

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

<hr/> <b>Nina Schmidt,</b>	)	HRC Case Nos. 0011009564 & 0011009567
Charging Party,	)	
versus	)	<i>Final Agency Decision</i>
<b>Elvin Lou Cook and Robert Cook,</b>	)	
<b>d.b.a. Triple Crown Motor Inn,</b>	)	
<hr/> Respondents.	)	

**I. Procedure and Preliminary Matters**

Nina Schmidt's mother<sup>1</sup> filed complaints on her behalf with the Department of Labor and Industry on February 1, 2001. In one complaint she alleged that Elvin Lou Cook, manager at the Triple Crown Motor Inn in Great Falls, Montana, discriminated against Schmidt on the basis of sex by subjecting her to sexual harassment on dates up to and including November 2, 2000. In the other complaint, she alleged that Triple Crown Motor Inn discriminated against Schmidt on the basis of sex in employment by reason of the manager's harassment. Amended complaints on behalf of Schmidt were filed on March 19, 2001.

On July 16, 2001, the department consolidated the two cases, gave notice of a contested case hearing on the complaints and appointed Terry Spear as hearing examiner. On September 21, 2001, the complainant moved to amend the caption to name Robert Cook, the owner of Triple Crown Motor Inn, individually as a respondent. After notice that he intended to grant the motion to amend and to enter the default of Elvin Lou Cook, the hearing examiner granted the motion to amend and ordered service on Robert Cook on October 10, 2001. On October 15, 2001, the hearing examiner entered the default of Elvin Lou Cook and continued the hearing. On November 5, 2001, Robert Cook appeared personally.

The hearing examiner heard the consolidated contested cases in Great Falls, Montana on January 30 and 31, 2002. Nina Schmidt attended with her attorney, Randy Lee Tarum. Robert Cook attended with his attorney, Patrick F. Hooks. Elvin Lou Cook, in default, did not appear during hearing. The transcript of hearing reflects the witnesses who testified and the exhibits

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<sup>1</sup> During contested case prehearing proceedings, Schmidt came of age and the hearing examiner amended the caption herein accordingly.

offered. After hearing, Robert Cook substituted his current counsel, Thomas W. Welch, for Patrick F. Hooks. Schmidt filed her reply brief on April 5, 2002, and the hearing examiner deemed the case submitted for decision.

## II. Issues

The issue in this case is whether Robert Cook is liable for the sexual harassment of Nina Schmidt by his brother, Elvin Lou Cook, the manager of his motel, Triple Crown Motor Inn. A full statement of the issues appears in the final prehearing order.

## III. Findings of Fact

1. Charging party Nina Schmidt was an emancipated 16-year-old minor (date of birth December 9, 1983, married and separated) in September through October 2000. She lived with her mother, Phyllis Slade, in Great Falls. Unable to find work because of her youth, 8<sup>th</sup> grade education and lack of experience, Schmidt was being supported by her mother, who received public assistance and Social Security disability payments of \$491.00 per month.

2. In September and October 2000, respondent Elvin Lou Cook managed the Triple Crown Motor Inn in Great Falls. His brother, respondent Robert Cook, had purchased the motel in August 2000, with the sale closing in September 2000. Robert Cook planned to buy the motel and own it through a corporation he expected to create. For no apparent reason, Robert Cook expected the seller of the motel to create the corporation for him. The seller was under no obligation to form Robert Cook's corporation for him, and did not. The corporation never existed. Robert Cook elected to place his brother in charge of the motel during the first months of his ownership, authorizing Elvin Lou Cook to operate the business and hire new staff.<sup>2</sup> Elvin Lou Cook had previously worked for his brother in similar capacities at the Custer Inn and the Highwood motel. Robert Cook resided in Boise, Idaho. Elvin Lou Cook usually lived in Oklahoma when not traveling or working at one of his brother's motels.

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<sup>2</sup>At some point, Robert and Elvin Lou Cook entered into a handwritten agreement by which Robert Cook purported to lease the motel to Elvin Lou Cook. The copy of the document in evidence purports to bear a notarization by a bank employee in Oklahoma, dated August 10, 2000, but Robert Cook's signature appears to be dated September 1, 2000. Robert Cook was unable to produce the original or satisfactorily explain its absence, thus the authenticity and date of signature of the document remained questionable. Cook was likewise unable to establish that either he or his brother ever performed any of the terms and conditions of the document during the time of the events in this case.

3. On September 28, 2000, Schmidt met Elvin Lou Cook through a friend of hers, Amber Symington, who worked as a maid and lived at the motel. Schmidt was staying in Symington's room while visiting her. Schmidt asked about working at the motel. Cook at the time was advertising for live-in maids for the motel. He scheduled an interview with Schmidt for a maid job. He conducted the interview on September 29.

4. Elvin Lou Cook informed Schmidt that she would be required, as an employee of Triple Crown Motor Inn, to have sex with him and with customers of the Triple Crown Motor Inn. The sexual conduct was a condition of her employment. Elvin Lou Cook described in detail a wide range of sexual acts that Schmidt would be required to perform with him and with guests. He told her that if she did a good job she might progress to earning \$20,000.00 to \$40,000.00 per month.

5. Schmidt considered accepting the job. Her mother's meager income did not support the family adequately, and the idea of being self-supporting appealed to her.

6. Immediately after the interview, Schmidt wrote down her mother's phone number so that Elvin Lou Cook could call. He dialed the phone number and Schmidt spoke to her mother from Cook's motel room. Schmidt told her mother that she was hired as a maid at the Triple Crown Motel. Schmidt was excited to have a job. Her mother wanted to talk to Cook, so Schmidt handed him the phone.

7. Elvin Lou Cook spoke with Schmidt's mother on the phone. He told Phyllis that the Triple Crown Motel belonged to his brother Robert Cook and that he, Elvin Lou Cook, was the manager. Elvin Lou Cook knew that Nina Schmidt was 16 years old and he assured Schmidt's mother he would make sure that she was okay in her new job as maid and masseuse. The telephone call was interrupted by an incoming call. Phyllis Slade asked Elvin Lou Cook to call her back in a few minutes. Cook hung up the phone and gave Schmidt and Symington \$50 to buy anything that they needed to stay at the motel. Schmidt left the room and went to the motel lobby.

8. A few minutes later, Elvin Lou Cook called Phyllis Slade back and discussed Nina's job in more detail. He discussed with her that Schmidt would need to live at the motel during her training and that he would take Schmidt under his wing and personally train her. Cook also told her that he planned to take Nina and three other girls to work at a motel in Las Vegas. Slade was happy that someone would be willing to train her daughter to work in a motel, since Schmidt had no prior experience. Slade hoped that this new job would enable Schmidt and the family to gain some financial independence.

9. On September 30, 2000, Cook fired and evicted Symington, because she had thrown a party in her room the night before. Schmidt also left the motel, returning the next day with another friend she had recruited (at Cook's request) to replace Symington in the combined job of maid and prostitute. Schmidt was still considering the job offer, which Cook reiterated during this visit. Cook rejected Schmidt's friend for the maid and prostitute job.

10. On October 1, 2000, Schmidt told her mother some of the extra requirements of the job. Her mother called the police.

11. Detective Richard Hollis of the Great Falls Police Department was already investigating Cook and the motel. The department had received a complaint from another woman to whom Elvin Lou Cook had made the same job offer. On October 2, 2000, Hollis met with Schmidt, verified that Cook had offered Schmidt a maid job, contingent upon her willingness to engage in sexual conduct with him and with customers. Schmidt agreed to wear a concealed recorder (a "wire") and return to meet again with Cook. Schmidt's mother also agreed to her daughter wearing a wire to the motel.

12. Later on October 2, 2000, Schmidt returned to the motel, with the recording device in her purse. Detectives listened to her conversation with Cook, verifying its consistency with Schmidt's reports of the prior conversations. Eventually, Cook pulled down Schmidt's pants and underpants and swatted her on the bottom with a ping pong paddle, at which time Schmidt fled the premises.

13. The Great Falls police then obtained a warrant and arrested Elvin Lou Cook for felony aggravated promotion of prostitution and misdemeanor sexual assault. Cook ultimately pled guilty to misdemeanor promotion of prostitution and misdemeanor sexual assault on Schmidt. At his sentencing Elvin Lou Cook admitted that he hired women at the Triple Crown Motor Inn to give massages, spank customers and offer other specialized sexual services, and apologized to Schmidt and the other women.

14. Robert Cook found out about the arrest and the events leading up to it when a friend called him about a newspaper article describing Elvin Lou Cook's arrest. At no pertinent time did Robert Cook have any written policy regarding sexual harassment or quid pro quo supervisory practices at the Triple Crown Motor Inn.

15. On July 18, 2001, Deputy Sheriff Weinheimer of the Cascade County Sheriff's Department personally served Elvin Lou Cook with process in this case, finding him at the Triple Crown Motor Inn and serving him as the manager of the motel. Elvin Lou Cook never appeared. Despite his failure to

appear and defend, Elvin Lou Cook suborned false statements from Schmidt's mother (and brother) on the evening of the first day of the hearing, promising them \$150,000 and college tuition for the son if they gave written statements and testimony that Schmidt was a drug user and had propositioned Cook, offering him sex for a room at the motel. Schmidt's mother and brother provided written statements to Robert Cook on the morning of the second day of hearing. Robert Cook told them that he would not pay them, but would encourage his liability insurer to pay them for the statements and supporting testimony.

16. From the time of her first job interview with Elvin Lou Cook until the conclusion of the last interview with him (when she was carrying the wire), Schmidt experienced ongoing efforts by Cook to coerce her into sexual acts with him. She avoided and postponed his propositions during that time, because although she wanted the job and needed the money, his advances were unwelcome.

17. Prior to these events, Schmidt struggled with periodic depression. After Elvin Lou Cook's arrest and sentencing, Schmidt was the victim of two physical assaults by persons who had stayed at, worked at or partied at the motel. She was still unable to find work. Her depression worsened. In November 2000 she began to receive treatment, and since has received medication to treat her condition, now diagnosed as bipolar disorder. She qualified for Social Security disability benefits because of her condition as of November 2000.

18. Schmidt was never qualified to work as hotel maid without training. Elvin Lou Cook never intended to hire her simply as a maid. The offers he made, regarding free housing (and its value) and regarding earnings, were false and fraudulent. He intended and attempted to seduce her into sexual acts with him as the first step toward turning her into a prostitute working for him.

19. Schmidt suffered emotional distress as a result of Elvin Lou Cook's attempts to recruit her to engage in prostitution on his behalf as well as and as a condition for working as a maid, and as a result of his sexual harassment of her during the time she was attempting to obtain a job at the motel. She is entitled to the sum of \$35,000.00 for that emotional distress.

20. Robert Cook placed Elvin Lou Cook in the position of manager of the motel, clothing him with the authority to hire and fire employees and condition their employment upon whatever Elvin Lou Cook chose to require. Robert Cook did not provide employees or applicants with any policy either describing how to seek redress from Elvin Lou Cook's requirements or limiting his power over employees to conform with applicable public policy and

anti-discrimination laws. Robert Cook is responsible, with Elvin Lou Cook, for Elvin Lou Cook's conduct toward Schmidt.

21. Robert Cook knew or reasonably should have known of the pendency of this action since service of process upon Elvin Lou Cook in July 2001. Robert Cook knew or should have known of the prior investigation into the original and amended complaints, in which Elvin Lou Cook participated on behalf of the motel. Robert Cook knew or should have known of his potential liability, as owner of the motel, since the inception of the complaints. Robert Cook took no action to form the purported corporation and had no legal right to rely upon the seller to do so. Robert Cook did not effectively create any actual or apparent separation between his ownership of the motel and his brother's authority to manage the motel on his behalf.<sup>3</sup>

22. Robert Cook's testimony in this case amply demonstrates that despite his brother's guilty plea and the overwhelming evidence of record, Robert Cook still disputes that his brother did anything wrong. There is a risk that Robert Cook will allow his brother, or some other manager, to use a position of power in Cook's business to engage in sexual harassment of employees or prospective employees.

23. Elvin Lou Cook's conduct, in his dealings with Schmidt and others at the motel and in his conduct toward witnesses during this hearing, demonstrates that he rejects the concept of being bound by the law in his treatment of women.

#### IV. Opinion

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

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<sup>3</sup> The credible testimony of record establishes that Elvin Lou Cook introduced Schmidt to Robert Cook during the few days she was trying to obtain work from the motel. There is no credible evidence of record to support Robert Cook's claim that he actually or ostensibly vested all rights of control and operation in his brother. His testimony that he fired his brother immediately upon learning of the arrest is itself powerful evidence that no relationship other than employment existed between them with regard to Elvin Lou Cook's operation of the motel.

Although Schmidt considered Elvin Lou Cook's offer of employment, his attentions toward her and his aims for her future conduct as a prostitute were clearly unwelcome. She used a number of ruses (showers, doing her hair, sickness) to avoid his demands for sex. Conditioning her employment upon sexual favors and acts of prostitution constituted illegal *quid pro quo* requirements upon that employment.

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

When a charging party establishes a *prima facie* case of sexual harassment with direct evidence, the burden is then on the employer to prove, by a preponderance of evidence, "that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief." 24.9.610(5) A.R.M., ***applicable to complaints filed after July 1, 1997***, 24.9.107(1)(b) A.R.M.; *cf.*, *EEOC Compliance Manual*, "EEOC: Policy Guidance on Sexual Harassment", No. 137, No. 4046-47, pp. 104-05 (BNA, April 1990). The respondents here offered no such evidence. Elvin Lou Cook remained in default, and his efforts at buying false testimony confirmed that he had, indeed, engaged in illegal sexual harassment. *Cf.*, *State v. Baker*, 237 Mont. 140, 750 P.2d 436 (1988)(attempt to influence or intimidate witness admissible in criminal trial to prove consciousness of guilt).

An employer has no vicarious liability to an employee for an actionably hostile environment created by that employee's immediate supervisor if the employer exercises reasonable care to protect employees from such a hostile environment. *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Robert Cook exercised no such care to protect employees and potential employees from illegal sexual harassment by Elvin Lou Cook. Therefore, he is vicariously liable for his brother's conduct, since he placed his brother in a position of power which enabled Elvin Lou Cook to engage in such conduct.

Robert Cook's agent on the premises, Elvin Lou Cook, was timely served with the complaint against the motel. Although Robert Cook maintains that he had fired his brother immediately upon learning of the criminal arrest, the fact remains that the Cascade County Sheriff's Department served Elvin Lou Cook, manager, on the motel premises, and that prior to that service of notice of this contested case, Elvin Lou Cook participated in the Human Rights Bureau investigation of the complaints. Since no corporation existed and Robert Cook could not have reasonably relied upon the purported creation of a corporation by the seller of the motel, Robert Cook knew or reasonably should have known of the claim against the motel (of which he was the sole owner). The subsequent amendment of the complaint to name him personally therefore properly related back and the claims against Robert Cook are timely. *See, e.g., Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6, 8 (1990).

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

Schmidt had no genuine earning losses. Elvin Lou Cook tied both the inflated wage and free housing to the *quid pro quo* demands for sexual conduct with Cook and motel clients. Her only actual damage was the emotional distress she suffered, which may have temporarily exacerbated her preexisting bipolar disease. She is receiving treatment and disability payments for that disorder. She is not receiving any compensation for her emotional distress. For a period of time after her encounters with Cook, that emotional distress resulted from his conduct.

Emotional distress is compensable under the Montana Human Rights Act. *Vainio, op. cit.* Emotional distress recovery under the Act does not require the threshold proof that the emotional distress was serious and severe, required for such recovery in tort cases. *Sacco v. High Country Independent. Press*, 271 Mont. 209, 896 P.2d 411 (1995). *Vortex Fishing Systems, Inc. v. Foss*, 308 Mont. 8, 38 P.3d 836 (2001).

A claimant's testimony alone can 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 result from enduring that particular illegal discrimination. *See, e.g., Carter*

*v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (employment discrimination, 42 U.S.C. §1981); *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).

The facts of the illegal discrimination itself case frame a self-evident entitlement to recovery for emotional distress in this case. On the face of it, being hired as a hotel maid only if she would also engage in a variety of sadomasochistic and fetish sexual behavior with her boss and strangers would cause emotional distress. Additionally, Schmidt’s subsequent application for and receipt of SSDI benefits and medication prove the deterioration of her emotional condition, coming immediately after her encounters with Elvin Lou Cook.

Two black college students suffered emotional distress entitling them to \$3,500.00 each from being told that a private landlord would not rent to them because of their race. *Johnson v. Hale, op. cit.* Schmidt suffered far greater emotional distress from Cook’s treatment of her over a period of days rather than minutes. \$35,000.00 is the reasonable value of the emotional distress she actually suffered as a result of Elvin Lou Cook’s conduct toward her.

Upon a finding of illegal discrimination, the law requires affirmative relief, enjoining any further discriminatory acts and prescribing appropriate conditions on the respondents’ future conduct relevant to the type of discrimination found. §49-2-506(1)(a) MCA. Robert Cook must undertake training in sexual harassment in the workplace and the adoption of appropriate policies for his enterprises in Montana. Elvin Lou Cook must refrain from acting as an employer or supervisor in any motel business in Montana for a prolonged period of time. Although the department can only inspect to insure compliance of a respondent for a maximum of one year, §49-2-506(3) MCA, there is no such constraint upon its injunctive power.

## V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Respondent Elvin Lou Cook illegally discriminated against Nina Schmidt because of her sex when he subjected her to *quid pro quo* sexual

harassment as a condition of hiring her as a maid at the Triple Crown Motor Inn in Great Falls, Montana, on September 29-30 and October 1-2, 2000. Respondent Robert Cook, the owner of the motel, who placed his brother Elvin Lou Cook in the position of manager without providing a sexual harassment policy to protect employees and applicants, is jointly and severally liable with Elvin Lou Cook. §49-2-506 MCA.

3. Robert Cook and Elvin Lou Cook are jointly and severally liable to Schmidt for her resulting emotional distress, in the sum of \$35,000.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against the respondents. The department enjoins Elvin Lou Cook from acting in any capacity as an employer or supervisor in any motel business in the State of Montana for a period of five years from the date this order becomes final. The department enjoins both Elvin Lou Cook and Robert Cook from discrimination on the basis of sex against female employees and candidates for hire in any business in which either or both are involved in Montana. The department also requires Robert Cook to promulgate and publish to employees at any business in Montana in which he holds any ownership interest (either directly or by ownership interest in a corporation or other entity with an ownership interest in such a business) a full and appropriate policy regarding sexual harassment of employees, including a reporting policy and procedure for such persons who may be aggrieved by harassment by their actual or prospective supervisor. Robert Cook must submit his proposed policy (identifying all the businesses which will adopt it) to the department's Human Rights Bureau within 60 days of this decision and then adopt and implement the policy as approved by the Bureau, including any changes the Bureau mandates. Finally, Robert Cook must attend eight hours of training in sexual harassment in the workplace, and the training must be approved in advance by the Human Rights Bureau. Robert Cook must submit the proposed training for Bureau approval within 60 days of this decision. §49-2-506(1) MCA.

## VI. Order

1. The department grants judgment in favor of Nina Schmidt and against Robert Cook and Elvin Lou Cook on the charge that they discriminated against her because of sex when Elvin Lou Cook subjected her to *quid pro quo* sexual harassment as a condition of hiring her as a maid at the Triple Crown Motor Inn in Great Falls, Montana, on September 29-30 and October 1-2, 2000, and Robert Cook, the owner of the motel, placed his brother Elvin Lou Cook in the position of manager without providing a sexual harassment policy to protect employees and applicants. Elvin Lou Cook and Robert Cook are

jointly and severally liable to Schmidt for \$35,000.00 for her emotional distress, which the department orders them to pay to her immediately. Interest on this award accrues as a matter of law, in like fashion to a district court judgment.

2. The department enjoins and orders Robert Cook and Elvin Lou Cook to comply with all of the provisions of Conclusion of Law No. 4.

3. Nina Schmidt is the prevailing party.

Dated: May 23, 2002

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

Montana Department of Labor and Industry