# BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

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| **Pam Hunter**, Charging Party, vs. **Marcus Johnson, M.D.**, Respondent. | ) | *HRC Case No. 0029009954* |
| | ) | *Final Agency Decision* |

## I. Procedure and Preliminary Matters

Pam Hunter, the charging party, filed a complaint with the Department of Labor and Industry on December 21, 2001. She alleged that Marcus Johnson, M.D., the respondent, discriminated against her on the basis of sex (female), subjecting her to a sexually hostile and offensive work environment during her employment and retaliating against her. On July 16, 2002, the department gave notice Hunter's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The hearing convened on December 16, 2002, and concluded on December 18, 2002, in Great Falls, Montana. Hunter and her attorney, Jennifer S. Hendricks, Meloy Law Firm, attended. Johnson and his attorney, Jean E. Faure, Church, Harris, Johnson & Williams, P.C., attended. Human Rights Bureau investigator Lynette Lee, charging party Pamela Hunter, Kelli Meuchel, Vivian McCormick, Dorothy Kingston, Dick Peterson, Barbara Lee, respondent Marcus Johnson, Marian Jean Fitzwater Nelson and Mary Bessette testified at hearing. Hunter filed the last post-hearing argument on March 17, 2003. Copies of the hearing docket and exhibit list accompany this decision.

On December 17, 2003, during the hearing, Johnson filed a motion to exclude the telephone deposition testimony of Hunter's Colorado counselor, Moshe Rozdzial. The hearing examiner denies the motion, and admits the deposition of Rozdzial. The hearing examiner will consider his treatment and evaluation of Hunter, but not any conclusion he reached regarding Hunter's credibility or the propriety of her decision to move to Denver. The ruling is explained in the opinion.

## II. Issues

The issue in this case is whether Johnson subjected Hunter to a sexually hostile and offensive work environment. A full statement of the issues presented by the parties appears in the final prehearing order.

## III. Findings of Fact

1. Marcus Johnson, M.D., the respondent, hired Pam Hunter, the charging party, in November 1998 as his office manager.

2. Hunter is a native of Montana who spent 7 years in Sacramento, California, where she earned a real estate license. She obtained a certification as a medical assistant and worked in the medical field in clerical and office manager capacities. From 1990 to 1992, she worked at Benefis Hospital (then Columbus). She thereafter worked steadily as a medical secretary for various physicians. She was working for Stephanie Herder in November 1998. Hunter lived in close proximity to her parents in Great Falls, and had daily contact with them. In 1998, her teenage son resided with her. At the urging of Barbara Lee, the retiring office manager for Johnson, she accepted the position of office manager with Johnson.

3. Johnson, the sole owner of his medical practice, is board-certified as a family practice physician. He has practiced since 1967. Until January 2000, his practice included surgery and obstetrics. Thereafter his practice included the rest of the broad range of family practice. While Hunter worked for him, he was also the President of the North Central Montana Physicians Association, a position he held since 1996 when the participating physicians formed NCMP.

4. During Hunter's employment, Johnson typically spent four full days in the office and one half day on Wednesday. He encouraged his staff to schedule between 12 and 25 patients each day in 15-minute increments with appointments beginning at 8:30 a.m. His practice also involved "drop in" patients. He would accommodate almost anyone seeking treatment from him on any given day.

5. Between November 1998, and November 2001, Johnson typically arrived at work before 8:30 a.m. He usually collected messages and mail from Benefis Hospital and made rounds of his hospital patients (at both Benefis locations) before coming to his office in the morning. He took a two-hour lunch from 11:00-1:00 p.m., after which he began seeing patients again in his office. He also handled all of his own calls during the week.

6. Johnson wanted the atmosphere in his office to be relaxed and family-oriented. He asked about his employee's lives, including their families. He provided treatment to members of employees' families. He felt free to call his employees at home, and he did "favors" for his employees. He visited with his staff about his life and family. For example, he liked to tell employees about his son's horses.

7. Hunter discussed with co-employees her status as a divorced, single mother. She was open and shared personal information about her life with co-employees Vivian McCormick and Jean Fitzwater. Hunter also talked with her co-employees about her financial struggles. All the employees in the office discussed their families and their personal lives with one another.

8. Barbara Lee trained Hunter in November 1998 for period of a few weeks at most. During that time, Lee learned that Hunter loved horses, that she had problems with her ex-husband regarding both being reliable in plans with their son and regularly making child support payments, and that Hunter's son attended school in Centerville.

9. Hunter's co-workers discussed her social life, asking her about dating and encouraging her to date. Johnson heard some of the conversations and began participating in them. As time passed, he also initiated conversations about dating and male-female relationships. He had these conversations with Hunter to a greater degree than with other employees. After Hunter's first six months of employment, Johnson's participation in conversations about her personal matters began to manifest a change in his attitude toward her. She felt he might be showing her sexual attention, which was unwelcome to her.

10. Johnson enjoyed visiting with Hunter. He began spending more time working in the front office, where she worked. He sometimes pulled his chair up next to her, crowding her. He began making comments of a sexual nature to her and in her presence, which Hunter found troublesome.

11. Over the course of late 2000 and early 2001, Johnson's interactions with Hunter changed further. On one occasion, prompted by staff discussion about a newspaper story regarding Rohypnol, Johnson told Hunter that if he knew where she was going that night, he would slip the drug into her drink. After he left, another employee told Hunter that the drug Johnson mentioned was the "date rape drug." She did not consider the comment funny. She did not initially believe he was serious, but still felt somewhat threatened. Johnson repeated the comment several more times on other days. Her fear grew and she no longer was certain that he was joking.

12. Johnson also commented several times to Hunter that while traveling he had written on the bathroom wall, "For a good time call Pam," with her home phone number. The locations he mentioned included bathrooms in Wyoming as well as those in the local hospital. Hunter wanted

to believe that Johnson was joking, but the developing pattern of comments heightened her concerns about his interest and attitude toward her.[1]

13. Johnson frequently commented favorably on Hunter's physical appearance and otherwise behaved in ways that suggested to her that he had some interest in having a romantic relationship with her. He called her at home, asked her personal questions, and dropped small gifts off at her home. Chancing to meet her in a public place one weekend after she had been doing housework, he whispered in her ear that she looked pretty, "even at her worst." He complimented her another time by saying that if he were not married he might want to marry her.

14. On another occasion, Johnson took Hunter to his home to show her his son's colts that she had expressed interest in seeing. While there, he gave her a tour of his home. Johnson did not make any sexual advances toward Hunter during the visit to his home. However, at the end of the visit he leaned toward her and remarked, "Let's get out of here before we get caught." In the context of his other behavior, Hunter reasonably wondered whether his pretending they were doing something secret indicated he wanted to initiate an illicit relationship with her.

15. Johnson also shared intimate information about patients with Hunter, such as telling her he had found a condom inside a patient during a pelvic exam. Hunter's job did not involve addressing patients' medical issues. She was uncomfortable hearing such information, and uncomfortable with Johnson's increasingly frequent discussions of intimate details of patient care (on the telephone with the patient) from the front office, within Hunter's hearing.

16. Johnson continued to crowd Hunter physically. He positioned his chair or his body so she was trapped at her desk and could not move without making physical contact with him. When she filed charts, he stood so that she could not avoid physical contact in doing her work. Johnson also touched Hunter directly, rubbing her shoulders and sometimes grabbing her waist.

17. Johnson began to spend longer periods of time in the front office, staring at Hunter as she worked. She responded by turning away from him

[1] Johnson made a similar comment at least once to another female employee, but did not subject the other employee to the same range of other behavior as Hunter.

and shielding her face from his view. He sometimes then moved to a new position, from which he could again stare at her.[2]

18. Hunter did not welcome Johnson's attentions. With some assistance from an office nurse, Vivian McCormick, she tried to avoid him as much as possible. She tried to dress unattractively. She was frequently tearful and upset at the office. Hunter did not confront Johnson about his behavior. Her fellow employees, regardless of whether they noticed the change in Johnson's conduct toward Hunter, observed that she was extremely upset about his treatment of her.

19. Johnson did not regularly act toward other female employees in the ways that he acted toward Hunter. Johnson had acted in some similar ways toward McCormick at the beginning of her employment, but he stopped when she gained weight shortly afterward. Johnson did not call Barbara Lee and Jean Fitzpatrick Nelson at their homes, bring them gifts, or take an acute interest in their personal lives. The only other employee Johnson had touched in a similar manner to Hunter was a 19-year-old woman who later replaced Hunter as office manager.

20. In April 2001, Hunter was working at her desk when Johnson reached from behind her desk to pick up a pen on her desk. Rather than reaching over her, he reached between her arm and her body. He brushed his hand along her breast as he reached toward the desk.

21. After this incident, Hunter contacted the Montana Human Rights Bureau and spoke to investigator Lynette Lee. Hunter was the most emotionally upset charging party Lee had ever interviewed in her years of conducting investigations of sexual harassment complaints. Hunter cried throughout their entire interview. Hunter decided not to file a complaint at that time.

22. Lee encouraged Hunter to confront Johnson about his behavior. Hunter was not a confrontational person, and could not conceive of an appropriate way to raise the issue with her employer. She was afraid of losing her job, a reasonable fear. She was also emotionally unable to face the man who was both her employer and her harasser, to tell him her fears and feelings. By April 2001, she was afraid of Johnson.

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[2] Sometimes Johnson held and adjusted his genitals when sitting down in Hunter's presence. One other woman observed this "adjusting" behavior, disregarding it as a habit.

23. Shortly after Hunter's visit with Lee, Johnson was standing just behind Hunter as she talked on the phone at work. He grabbed her shoulders as she hung up. She was startled by his unexpected physical contact when she had not been aware he was behind her. She swung her arm back at him and told him never to do that again. But for her surprise, she would have done nothing, except perhaps recoil from the unwanted contact. After this incident, Johnson stopped touching Hunter. He stood uncomfortably close to her more often and crowded her so that she had to brush against him to move within the small office area to do her work. She suspected that he was making a point of staring at her buttocks as she moved around the office.

24. Hunter never again confronted Johnson about his behavior. He more frequently and aggressively crowded her and stared at her after her single act of resistance to his physical touching. His escalating conduct increased her fear of retributive employment action. She was having personal financial difficulties and needed her job.

25. Johnson did not increase his "non-touching" harassing conduct toward Hunter to retaliate against her for resisting his touching. He did it to express his attraction for her in ways other than by touching her, since she had expressly told him to stop touching her. He could not reasonably have believed that the increased harassment was either welcomed or invited.

26. Hunter switched from wearing dresses to pants and turtle necks. She tried to look "frumpy, ugly, worse," to get him to cease his unwelcome attentions. His attentions did not diminish.

27. Hunter persisted in trying to avoid Johnson at work. She stopped doing any filing when he was present, and avoided entering data into the computer that was kept in his office, except when he was not present. By the end of her employment, she spoke to Johnson only when necessary for her job duties. She tried to use body language to discourage him. When he crowded her, she showed her anger, sometimes slamming charts down on the desk or backing her chair up and leaving the reception area because he was too close.

28. During the last few months of her employment, Johnson crowded Hunter to the point that she had to reach across him to answer the phone. She began to wait until he was not present to fax or phone as well as to file.

29. Johnson responded to Hunter's "unfriendly" behavior by paying more attention to her when he was in her vicinity, and making a point of spending more time in her vicinity. He could not reasonably have missed her attitude, her reactions to his comments and behavior or her growing aversion to social interaction with him and to his very presence.

30. McCormick resigned from her nurse job in Johnson's office at the end of July 2001. McCormick had unobtrusively acted as buffer between Hunter and Johnson. Her departure left Hunter feeling more frightened and exposed to Johnson.

31. By the Fall of 2001, Hunter reasonably considered Johnson's continued pervasive conduct toward her to be intolerable. He did more than make sporadic abusive comments and gender-related jokes. He did more than occasionally teasing her. He went beyond attempts at personal conversation with her. Avoiding his frequent conduct interfered with her job performance, making it more difficult to do her job and altering her working conditions. Contending with his daily actions humiliated her. She reasonably concluded that she had the choice between continuing to endure his conduct or leaving her job.

32. During the last three months of her employment with Johnson, Hunter became depressed and angry on Sunday nights about going back to work the next day. In the mornings, when she saw Johnson's vehicle drive up to the office early (as he regularly did), Hunter began to feel that she might become physically sick.

33. Hunter began to look for a new job. She made limited inquiries into possible jobs in the medical field in Great Falls. She believed that Johnson would give her a bad reference, so she did not pursue any openings in physicians' offices. She investigated openings and applied for jobs in Great Falls and in Helena (where she thought she might be able to stay in the medical field). She took a class to learn how to seek employment with the State of Montana. At first, she sought work that paid at least as well as her job with Johnson. As time went on, however, and she grew more desperate, she lowered her standards.

34. Hunter's fear of a bad reference from Johnson was not reasonable. She had no factual basis for concluding that he would make false reports of her performance to prospective employers. This decision cut her off from the most reliable source of comparable work within the reach of her current residence.

35. After a particularly bad day with Johnson, Hunter responded to an ad for waitresses at the Golden Corral restaurant in November 2001. She accepted the job at minimum wage, albeit with the potential for tips. On November 16, 2001, Hunter resigned from her employment with Johnson. By continuing his pervasive pattern of sexual harassment, Johnson had rendered working Hunter's working conditions so oppressive that resignation was her only reasonable alternative.

36. On December 21, 2001, Hunter filed her complaint with the Department, approximately one month after she resigned. She had known since April 2001 that she could file a human rights complaint regarding her treatment by her employer. She delayed filing for the same reason she did not effectively confront him–she feared losing her job.

37. Hunter suffered financial loss as a direct result of her resignation from her employment with Johnson. She knew that would be the result of her resignation. But for Johnson's conduct toward her, she would not have resigned her job.

38. Hunter's decision not to look for work in comparable medical offices in Great Falls, because of her unreasonable fear of a bad recommendation from Johnson,[3] prevented her from finding a new job in the market where she had successfully found jobs for a decade. She had found and maintained steady work with multiple employers since 1990, and had she pursued work in that market, she would not have lost more than six months of wages (the differential between subsequent actual earnings in that time period and the wages lost) as a result of leaving Johnson without first securing a comparable replacement position in Great Falls.

39. Hunter's salary from Johnson in 2001 was $1,800.00 per month, or $21,600.00 per year. In 2001, he paid her $19,000.00, according to her W-2. Had she not resigned, she would have earned $2,600.00 for the balance of the year, and a Christmas bonus of $300.00. After resigning from Johnson's employment, Hunter earned $1,402.02 at her waitress job during the balance of 2001, according to her W-2s. In 2002, through May 15, Hunter earned $4,410.80 at her waitress job in Great Falls (which she left May 4 to move to Colorado), according to her W-2s. Had she remained employed by Johnson, she would have earned $8,100.00 over that same time. During the six months involved, she would also have earned a small profit sharing benefit, of approximately $160.50, by remaining with Johnson. Her income losses therefore amount to $5,347.56. Prejudgment interest, at 10% per year simple interest, totals $145.42 through the date of this decision.

40. Hunter had great difficulty making ends meet with her waitress job. She was also working less convenient hours for her family life (her teenage son lived with her), including nights and weekends. She felt like a failure because

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[3] Hunter apparently told her counselor that she believed Johnson had influenced the medical community in Great Falls to deny her subsequent employment. There was no evidence to support this belief.

she was no longer in a professional position. She was also haunted by the fear that Johnson would reappear in her life, at her home or elsewhere.

41. Hunter had relatives who operated a business in Denver, Colorado. They offered to hire her and help her establish herself in Denver. Hunter accepted this offer. After a few months working for her relatives and as a waitress, Hunter found a permanent job with the National High School Rodeo Association in Denver, at a higher salary than she had received from Johnson.

42. Hunter suffered emotional distress as a result of her treatment by Johnson. Hunter's emotional distress resulting from Johnson's harassment of her engendered anxiety, sleeplessness, depression, abnormal fear responses (such as difficulty dealing with people, extreme anxiety in unfamiliar settings and unreasonable fear of seeing or hearing from Johnson after leaving his employment). Her emotional distress contributed to her decision, otherwise prompted by a desire to find a higher paying job with better hours, to move to Colorado. Had she found comparable employment in Great Falls, she would not have moved to Denver (see finding 38, above).

43. Throughout her employment with Johnson, Hunter periodically dated and had romantic involvements. She wanted to develop a committed relationship during that period–either a new marriage or a similar if less formal relationship. She was disappointed and disturbed by the lack of such a relationship. Hunter made multiple entries in her personal diary about her romantic involvements and their shortcomings. She also wrote about other problems unrelated to Johnson that disturbed her. She made no diary entries about her problems with Johnson until after she left her employment, and no particularly illuminating entries then.

44. Hunter suffered emotional distress because of her decision to leave Great Falls and obtain employment in Denver. Her teenage son chose to remain with his father in Great Falls, to Hunter's sorrow. She no longer lived right next door to her parents, and she missed them. Hunter also suffered emotional distress because (1) she had a strained relationship with her son's father (her ex-husband); (2) she wanted but did not develop a stable romantic bond with a man and (3) before and after the period of financial loss caused by Johnson, Hunter was unable to earn enough money to meet her ongoing needs, wants and responsibilities. All of these factors caused or contributed to Hunter's continuing emotion distress after she moved to Denver.

45. Hunter's continuing emotional distress led her to seek "low fee counseling" from Maria Drosfe Counseling Services after she moved to Colorado. She could not afford any other kind of professional treatment. Moshe Rozdzial, Ph.D., began counseling her in July 2002. He had an M.S. in

community counseling and "masters' level training" in marriage and family counseling,[4] both from the University of Northern Colorado. At the time of the hearing, he had provided 12 counseling sessions to Hunter.

46. Rozdzial is a board-certified counselor, in his fourth year of practice. Hunter is the first patient he has treated who presented with complaints she related to sexual harassment at work. His telephonic deposition testimony was his first experience with providing testimony regarding his treatment of clients.

47. Rozdzial relied entirely upon the reports of Hunter regarding her problems and the sources of those problems. He used his training and experience to ascertain the nature of her problems from what she told him and from his observation of her during the sessions with her. He did no psychological testing of Hunter. He did not seek any outside information, from her diary, from her counsel, or from any other source.

48. Hunter reported to Rozdzial that Johnson's harassment of her caused anxiety, fearfulness, sleeplessness, depression, hypervigilence, startle response, flashbacks and other symptoms. Applying the diagnostic criteria for post-traumatic stress disorder, Rozdzial concluded that Hunter suffered from PTSD. Rozdzial decided that Johnson's conduct was the sole cause of Hunter's PTSD. He based this conclusion entirely upon Hunter's report to him that Johnson did it to her. Rozdzial also concluded that Hunter's fears of Johnson were a major reason for Hunter's move away from her family, with the only other major reason being her desire to find a better paying and more prestigious job. He also came to this conclusion because that is what Hunter told him.

49. Rozdzial concluded that Hunter needed at least an additional year of therapy, and would benefit from medication (she declined referral to a medical doctor for medication). He considered that approximately 75% of the time spent treating Hunter was spent addressing problems that, according to her reports, related to Johnson, as opposed to problems due to financial insecurity, separation from her son, loss of her support system (her family of origin), and issues (involving custody of her son) with her ex-husband.

50. Hunter's reports to Rozdzial of her current emotional distress were largely consistent with her credible testimony at hearing, although she apparently expanded her accounts of her distress when talking with her counselor.

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[4] Rozdzial also has a Ph.D. in cell biology and a B.S. in microbiology, but Hunter has not suggested that this expertise has any relevance to this case.

51. Johnson's harassment caused some but not all of Hunter's emotional distress. His harassment did considerably deepen the pain of her emotional distress. The intensified and extended emotional distress he caused her, as opposed to the emotional distress resulting from other problems in her life, entitles her to recover the sum of $35,000.00.

52. Rozdzial, acting as a treating counselor, did not attempt a forensic analysis of the causes of Hunter's emotional problems. His goal was to help her deal with her problem, taking her understanding of the source of the problem as a starting point for that treatment. As a result, his conclusions about causation, upon which he based his diagnosis of PTSD, are not a sufficient basis for a finding either that Hunter suffers from PTSD or, if she does, that Johnson is responsible. Therefore, there is insufficient evidence reasonably to find that but for Johnson's conduct, Hunter would not need both continuing counseling and medical evaluation of the need for the prescription of psychoactive drugs.

53. There is a risk that Johnson, for whatever reason, may again focus unwelcome attentions upon a female employee. Affirmative relief, by way of training in sexual harassment avoidance and injunctive relief, is necessary.

## IV. Opinion[5]

The Hearing Examiner Will Decide Only the Sexual Harassment Claim

Montana law prohibits workplace discrimination against an employee based on sex. Mont. Code Ann. § 49-2-303(1). Under the Human Rights Act, sexual harassment of an employee is illegal discrimination because of sex. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 205. An employer violates an employee's right to be free from illegal discrimination when directing unwelcome sexual conduct toward her which is sufficiently abusive to alter to alter the terms and conditions of employment and create a hostile working environment. *Brookshire v. Phillips*, No. 8901003707 (1991), ***affirmed sub. nom.*** *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. Hunter properly pleaded and presented a claim for illegal discrimination by sexual harassment.

Hunter also asserted a claim for illegal retaliation, based upon alleged escalation of the sexual harassment after she confronted Johnson about deliberately touching her. The retaliation claim rests upon precisely the same

[5] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

facts as the sexual harassment claim. Under both theories, Hunter claimed that Johnson's conduct toward her after she told him, in April 2001, not to touch her again constituted adverse employment action. The only difference in the theories arises because Hunter asserts in one claim that Johnson did it because she was a woman (sexual harassment) and in the other that he did it because she resisted his touching her (retaliation).

If Johnson's conduct in the 180 days before complaint filing was sexual harassment which resulted in a hostile work environment, Hunter is entitled to recover. Necessary to that determination is the finding that Johnson harassed her because she was a woman. After making those findings, if the hearing examiner then considers the retaliation claim, the findings in the sexual harassment claim would already establish adverse employment action. The only additional question to resolve would be whether Johnson was motivated after April 2001 by the desire to retaliate because Hunter resisted his physical contact. There was no direct evidence of this retaliatory motive. Since a finding of a hostile environment already supplies a motive ("because of sex") for the conduct, there is no way meaningfully to apply any presumptions of a retaliatory motive. Attempting to discern whether sexual harassment sufficient to constitute a hostile work environment was also retaliatory would thus be an exercise in speculation, requiring additional analysis of the continuing violation doctrine, but ultimately leading to no greater recovery or affirmative relief than that involved in the sexual harassment claim.

Therefore, the hearing examiner will disregard both the claim of retaliation and the legal defenses interposed against it, as redundant. The issue in this case is whether Johnson violated Hunter's right to be free from sexual discrimination by engaging in conduct sufficiently abusive to alter the terms and conditions of her employment and to create a hostile working environment.

## The Continuing Violation Doctrine Allows Hunter to Present Evidence of Relevant Conduct More than 180 Days Before Complaint Filing

Failure to file a discrimination complaint within 180 days of the last alleged unlawful act bars the claim. Mont. Code Ann. §49-2-501(4); ***e.g.***, *Skites v. Blue Cross/Blue Shield of Montana*, 1999 MT 301, ¶¶ 15-16, 297 Mont. 156, 991 P.2d 955 (summary judgment proper when complaint on its face indicated last act of discrimination occurred more than 180 days before complaint filing). Here, unlike *Skites*, the complaint alleged harassment within 180 days of complaint filing. The statute of limitations questions here are: (1) whether a timely complaint of such unlawful acts also confers jurisdiction upon the department to determine whether the employer is liable for related

violations more than 180 days before the complaint filing; and (2) whether acts outside of the 180 days are admissible as evidence of the respondent's continuing conduct and motive even if they cannot be a basis for relief. These issues involve case law defining the "continuing violation" doctrine.

The Montana Supreme Court has not considered the continuing violation doctrine. Neither *Skites* nor the earlier Montana Supreme Court decision regarding the statute of limitations for discrimination claims directly addressed it.[6] *Hash v. U.S. W. Communication Serv.* (1994), 268 Mont. 326, 886 P.2d 442. The Montana Human Rights Commission has considered the proper use of continuing violation evidence. ***E.g.,*** *Kundert v. City of Helena*, HRC No. 9301005512 (Mar. 31, 1995) (adopting findings regarding conduct of employer for 17 months prior to the complaint filing date); ***followed***, *Dernovich v. City of Great Falls*, HRC No. 9401006004 (Nov. 28, 1995) (citing *Kundert* and overruling objections to consideration of discriminatory acts occurring more than 180 days before complaint filing). The department has more recently considered the appropriate handling of continuing violations, in *Gummer v. Golden Triangle*, Case Nos. 0009009275 and 0001009276 (2002), applying *Kundert* and *Dernovich*, and a series of consistent federal court decisions regarding continuing violations.[7]

Six months after the department decided *Gummer*, the United States Supreme Court issued its decision affirming, reversing and remanding the most recent Ninth Circuit decision of those cases the department applied in *Gummer*. *National Railroad Passenger Corp. v. Morgan* (2002), 536 U.S. 101. The approach of *N.R.P.C.* to a hostile environment claim involving illegal acts occurring both before and during the limitation period before the complaint filing was simple. So long as at least one act contributing to the hostile environment occurred within the limitation period, the entire array of illicit conduct was a single occurrence, the creation of a hostile environment. No analysis of recency, remoteness or similarity by genre of the precise hostile acts was involved. The entirety of the employer's conduct, both within and before the filing time limit, was the basis for deciding liability in a hostile environment claim. *N.R.P.C.* at 117-19.

With the exception of evidence regarding Dave Kostas' conduct (discussed below), the entirety of Johnson's conduct toward Hunter during her

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[6] The dissent in *Skites* does raise the question. *Skites* at ¶ 28.

[7] Montana does seek guidance from federal cases where the decisions can appropriately illuminate the meaning of Montana anti-discrimination law. *Harrison v. Chance* (1990) 244 Mont. 215, 797 P.2d 200, 204; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

entire employment is relevant to the question of whether he created a hostile work environment. The reasoning of *N.R.P.C.* is persuasive, and follows logically from *Kundert* and *Dernovich*. The prior Ninth Circuit decisions now can only be read in light of *N.R.P.C*. With the well-reasoned change to the federal standard in place, Montana should and will adopt *N.R.P.C.*'s treatment of continuing violation claims of hostile work environment employment discrimination.

However, the hearing examiner has not considered the evidence regarding the conduct of Dave Kostas. Hunter claimed that this person, a friend of Johnson who sometimes worked for Johnson on matters outside of the medical practice, also harassed her. While there was some testimony that another employee told Johnson that Hunter had a problem with Kostas, the evidence was insufficient to establish that Johnson had adequate notice to impose a duty upon him to act to protect Hunter from Kostas. The EEOC's guidelines apply a standard similar to that for co-employee harassment to address third party harassment. An employer may only be held responsible for sexual harassment of employees in the work place by third parties when the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. 29 C.F.R. § 1604.11(e). Hunter failed to adduce proof sufficient to satisfy this standard. Therefore, even under *N.R.P.C.*, failure by Johnson to intervene with Kostas was not conduct related to the allegations of a hostile environment.

Hunter Established Sexual Harassment in the Workplace

Hunter must prove that she was subject to "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison v. Brady* (9th Cir. 1991), 924 F.2d 872, 879 [emphasis added]. The harassment need not be severe and pervasive. *Hostetler v. Quality Dining, Inc.* (7th Cir. 2000), 218 F.3d 798, 808.

The totality of circumstances test determines whether Johnson's conduct created a hostile work environment. *Harris v. Forklift Sys., Inc.* (1993), 510 U.S. 17, 23. The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris* ***at*** 23; ***see also***, *Faragher v. City of Boca Raton* (1998), 524 U.S. 775, 787-88.

Johnson cited federal cases with findings that particular kinds of acts, viewed in isolation, did not amount to harassment. For example, he offered

authority that repeatedly staring at a female employee, taken alone, could not create a hostile environment. Considering the totality of the circumstances does not mean doing separate analyses of whether each kind of conduct, occurring separately, would suffice to create a hostile work environment. *Conner v. Schrader-Bridgeport Int'l, Inc.* (4th Cir. 2000), 227 F.3d 179.

The standard for finding a hostile environment must be "sufficiently demanding to ensure that [anti-discrimination law] does not become a 'general civility code.'" *Faragher*, ***op. cit.***, ***citing*** *Oncale v. Sundowner Offshore Serv., Inc.* (1998), 523 U.S. 75. Properly applying the correct standard means rejecting complaints about nothing more than "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Oncale*, ***supra***, ***quoting*** Lindemann & Kadue, *Sexual Harassment in Employment Law* 175 (1992). If a reasonable person in the charging party's position, considering all the circumstances, would react as the charging party did, then the objectionable conduct constitutes culpable harassment. *Oncale*, ***supra***, ***quoting*** *Harris* ***at*** 23.

Ultimately, the question of whether sexual harassment created a hostile work environment is a fact-driven question. The hearing examiner heard the evidence and saw the witnesses in this case, but had only the cold record of the appellate opinions in the cases the parties cited. Facts that are similar in summary, but involve different people in different places, do not necessarily reflect identical realities. This is why evidentiary hearings are necessary, with the confrontation of witnesses by the parties, in the presence of a fact finder. If this were not necessary, discrimination cases could be decided on documents in a file, without the need for the time and expense of a hearing at which the parties can both present witnesses and cross-examine them. The hearing examiner considered the holdings in the cases the parties cited. In this case, the entirety of the evidence presented over the three days of the hearing persuaded the fact-finder that Johnson engaged in sexual harassment of Hunter with such frequency and severity as to humiliate her and unreasonably interfere with her work performance. Thus, the hearing examiner concluded that Hunter, faced with a hostile work environment, reasonably resigned from her job.

Johnson's conduct toward Hunter was not merely one of the ordinary tribulations of the workplace. A reasonable employer could not have believed

this treatment of Hunter was welcome or appropriate[8] or that her efforts to avoid both his company and his conduct were unrelated to his treatment of her. A reasonable woman subjected to the continuing course of Johnson's conduct would, as Hunter did, find it intolerable.

Johnson also argued that Hunter could not justify her decision to resign as a constructive discharge unless she proved that Johnson intended or at least should have reasonably foreseen that his conduct would prompt her resignation. That is not the appropriate standard under the Montana Human Rights Act. A resignation due to illegal harassment at work is a constructive discharge if the employer was responsible for the harassment and it rendered working conditions so oppressive that resignation was the only reasonable alternative. *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841, 846. As is clear from the preceding analysis, Hunter met this standard.[9]

The Sealed Evidence

While it is sealed from the public record, the contents of Hunter's personal diary are part of the evidentiary record. It is troublesome that she never addressed Johnson's harassment in her diary while she worked for him. However, it is equally troublesome that Johnson never provided a satisfactory explanation for his failure at least to ask about the changes in Hunter's behavior while she worked for him (her efforts to avoid his company and his conduct). Ultimately, the issues of hostile environment (above) and emotional distress (following) must be decided in this case on the affirmative evidence of record, rather than upon the absence of better evidence regarding these two particulars. Nothing else from the sealed evidence was useful in deciding the

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[8] Some of Johnson's evidence suggested that his behavior toward Hunter was no more than the result of his years of practice of medicine, during which he had become accustomed (within the confines of his office) to frank and crude comments about otherwise sensitive and private matters involving his patients and his staff. In addition to being incredible on its face, this explanation was inconsistent with his avowed goal of having a "relaxed and family-oriented" office, and did not survive the totality of circumstances test. Finally, even if a family practice physician's office would merit interposition of a "rugged environment" defense, the defense does not exist. *Conner v. Schrader-Bridgeport International, Inc.*, ***op. cit.***

[9] Unreasonable failure to complain about workplace harassment, as an affirmative defense, applies to vicarious liability claims, when the harasser was a supervisor rather than the employer himself, and the defense requires that the employer had a known policy against sexual harassment, with a means of making a complaint which the charging party disregarded. *Faragher,* ***op. cit.****; Burlington Industries v. Ellerth* (1998), 524 U.S. 742. That defense is not applicable here. Unreasonable failure to complaint could also be an affirmative defense of waiver, estoppel or laches under *N.R.P.C.*, but Hunter's failure to complain while still employed was not unreasonable.

case, aside from substantiation of other sources of stress reported by Hunter in her testimony and in her sessions with Rozdzial.

## Relief Awarded

Upon the finding of illegal discrimination by Johnson, the department may order any reasonable measure to rectify resulting harm that Hunter suffered. Mont. Code Ann. § 49-2-506(1)(b) MCA. The express purpose of damage awards in employment discrimination cases is to make the victim whole. *P. W. Berry, Inc. v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

Hunter had an obligation to make reasonable efforts to mitigate damages from discrimination by seeking comparable, alternative employment. *Ford Motor Co. v. EEOC* (1982), 458 U.S. 219, 231. Johnson had the burden to prove Hunter's lack of reasonable diligence in mitigating her damages from her lost wages. *P. W. Berry, Inc.*, ***supra***; *Hullett v. Bozeman School Dist. #7* (1987), 228 Mont. 71, 740 P.2d 1132.

Hunter did not have to seek all possible employment opportunities. She could exercise reasonable discretion in pursuing offers of work. Factors such as whether the opportunity was in her chosen field of work, whether it was comparable to the opportunity lost as a result of discrimination, and whether it was economically feasible in light of her actual circumstances, can be considered. *Ford Motor Co.*, ***supra at*** 231 ("the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position . . . "); ***accord***, *Hullett*, ***supra***. In this case, Hunter's failure to make a reasonable effort to seek comparable work in Great Falls limited her entitlement to lost wages.

By proving discrimination, Hunter established an entitlement to actual lost wages. *Albermarle Paper Company*, ***supra. at*** 417-23. She must prove the amount she did lose, but not with unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Off. Sys. Co.* (3rd Cir. 1984) 747 F.2d 885, 889; *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983) 714 F.2d 614, 626 (fact that back pay is difficult to calculate does not justify denying an award). Thus, although her entitlement to lost wages is limited by her failure to mitigate, it is not eliminated, because it was reasonable for her to leave her job without first securing comparable employment.

Prejudgment interest on lost income is a proper part of the damage award. *P. W. Berry, Inc.*, ***op. cit. at*** 523; *Foss v. J.B. Junk*, HRC No. SE84-2345 (1987).

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire*, ***op. cit.*** The standard for such awards derives from the federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3rd Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2nd Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden,* in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman,* 107 F.3d at 385.

While Rozdzial's testimony (as discussed below) is not useful with regard to the causation of what he diagnosed as PTSD, it certainly confirms the severity of the emotional distress suffered by Hunter. Although Hunter was a distressed woman, for many established reasons, before Johnson harassed her, his conduct clearly intensified and prolonged that distress. Before she went to work for him, she was not seeking out counseling, desperate for relief. Although moving to Denver caused her more grief in several ways unrelated to Johnson, and the already existing stresses continued to torment her, his conduct caused her substantial additional emotional distress, beginning early in 2001. $35,000.00 is a reasonable award for that distress. Had the expert testimony been stronger and the proof of harm attributable to Johnson's conduct been clearer, the award for emotional distress would be higher. ***See***, ***e.g.***, *Fox v. Gen. Motors Corp.* (4th Cir. 2001), 247 F.3d 169, 180 (4th Cir. 2001) ($200,000.00 award upheld for post-traumatic stress disorder and long-term depression, as well as worsening of prior back injury, all tied by neurologist and psychiatrist as well as lay testimony to the stress of sexual harassment by supervisors that created a hostile work environment).

Rozdzial's testimony is consistent with the other credible evidence regarding the severe emotional distress Hunter suffered after leaving Montana.

Although it is largely a moot point in this case, since Hunter was credible at hearing, Rozdzial's testimony cannot establish Hunter's credibility.[10] The hearing examiner expressly notes that he has not relied upon Rozdzial's testimony in deciding Hunter's credibility.

Because Rozdzial took his patient at her word about the causation of her problem, there is a further limit to the permissible use of his testimony. An expert testifies to opinions, in either the form of hypothetical assumptions (related to the facts of the case through other evidence) or actual opinions about the particular case. This is proper when scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, and the expert is qualified by knowledge, skill, experience, training of education. Mont. R. Ev. 702. The expert may even testify in the form of an opinion as to an ultimate fact if the testimony is otherwise admissible. Mont. R. Ev. 704. However, the expert may not testify about the ultimate determination for the fact-finder on a question of law or in circumstances where no specialized knowledge is necessary to make the ultimate determination from the evidence, and the expert is serving as an advocate for an outcome rather than as an aid to the understanding of the fact-finder. *Kizer v. Semitool, Inc.* (1991), 251 Mont. 199, 205-07, 824 P.2d 229; *Heltborg v. Modern Machinery* (1990), 244 Mont. 24, 31-32, 795 P.2d 954, 958; *Mahan v. Farmers Union Central Exchange, Inc.* (1989), 235 Mont. 410, 421, 768 P.2d 850, 857-59; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 820; *Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 748 P.2d 937 ***quoting*** *Marx Co. v. Diners' Club* (2nd Cir. 1977), 550 F.2d 505 ***crt. den.*** 434 U.S. 861.

Rozdzial used his expertise to treat Hunter. He did not use his expertise to decide that her PTSD resulted from Johnson's conduct–he simply took her at her word. In this case, having Rozdzial repeat Hunter's conclusion about what caused her problem is using him as an advocate rather than an expert. To the extent that Rozdzial might have expressed a proper professional opinion that Hunter's problem was PTSD and that it was caused by Johnson's conduct toward her, his causation testimony was not entirely credible in light of the myriad of other emotional stresses and distresses in Hunter's life. A trier of fact is free to disregard an expert's testimony and adopt lay testimony that is substantial and more credible. *Rose v. Rose* (1982), 201 Mont. 86, 651 P2d 1018, 39 St. Rep. 1971. Rozdzial's acceptance of Hunter's conclusion that all

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[10] Montana does not permit expert testimony about witness credibility. *In re Thompson* (1995), 270 Mont. 419, 427, 893 P.2d 301, 306. The exception (challenge to the credibility of a minor testifying in a criminal case about being the victim of a sexual assault) is irrelevant here. ***Id.***; *State v. Harris* (1991), 247 Mont. 405, 410, 808 P.2d 453, 455; *State v. J.C.E.* (1988), 235 Mont. 264, 269, 767 P.2d 309, 312. This analysis specifically applies to a civil administrative proceeding. *Thompson*, ***supra***.

of her emotional problems resulted from the conduct of Johnson was not a credible expert opinion, and therefore Hunter failed to prove that she was entitled to payment by Johnson of her counseling and other related health care expenses. While Hunter was neither seeking counseling nor desperate before her problems with Johnson, her move to Denver (which resulted from her failure to mitigate) generated other major sources of emotional distress. Thus, she failed to prove that Johnson's conduct toward her was either a necessary or a primary cause of her eventual need for counseling.

Upon a finding of illegal discrimination, the law requires affirmative relief, enjoining any further discriminatory acts and prescribing appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). Johnson must undertake training in sexual harassment in employment. He must cease and desist from engaging in sexual harassment in his professional capacity. Although the department can only inspect to insure compliance of a respondent for a maximum of one year, Mont. Code Ann. § 49-2-506(3), there is no such constraint upon its injunctive power, which authorizes a permanent injunction.

## V. Conclusions of Law

1. The Department has jurisdiction over the complaint and this case. Mont. Code Ann. § 49-2-509(7).

2. Marcus Johnson, M.D., illegally discriminated against Pam Hunter by subjecting her to sexual harassment in employment that created a hostile work environment for her while she was in his employment, up to her constructive discharge on November 16, 2001. Hunter's claim of retaliation is redundant.

3. Johnson is liable to Hunter for her economic losses and the emotional distress she suffered as a proximate result of his illegal discrimination, in the sum of $40,492.98, including prejudgment interest on her lost earnings. Mont. Code Ann. § 49-2-506(1)(b).

4. The law mandates affirmative relief against Johnson. The department enjoins him from subjecting women in his employ to a hostile work environment by sexual harassment. Within 60 days of this decision, unless the Human Rights Bureau allows him additional time, Johnson must also attend eight hours of training approved by the Bureau in sexual harassment identification and prevention techniques. Should Johnson fail to timely comply with each provision of this injunction, the department hereby orders that he cease and desist from acting as an employer in the practice of his

profession in any manner in the state of Montana until the Bureau determines that Johnson has completed full compliance with all of these provisions. Mont. Code Ann. § 49-2-506(1) MCA.

## VI. Order

1. The department grants judgment in favor of Pam Hunter and against Marcus Johnson, M.D., on the charge that he subjected her to sexual harassment in employment that created a hostile work environment for her while she was in his employment, up to her constructive discharge on November 16, 2001. Having made no findings on the further charge of retaliation, which is moot, the department dismisses that charge.

2. The department awards Hunter the sum of $40,492.98 and orders Johnson 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 Marcus Johnson to comply with all of the provisions of Conclusion of Law No. 4.

Dated: May 23, 2003

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry