clerical employees. He used reports of complaints by former employees that Clark provided to him. He relied upon Clark's assessment of the veracity of the former employees' complaints against Hooper.

83. At the beginning of June 1997, Minckler asked Clark about the scope of county authority to discipline Hooper. He couched his inquiry in terms of the chain of command. Clark passed the question to the county attorney. On June 5, 1997, the county attorney wrote to Clark recommending that before Lynch reassigned Hooper or took disciplinary action against her, the county should seek expert assistance (an opinion from outside counsel) regarding such action. He made this recommendation because although he believed that Lynch had the power to discipline the employees of an elected county official, no chief executive had ever exercised it against supervisory non-deputized LEA employees. Clark shared this information with Minckler.

84. On June 5, 1997, Minckler reported to Clark that he was nearly done with the investigation and could proceed with interviews of Hooper's current subordinates. He asked Clark's help in arranging and setting up the interviews. McPherson had requested that the interviews take place outside of the LEA's offices. Minckler interviewed the clerical employees in the union office, at McPherson's suggestion.

85. On June 11, 1997, Hooper submitted a lengthy written rebuttal to the complaints lodged against her during the investigation. She identified seven county employees that she requested Minckler interview before he concluded his investigation. Minckler reported to Clark that he should "abide by these demands in order to avoid obvious charges of personal bias." He did not undertake any of the requested interviews.

86. Hooper declined Minckler's request that he interview her at the LEA office, because McPherson insisted that the investigation take place outside of the work place. His insistence stemmed from Hooper's reports to him, substantiated by his own observations, that the investigation was making it impossible for her to supervise the LEA clerical unit.

87. Minckler decided not to interview Hooper again. He reported to Clark that he had all the information he needed from Hooper, unless he could interview her in her office, with access to the documents in that office. Since he had already interviewed her once and had her 22 page response to the allegations of others, he concluded he need not talk with her again. He proceeded to write his report. He did not try to determine the validity of Hooper's June 11 responses to the various allegations made against her. He found "not a great deal" with which he disagreed in her responses, and he included her responses as an exhibit to his report.[13]

88. Minckler concluded that Hooper was unduly stern to her subordinates (loud, angry, intimidating and sometimes repetitively so). He concluded that Hooper did not conform her own behavior to that she demanded of her subordinates regarding comments containing sexual innuendo or comment (which he characterized as "water cooler talk").[14] He concluded that Hooper did not otherwise behave inappropriately as a supervisor, and even praised her for using an "administrative style [that] appears to demand and result for the most part in a product of high confidence." Minckler's failure to interview all of the pertinent persons and to follow up on Hooper's responses, together with his reliance on second-hand information from Clark's prior investigative work, rendered his conclusions insufficiently supported by his investigation. Nonetheless, he was correct in two of these three conclusions–that Hooper was unduly stern to her subordinates and that Hooper did not otherwise behave inappropriately as a supervisor.

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[13] In his testimony, Minckler acknowledged that Hooper included 10 detailed responses in her June 11 submission that warranted additional follow up. He did not do that follow up.

[14] This conclusion was not substantiated by the conflicting evidence at hearing. The county did not pursue effective follow-up on this conclusion in its abortive efforts to impose a remediation plan on Hooper.

89. Minckler considered the inappropriate treatment of subordinates to be sufficiently serious to pose a risk of liability for the county, regardless of the merits of any underlying claim. He reasoned that evidence of Hooper's unprofessional shows of anger and criticism and ridicule of employees in the presence of others could inflame a tribunal against the county on a claim. He decided that when Hooper repeatedly subjected the employees to this conduct for the same offenses, she engaged in disproportionate discipline. He predicted that unless Hooper changed her practices after the report, the union would commence a series of grievances and complaints against Hooper that would cost the county time and money. He relied upon the selected members of the clerical unit that he interviewed to conclude that the unit suffered from pervasive low morale. He relied upon anecdotal evidence to conclude that the unit had an unacceptably high turnover rate.[15] He attributed these problems to Hooper's supervision style. He recommended that unless Hooper admitted her inappropriate behavior upon receipt of the report, the county should require her to attend supervisory training sessions "conducted by one experienced in the enhancement of productive employee-employer relationships in times of trouble," followed by periodic evaluation of her supervisory performance by Clark and direction by Clark regarding the importance of strict adherence by Hooper to the county's sexual harassment policy. Minckler recommended that the county could remove Hooper from her supervisory position or terminate her employment for any subsequent failure by Hooper to improve her dealings with the employees under her supervision.

90. Minckler did not independently investigate Hooper's claims of denial of due process and of retaliation. He reported only the information regarding Hooper's claims that arose in the course of investigating Hooper's conduct.[16] Despite undertaking no direct investigation of Hooper's claims, he stated in his report that he sought but could not find any evidence to support either claim.

91. Minckler also concluded that Hooper's refusal to meet with him at the LEA offices in June 1997 was a "subterfuge" and constituted insubordination for which the county could appropriately discipline her.

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[15] After the Minckler report, in responding to Hooper's discrimination claims, Clark prepared a summary of turnover at the LEA clerical unit. He did no comparative summaries of turnover in other departments or areas. He concluded that the LEA clerical unit had substantially higher turnover than other county departments and areas. In other words, he summarized actual clerical unit turnover (from all causes, whether related to Hooper's conduct or not) and decided it confirmed his prior conclusion that the turnover was too high.

[16] Minckler had no experience, training or expertise in investigating civil rights claims and virtually no knowledge or training regarding Human Rights law, claims and investigations.

92. On July 9, 1997, Minckler completed and submitted his report. Clark prepared a summary of the report, which he submitted to Lynch. In the summary, Clark noted the two deficiencies Minckler cited in Hooper's supervisory performance [see finding No. 87], and the recommendations regarding those deficiencies.[17]

93. In July 1997, Hooper's son was critically injured in a vehicular accident. While she waited at the hospital for the arrival of the ambulance carrying her son, Hooper heard a dispatch report that one of the two patients being transported had died. From July 1997 through April 1998, Hooper's reactions to her son's accident and injuries, and the fear of his death, exacerbated Hooper's depressive disorder.

94. In July 1997, Van Swearingen and some of the clerical unit workers complained that Hooper denied the union adequate access to its members in the clerical unit. McPherson gave them written instructions and permission to meet with Van Swearingen. The complaints and the resulting paperwork arose out of the increasing boldness of the clerical unit workers in resisting Hooper's supervision. The boldness resulted from the perception that the county wanted to discipline or fire Hooper and welcomed their complaints and resistance to her supervision.

95. On August 14, 1997, Lynch, Clark and McPherson met with outside counsel and decided upon a remediation plan for Hooper. Lynch directed McPherson, as the head of LEA and Hooper's supervisor, to work with Hooper to develop a remediation plan based on Minckler's recommendations. McPherson disagreed with the Minckler report. He felt that Lynch had tricked him into agreeing to an investigation that was radically different from the one he had originally suggested. He believed that Lynch had orchestrated the investigation and the remediation out of animus toward Hooper. He grudgingly agreed to commence the remediation plan.

96. McPherson did not tell Hooper about the remediation plan. Instead, he utilized the county's normal practice of continuing training through seminars and classes. By arranging and approving such training, he could then classify Hooper's participation as compliance with a remediation plan of which she had no knowledge.

97. On October 30, 1997, in response to an inquiry from Clark about the status of the plan, McPherson stated his objections to the investigation of Hooper. He asserted that with the Minckler report, he must either take action

[17] The county decided not to provide the union with any copies of Minckler's report.

and risk litigation by Hooper or take no action and risk of litigation by other employees and the union. He then went on to list the "proposed action plan" which consisted of stress management training for the entire clerical unit and any other interested LEA employees (held in October 1997), an "Essentials of Management" seminar Hooper would attend in Helena,[18] a review of the physical work area in the LEA clerical unit (requesting Clark's assistance in such a review) and development of a new formal system for employee evaluations (being worked on by Clark, McPherson and others). Hooper had no idea that her participation in the stress management training and her attendance at the management seminar were part of a remediation plan. Although it was unreasonable to conceal it from Hooper, the plan was reasonable and McPherson did not conceal it out of either any retaliatory animus or any bias against her because she was a woman.

98. On October 31, 1997, Strand, with Van Swearingen's assistance, filed a grievance against Hooper, to replace the previous grievance relating to Hooper's supervision of Strand in 1996. This grievance again referenced Hooper's equal pay claim and settlement. The county did not reject the grievance as untimely.[19]

99. On October 31, 1997, Carole Heard, with Van Swearingen's assistance, filed five separate grievances against Hooper. Heard was already planning to leave her job with the LEA clerical unit when she filed the grievances. She left the LEA for another job less than two weeks later.

100. Encouraged by their union representatives (Van Swearingen until March 1998, Todd Lovshin thereafter), the clerical employees who participated in the growing efforts to oust Hooper began to act as "witnesses" for each other whenever Hooper tried to speak with one of them.[20] Some of the employees used this "witness" role to interfere as much as possible with Hooper's efforts to communicate with her subordinates. Hooper obtained permission from McPherson to audiotape meetings with her subordinates, so she would have a record of the conversations. This effort to document actual transactions rather than rely upon memories worsened the relations between

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[18] ***See*** Finding 13, ***supra***, regarding what appeared to be the same seminar previously attended by Hooper.

[19] The county ultimately settled Strand's grievance, and hired her for a county position outside of the LEA clerical unit in September 1998, without the usual application and selection process. The LEA initially paid one-half of her wages in her new job.

[20] At hearing, Van Swearingen admitted that the union did not have the authority to instruct the employees to require a witness any time Hooper was speaking to them.

Hooper and her subordinates.[21] Hooper could not effectively supervise the unit under the conditions that existed during the winter of 1997 and the spring of 1998.

101. In October 1997, Hooper filed a complaint against Van Swearingen, as a result of a confrontation in her office about her taping of conversations with employees. The complaint heightened the tension between Hooper, the union and Van Swearingen.

102. On November 7, 1997, Hooper opened and read a letter from Clark to McPherson regarding the remediation plan. This was her first notice of the plan. On December 4, 1997, after learning of the agreement of McPherson to pay for part of the Minckler investigation, Hooper filed another grievance against the county, alleging that the county was retaliating against her, that it had not protected her against the allegations and actions of her subordinates and that she had not been accorded due process in the investigation and remediation.

103. In early 1998, five clerical workers under Hooper's supervision (Stepan, Heard, Bishop, Leary and Dolan), assisted by Van Swearingen and Lovshin, filed nearly a dozen additional grievances against Hooper.[22] The complaints offered few specifics and were filled with intemperate language, such as an accusation that Hooper acted like a concentration camp guard and a comparison between conditions at the LEA and the conditions during the Holocaust. Geneta Bishop, the author of that hyperbole, had never been subjected to any material adverse action while a clerical worker under Hooper's supervision. The county initially denied the grievances filed against Hooper, but did not otherwise act to ameliorate the effect on Hooper of the continuing hostility and resistance of her subordinates.

104. On April 21, 1998, Hooper filed another complaint against the county for illegal discrimination because of sex and retaliation, the complaint that resulted in these proceedings (HRA No. 9809008523). In that complaint she reiterated her 1997 allegations and added allegations of subsequent discriminatory acts up to the date of complaint filing.

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[21] The limited examples of recorded conversations that are of record demonstrate both that Hooper was not the monster some of her subordinates painted her to be and that Hooper was clumsily manipulative as well as invasive and patronizing in dealing with them. While the limited transcripts suggest both the validity and invalidity of various subordinate's complaints about Hooper, they also depict the difficulty in managing employees in the turmoil that existed within the LEA clerical unit.

[22] Since Hooper limited her claims to the period ending in April 1998, the additional grievances and activities after that cut-off are not relevant to liability or damages.

105. On August 6, 1998, Clark wrote to Minckler and requested a copy of his complete file regarding the July 9, 1997, report and Minckler's investigation of Hooper. Minckler responded that approximately one year after he concluded the investigation he had destroyed all the notes and documents in his possession regarding it. This included documents he obtained from the county that were the only copies or originals in the county's possession. The county did not know Minckler would destroy documents, and never authorized him to do so.

106. In 1997, the LEA received a complaint that a male administrator had sexually harassed a female subordinate. The LEA conducted an internal investigation. Lynch was not involved. The union was not invited or permitted to assist in the investigation. There was no outside investigator. The sheriff supervised the handling of the complaint.

107. For several years prior to 1997, LEA knew of repeated complaints about a male administrator for shouting at and harassing LEA employees. Some clerical employees and McPherson considered the male administrator condescending, overbearing, intimidating and abusive. Several employees in the LEA clerical unit, as well as Hooper and some police officers, complained about the male administrator's conduct. The LEA handled the complaints internally, without Lynch's involvement. The union was not invited or permitted to assist in the investigation. There was no outside investigator. The county did not discipline the male administrator, nor impose any remediation or corrective plan upon him.

108. While Lee was undersheriff, he supervised a number of internal investigations, assigning an officer to investigate in each instance. Lynch did not participate. There were no outside investigators. The union was not invited or permitted to assist in the investigations.

109. After the Hooper investigation, the county received another grievance involving the LEA. Jailers whose working conditions had changed after the county jail burned down lodged the grievance. The county did not waive the procedural steps under the collective bargaining agreement, although the union did waive specific time limits for county responses for specific time periods. The county followed the ordinary practice of conducing its investigation outside of the presence of union representatives.

110. The county's investigation of Hooper improperly included the union representatives and the grievant, Strand, as part of the investigative team rather than as advocates and witnesses. The eventual effect of this impropriety was to allow those of Hooper's subordinates who disliked her supervision and wanted her removed access to the internal workings of the

investigation, while denying similar access to Hooper, McPherson and those of Hooper's subordinates who supported her. As a direct result, the Hooper subordinates who wanted her removed came to believe that the county supported and encouraged their hostility and insubordination toward Hooper. The course of the investigation rendered Hooper unable to supervise the hostile employees or protect herself from them. The county engaged in a course of investigatory conduct that manifested a hostile intent toward Hooper because she was female and had engaged in protected activity.

111. The effect of the investigation and the escalating campaign against Hooper was to undermine her appreciation for her job, to damage her ability to function as a LEA administrator, to isolate her from her co-workers, to interfere with her ability to do her work, and to make continued employment at the LEA painful and depressing. It affected her in both her professional and her personal life to the point that she had difficulty socializing with others, lost a sense of pride for her accomplishments and became estranged from her own family members.

112. From March 1997 through April 1998, Hooper experienced such serious and severe emotional distress that she had a recurrence of the previous depression that Casey had treated in 1988 through 1994. Her emotional distress commenced and remained at levels that sustained her depression and necessitated continuing treatment because of the conditions at work. The conditions developed after and because Lynch directed the investigation of her entire supervisory career. The conditions resulted from the conduct and scope of the investigation and the conduct of her subordinates during and after the investigation. The hostile conduct of her subordinates during and after the investigation resulted from the manner in which the county conducted the investigation. But for the conduct of the investigation, Hooper's subordinates would not have dared to engage in the course of hostile and insubordinate conduct which caused her emotional distress.

113. From March 1997 through April 1998, Hooper's emotional distress involved and resulted in excessive anguish and mental agitation, resultant physical agitation, low self-esteem, self-hatred, thoughts of death, appetite or weight disturbances, upsets of the autonomic nervous system and attention span and concentration problems. During that time she required both Casey's course of treatment and prescriptive drug therapy to relieve her anxiety and depression. Her son's accident and the events immediately following it contributed to Hooper's emotional distress in beginning in July 1997 and thereafter. However, but for the emotional distress resulting from the investigation of her supervisory career and the events that it triggered at work, she would not have experienced serious and severe emotional distress

that required the ongoing treatment. For her emotional distress from March 1997 through April 1998, Hooper is entitled to recover the sum of $50,000.00.

114. Although Hooper obtained treatment for her emotional distress, the record does not contain adequate evidence from which to find any dollar amount for the expense of treatment (doctor bills, prescription costs, and so on) which she obtained.

115. Lynch is no longer working for the county. In addition to injunctive relief, the county must submit its equal employment opportunity employment policies to the Montana Human Rights Bureau for review to assure that the policies make it clear to job applicants, employees, and managers that the county will not discriminate in the terms and conditions of employment because of an individual's sex, or in retaliation for human rights activities, and that the policies acknowledge the county's affirmative duty to provide an environment free of sex discrimination and retaliation. If the Bureau directs any changes to the existing policies, the county must adopt and publish the policies as changed.

116. The county must post its policy (as it exists after approval by the Bureau) at its facilities, break areas and business offices and provide copies to all current and future employees, who will be asked to sign their receipt of the policy. The policy should (in addition to any Bureau requirements):

> (a) Require the county' department heads and supervisors, including the chief executive, to complete a course of training in EEO practices with special emphasis on sex discrimination and retaliation;
>
> (b) Provide preventive training to all county employees on a recurrent basis in sex discrimination, gender bias, and hostile work environment, and non-retaliation.
>
> (c) Require posting of EEO posters, which include the Montana Human Rights Bureau toll free telephone number, in break rooms and work areas indicating employees can call the HRB for information regarding discrimination.

IV. Opinion

The Montana Human Rights Act prohibits retaliation against a person because the person opposed illegal discrimination under the Act or participated in an investigation or proceeding under the Act. §49-2-301 MCA; ***see also*** *Mahan v. Farmers Union Central Exch., Inc.*, 235 Mont. 410, 422, 768 P.2d 850,

857-58 (1989). This prohibition also appears in the Human Rights Commission's regulations, at 24.9.603(1) ARM[23]:

> It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation.

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. "Protected activity" includes opposition to illegal discrimination and participation in a Montana Human Rights Act investigation or proceeding. §49-2-301 MCA. Hooper's retaliation claim is for retaliation because of participation in a Human Rights Act proceeding. Therefore, her initial burden of proof under the rule is to establish that she engaged in such participation, that the county took significant adverse employment action against her and that there was a causal link between the adverse action and her participation in a Human Rights Act proceeding.

Similarly, the Montana Human Rights Act prohibits discrimination in terms and conditions of employment because of sex. §49-2-303(1)(a) MCA. Hooper's initial burden of proof on allegations of employment discrimination because of gender is to establish that she was a member of a protected class (women), that the county took adverse employment action against her and that the adverse action was because she was a woman. For both claims, she must establish her prima facie case by a preponderance of the substantial credible evidence of record. The elements of Hooper's two claims are sufficiently similar for combined analysis.

Hooper established the first element of her retaliation claim. She engaged in protected activity by participating in her equal pay claim, which on its face involved the claim that the county discriminated against her due to her gender, a violation of the Human Rights Act.[24] The Human Rights Act is the exclusive remedy for violations of its prohibitions against illegal discrimination. §49-2-509 MCA (1991). That remedy includes the right of an aggrieved person to proceed in district court under defined circumstances. ***Id.***[25]

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

[24] Hooper's participation in her brother's religious discrimination claim was *de minimis*, and did not trigger any retaliatory animus.

[25] The statements are true under the current Act as well, but since Hooper filed her equal pay complaint before July 1, 1997, the prior Act applied to the equal pay claim.

Hooper's civil suit on her equal pay claim was participation in a proceeding under the Act. Her participation in the civil action, including its settlement, was therefore protected activity because it was participation in a proceeding under the Act.

Hooper also established the first element of her sex discrimination in employment claim, membership in a protected class. She is a woman.

Hooper asserted that the county's investigation of her, the scope of that investigation (spanning her entire career) and the conduct of that investigation (in numerous aspects) all constituted adverse employment action. The question can be condensed to whether the county's extraordinary investigation of Hooper's entire supervisory career constituted adverse action. Only if there was such adverse action can Hooper establish the second elements of her claims of retaliation and sex discrimination in employment.

Not every employment action amounts to an adverse employment action. *Strother v. Southern Cal. Permanente Med. Group,* 79 F.3d 859, 869 (9th Cir. 1996). Discharge, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion are adverse employment actions. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).[26] Transfer of job duties and undeserved low performance ratings are also adverse employment decisions. *Brooks*, ***supra*** at 928-29; ***citing*** *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987). By contrast, declining to hold a job open for an employee and badmouthing an employee outside the job reference context are not adverse employment actions. *Brooks*, ***supra***.[27]

Another proper way to approach whether the county took adverse action is to decide whether the action the county did take would have deterred workers who saw what happened to Hooper from themselves engaging in protected activity. ***See*** *Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir. 2000) ("[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity"). A proper investigation of an employee based on accusations from a coworker would not

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[26] ***See*** *O'Day v. McDonnell Douglas Helicopter Co.,* 79 F.3d 756, 763 (9th Cir.1996) (termination); *Hashimoto v. Dalton,* 118 F.3d 671, 676 (9th Cir.1997) (negative reference); *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987) (negative performance reviews); *Ruggles v. California Polytechnic State Univ.,* 797 F.2d 782, 786 (9th Cir.1986) (refusing to consider for promotion).

[27] ***See*** *McAlindin v. County of San Diego,* 192 F.3d 1226, 1238- 39 (9th Cir.1999) (refusing to hold job open for employee); *Nunez v. City of Los Angeles,* 147 F.3d 867, 875 (9th Cir.1998) (badmouthing).

be retaliatory, ***see***, *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510-11 (7th Cir. 1999), however, Lynch's direction to investigate Hooper's entire career was neither reasonable nor proper. The county presented no evidence that such an investigation of a supervisor had ever taken place. Hooper presented comparative evidence of investigations involving male supervisors who had not filed Human Rights Act claims and were not subject to career-wide scrutiny. The county presented no credible evidence that it had prior substantiated grievances against Hooper, so that a repeat accusation might properly trigger a broader inquiry than a first grievance. The county's inaugural investigation into this supervisor's conduct was of unprecedented breadth.

Even worse, the investigation rapidly became a matter of general knowledge to present and former clerical unit members, and then to any interested union members and to some members of the public. The vehicles for this inappropriate dissemination of information about the existence and nature of the investigation included Clark's form letter, inclusion of the union in the investigation, inclusion of Strand in the investigation and the site of the Minckler interviews.

The form letter informed everyone who received it or otherwise saw it that Hooper was under investigation and that the county was at least considering if not seeking to level disciplinary charges against her. It did not even request confidentiality about the investigation, and went to at least one private citizen with no connection to the county.

The union, through its representative, was privy to virtually every aspect of the investigation (until Minckler wrote his final report, which the union did not receive). Van Swearingen became a de facto assistant investigator, by direction of Lynch. Strand herself almost became a member of the investigative team, providing Clark with the initial contact list and regularly calling Lynch or Clark about the progress of the investigation. In the meantime, while Van Swearingen worked with Clark and then Minckler in the investigation, he was also counseling the clerical unit's union members about being each other's witnesses when talking to Hooper and assisting them in bringing further grievances against Hooper. Clark even provided ammunition to the union members so they could attack and pressure clerical unit employees who did support Hooper. Becky Woods found out that going on record in support of Hooper would result in hostility from her coworkers, who found out about her letter because Clark provided it to the union.

Minckler, at McPherson's insistance and with the county's aid and approval, interviewed the clerical workers on the union's premises. The internal investigation was anything but internal.

In these ways and others, the county conducted the investigation in such a fashion as to publish its antipathy toward Hooper to the clerical unit members, the union and to a lesser extent to the public. Hooper presented clear and convincing evidence that the investigation encouraged and enlarged the hostility and insubordination she faced from her subordinates during and after the investigation. It was more likely than not that the investigation caused the "feeding frenzy" (as McPherson called it) that destroyed Hooper's ability to supervise her subordinates. The actual conduct of this investigation, and its impact upon Hooper, was reasonably likely to deter other employees from engaging in protected activity. Any other supervisor who witnessed the consequences upon Hooper of the investigation would certainly pause and consider well before daring to participate in a Human Rights Act proceeding against the county. The scope and conduct of the investigation did constitute serious and substantial adverse employment action against Hooper, under the analysis of *Ray*, ***op. cit***. No sane supervisor would want to endure the scrutiny to which the county subjected Hooper.

Ordinary logic dictates the same conclusion. Hyper scrutiny of a supervisor, to the extent that she loses her ability to govern her subordinates and can no longer perform her duties, constitutes adverse action.

Rule 24.9.603(3) ARM dictates a disputable presumption of retaliatory motive for significant adverse acts against a Human Rights Act complainant while the complaint is pending or within six months after its resolution. Settlement and dismissal of Hooper's equal pay claim occurred less than six months before the initiation of the investigation into her supervisory performance. Performance of the settlement by the county by periodic payments to Hooper was still continuing through April 1998. The overlap between her participation in protected activity and the investigation gives rise to a presumption that the county investigated her because of that participation in protected activity. The events that transpired within six months after dismissal of the civil equal pay complaint or while the county was still performing its obligations from the settlement of that case encompass all of the alleged retaliatory conduct of the county. Hooper is entitled to the disputable presumption of retaliatory motive, and the rule's presumption of retaliatory motive established a causal connection between Hooper's protected activity and the adverse employment decision to investigate her career.

The proximity in time was not only factor in establishing the causal connection between Hooper's protected class status and the adverse action. Clark and Lynch knew or should have known that undertaking an investigation into the entire supervisory career of Hooper could encourage her subordinates to attack her and resist her authority. They already knew that Strand and

probably some of the clerical unit employees resented Hooper's successful equal pay claim. They knew or should have known that making the kinds of inappropriate disclosures about the investigation that the county made would seem to some of Hooper's subordinates as an endorsement by the county of those subordinates' dislike toward her. They knew or should have known that making the union a partner in the investigation would also signal to Hooper's subordinates that the county encouraged further assaults on Hooper's authority. They knew or should have known that providing detailed information about the ongoing investigation to the union would fuel greater hostility toward and actions against Hooper. That the county took these actions with actual or imputed knowledge of the consequences, and did not take comparable action against male supervisors who had not participated in Human Rights Act proceedings also established the requisite proof of causation.

In addition, the county is responsible for Minckler's conduct of the investigation after his hiring. Minckler admitted in testimony that he should have gone further in inquiring about some of Hooper's responses to the investigation. He admitted in writing that he needed to interview the persons Hooper identified to avoid "obvious charges of personal bias," yet he did not.

Minckler also admitted in his testimony that he had not directly investigated Hooper's claims of denial of due process and retaliation, despite written directions to do so. Minckler testified that Clark told him not to give those two items equal priority with his investigation of Hooper, a charge that Clark denied. Under either version, the county is responsible for Minckler's conduct in issuing conclusions on those two claims without investigating them.

Minckler knew that the county hired him because of Clark's conflict of interest. Instead of conducting an independent investigation, Minckler relied upon Clark's prior work regarding contact with the former employees. Whether Minckler, Lynch or Clark decided upon this approach, the county is responsible for an investigative procedure in which the conflict of interest is addressed in Minckler's hiring then ignored in his reliance upon Clark's work.

Minckler decided not to interview Hooper a second time unless he could do so in the LEA office. His reasoning (that the only reason to interview Hooper again was to look at records) contradicted the assurance Lynch and Minckler had each given Hooper–that she would have due process and could be the last person the investigator heard. He dismissed another interview once she declined an interview in the LEA offices (obeying McPherson's directive). He made no effort to arrange to talk with her and review documents away from the LEA office. He then cited her refusal to meet with him at the LEA offices as insubordination which would justify disciplinary action. Minckler

manifested an inappropriate hostility toward Hooper, inexplicable except in terms of retaliatory and gender-based animus.

Finally, Minckler destroyed the records upon which he based his investigative report. Failure to preserve those records impaired the parties' ability to delve into the conduct of the investigation during this case. While that problem caused at least potential prejudice to both the county and Hooper, Minckler was acting on behalf of the county. Thus, the presumption that the records contained information beneficial to Hooper's case is proper. §26-1-602(5) MCA.[28]

The presumption of discriminatory motive, together with the facts regarding the deficiencies (lack of confidentiality and lack of impartiality) in an investigation that led to an uprising among Hooper's subordinates and the evidence of actual animosity toward Hooper on the part at least of Minckler, all supported a finding of discriminatory animus motivating the adverse employment actions. Hooper established the third element of her prima facie case, a causal link between her protected activity and protected class status and the adverse employment actions.

Because Hooper proved her prima facie case, the county then had the obligation to present legitimate business reasons for the scope, breadth and conduct of the investigation, to which Hooper could then present evidence of pretext. ***E.g.***, *Vortex Fishing Systems v. Foss*, 38 P.3d 836, 839, 2001 MT 312 (2001). Although the county had legitimate business reasons for undertaking an investigation, the county lacked legitimate business reasons for carrying out this investigation into Hooper's entire supervisory career with the union as an unprecedented investigatory partner. Judy Strand's vitriolic complaints and Clark's general impressions were not legitimate business reasons for the scope and conduct of the investigation, but only pretexts for an assault upon Hooper's career.[29]

The damages the department may award to Hooper include any reasonable measure to rectify any harm she suffered. §49-2-506(1)(b) MCA. The purpose of an award of damages in an employment discrimination case is

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[28] As an investigator clothed with the authority of the county, Minckler should have known better. The county selected him, and he acted on its behalf. Thus, the county bears the brunt of the presumption, even though it did not know of his destruction of documents in time to prevent it.

[29] The county presented considerable evidence (over Hooper's objections) to support Clark's general recollections of prior incidents suggesting problems with Hooper's supervisory conduct. The evidence was ultimately unnecessary, since Clark's testimony about his recollections was credible, and the county's election to investigate the distant past was unrelated to Clark's recollection but was instead motivated by retaliatory animus.

to ensure that the victim is made whole. *P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); ***accord***, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).[30]

Hooper failed to prove any wage damages. She likewise failed to prove any out of pocket expenses. Because she elected to limit the period of discrimination for which she made claim, she failed to prove any damages which occurred after April 1998 that proximately resulted from the county's illegal discrimination during the time from December 1996 through April 1998. While she sought such damages, she failed to establish that the prior conduct of the county was the proximate cause of any subsequent damages. Therefore, the damages involved in this case are those resulting from emotional distress during the delineated time. The hearing examiner did not make negative findings about the lack of proof of proximate cause of subsequent damages. To the extent required, the statements in this paragraph shall serve as such additional findings.

Since the law requires "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against,"[31] the power and duty of the department to award money for proven emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596, 601 (1993). As already noted, damages in discrimination cases are broadly available precisely so that the awards rectify any and all harm suffered. *P. W. Berry, Inc.,* ***op. cit.***; *Dolan,* ***supra***; *Albermarle Paper Co.*, ***supra***. Emotional distress recovery is appropriate upon proof that Hooper suffered emotional distress as a result of the proven illegal discrimination. *Campbell v. Choteau Bar and Steak House*, HRC#8901003828 (3/9/93).[32] The standard of proof for emotional distress recovery in Human Rights Act cases does not require proof establishing that the distress is serious or severe,[33] although Hooper did establish that she suffered serious or severe distress. *Vortex Fishing Systems*, ***supra***.

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

[31] §49-2-506(1)(b) MCA.

[32] ***See*** *Carey v. Piphus*, 435 U.S. 247, 264, n. 20 (1978); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C.Cir. 1984); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7thCir.1974); *Brown v. Trustees*, 674 F.Supp. 393 (D.C.Mass. 1987); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475 (1984); *Hy-Vee Food Stores v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 525 (Iowa, 1990).

[33] Montana applies this requirement to recovery for emotional distress in all tort cases. *Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411 (1995).

Hooper's testimony can, by itself, establish entitlement to damages for compensable emotional harm, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). In some cases, the illegal discrimination itself establishes an entitlement to damages for emotional distress, because it is self-evident that emotional distress does arise from enduring the particular illegal treatment. ***See, e.g.***, *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (42 U.S.C. §1981 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. M.C.A.D.*, 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 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).

Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson*, ***op. cit. at*** 1193. "The severity of the harm should govern the amount, not the availability, of recovery." *Chatman v. Slagle*, 107 F.3d 380, 385 (6th Cir. 1997), ***quoted in*** *Vortex Fishing Systems* ***at*** 841. This broader right of recovery under the Human Rights Act arises because the protected interests are not necessarily accorded the same protection by any branch of common law torts. *Bolden v. Southeastern Pennsylvania Trans. Auth.*, 21 F.3d 29, 34 (3rd Cir. 1994) (***quoting*** *Carey,* ***op. cit. at note 44, at 258***); ***quoted in*** *Vortex Fishing Systems* ***at*** 841.

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* ***op. cit.***; *Johnson*, ***op. cit***. In *Johnson*, 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, 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:

> 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 (11th 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 (11th Cir. 1995). A federal district court awarded $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).[34]

Hooper's credible testimony on her own behalf and the expert testimony of her counselor established her severe emotional distress. Based upon the credible evidence of record, Hooper's emotional distress was comparable to that of the Griffiths. From the evidence adduced, the continuing course of conduct of the county during the delineated period caused Hooper's emotional distress during that period. $50,000.00 is a reasonable and even moderate award for her harm, far greater than that of the victim in *Vainio*, and as great as that Paddy and Patricia Griffith each suffered in *Griffith*.

In *Flanigan v. Prudential Federal Savings and Loan*, 221Mont. 419, 720 P.2d 257 (1986), the Supreme Court affirmed an award of $100,000.00 to a wrongfully fired employee for her emotional distress. Here, Hooper did not lose her job, but she did lose her ability to perform the job as a result of the county's conduct. Half the emotional distress recovery of *Flanigan*, in this case where Hooper suffered such intense and prolonged emotional distress as to require psychological counseling and medication, is reasonable.

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[34] 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.

In *Maloney v. Home and Investment Center, Inc.*, 298 Mont. 213, 233, 994 P.2d 1124, 1137 (2000), the Supreme Court affirmed an award of $100,000.00 to the plaintiffs for the emotional distress they suffered when they could not purchase land they had contracted to buy. The plaintiffs had testified that they were devastated by the sudden impact of the possible sale of the land to someone else and that they suffered intense emotional hardship during the ensuing weeks when they attempted unsuccessfully to undo the impending sale. The plaintiffs in Maloney recovered for future as well as present emotional distress, thus an award to Hooper of half as much for her emotional distress during a prolonged and defined period of time is appropriate.

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* (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[35] (disapproving of recovery for loss of sleep and nervous tension).

Exactly as the same evidence can sometimes persuade the fact finder that the claimant suffered severe emotional distress and other times not be persuasive, the same evidence of emotional distress under the Human Rights

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[35] *First Bank of Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989).

Act can produce different recovery entitlements (more severity equals greater recovery). In this case, Hooper's demeanor during testimony, and the testimony of her treating mental health professional, convinced the fact finder that she is entitled to recover $50,000.00 for her emotional distress.

V. Conclusions of Law

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

2. Butte-Silver Bow County Government illegally discriminated against Carolyn Hooper by subjecting her to an unwarrantedly broad investigation into her entire career as a supervisor and by enlisting and approving the participation and assistance of the initial complainant against Hooper and the clerical unit workers' union in that investigation. In so doing, the county engaged in illegal retaliation and discrimination in employment by reason of sex. The illegal discrimination occurred between January 1997 and the end of April 1998.

3. The county is liable to Hooper for the emotional distress she suffered during March 1997 through the end of April of 1998 as a proximate result of the county's illegal discrimination and retaliation, which entitles her to the sum of $50,000.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against the county. The county is enjoined from discriminating against female supervisors and retaliating against employees participating in protected activity by subjecting them to unreasonably broad investigations of their career performances which invite and include their subordinates and their subordinates' union as participants in the investigation rather than as witnesses and grievants in the investigation. Within 60 days after entry of this decision (or any final decision upon timely appeal of this decision), the county must submit to the Montana Human Rights Bureau its existing policy that the county will not discriminate in the terms and conditions of employment because of an individual's sex, or in retaliation for human rights activities. The Bureau shall expeditiously approve or require amendment to that policy so that it does properly acknowledge the county's affirmative duty to provide an environment free of sex discrimination and retaliation, and provide for posting of the policy on site facilities, break areas and business offices and provide copies to all of its present and future employees, who will be asked to sign their receipt of the policy. In order to be adequate and proper, the county's policy must:

(a) Require the county's department heads and supervisors, including the chief executive, to complete periodic courses of training in EEO

practices, with the courses of training having special emphasis on sex discrimination and retaliation;

(b) Provide recurring preventive training to all county employees on gender bias, hostile work environment and retaliation.

(c) Require posting of EEO posters, including the Montana Human Rights Bureau toll-free telephone number, in break and work areas, advising employees to call HRB for information about discrimination.

5. The county must adopt any changes directed by the HRB in its policy immediately, and implement it at once upon HRB approval.

VI. Order

1. Judgment is found in favor of charging party Carolyn Hooper and against respondent Butte-Silver Bow County Government on the charge that the county illegally discriminated against Hooper by reason of her sex and retaliated against her for her participation in protected activities between January 1997 and the end of April 1998.

2. The department awards Hooper the sum of $50,000.00 and orders the county to pay her that amount immediately. Interest accrues on the award in this final order as a matter of law until satisfaction of this order in accord with its terms.

3. The department enjoins and orders the county to comply with all of the provisions of Conclusion of Law Nos. 4 and 5.

Dated: April 29, 2002.

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