BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Angela Stringer Altmaier, Charging Party, versus **Janet Haffner**, d.b.a. Good Time Charlie's Restaurant, R & R Casino, and Cody Bill's Steakhouse, and **Fred Haffner**, Respondents.	) Case Nos. 0011009560, 0011009561 & 0011009562)) *Final Agency Decision*))))))

I. Procedure and Preliminary Matters

Angela Stringer (now Angela Stringer Altmaier) filed three complaints with the Department of Labor and Industry on January 29, 2001. She alleged that Janet Haffner, doing business under the three business names in the above caption, and Fred Haffner discriminated against her in her employment because of sex. On August 31, 2001, the department consolidated the three cases, gave notice that Stringer's complaints would proceed to a contested case hearing and appointed Terry Spear as hearing examiner. The parties stipulated to extend department jurisdiction beyond one year after complaint filings.

Contested case hearing proceeded on April 8-11, 2002, in Great Falls, Cascade County, Montana. Stringer attended with counsel, Elizabeth Best, Best Law Offices P.C. Janet Haffner attended with counsel, Jean E. Faure and Jason T. Holden, Church, Harris Johnson & Williams P.C. Fred Haffner attended with counsel, Sara Sexe, Marra, Wenz & Johnson P.C. The parties filed the last post-hearing argument on June 3, 2002. The hearing examiner's file docket accompanies this decision.

II. Issues

The issue in this case is whether respondents subjected Stringer to unlawful sexual harassment and if so, what harm, pecuniary or otherwise, res ulted to Stringer and what reasonable measures the department should require to rectify that harm. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Angela Stringer (now Angela Stringer Altmaier) is a woman. She passed a high school equivalency exam at May Technical College where she

graduated as a medical secretary. After graduation, she pursued training as a Certified Nurse Assistant (CNA). Stringer worked as a CNA for five years, including on-call work at Golden Triangle Mental Health Center. In 2000, she sought other work because she had a back injury working as a CNA and could not do that work without pain. Stringer worked briefly as a cocktail waitress at the Holiday Casino in Great Falls until November 2000. She then applied for work with R & R Casino. In November 2000, Stringer was a single mother, with a 5-year-old daughter.

2. R & R Casino was one of three assumed business names under which Janet Haffner-Lynn (Janet Haffner in the caption), the owner, operated a sole proprietorship that included a casino, a bar and two restaurants on the premises. The other two business names in this consolidated case are those of the restaurants on the same premises as R & R Casino and R & R Lounge (the bar). Haffner-Lynn's first husband, Robert Haffner, had jointly owned and operated the premises with Haffner-Lynn from 1978 until his death more than a year prior to the alleged sex discrimination against Stringer.

3. Haffner-Lynn's business had grown from a small downtown bar in Great Falls to the combination of the two restaurants, the bar and the casino. In 2000, the business served a variety of customers, employing thirty to forty employees. As is common in the food service industry, Haffner-Lynn had many short term employees and had employed hundreds of people over the years. The business occupied one building which included an upstairs office, a downstairs office, an employee lounge, a banquet room and a fun room for children called the Kids Room. The bar was adjacent to the casino, separated by a pair of doors that by law had to be closed and locked at 2:00 a.m. The bar was adjacent also to Cody Bill's Steakhouse, one of the two restaurants, separated by a metal gate that was closed and locked at 2:00 a.m. Haffner-Lynn had a policy that the bartender and the cashier must leave together after the bar and casino closed, for safety purposes.

4. Stringer's mother, Kathy Stringer, worked at the casino as a cashier from October 20, 2000 to January 5, 2001. On November 4, 2000, Stringer filled out her application for employment at the casino. Pattie Smith was then the general manager of the casino, responsible for hiring, firing, disciplining, and scheduling employees. Smith placed Stringer's job application in the "dead file" because Haffner-Lynn preferred to avoid employing relatives at the same time.

5. On November 9, 2000, a bartender for Haffner-Lynn quit without notice. The bartender worked a combination of two day shifts and two night shifts. Haffner-Lynn needed to fill the shift immediately, so she looked

through all the employment applications and found Stringer's application in the "dead file." Stringer's application included Vera Courtney as a reference. Haffner-Lynn knew and respected Courtney. Haffner-Lynn directed Smith to interview Stringer despite the existing employment of Kathy Stringer. Haffner-Lynn decided it would not be a problem as long as the two did not work during the same shifts.

6. On or about November 13, 2000, Smith, acting on behalf of Haffner-Lynn, interviewed and then hired Stringer as a bartender. Stringer asked Smith for night shifts. Haffner-Lynn preferred that all her employees be available to work any and all shifts. Smith did not promise Stringer night shifts, but she did tell Stringer that initially she would need to work some day shifts for training and thereafter probably could work nights.

7. Stringer initially worked two day shifts and two night shifts, the same shifts as the bartender that she replaced. Brent Jacobson, an experienced bartender for Haffner-Lynn, trained Stringer. Jacobson warned her to "watch out" for Fred Haffner, the son of Haffner-Lynn and her first husband, because he acted inappropriately around young girls. Shortly after Stringer began work in the bar, Jacobson quit. He gave his notice after Smith hired Stringer. Jacobson's departure left the schedule sufficiently open so that Smith was able to assign Stringer to work all night shifts.

8. In November 2000, Fred Haffner worked for his mother in the business. He had been a member of the management team for the business since 1990, with some interruptions when he pursued other endeavors. Haffner, Smith and Haffner-Lynn were Stringer's supervisors. Smith and Haffner were a couple, cohabiting openly, with a child.[1] Their relationship was common knowledge among the employees of Haffner-Lynn.

9. In 1990, ten years before Stringer came to work for Haffner-Lynn, three former employees of the business filed Human Rights Act complaints of sex discrimination, alleging that Haffner had subjected them to harassment and hostile treatment because of their sex (female). After a 1991 consolidated contested case hearing on all three complaints, the hearing officer issued a proposed commission decision finding against two of the charging parties and in favor of the third. Haffner-Lynn and Haffner both testified during the hearing. Haffner-Lynn attended the entire hearing. The cases settled before

[1] At the time of hearing, Smith and Haffner were no longer together, and were apparently disputing the nature of their relationship, which Smith contended was a common law marriage.

the Commission acted upon the proposed decision. Haffner-Lynn adopted a sexual harassment policy as part of the settlement.[2]

10. The policy Haffner-Lynn adopted prohibited sexual harassment in any form, specifically defining sexual harassment to include sexual flirtations, touching, graphic or suggestive comments about an individual's dress or body, sexually degrading words to describe an individual and the display in the workplace of sexually suggestive objects or pictures. The policy specified that employees subjected to any sexually harassing behavior should notify a manager or owner immediately. The policy did not include any written procedure for investigating complaints of sexual harassment. The only grievance procedure available to Stringer in 2000 was to complain to Haffner, Smith or Haffner-Lynn.

11. In the course of his work in the business, Haffner frequently would visit with customers and employees in the bar. He often embarked upon sexual flirtations with women, sometimes touching them. He made suggestive comments about individuals' attire or bodies. He sometimes used sexually explicit words to describe individuals. He sometimes displayed sexually suggestive objects (such as thong underwear with the business' name on it) in the workplace.

12. Stringer, already afraid of Haffner as a result of Jacobson's comments, felt uncomfortable and "stupid" around Haffner. Her emotional reaction to his conduct was readily apparent.[3] Despite the sexual harassment policy, Stringer thought she had to endure Haffner's comments to keep her job. She did not talk to Smith, whom she rarely saw during her shifts, and she did not talk to Haffner-Lynn because she considered Haffner-Lynn unapproachable.[4]

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[2] The 1991 proposed decision required Haffner-Lynn to adopt such a policy, which did not exist at that time. The Human Rights Commission staff, like its successor, the department's Human Rights Bureau, had a regular practice of requiring "affirmative relief" (i.e., changes in practice, adoption of policies) as a condition of approval of a settlement.

[3] Stringer's demeanor during her testimony amply proved her inability to disguise her emotions. Any casual observer could readily ascertain her fear and distrust of Haffner. The clear and convincing evidence established that her reaction to Haffner's comments was visible to him at the time.

[4] Haffner-Lynn and her second husband frequented the business, and often spent an evening in the bar after eating, drinking and observing karaoke singers. Stringer had ready access to Haffner-Lynn, but was afraid to approach her.

13. In December of 2000, Haffner told Stringer she was required to wear an elf costume to work for Christmas.[5] Stringer resisted, because she thought the costume was unflattering and humiliating. Haffner insisted that she not only wear it, but try it on for him. After continued resistance, she agreed to try on the costume, because he was one of her supervisors. Because she was already wary of Haffner, she agreed with a fellow employee, Rochelle Johnson Spencer, that if Spencer did not see Stringer within five minutes after she went downstairs with Haffner, she should come looking for her. Haffner took her downstairs, and gave her a costume to try on in the bathroom. While she was in the bathroom, he stayed outside the door asking her how it fit, and asking her to come out. Very uncomfortable, Stringer finally emerged from the bathroom. At that point, Haffner began touching and feeling the costume, getting down on his knees and stroking first the outside of Stringer's legs in the costume (tightly fitting tights) and then the insides of Stringer's legs. Stringer was "frozen" and did not know what to do. At that point, Spencer came downstairs and Haffner stopped touching Stringer and got to his feet.

14. Stringer was too embarrassed to discuss Haffner's touching of her with Spencer or anyone else at the business when it occurred. She later gave confused and inconsistent accounts of the touching to her sister, because she remained embarrassed and uncomfortable talking about what had happened.

15. Stringer decided to make the best of wearing the elf costume, which she considered stupid rather than sexually provocative or inappropriate. She had her sister add freckles to her face and wore the costume more than once. When she quit wearing the elf costume before the end of the holiday season, she was not reprimanded or disciplined.

16. After the incident involving the elf costume, Stringer talked with Smith about some behavior problems of another bartender that Stringer had observed, and complained about Haffner's conduct. Stringer mentioned her fear of making the complaints because of the relationship Haffner had with Smith as well as his mother owning the bar. Smith included Stringer's comments about Haffner in her notes of the conversation. Smith arranged a meeting for Stringer with Haffner-Lynn. Haffner-Lynn met with Stringer after Christmas and before New Year's Eve. Stringer complained about Haffner's conduct and also about the other bartender. Haffner-Lynn told Stringer that she would meet with her again after the holiday season (Christmas and New

[5] At hearing, Haffner-Lynn and Haffner correctly noted that employees could have worn either the usual uniform or the elf costume. Stringer credibly testified that at the time she did not understand that despite Haffner's comments she had a free choice between the outfits.

Years) to resolve any continuing problems. Haffner-Lynn also told Stringer that she needed to be able to accept sexual conduct and comment in a bar, and that people misunderstood Haffner, her son, because he was overly friendly.[6]

17. Haffner-Lynn then instructed Haffner to stay away from Stringer. She decided that the real problem was between Stringer and the other bartender, not with her son. Within a few days, she directed Haffner to work with Stringer on a procedure for charging drinks during New Year's Eve, which he did. Haffner-Lynn took no further action to address Stringer's complaint about Haffner.[7] Haffner had no further contact with Stringer during her last few days of work.

18. After Stringer complained to Haffner-Lynn about Haffner, Haffner-Lynn took steps to verify hearsay she had previously heard about prior criminal offenses by Stringer's father and charges against Stringer.[8] But for Stringer's complaint about Haffner, Haffner-Lynn would not have acted to verify the rumors.

19. Smith posted a schedule for the week following January 1, 2001. Smith scheduled Stringer to work her usual 6:00 p.m. until 2:00 a.m. shift, after being off work for the two days following New Year's Day. During those two days, as a result of disagreements Smith had with Haffner-Lynn and Haffner, Smith quit without notice.

20. Haffner-Lynn redid the work schedule and changed Stringer to day shifts. Haffner-Lynn rationalized this change as necessary because Stringer's family was too frequently in the bar and casino when Stringer was working, because Stringer was not performing acceptably, because Stringer's family included "undesirables," because Stringer herself had faced criminal charges and because Stringer required more training. In fact, Haffner-Lynn changed Stringer's shift as the first step in a plan to either force Stringer to quit or to fire her because she had complained about Haffner. Haffner-Lynn also changed the schedules for a number of other employees at the same time. Those changes did not transform her motives for changing Stringer's schedule.

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[6] At hearing, Haffner-Lynn denied making these comments to Stringer, but made the same comments during her testimony. Her denial was not credible.

[7] Although Haffner-Lynn was purportedly coerced by the Human Rights Bureau into suspending Haffner, the "suspension" was a sham.

[8] Haffner-Lynn's testimony about when and why she undertook this verification is unclear and suspect, and leads to the finding that she did not do so until after Stringer's complaint about Haffner.

21. On the revised schedule, Stringer worked during the day on Thursday, January 4, 2001. A cashier from the casino called Stringer on January 4 and told her that Haffner had changed her shift to day shifts, effective that day.

22. Stringer immediately called Haffner-Lynn to protest the change in shifts, explaining that she needed her job, but could not work the job on those shifts because of her child. Stringer was crying and upset during the phone conversation. Haffner-Lynn asked Stringer to come in that day, meet with her and work. Stringer, without first making any efforts to do so, insisted she could not arrange day care on such short notice. Haffner-Lynn responded by insisting that Stringer come in that day. Stringer refused. Stringer separated from her employment with R & R Casino effective January 5, 2001.

23. Haffner-Lynn did not tolerate a female employee criticizing her son's behavior toward women. Because of her refusal to consider any complaints against Haffner, and her hostile acts toward Stringer because she complained, Haffner-Lynn made it a condition of employment that Stringer endure Haffner's conduct without complaining or resisting. Haffner-Lynn had notice of prior complaints regarding sexual harassment of female employees by Haffner.[9] She rejected all such complaints. Haffner-Lynn does not believe that her son ever sexually harassed anyone at any time, or that he ever would. Haffner's conduct toward Stringer and around her was offensive, but it was Haffner-Lynn's response to Stringer's complaint that created the hostile environment that Stringer had feared.

24. As the result of Haffner's conduct during Stringer's employment, she felt embarrassed, "frozen," humiliated, and distressed. She felt "stupid." When she discovered Haffner-Lynn's shift change, Stringer was upset, crying, and shaking. She was unable to find replacement work for three weeks. Since she was living from paycheck to paycheck, she was terrified about her ability to provide for her daughter and herself. She got behind on her payments. As a result of getting behind, she lost her car, because she was late on payments and could not catch up. Her financial problems caused her more emotional distress. She did not seek counseling because she could not afford it. Her

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[9] Stringer's evidence in this regard, for many of the alleged other instances of sexual harassment of other female employees, lacked any proof that Haffner-Lynn received any complaint or other notice of the alleged conduct. Nonetheless, Stringer did prove that Haffner-Lynn had notice of some prior complaints and had uniformly rejected the complaints without any investigation (except when forced to respond in litigation), because she believed in her son's goodness. All of the alleged other instances of sexual harassment are otherwise irrelevant and do not form the basis for any findings herein except the findings of prior notice to Haffner-Lynn and refusal by her to consider the validity of any such alleged instances.

emotional distress, resulting in some part from her treatment by Haffner and in larger part from her loss of her job due to Haffner-Lynn's conduct, entitles her to the sum of $7,000.00.

25. Stringer earned $6.00 per hour, for a forty-hour week, working for Haffner-Lynn. She worked a forty-hour week with overtime and double time. For the eight-week period she worked for Haffner-Lynn, she earned $1,896.75 in wages, an average of $237.09 per week. She also earned $553.16 in "allocated tips" for the eight-week period, an average of $69.14 per week in tips, which exceeded her actual tips as a bartender. Her total average weekly earnings, included allocated tips, were $306.23. She lost three weeks of wages before she found new employment, at a wage which replaced her lost earnings.[10] Interest at 10% simple per annum for the 77 weeks from the beginning of those losses until the date of this decision is $132.14.

26. Stringer's employment after her work for Haffner-Lynn began with Benefis hospitals in Great Falls, where she quickly advanced to a salary ($7.94 per hour) that entitled her to more wages for a forty-hour week than she averaged for wages plus overtime and double time and tips at the bar. She returned to Benefis as a CNA because she could not immediately find other employment. When she became pregnant, she was unemployed as a CNA for four weeks in October 2001, but she failed to prove that she could have worked as a bartender during that time.[11]

27. Since her pregnancy, Stringer has worked for Golden Triangle Mental Health for 40 hours a week at $7.18 per hour, from October 29, 2001 through the hearing. She works no overtime or double time, and earns no tips, but the employer does contribute $325.00 per month toward her health insurance. Her salary is $287.20 per week at Golden Triangle (40 x $7.18), and the health insurance contribution of the employer has greater value than the additional weekly earnings she received working for Haffner-Lynn.

28. At the time of the hearing, Haffner was no longer a general manager for Haffner-Lynn. Nonetheless, he still performed work at the business on a fairly regular basis when he was not occupied elsewhere, and his mother can (and will) rehire him as a management employee as soon as this case resolves. She will continue to disregard any complaints about his conduct toward female

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[10] During that three week period, Stringer worked "on call" for Golden Triangle Mental Health, as she had worked "on call" throughout her employment with Haffner-Lynn. Such earnings did not offset her losses.

[11] According to Stringer, her physician restricted her lifting, which prevented her from working as a CNA, but she would have been able to work as a bartender. Stringer failed to present adequate supporting evidence to verify her testimony in this respect.

employees, without undertaking any independent investigation. She may continue to respond hostilely toward any female employee who makes such a complaint, thereby again making it a condition of employment that female employees endure Haffner's conduct without complaint or resistance. The only way to protect employees, while still according to Haffner-Lynn the right to include her progeny in her business, is to require that she must use an independent investigator to address any and all complaints about Haffner's conduct toward female employees, as a condition of his further involvement in the business.

IV. Opinion

Montana law prohibits sexual harassment in employment pursuant to §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 working environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), ***aff. sub. nom.*** *Vainio v. Brookshire*, 852 P.2d 596 (Mont. 1993). When applying the Act, it is both useful and appropriate to examine federal civil rights case law arising under parallel anti-discrimination statutes. ***See***, *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987); *Snell v. Montana-Dakota Utilities Company,* 198 Mont. 56, 643 P.2d 841 (1982).

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986), the Supreme Court held "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." The Court noted that not all conduct that may be called "harassment" affects a term, condition, or privilege of employment. *Id.* ***at*** 67, ***citing*** *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.*, ***quoting*** *Henson v. City of Dundee,* 682 F.2d 897, 904 (11th Cir. 1982).

The hostile or abusive environment standard has developed since *Meritor*, in a series of decisions. *Farragher v. City of Boca Raton,* 524 U.S. 775, 787-88 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). The *Meritor* standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."

Harris ***at*** 21. The prohibition against hostile environment sexual harassment is not "a general civility code for the American workplace." *Oncale* ***at*** 80. " 'The critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' " *Id.*, ***quoting*** *Harris* ***at*** 25 (Ginsburg, J., concurring).

The actual circumstances illuminate whether a work environment is hostile, which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. ***at*** 23. The use of the term "may" reiterated the Court's insistence that this is a non-exhaustive list of circumstances to consider. The issue "can be determined only by looking at all the circumstances." *Id.*; ***see***, *Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir.1999) (stating that "it is well-established that the court must consider the totality of circumstances.").

Whether sexual harassment occurs in the workplace depends upon the totality of circumstances and the analysis does not exempt certain "rugged environments" from the prohibitions against unacceptable harassing behavior. *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179 (4th Cir. 2000). The work environment cannot be a hostile environment based on gender, be it a bar, a construction site or a day-care center.

The appropriate test to evaluate whether a work environment is hostile involves three factors: (1) Whether the complainant was subjected to verbal or physical conduct of a harassing nature, (2) whether the conduct was unwelcome, and (3) whether the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Nichols v. Azteca Restaurant Ent., Inc.*, 256 F.3d 864, 873 (fn. 14) (9th Cir. 2001), ***citing*** *Farragher* ***op. cit.***; *Pavon v. Swift Transportation. Co.*, 192 F.3d 902, 908 (9th Cir.1999); *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir.1991) and *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir.1988); ***see also*** *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000); ***and*** *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir.1995).

In this case, Haffner did subject Stringer to verbal and physical conduct of a harassing nature and the conduct was unwelcome. However, until Stringer complained to Haffner-Lynn, the conduct was borderline with regard to whether it was severe or pervasive enough to alter the conditions of Stringer's employment and create a hostile work environment. In late December, when Haffner-Lynn talked with Stringer and heard her complaint, Haffner-Lynn could have resolved the matter by inaugurating an actual investigation,

maintaining the separation between Haffner and Stringer that she started (but did not maintain) and refraining from taking adverse action against Stringer because she was not tolerating Haffner's conduct. The circumstance that created the hostile environment was Haffner-Lynn's reaction to the complaint. As Stringer had feared, complaining about harassment by the owner's son caused her more grief than the harassment itself had caused.

Stringer could have prosecuted this case as a retaliation claim as well as a harassment claim. She belatedly attempted to do so, but did not timely plead an express retaliation claim. However, the owner's reaction to her complaint was to heighten the hostility of the work environment. Stringer could properly present evidence of Haffner-Lynn's reaction and conduct as part of her hostile environment claim.[12] Stringer, because she was a female employee who was unwilling to suffer harassment from Haffner, now faced radically changed terms and conditions of employment. Her schedule changed, to her detriment.[13] Her past became the subject of searching inquiry by Haffner-Lynn. Her work environment became completely hostile, because she would not accept Haffner's conduct in silence.

Obviously, Haffner-Lynn's failure to follow her own sexual harassment policy and act with reasonable care on Stringer's complaint renders the *Farragher* defense[14] unavailable here.

Stringer, as part of her case, sought administrative notice of the proposed decision in 1991 in the three discrimination claims based on Haffner's alleged conduct in 1990. For purposes of notice to Haffner-Lynn of prior complaints against Haffner, the proposed decision (exhibit 55) was proper and was admitted. The proposed decision is not binding as to the facts found therein–the complaints were settled without Commission action on the proposed decision. But Haffner-Lynn had notice of both the testimony in that case and the proposed decision. Her conduct when she received notice of later complaints, and ultimately heard Stringer's complaint, is viewed in light of her

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[12] Stringer did not present a *quid pro quo* case, in which acquiesence in sexual advances by a supervisor was a condition of her employment. Haffner-Lynn did not necessarily even want Stringer to acquiesce in Haffner's conduct, but only to be silent about it.

[13] Haffner-Lynn correctly argued that she was never required to schedule Stringer for only night shifts. However, Haffner-Lynn could not thereby switch Stringer off of night shifts because Stringer would not be silent about Haffner's harassment.

[14] The *Farragher* defense is that Haffner-Lynn exercised reasonable care to prevent and promptly correct sexually harassing behavior and that Stringer unreasonably failed to take advantage of the corrective or preventive opportunities provided by Haffner-Lynn or otherwise failed to avoid the alleged harm. *Burlington Industries,* ***op cit. at*** 764-765; *Farragher,* ***op cit. at*** 807-808.

knowledge about prior complaints. Haffner-Lynn did not have notice that Haffner had engaged in previous sexual harassment.[15] She did have notice that Haffner was the subject of prior complaints of sexual harassment. For purposes of notice, the time between the prior complaints and Stringer's complaint is not prohibitive. ***See***, *Kalanick v. B.N.R.R. Co.*, 242 Mont. 45, 788 P.2d 901 (1990).

Aside from proof of notice, Stringer's evidence regarding a long series of alleged harassing acts by Haffner (many of which went far beyond her testimony of his conduct toward her) was not relevant to any issue in this case. Stringer's counsel ably argued that such evidence established a common plan of harassing behavior admissible under Rule 404(b) M.R.E., arguing as well virtually every other exception within 404(b). However, the ultimate issue remained whether evidence of other wrongs could be considered to prove that Haffner's character was such that he behaved in the same wrongful fashion with Stringer. The rule clearly barred such evidence. Stringer's evidence fell short of establishing the requisite similarity in conduct necessary to allow the evidence as proof of common plan or scheme or course of conduct.[16] For an example of sufficient similarity, ***see***, *Cartwright v. Equitable Life Assurance Soc'y*, 276 Mont. 1, 914 P.2d 976 (1996).

The same notice analysis applicable to Stringer's other wrongs evidence applied to Haffner-Lynn's proof (and request for administrative notice) of the criminal convictions of Stringer's father. Haffner-Lynn asserted that she had notice of those convictions prior to Stringer's complaint to her. To prove notice of the convictions required presenting evidence of the convictions, which the hearing examiner allowed over Stringer's objections. Haffner-Lynn ultimately failed to prove that she had sufficient notice of the criminal

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[15] According to an unpublished federal decision cited by Haffner-Lynn, notice of prior harassment (as opposed to prior alleged harassment) must be by a valid prior complaint. *Woodhouse v. Motel 6 G.P., Inc.*, 67 F.3d 310 (9th Cir. 1995)(unpublished disposition). While the unpublished disposition is not authoritative, its reasoning certainly is. Stringer did not establish that any prior complaints were finally adjudicated as valid.

[16] The elements for establishing the admissibility of other wrongs evidence are: (1) the other crimes, wrongs, or acts must be similar; (2) the other crimes, wrongs, or acts may not be remote in time; (3) the evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity or absence of mistake or accident; and (4) although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *State v. Matt*, 249 Mont. 136, 814 P2d 52 (1991).

proceedings before Stringer's complaint to her or that she would have undertaken her subsequent inquiry to confirm what she had already heard but for Stringer's complaint. Thus, Haffner-Lynn's purported proof of notice ultimately helped to establish her discriminatory motive.

Haffner also sought administrative notice of the time of sunset on a particular day, as part of his rebuttal of evidence of his conduct toward other female employees and former employees.[17] Since the hearing examiner has refused to consider the evidence of other wrongs, but has only considered evidence of notice to Haffner-Lynn of prior complaints about alleged harassment, Haffner's rebuttal of the other wrongs evidence was moot, including the time of sunset on the particular day.

The damages the department may award include any reasonable measure to rectify any harm Stringer suffered. §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); ***accord***, *Albermarle Paper Company v. Moody*, 422 U.S. 405 (1975).

By proving discrimination resulting in loss of her job, Stringer established a presumptive entitlement to lost wages. *Albermarle Paper Company*, ***supra at*** 417-23. Stringer must prove the wages she lost, but not to unrealistic precision. *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 607 (7th Cir. 1985); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3rd Cir. 1984); *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award).

In this case, the only back wages Stringer lost came during her initial period of unemployment. Thereafter, she actually earned more in wages and/or benefits than she had been earning from Haffner-Lynn. The only additional period of actual wage loss arose during Stringer's pregnancy, and Stringer failed to prove that her alleged medical limitations precluded her from working as a CNA but not as a bartender.

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[17] While the majority of Stringer's "other wrongs" evidence addressed alleged incidences of harassment of other employees, some purported to prove efforts to suborn false testimony or intimidate witnesses.

Prejudgement interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d at 523; *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987).

Since Stringer at the time of hearing was earning more in wages and/or benefits than she had earned from Haffner-Lynn, front pay was not appropriate. Front pay compensates for probable future losses in earnings, salary and benefits to make the victim of discrimination whole until she can reestablish her "rightful place" in the job market. *Sellers v. Delgado Comm. Coll.*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *Rasmussen v. Hearing Aid Inst.*, HRC Case #8801003988 (March 1992). Stringer has already done so.

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 under *Sacco v. High Country Ind. 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 the 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 frame a self-evident entitlement to recovery for emotional distress in this case. On the face of it, putting up with unwelcome verbal and physical conduct of a harassing nature from the owner's son for eight weeks, and then being switched by the owner to an inaccessible shift after complaining about the conduct and thereupon losing the job would cause emotional distress.

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.*** Stringer suffered far greater emotional distress from her treatment by Haffner and Haffner-Lynn over a period of two months rather than minutes. $7,000.00 is the reasonable value of the emotional distress she actually suffered as a result.

Haffner and Haffner-Lynn are jointly and severally liable for the damages awarded to Stringer, as employers, Haffner as an agent of the employer and Haffner-Lynn as the employer. §§49-2-101(11) and 49-2-506 MCA.

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. Haffner-Lynn must undertake training in sexual harassment in the workplace. Prior to involving Haffner again in her enterprise in any capacity, she must adopt appropriate policies providing for investigation by an independent third party of any allegations of harassment of female employees by Haffner. She must also verify that Haffner has undertaken training in sexual harassment in the workplace before permitting him to work in her enterprise in any capacity. Haffner must undertake training in sexual harassment prior to engaging in any ownership or management activity in any casinos, bars and restaurants in the state of Montana. Both must cease and desist from engaging in, allowing or protecting sexual harassment in any such business enterprises. 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. Janet Haffner-Lynn (aka Janet Haffner), d.b.a. Good Time Charlie's Restaurant, R & R Casino, and Cody Bill's Steakhouse, and Fred Haffner illegally discriminated against Angela Stringer Altmaier (fka Angela Stringer) by subjecting her to sexual harassment in her employment from November 13, 2000, through January 4, 2001, in a continuing course of conduct.

3. Haffner and Haffner-Lynn were both employers of Altmaier pursuant to the statutory definition of "employer." §49-2-101(11) MCA.

4. Haffner and Haffner-Lynn are jointly and severally liable to Altmaier for her lost wages resulting from their illegal discrimination, in the sum of $918.69, for prejudgment interest upon her lost wages in the sum of $132.14, and for the value of the emotional distress suffered by Altmaier as a result of their illegal discrimination, in the sum of $7,000.00. §49-2-506(1)(b) MCA.

5. The law mandates affirmative relief against Haffner. The department enjoins him from discrimination against female employees by taking advantage of his position as an employer or agent of an employer to subject such employees to sexual harassment. Within 60 days of this final order, Haffner must file with the Human Rights Bureau a written statement of any and all employment and business endeavors involving casinos, bars or restaurants within the state of Montana in which he is currently involved, and follow any directions from the Bureau regarding changes in the manner in which he conducts those activities, to assure non-discrimination. Within 60 days of this decision, unless the Bureau allows him additional time, Haffner must also attend 8 hours of training approved by the Bureau in sexual harassment identification and prevention techniques. Should Haffner fail timely to file to comply with each provision of this injunction, the department hereby orders that Haffner cease and desist from any such employment or business endeavors in the state of Montana until such time as he shall fully comply. §49-2-506(1) MCA.

6. The law mandates affirmative relief against Haffner-Lynn. The department enjoins her from discrimination against her female employees by failing and refusing to receive and reasonably investigate complaints of sexual harassment by Haffner amd from discrimination by acting adversely to any female employees who refuse to remain silent in the face of Haffner's harassing behavior. Within 60 days of this decision, Haffner-Lynn must file with the Montana Human Rights Bureau written proposed rules against sexual harassment for her enterprise in Great Falls ready for adoption and publication upon approval by the Bureau or ready for amendment, adoption and publication should the Bureau recommend any amendments, that

a) identify an independent third party unrelated to Haffner-Lynn and Haffner to whom an employee can present an internal complaint of harassment by Haffner and by whom a reasonable, thorough and impartial investigation of such complaints will be undertaken promptly,

b) require her enterprise to act to protect the complainant from any harassment disclosed in the investigation, and

c) include the means of publication of the policies to the employees.

Within 60 days of this decision Haffner-Lynn must attend 8 hours of training approved by the Bureau in sexual harassment identification and prevention techniques. §49-2-506(1) MCA. Should Haffner fail timely to

comply with each provision of the injunction in the preceeding paragraph, the department hereby orders that Haffner-Lynn cease and desist from any employment of Haffner in any capacity in her enterprise in Great Falls until he shall fully comply. Should Haffner-Lynn fail timely to comply with each provision of this injunction, the department hereby orders that she cease and desist from any and all operations and business endeavors in her enterprise in Great Falls until she shall fully comply. §49-2-506(1) MCA.

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

VI. Order

1. The department grants judgment in favor of Angela Stringer Altmaier (fka Angela Stringer) and against Janet Haffner-Lynn (aka Janet Haffner), d.b.a. Good Time Charlie's Restaurant, R & R Casino, and Cody Bill's Steakhouse, and Fred Haffner on the charge that they discriminated against her because of gender (female) when they subjected her to a sexually hostile and offensive working environment from November 13, 2000, through January 4, 2001, in a continuing course of conduct.

2. The department awards Altmaier the sum of $8,050.83 and orders Janet Haffner-Lynn and Fred Haffner, jointly and severally, to pay her that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

3. The department enjoins and orders Janet Haffner-Lynn to comply with all of the provisions of Conclusion of Law No. 6.

4. The department enjoins and orders Fred Haffner to comply with all of the provisions of Conclusion of Law No. 5.

Dated: July 19, 2002.

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