BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Darrell Beauchamp, Charging Party,	)	HRC Case No. 0031010397
vs.	)	*Final Agency Decision*
Montana Waste Systems, Inc., Respondent.	)	

I. Procedure and Preliminary Matters

Darrell Beauchamp filed a complaint with the Department of Labor and Industry on January 16, 2003. He alleged that Montana Waste Systems, Inc., discriminated against him because of sex (male) when it subjected him to a sexually hostile and offensive work environment beginning in February of 2001 and continuing. On August 27, 2003, the department gave formal notice that Beauchamp's complaint would proceed to a contested case hearing, appointing Terry Spear as hearing examiner.

The contested case hearing proceeded on January 5 and 6, 2004, in Great Falls, Cascade County, Montana. Beauchamp attended in person with his counsel, J. Kim Schulke and Stacy Tempel-St. John, of Linnell, Newhall, Martin & Schulke. The corporation attended through Roger Bridgeford, general manager, designated representative, with its counsel, Todd A. Stubbs, of Graybill, Ostrem, Crotty & Stubbs. Andee Anderson, David Azure, Deborah Bailey, Darrell Beauchamp, Shareece Beauchamp, Jerry Bedwell, Jo Bridgeford, Roger Bridgeford, Susan Bridgeford, Simon Brown, David Lee Burn[1], David Burns, Christopher Cogar, Charles Crouch, Vickie Forbes, Clint Haymaker, Katrina Hearns, Debra Koetitz , Kelli Lawson, Bruce Leven, Timothy Lodge, Cheryl Notti, Chris Plute (by two depositions taken on November 12, 2003), Pamela Skogen, Matt Spires and Bonnie Worrell testified. The hearing examiner admitted exhibits 1, 3-8, 9 (except the first two pages, which the hearing examiner refused), 10-11, and 101-107 into the record. The parties filed post hearing arguments and proposed decisions and submitted the matter for decision. They subsequently agreed the decision should not issue until after the Montana Supreme Court issued a decision in *Campbell v. Garden City Plumbing and Heating, Inc.* That decision issued on August 24, 2004. A copy of the Hearing Bureau docket of this contested case proceeding accompanies this decision.

[1] The spelling may be "David Lee Byrne." The transcript has the above spelling.

II. Issues

The issue is whether the behavior of Bridgeford toward Beauchamp was impermissible based upon Beauchamp's gender. For a full statement of the issues, ***see*** "Final Prehearing Order," December 22, 2003.

III. Findings of Fact

1. The respondent is Montana Waste Systems, Inc., a Washington corporation. Its principal place of business is in Great Falls, Montana. The corporation performs waste hauling services, which require the continuous service and maintenance of a number of trucks and other equipment. In addition to a disposal site outside of Great Falls, the corporation had premises in the city containing its offices and a shop for necessary fabrication and maintenance.

2. Bruce Leven, a man[2], was and is the sole shareholder and owner of the corporation. Leven lives in the state of Washington. Leven typically spent two or three days at the corporation's Great Falls premises at least once a month and often every other week.

3. The corporation's general manager was and is Roger Bridgeford, a man, who supervises all the employees working in Great Falls. Bridgeford did not have an office in the mechanic's shop at the corporation's Great Falls premises. His office was in the general office area in another part of the same building. Bridgeford's direct supervisor was Leven.

4. At all pertinent times, Bridgeford spent more time in the office area than in the shop. Overall, he spent roughly 10% of his working time in the shop, which was the direct responsibility of the maintenance manager.

5. At all pertinent times, the corporation employed seven women at the Great Falls premises.[3] The women performed most of their work in the office area, apart from the mechanics who worked in the shop. However, the women also went into the shop and interacted with the mechanics with regard to work orders, parts and equipment purchases and other business matters. All of the employees shared the same break area. Mechanics and female employees interacted daily while at work, although they generally worked separately and

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[2] Aside from Leven, Bridgeford and Beauchamp, the hearing examiner has not made an express finding of the sex of the persons involved in the findings of fact, since their names accurately indicate their genders.

[3] The seven women were Deborah Bailey, Vicki Forbes, Katrina Hearns, Deborah Koetitz, Kelli Lawson, Pamela Skogen and Bonnie Worrell.

the female employees left at the end of their day shift.[4] Bailey saw the male employees every day. Forbes occasionally performed her duties in the shop. Hearns went into the mechanics' shop several times every day, sometimes stopping and talking with the men in the shop. Koetitz occasionally went into the shop in connection with her duties. Skogen went into the shop every day in connection with her duties. In addition, there was a large window between Skogen's office and the maintenance manager's office (adjacent to the shop itself). Forbes opened the window regularly to visit regarding her work.

6. In February 2001, the corporation hired the claimant, Darrell Beauchamp, a man, as a metal fabricator or welder, working the day shift (7:00 a.m. to 3:00 or 3:30 p.m.) at the Great Falls site. Beauchamp worked in the shop. He later became a mechanic working in the shop. The pertinent portion of Beauchamp's employment was his work as a mechanic.

7. During Beauchamp's employment all the mechanics were male. The number of mechanics on any given shift (day or night) ranged from two to four. Beauchamp preferred and worked on the night shift as a mechanic, from 3:00 p.m. (later from 2:30 p.m.) to 11:00 p.m. The maintenance manager supervised the mechanics on both shifts. The maintenance manager typically was present during the day shift and the early night shift, leaving during the night shift.

8. During Beauchamp's employment, there were three successive maintenance managers. Brian Love was maintenance manager when Beauchamp began work. Timothy Lodge replaced Love in August of 2002, and then Charlie Crouch replaced Lodge in February of 2003. The maintenance manager was under the direct supervision of Bridgeford.

9. During Beauchamp's employment, there was always considerable pressure to complete necessary repair to and maintenance work on the corporation's vehicles and equipment. This caused tension between the mechanics and upper management (Bridgeford and Leven). Love and Lodge understood the needs and difficulties of the mechanics. Crouch came to the corporation from outside employment, with less experience in the type of operation the corporation had in Great Falls. Crouch was more sympathetic and responsive to upper management. He was more amenable to Bridgeford's suggestions regarding the shop operation than either Love or Lodge had been.

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[4] The office personnel worked a day shift that ended at the normal time (***i.e.***, at or around 5:00 p.m. As finding 6 reflects, the men in the shop worked a "day shift" that ended earlier, with the "night shift" beginning near the middle of the afternoon. Thus, the women in the office worked a shift that overlapped both day and night shifts in the shop.

Bridgeford's Conduct Toward and Around Beauchamp

10. During his employment as a mechanic, Beauchamp experienced repeated inappropriate contact and conduct from Bridgeford. Beauchamp also observed similar contact and conduct by Bridgeport toward other male employees on the night shift. The conduct involved more than a few isolated instances.

11. In August of 2002, while Beauchamp was eating lunch with his wife, Shareece Beauchamp, in the break room, Bridgeford came in and started rubbing Beauchamp's shoulders in a suggestive way. Beauchamp stiffened up. He disliked the contact and felt that Bridgeford was being inappropriately affectionate.

12. In October of 2002, Beauchamp and Clint Haymaker, another male employee, were talking about the corporation's lock out/tag out program. Bridgeford asked about Beauchamp's lock and Beauchamp said it was green. Bridgeford stated to Beauchamp and Haymaker that they needed to take the lock out/tag out program seriously because he did not want to see anybody get hurt at work and get his penis squished. Bridgeford asked what color Beauchamp's little penis was. He then told Haymaker that he did not want Haymaker's little penis to get squished. Beauchamp considered these statements offensive and demeaning. He did not understand why Bridgeford would make a sexual reference during a simple safety program discussion.

13. In November of 2002, Bridgeford walked into the shop and tapped his fingers across Beauchamp's back suggestively. Bridgeford subsequently tapped Beauchamp's back in a similar manner on other occasions.

14. In November of 2002, Bridgeford took Beauchamp into the storage room to get some safety glasses and said, "I've even got these rubber gloves for people that are allergic to latex or whatever else you do at night that I don't want to know about." Beauchamp thought Bridgeford was trying to flirt with him. Beauchamp was embarrassed.

15. At work, Beauchamp also witnessed Bridgeford poke David Burns, another male employee, in the groin with a tape measure.

16. Beauchamp saw Bridgeford reach into the front pants pockets of Chris Plute, another male employee (to get a cigarette, when Plute was either working or had dirty hands from working). Beauchamp also observed Bridgeford grab Plute's crotch on more than one occasion.

17. Bridgeford sometimes said to Beauchamp that he should have done a particular task a particular way or that it would have been smarter to do it a different way. Bridgeford also told Beauchamp that he should have had someone else do a particular task because they were better at it. Beauchamp's self esteem suffered under the barrage of negative comments. Often Bridgeford combined negative comments or apparent disdain with sexual comments or suggestive physical contact.

18. Although Beauchamp started out respecting Bridgeford, he soon lost that respect due to Bridgeford's demeaning treatment of him. Bridgeford displayed an attitude that the mechanics never did anything right. He always had something negative to say and never gave any praise.

Bridgeford's Conduct Toward Other Men in the Shop

19. Bridgeford called Haymaker "Clitoris." Beauchamp and other mechanics in the shop heard Bridgeford call Haymaker "Clitoris." Sometimes Bridgeford would walk out into the shop and yell it, to locate Haymaker. Haymaker repeatedly asked Bridgeford to stop. Bridgeford did not stop, saying in reply on more than one occasion that he could do anything he wanted because he was God.

20. On one occasion Haymaker had installed a part on a truck and Bridgeford disapproved of the installation. Bridgeford told Haymaker that if he did it again he would get a pair of vise grips and squash his nuts. Bridgeford also walked up to Haymaker from behind, put his hands on his shoulders and called him "Sweetheart," telling him he looked good.

21. In October of 2002, Bridgeford told Matt Spires, another male employee, that the way to test an engine block heater was to "plug it in." He then took the heater from Spires and poked Haymaker in the buttocks with it.

22. During 2001 and 2002, on several occasions, Bridgeford approached Spires from behind and put his hands gently on the sides of his head and rubbed his hair. On one occasion, Bridgeford asked if Spires' stubble would scratch the inside of Bridgeford's thighs. Spires replied, "No, because I'm not a fag." On another occasion, Bridgeford put his hand on Spires' hand and rubbed it very gently. Beauchamp heard Bridgeford call Spires "Matilda," and saw Bridgeford rub Spires' head. Bridgeford also picked apart Spires' work and work ethic.

23. In October of 2002, Bridgeford told Spires to test a pintle hitch by putting his buttocks against it and hitting the switch.

24. At the end of October 2002, Bridgeford followed Burns to his toolbox and started poking him in the groin with an extended tape measure. At about the same time, the end of October 2002, while Burns was talking with an employee from a tire company, Bridgeford started patting Burns near his groin with the back of his hand.

25. On approximately December 12, 2002, while Burns was working at the grinder, Bridgeford came up behind him and grabbed his left shoulder and said, "Hey, Sweetheart, what are you doing?" Burns asked Bridgeford to quit calling him that.

26. On or about December 14, 2002, Bridgeford and Burns were discussing some damage to the door of the welding shop. Bridgeford asked Burns whether he knew anything about how the damage had been done. Burns said he did not know. Bridgeford asked if Burns would take a lie detector test. Burns said he would. Bridgeford then said, "What if we stick an anal probe in your ass?" Burns told Bridgeford that he did not want to discuss it further.

27. On approximately December 28, 2002, Burns was working on a truck's lights. Bridgeford approached, started rubbing Burns' leg and called him "Sweetheart." Burns considered this a sexual advance by Bridgeford.

28. On approximately December 31, 2002, Burns was working at the grinder. Bridgeford walked up to him, touched his shoulder and called him "Sweetheart" and said he "had something for him." Burns turned around and Bridgeford poked him in the groin area with a spring hanger pin. Burns grabbed the pin and walked away. Burns thought Bridgeford wanted to have a sexual relationship with him.

29. Throughout Plute's employment, Bridgeford dug into Plute's pants and shirt pockets for lighters and cigarettes. Bridgeford also pinched Plute's nipples, rub his shoulders and refer to him as his "little bitch," "Sweetheart," "Christina," and "baby." Burns saw Bridgeford reach into Plute's pants and shirt pockets.

30. Plute is considerably smaller in stature than Bridgeford. In early February 2003, as Plute was leaving the men's restroom at the corporation's shop, Bridgeford pushed him back into the bathroom, unbuckled his belt and unzipped his pants. Plute pushed his way out and left.

31. Near the end of February 2003, Plute received some parts that were delivered to him by a woman working for another company. Afterward, Bridgeford commented that he knew Plute fantasized about the delivery

woman and that maybe they could all get together "for a little group action." Plute understood this to mean sex among the three of them.

32. On approximately March 3, 2003, the maintenance manager asked Plute to go outside to shovel the sidewalk. Bridgeford was standing nearby and said, "He doesn't want to go out there. He'll freeze his little dick off." Also in March 2003, when Plute was walking across the shop, Bridgeford unzipped his pants and blew Plute a kiss.

33. When Bridgeford instructed Plute how to perform some of his tasks, he often got very close to him and sometimes came up behind him and put his arms around him. This was not a necessary part of the instruction.

34. Bridgeford's speech was offensive. He swore frequently and made sexual comments more frequently. He said demeaning things about Plute's sexuality and asked him what he liked to do in the bedroom.

35. Plute asked Bridgeford to cease touching him and making sexual remarks to him, but Bridgeford told him that he was God, that he should keep his mouth shut and that all it would take was one phone call and Plute would be gone. The behavior did not stop, even after Plute's co-workers filed sexual harassment claims against the corporation.

36. Bridgeford frequently spoke to Plute in a demeaning way, calling him stupid and making fun of his inability to do certain things due to his inexperience. Bridgeford also asked Plute questions about trucks knowing full well that he could not answer. The sexual and demeaning comments made Plute uncomfortable and he ultimately quit working for the corporation because he could not endure the comments any longer.

37. After Andee Anderson, another male employee, completed a welding job with which Bridgeford was displeased, Bridgeford told Anderson that he should have his "peepee" slapped. Bridgeford also told Anderson that he ought to bend him over and screw him.

38. Bridgeford also asked Anderson to dance at the corporation Christmas party. Anderson thought (then and when he testified at the hearing) that Bridgeford was "coming on to him."

39. Bridgeford called Lodge "Timmy Baby." Bridgeford rubbed Lodge's shoulders one time when he was sitting at his desk. Lodge told him to quit. Bridgeford did it again and Lodge jumped up and pushed him and said, "Don't do that again or I will beat the hell out of you." Lodge eventually left the job.

Bridgeford's Effect On the Shop Environment

40. The incidents of Bridgeford touching or saying something sexual to male employees happened regularly whenever Bridgeford came into the shop. The night shift mechanics (including Beauchamp), unhappy with Bridgeford's contacts and conduct, talked with each other about incidents they had experienced or observed. As a result, Bridgeford's conduct stayed on their minds. Subsequent incidents and the continual lack of any management action to address them had greater impact.

41. Bridgeford's conduct interfered with the work of the mechanics, including Beauchamp. When Bridgeford walked into the shop, the employees stiffened up and found places to hide. In addition to his sexual innuendo, comments and physical contact with the mechanics, Bridgeford constantly criticized them. He indicated both that their work was not good enough and that they were not moving fast enough. Bridgeford came to the shop, started with one employee, then moved on to another, and then another, and within an hour or two, all the employees in the shop had bad attitudes. It worsened working conditions and slowed completion of work. He also switched mechanics from one project to another, leaving them unable to finish either project efficiently and unclear about which work had priority.

42. Jerry Bedwell, another male employee, overheard Bridgeford saying that any mechanic that is working in the shop was an idiot. He shared the comment with the mechanics, confirming their belief that Bridgeford looked down on them, hurting morale.

43. Bridgeford's presence in the shop was stressful for the mechanics. When Bridgeford was not in the shop, the workers had peace of mind. They concentrated on their jobs and did not feel pressured. When Bridgeford was there, they hated being at work and watched the clock until time to go home.

44. Beauchamp had worked in predominantly male employee work places his entire life and had never been subjected to the kind of treatment that he received from Bridgeford.

45. Haymaker had worked in other predominantly male employee work places before working for the corporation and had never been subjected to the kind of treatment he received from Bridgeford.

46. Burns had worked in other predominantly male employee work places before and had never been subjected to the kind of treatment he received from Bridgeford.

47. Spires had worked in other predominantly male employee work places before and had never been subjected to the kind of treatment he received from Bridgeford.

Complaints about Bridgeford and the Corporation's Responses

48. After the October 2002 lock out/tag out incident, Beauchamp complained to Leven, both about Bridgeford's treatment of male employees and about Bridgeford's sexual innuendos. Leven said he would take care of it.

49. On December 15, 2002, Haymaker and Beauchamp were talking about letting a power steering gearbox suck or blow some fluid either into or out of it. Leven was present in the shop. He was upset with Haymaker and Beauchamp because he believed that they had been talking too long without actually doing any work on the equipment. He walked up to them and said to Beauchamp, "I've got something you can [suck on or blow]." He then told Haymaker he would let him know if Beauchamp was any good. Beauchamp was embarrassed and confused by this comment.

50. After Leven's December 15, 2002, comment, Beauchamp began to suspect that Leven had done and would do nothing about complaints about Bridgeford's conduct.

51. Beauchamp complained to maintenance managers Love and Lodge about Bridgeford's conduct on more than one occasion. The maintenance managers indicated that Bridgeford was weird and nothing would be resolved.

52. Haymaker made multiple complaints about Bridgeford's conduct to Love. He also complained to Lodge after he replaced Love. Lodge recalled that Haymaker complained to him that Bridgeford had touched his buttocks.

53. Spires asked Lodge to keep Bridgeford away from him.

54. Burns complained to Lodge about Bridgeford's conduct. Lodge said that Bridgeford was strange and Burns should try to stay away from him.

55. Anderson complained about Bridgeford's conduct to Leven. Leven said he could not get rid of Bridgeford because he made too much money for the corporation.

56. Lodge, himself a recipient of Bridgeford's unwelcome attention, received complaints from several male employees about Bridgeford. Lodge recognized that many complaints about Bridgeford's conduct (in addition to Haymaker's complaint) were of a sexual nature. He asked Bridgeford to leave the shop and leave the mechanics alone. He also complained to Leven on two

occasions about Bridgeford's interference with work getting done in the shop. Lodge's efforts to keep Bridgeford out of the shop went unsupported.

57. Leven did receive specific oral complaints about Bridgeford's sexually offensive conduct toward male employees in the shop. He dismissed the complaints and took no action. Testifying at hearing, Leven denied that Beauchamp reported "certain incidents of sexual harassment to him." Leven also recanted his admission during his deposition that if several specific instances of Bridgeford's conduct had actually occurred, the conduct would have been were inappropriate. Leven's carefully phrased denial of the specific reports was not credible.

58. Although Leven knew about the nature of the problems between Bridgeford and the mechanics, he sometimes engaged in similar behavior. Once, when Haymaker was kneeling down working on a truck frame, Leven approached, put his foot underneath Haymaker's buttocks and tried to stand Haymaker up by lifting his foot. Haymaker told him to quit.

59. On January 15, 2003, Beauchamp filed a complaint with the Human Rights Bureau alleging that the corporation discriminated against him in employment because of sex by subjecting him to a sexually hostile and offensive work environment. He had a reasonable basis for his complaint.

60. In January 2003, Haymaker, Spires and Burns also filed similar sexual harassment claims against the corporation.

61. After the sexual harassment complaints were filed, another employee, Christopher Cogar, heard Leven and Bridgeford joke about the lawsuits. Cogar told Beauchamp.

62. After receiving Beauchamp's sexual harassment complaint, Leven wrote a letter to Bridgeford (filing a copy in the corporation's business records) directing that the corporation "would continue to respect the rights of Mr. Beauchamp and the other complainants" (Ex. 101). Except for the letter, the corporation neither took nor attempted any action to address Bridgeford's toward the shop employees. At hearing, Leven and Bridgeford gave conflicting testimony about whether the letter constituted a "reprimand." Bridgeford suffered no adverse consequences because of the informal complaints, the human rights complaints and the letter.

63. After the corporation received the sexual harassment complaints, both Bridgeford and Leven paid special attention to the complainants. Both displayed their hostility toward the complainants with nonverbal behavior. For example, Leven stood in the shop and glared at them without speaking.

64. Charlie Crouch started as the full time maintenance manager for the corporation in the first week of February 2003. He took the job because it was better than his previous employment. He had no experience managing a shop that handled the amount of heavy equipment serviced in the corporation's shop.

65. After he filed his sexual harassment claim, Beauchamp noticed that when Leven, Bridgeford or Crouch saw him either walk in at the beginning of his shift and visit with other employees while preparing to begin work, or visit during work, they would glare at him and tell him to do his job. Other employees did not receive such treatment for the same behavior.

66. In his first month as maintenance manager, Crouch announced rules on overtime. The change in overtime policy was discussed at a management meeting with Bridgeford before it was imposed. Crouch told Beauchamp that the overtime policy came from Bridgeford.

67. Prior to the filing of the sexual harassment claims, the corporation allowed overtime work in the shop as needed. After filing of the sexual harassment claims, Beauchamp, Cogar, Burns, David Azure and Haymaker were all initially told there would be no overtime. Spires, who was not a mechanic, was also told no overtime (although he had rarely worked overtime). However, Azure was subsequently permitted to work overtime.

68. The mechanics complained to Crouch about the overtime policy. Some nights they could not complete necessary repair to and maintenance work on the corporation's vehicles and equipment without overtime. Crouch replied that the new policy was his idea and was a cost control measure.

69. Because of the new policy the night shift left a truck unfinished one evening because they could not finish the necessary work without overtime. Crouch reprimanded them for it.

70. Crouch then announced a procedure that overtime was acceptable if he approved it in advance. To obtain approval the mechanics had to contact Crouch before 9:00 p.m. However, the mechanics could not always tell before 9:00 p.m. if they could finish necessary work that night without overtime.

71. When the mechanics called Crouch after 9:00 p.m. to request permission to work overtime to finish necessary work, they got into trouble for violating the pre-9:00 p.m. approval policy. When they did not call Crouch but worked overtime without approval to finish necessary work, they got into trouble. If they left without working overtime and did not finish necessary work, they got into trouble.

72. In February of 2003, Beauchamp was presented with a document entitled "Shop Rules." Prior to the filing of the complaints, the employees had never been required to sign personnel policies. Beauchamp signed it as required, and it was placed in his personnel file. The corporation did not provide him with copies of the "Shop Rules." One policy in the "Shop Rules" provided that no spitting of any kind would be allowed in the building for health reasons. All four of the mechanics who filed sexual harassment complaints chewed tobacco. Prior to adoption this policy, chewing and spitting tobacco were allowed in the shop. Smoking cigarettes continued to be allowed in the shop.

73. Immediately after the inauguration of the "no spitting" policy, tobacco stains and wads of chewing tobacco appeared on several vehicles in the shop when the morning shift came to work. The amount of staining and the size of the wads made it obvious that this had been deliberate soiling of corporation property. The stains and wads had not been present at the end of the day shift the previous day. Beauchamp had not seen them present when he had left work at the end of the night shift, and did not know when (or by whom) the messes had been made. The corporation was unable to discover who had deposited the stains and wads on the vehicles.

74. Crouch and Bridgeford decided that the harassment complainants were the culprits. They resolved to impose even tighter discipline on the complainants. Bridgeford had pictures taken of the stains and wads on the vehicles.

75. Deborah Bailey was never asked to sign the "Shop Rules" policy. She had never seen that document. Vicki Forbes had never been asked to sign it. Katrina Hearns was never asked to sign it. Deborah Koetitz had never seen the Shop Rules policy nor been asked to sign it. Pamela Skogen had never seen the Shop Rules policy nor been asked to sign it. Kelli Lawson had never seen the Shop Rules policy nor been asked to sign it. Bonnie Worrell had never seen the Shop Rules policy nor been asked to sign it.

76. Bridgeford testified in his deposition that <u>all</u> employees had to sign the Shop Rules policy. As the designated representative for the corporation, he heard the testimony of the female employees. After hearing that testimony, he testified that all <u>shop</u> employees had to sign the Shop Rules policy.

77. On or about March 13, 2003, Beauchamp received a copy of corporation policy and procedures and was required to sign them.

78. On April 4, 2003, Beauchamp was required to sign a time clock policy.

79. Bridgeford testified that everyone was required to have a signed time clock policy in their file. Pamela Skogen punched a time clock but was aware of no written time clock policy and had never signed one. Bonnie Worrell was not asked to sign a written time clock policy. Kelli Lawson had never been asked to sign a written time clock policy.

80. Crouch testified that all of the policies and the requirement (as he described it) that employees under his supervision sign to acknowledge receipt of the policies, were simply part of his efforts to be sure the corporation had proper documentation in its files. The timing of the corporation's efforts to generate such "documentation" contradicted testimony that there was no hostile motive for the welter of policies in 2003 and that the policies were addressed toward all employees equally. Crouch more than his predecessors followed the suggestions and directions of both Leven and Bridgeford. The source for the new policies was not Crouch, but upper management of the corporation (Bridgeford and Leven).

81. Crouch began keeping a logbook, recording the conduct of the four employees who had filed the sexual harassment complaints. Crouch confided in Cogar that Bridgeford had asked him to keep the logbook. Cogar observed Crouch maintaining and writing in the logbook. He told Beauchamp about it.

82. Crouch made notes about employees other than Beauchamp and the other complainants, but the primary purpose of the notebook was to record the conduct of the complainants, to use against them.

83. Bridgeford told some of the corporation's employees in 2003 that they would not get a cost of living increase because of some "unexpected costs," including the sexual harassment complaints. One of the truck drivers, Scott Beck, reported to Beauchamp that Bridgeford told employees other than the four complainants that the other employees would not get cost of living increases in 2003 because of the sexual harassment complaint.

Conclusions of Male Employees About Bridgeford's Motives

84. Beauchamp believed that Bridgeford was either homosexual or bisexual. Beauchamp came to this conclusion because of Bridgeford's observed behavior toward Beauchamp and other male mechanics at work.

85. Based upon his observations during the time that he worked for the corporation, Anderson believed Bridgeford was sexually attracted to men. He formed this belief because of Bridgeford's conduct.

86. Burns believed that Bridgeford was sexually attracted to men, based upon what he believed to be Bridgeford's sexual advances to him.

87. When Bridgeford engaged in sexually offensive comment and contact with Spires, it made Spires angry. It offended him. It affected his work. Spires' observations and experiences led him to believe that Bridgeford was sexually attracted to men.

88. Plute believed that Bridgeford was sexually attracted to men. Plute could not imagine a heterosexual man doing and saying the things he observed Bridgeford do and say. Plute believed that Bridgeford liked men and that he was on a power trip. He believed that Bridgeford demeaned and dehumanized people to the point that he could push them around and control them.

89. Lodge denied knowing whether Bridgeford had been making a sexual advance by touching him. Lodge said that he did not care and was not going to find out if it was a sexual advance. His reaction to Bridgeford's touching and his demeanor while testifying about it showed that he had felt threatened and angry at a sexual advance toward him by his immediate supervisor. Lodge was unable consciously to acknowledge the contact as a sexual advance. Had he done so, his rebuff of Bridgeford would have been to do what he only threatened to do at the time.

Bridgeford's Treatment of Female Employees

90. The Great Falls female employees of the corporation were Kelli Lawson, Bonnie Worrell, Debbie Bailey, Katrina Hearns, Vicki Forbes, Pam Skogen and Deborah Koetitz. Bridgeford supervised Bailey, Koetitz, Hearns and Lawson. He did not treat the female employees in the manner he treated the male employees. He never said anything sexual to or touched the female employees in sexual ways. They never heard him say anything sexual to or touch any other female employees in sexual ways. Bridgeford never said anything demeaning to the female employees and they never heard him say anything demeaning to other female employees.

Damages and Affirmative Relief

91. Crouch told David Lee Burn in the summer of 2003 that he would be moving Beauchamp to the day shift. Burn told Beauchamp. Beauchamp knew that the move would give Bridgeford access to him during his entire shift rather than during the first two to two and one-half hours of the night shift. From the behavior of Leven, Bridgeford and Crouch, Beauchamp reasonably concluded that nothing had been or would be done to address Bridgeford's behavior. Beauchamp began to seek other employment.

92. Beauchamp inquired at several places about positions. When the tool suppliers came in (about once a week), he asked if they had heard of anything that was open. He regularly checked the job service board in the mornings and looked in the paper.

93. Beauchamp applied for work with Tire Rama. He also talked to Ken Noble, for whom he had worked before starting with the corporation. He inquired about a janitor job at the School for the Deaf and Blind. He applied for jobs with Big Sky Bus Lines and Mechanics Unlimited. He did not find a job that paid the same wages and benefits as he had received with the corporation.

94. Beauchamp continued to work for the corporation. He needed the income and benefits to support his family and could not afford to quit until he found another job. On September 18, 2003, when he had found and accepted a job with Big Sky Bus Lines, he quit working for the corporation.

95. The changes made by management in shop procedures after the filing of the complaints, the failure and refusal to address Bridgeford's behavior, the apparent impending shift change and the sexual harassment all led Beauchamp to seek other work. He reasonably searched for other work that would not result in a loss of income. His decision to voluntarily terminate his employment once he found other work, even though it did result in a loss of income, was reasonable.

96. Beauchamp earned fringe benefits working for the corporation, consisting of health and dental insurance for himself and his family (which cost the employer $859.31 per month), life insurance coverage (which cost the employer $43.92 per month), two weeks' paid vacation per year (during which Beauchamp would receive $1,260.00); five days of sick leave per year ($630.00 for one work week); $350.60 for the monthly estimated 401(k) employer contribution; $0.15 per hour for a tool allowance; $150.00 per year safety bonus if there were no accidents (received in 2001 and 2002) and free garbage service valued at $14.33 per month. He has no benefits with his current employer. He has lost the reasonably quantifiable value of his benefits for 1.01 years (52.572 weeks) by the date of this decision (September 21, 2004).

97. The loss of garbage service is worth $173.68 ($14.33 times 12 times 1.01). The loss of paid vacation is worth $1,272.608 ($1,260.00 times 1.01). The tool allowance is worth $303.87 ($.15 times 40 times 50.143 times – no tool allowance for paid vacation – times 1.01). There is no evidence regarding whether Beauchamp would have received a safety bonus in 2003. There is no evidence of the value, in terms of medical and dental expenses that would have been covered, of the health insurance. The value of the employer's

contribution to the 401(k) plan is $4,249.27 ($350.60 times 12 times 1.01), contributed (at Beauchamp's election to an IRA created by Beauchamp or to Beauchamp's existing vested entitlement under the corporation's plan (if Beauchamp both has any such vested entitlement and chooses that option). There is no evidence regarding the value of the sick leave entitlement (whether Beauchamp would have received payment for unused days at some point or how much sick pay Beauchamp has lost to date by taking unpaid sick days with his current employer). Thus, the quantifiable loss of earned benefits to date is a total of $1,706.46, and the retirement contribution.

98. The future losses for the quantifiable benefit items will be $14.33 garbage service per month, $105.00 paid vacation per month, $25.07 tool allowance per month, for a total of $144.40 per month, and the continuing retirement contribution of $350.60 per month.

99. At the time of his resignation, Beauchamp earned $15.75 per hour. His weekly salary for 40 hours of work was $630.00. At Big Sky Bus Lines he earned $14.00 per hour. That was, at the time of the hearing a reasonable measure of his earning capacity for full time employment in the local market, $560.00 per week. From September 18, 2003 through September 21, 2004 (50.572 weeks times $70.00), Beauchamp's total lost wages are $3,540.04.

100. Beauchamp's future earnings may vary depending upon whether he is able to maintain his current employment or find higher paying employment. No employment, either with the corporation or with other employers, is guaranteed. The factors related to whether Beauchamp's future earnings will grow, be static or decline are reasonably likely also to result in similar changes to earnings for employees of the corporation. Thus, Beauchamp's future loss of wages can reasonably be measured by his present weekly lost wages, extended over a year (less two weeks for paid vacation now recovered) and divided by 12, which is $275.83 per month.

101. Four years from the date of Beauchamp's resignation is an appropriate period for the corporation to be responsible for his wage losses.

102. Interest on Beauchamp's earning loss to date is based upon his monthly earning loss of $275.83. Interest on the monthly lost earnings to date is $177.76 ($275.83 per month times .1 per year divided by 12 times 47.44 months (11.12 plus 10.12 plus 9.12 . . . etc. . . . plus 1.12 plus .12 total months of interest, beginning one month after Beauchamp resigned).

103. Beauchamp suffered emotional distress because of the hostile work environment to which the corporation subjected him. He had difficulty dealing with it. It affected his work performance. He blamed himself,

questioning whether he could or should have done something to stop Bridgeford's continuing conduct. He had headaches at work, and felt sick (to the point of nausea) when he went to work. He went to work and found something to do out in the yard so he would not have to be around until Bridgeford had left the shop. If Bridgeford was around, he grabbed a creeper, crawled under a truck and tried to hide just so he would not have to deal with him. He felt browbeaten and that he could never do anything right.

104. Beauchamp went home and told his wife, Shareece, about what was happening at work. She observed his distress, beginning in the fall of 2002. She felt as if she was on an emotional roller coaster with her husband.

105. Beauchamp was consumed by what was going on at work. He was not able to interact with his family. He frequently lost his temper. He began to think that his family would be better off if he was not around them. His emotional distress impaired his ability to help with his teenage daughters' problems. His ability to discipline his children was lessened. He either took no action despite the need, or overreacted in imposing discipline.

106. Beauchamp attended one counseling session with Rich Kuka, while still working for the corporation. He could not afford to continue, because the corporation-provided health insurance denied coverage for his counseling treatment.

107. The value of Beauchamp's emotional distress claim is $25,000.00.

108. The department must enjoin further discrimination and reasonably should require training and adoption of appropriate policies.

IV. Opinion[5]

A. Discrimination in Employment Because of Sex

Montana law prohibits employment discrimination based upon sex. Mont. Code Ann. § 49-2-303(1)(a). An employer who directs unwelcome sexual conduct toward an employee violates that prohibition, when the conduct is sufficiently abusive or pervasive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips* (April 4, 1991), H.R.C. No. 8901003707, ***aff. sub nom.*** *Vanio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596; *Houghton v. Medtrans* (May 3, 2000), H.R.C. No. 9901008749, "Final Agency Decision," pp. 7-8.

[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.

A.1. Standard of Proof for Same Sex Sexual Harassment Claims

The anti-discrimination provisions of the Montana Human Rights Act closely follow federal anti-discrimination laws, including Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e ***et seq***. Montana tribunals seek guidance from federal case law that illuminates proper application of the Montana Human Rights Act, when there is no existing Montana precedent. ***E.g.***, *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816.

The United States Supreme Court has decided that sexual harassment in the workplace when both the harasser and the target are of the same sex (which is alleged in the present case) is actionable under Title VII of the federal Civil Rights Act. *Oncale v. Sundowner Offshore Services, Inc.* (1998), 523 U.S. 75, 79. The Court limited such claims to exclude harassment with sexual content or overtones that did not result <u>because of</u> the victim's sex. *Oncale* distinguished workplace discrimination because of sex from harassment not motivated by sex even though the words used had sexual content and connotations. Under *Oncale*, a plaintiff can prove illicit motivation by establishing actual sexual advances toward the victim or proving that the harasser was sexually attracted to persons of the same sex or proving that the harasser was hostile toward the victim's gender. Hostility that is not gender based is outside of the scope of the Title VII prohibition.

The Montana Supreme recently adopted the *Oncale* standard for human rights complaints of illegal discrimination by workplace same sex harassment. *Campbell v. Garden City Plumbing and Heating, Inc.*, 2004 MT 231, ¶ 11, __ Mont. __, __ P.3d __. Thus, when the harasser and the target are of the same sex, Montana law does not automatically infer from the express sexual content of the objectionable conduct that the motivation was because of gender. Instead, additional evidence to prove that the harassing conduct is because of sex is necessary.

Campbell applied the *Oncale* four part *prima facie* case test: (1) protected class membership (being male); (2) harassing conduct was because of being male); (3) unwelcome harassment and (4) severe or pervasive harassment that altered the conditions of employment, creating an abusive environment. *Campbell* ***at*** ¶¶ 16-19; ***citing*** *Oncale*; *Beaver v. Mont. D.N.R.C.*, 2003 MT 287, 318 Mont. 35, 78 P.3d 857; Admin. R. Mont 24.9.1407; 29 C.F.R. § 1604.11.

Beauchamp, a man, proved that Bridgeford, another man, subjected him to unwelcome harassment. The harassment was so severe or pervasive that it altered the conditions of his employment and created an abusive working environment: Bridgeford was the general manager of the operation where

Beauchamp worked and the employer had actual notice of the harassment and took no meaningful remedial measures. Beyond question, Beauchamp proved the first, third and fourth parts of the *Oncale* test. The second part of the test was the only real issue.

Illegal discrimination exists only if the motive for the harassment is the victim's membership in a protected class. *Campbell* confirms the standard of proof necessary to establish that protected class membership triggered the same sex harassment. Absent adequate proof that the harassment was motivated by either sexual attraction or hostility toward men, the treatment Beauchamp endured does not constitute illegal discrimination in employment because of sex, even though it clearly would constitute illegal discrimination if a male supervisor were directing similar conduct toward a female subordinate.

Evidence to prove motivation may be direct or indirect, but it must be more than the fact-finder's inference from Bridgeford's words and acts.[6] Beauchamp's evidence did persuade the fact-finder of Bridgeford's motive. In addition to the plain inference, which alone was not enough, Beauchamp proved a series of other acts, toward other similarly situated men, as additional evidence of motive. He also proved that he and the other men Bridgeford targeted all perceived the conduct as sexual at the times of the incidents.

A.2. Evidence of Other Acts to Prove Motivation

Evidence of other acts is admissible to prove motive, intent or notice. Mont. R. Ev., Rule 404(b). The admissibility of other acts evidence is subject the "*Matt* test," test, *State v. Matt* (1991), 249 Mont. 136, 814 P.2d 52, also known as the "modified *Just* test," *State v. Just* (1979), 184 Mont. 262, 602 P.2d 957, requires:

> (1) the other acts must be similar; (2) the other acts must not be remote in time; (3) the other acts may be admitted for one of the permissible purposes provided in Rule 404(b); and (4) the probative value of the other acts must not be outweighed by the danger of unfair prejudice.

Benjamin v. Torgerson, 1999 MT 216, ¶ 17, 295 Mont. 528, 985 P.2d 734.

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[6] Severe or pervasive physical sexual contact would prove the illicit motive, *Rene v. MGM Grand Hotel, Inc.* (9th Cir. 2003, ***en banc***), 305 F.3d 1061, 1063-64, ***cert. den.***, 538 U.S. 922, but Bridgeford's conduct was not as extreme as that Rene endured.

Evidence of Bridgeford's behavior toward the other mechanics was admissible under this test. It was sufficiently similar to satisfy the first part of the *Matt* test. As he did with Beauchamp, Bridgeford made sexual comments, suggestive physical contacts and physical contacts simulating sexual contact (if not constituting it) with other mechanics (all male) in the same workplace.

Bridgeford's other acts were clearly not too remote in time. His conduct with the other mechanics was essentially contemporaneous with his conduct with Beauchamp. This satisfied the second part of the *Matt* test.

The evidence of the other acts was offered to prove motive and notice to management, admissible purposes under Rule 404(b). This satisfied the third part of the *Matt* test.

Finally, the *Matt* test requires that other acts evidence have probative value outweighing any danger of unfair prejudice. "Probative" means tending to prove or actually proving facts pertinent to the case. *Black's Law Dictionary*, p. 1203 (6th Ed. West Pub. 1990). ***Cf.*** *Britton v. Farmers Ins. Group* (1986), 221 Mont. 67, 721 P.2d 303, 315. Obviously, any evidence tending to prove Beauchamp's case would be prejudicial to the corporation. "It is inevitable that the introduction of evidence of a prior crime will have some prejudicial effect on a defendant." *State v. Anderson* (1996), 275 Mont. 344, 912 P.2d 801, 804, ***citing*** *State v. Brooks* (1993), 260 Mont. 79, 84, 857 P.2d 734.

> [P]robative evidence will frequently and inevitably be prejudicial to a party. *State v. McKnight* (1991), 250 Mont. 457, 465, 820 P.2d 1279, 1284; *State v. Paulson* (1991), 250 Mont. 32, 43, 817 P.2d 1137, 1144.

State v. Henderson (1996), 278 Mont. 376, 925 P.2d 475, 479; ***see also*** *State v. Just*, 602 P.2d ***at*** 961 ("Evidence of other acts, especially of the nature testified to in this case, invariably will result in prejudice to the defendant to a certain degree.") ***and*** *State v. Keefe* (1988), 232 Mont. 258, 759 P.2d 128, 135.

Obviously, evidence of Bridgeford's conduct toward other mechanics was potentially prejudicial, because it tended to prove the illegal motive for similar conduct toward Beauchamp. The question was whether any <u>unfair</u> prejudice outweighed the probative value of the evidence:

> In this case, the evidence of "other acts" was prejudicial, *State v. Romero* (1993), 261 Mont. 221, 861 P.2d 929. "but because it satisfies the other requirements of the modified *Just* rule, such prejudice alone is not a sufficient reason to refuse admission."

Romero, 261 Mont. ***at*** 226, 861 P.2d ***at*** 932. ***See also*** *McKnight*, 250 Mont. ***at*** 465, 820 P.2d ***at*** 1284.[7]

State v. Henderson, ***supra***; ***see also*** *State v. Anderson*, ***supra***, ("[W]hen the prior crime evidence meets the first three elements of the modified *Just* rule, the prior crime evidence necessarily carries great probative weight."), ***quoting*** *Brooks*, ***supra***, ***citing*** *State v. Eiler* (1988), 234 Mont. 38, 762 P.2d 210, 218; ***see also*** *State v. Keefe* ***supra***.

The risk of unfair prejudice did not outweigh the substantial probative weight of the evidence of Bridgeford's conduct toward others. In the cases cited, the risk of unfair prejudice involved the risk of an emotional reaction by the fact-finders to the nature of the other acts. Here, the other acts were a necessary foundation for the lay opinions of other male employees, as well as supporting evidence for the findings regarding notice to management of complaints about Bridgeford's conduct. Thus, in accord with the case law on the fourth part of the *Matt* test, the probative weight of the other acts evidence substantially outweighed any risk of unfair prejudice. The evidence regarding Bridgeford's conduct toward other male employees was admissible to prove both motive and notice to management. As proof of motive, it confirmed the express content of Bridgeford's sexual comments and physical contacts – he treated the male mechanics in this fashion because of their sex.

A.3. The Mechanics' Interpretations of Bridgeford's Conduct

Beauchamp, Spires, Anderson, Burns and Plute interpreted Bridgeford's behavior to mean that he was sexually attracted to them. People can and do interpret the observed behavior of others, inferring the motivation or causation for the behavior. Witnesses can give admissible testimony about their interpretation of the motivation for observed behavior.

The Commission Comments on Rule 701 of the Montana Rules of Evidence ably explain the effect and purpose of the rule on opinion testimony. ***See***, Mont. R. E., Rule 701, "Commission Comments."

Before the Rules, the early American common law's "traditional lay opinion rule," which prohibited lay witnesses from testifying to their opinions, applied in Montana. Montana case law had developed numerous exceptions to the lay opinion rule, which allowed lay persons to testify about conclusions

[7] The full citation appears in the prior quote from *State v. Henderson* on p. 20 of this opinion.

they reached and reasonably relied upon in the conduct of their everyday affairs. These exceptions included both opinions which were shorthand renditions of observed facts and opinions about the mental and emotional state (including the motivation) of a person, based upon their observations of the person's behavior:

> The traditional lay opinion rule, found in early American common law, prohibited lay witnesses from testifying as to their opinions. Yet the traditional rule has been criticized because of the difficulty of distinguishing "facts" which lay witnesses could testify to and "opinions" which they could not. ***See*** *Territory v. Clayton*, 8 Mont. 1, 12, 19 P. 293 (1888) ***and*** *Watson v. Colusa-Parrot Mining and Smelting Co.*, 31 Mont. 513, 521, 79 P. 12 (1905). The impracticality of the traditional rule is obvious when the many sensible exceptions to it are considered. These exceptions are part of Montana case law, the most general of which allows a witness to give an opinion which is a "shorthand rendering of the facts." *State v. Lucey*, 24 Mont. 295, 302, 61 P. 994, (1900); *State v. Tighe*, 27 Mont. 327, 341, 71 P. 3 (1903); *State v. Byrd*, 41 Mont. 585, 592, 111 P. 407 (1910); ***and*** *State v. Collins*, 88 Mont. 514, 523, 294 P. 957 (1930).

Montana case law provided additional exceptions to the traditional rule, as the following statement indicates:

> > [A]ll concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are . . . questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication . . . and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention.
>
> *State v. Trueman*, 34 Mont. 249, 253, 85 P. 1024 (1906).

Other cases have allowed opinions in the following specific areas: the general health of another person (*Fearon v. Mullen*, 38 Mont. 45, 52, 98 P. 650 (1908)); nervousness (*State v. Lucey*, ***supra*** 24 Mont. ***at*** 303); fright (*State v. Byrd*, ***supra*** 41 Mont. ***at*** 592); the nature of alcohol and intoxication

(*State v. Trueman*, ***supra*** 34 Mont. ***at*** 252; *State v. Sedlacek*, 74 Mont. 201, 211, 239 P. 1002 (1925), *Meinecke v. I.T.C.*, 101 Mont. 315, 322, 55 P.2d 680 (1936), and *State v. Strobel*, 130 Mont. 442, 446, 304 P.2d 606 (1956)) . . . .

Mont. R. Ev., Rule 701, "Commission Comments."

Under Mont. R. Ev., Rule 701, the testimony regarding Bridgeford's perceived motives was admissible because it was both rationally based on the witnesses' perception and helpful to the determination of a fact in issue:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Cf. also, *State v. Musgrove* (1980), 187 Mont. 549, 610 P.2d 710, 712 (wife's observations about husband's appearance and condition – his mental state – helpful to determine fact at issue and clearly admissible lay opinion testimony); ***and*** *Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc.* (1989), 236 Mont. 394, 770 P.2d 859, 863 (plaintiff's opinion or inference testimony that defendant was "pressuring" general contractor to reject his bid admissible under Rule 701), ***citing and applying*** *State v. Trueman*, ***op. cit.***

Lay witnesses can properly testify that behavior they observed seemed angry, nervous or excited, because adults in this society have seen how people act when angry, nervous or excited. Adults in this society have also seen how people act when sexually attracted. Virtually every uncloistered adult has experience with sexual advances.

The lay witnesses could and did testify that Bridgeford acted as if sexually attracted to them and that he made actual sexual advances toward them. Five witnesses testified that they interpreted Bridgeford's behavior as sexual advances or expressions of sexual attraction toward them. Two other witnesses, Haymaker and Lodge, made it plain by both their testimony and their demeanor while testifying that although they would not say it out loud, they also interpreted Bridgeford's behavior toward them as unwelcome sexual advances or expressions of sexual attraction.

Four of these seven witnesses filed discrimination complaints based upon Bridgeford's unwelcome attentions. At least three of them left employment with the corporation because of Bridgeford. The credible

evidence of record established that the antipathy of these men toward Bridgeford resulted from his treatment of them. They did not slant their testimony about his behavior because they did not like him. They credibly testified that they did not like him because of the ways he had treated them. They did not like his treatment of them because they perceived it as consisting of sexual advances or expressions of sexual attraction.

A.4. Beauchamp Proved a Prima Facie Case

The testimony regarding Bridgeford's treatment of Beauchamp and the other mechanics was probative on his illicit discriminatory motive. The hearing examiner cannot, under *Campbell*, simply infer Bridgeford's motive from his words. However, the facts establish that he deliberately led seven male employees under his ultimate or direct supervision to believe in his sexual attraction toward them. He persisted in his behavior despite complaints and perhaps some risk that Leven might eventually act to change his conduct.

There are only two credible explanations for Bridgeford's conduct. Either he was actually sexually attracted to the men or he was acting out his hostility toward them. He could not have been blind to the effect he had on the mechanics. He did not offer any reasonable explanation of his conduct. Thus, the two explanations supported by the substantial and credible evidence of record are that he either had or feigned sexual attraction toward these men. If he feigned the attraction, the only credible explanation for acting out an attraction he did not feel was hostility toward them, which he chose to express by pretending a sexual attraction that he knew they considered demeaning, inappropriate and emotionally threatening.

In *Campbell*, the only person who testified that the atrocious conduct of fellow workers and supervisors toward him was sexually motivated was Travis Campbell, himself, who feared that the motivation might actually be sexual. *Campbell* ***at*** ¶ 9. In this case, Beauchamp and another half a dozen employees, including one of his supervisors, experienced Bridgeford's attentions as unwelcome sexual advances or expressions of sexual attraction. This was substantial and credible evidence that Bridgeford's conduct was because of sex.

Viewing the entire record, it is more likely than not that Bridgeford had an illegal discriminatory motive in engaging in sexual comments to and sexual contact with Beauchamp. The frequency of the incidents was consistent with

either sexual attraction or hostility toward male employees.[8] The disruptive effect upon the mechanics of the incidents was consistent with either motivation. The stubborn refusal of Bridgeport to modify his conduct, despite complaints from the mechanics and directions from Leven, was also consistent with either motivation. The perceptions of Beauchamp and the other men who were recipients of this unwelcome attention were probative on Bridgeport's motives. Beauchamp proved the second part of the *Campbell* test. Whatever else may have motived Bridgeford's conduct, a major reason for it was because Beauchamp was male. Thus, Beauchamp proved his *prima facie* case.

B.1. The Corporation Did Not Establish a Faragher Defense

One of the issues in this case was whether the corporation could interpose an affirmative defense under *Faragher v. City of Boca Raton* (1998), 524 U.S. 775 ***and*** *Burlington Industries, Inc. v. Ellereth* (1998), 524 U.S. 742. Both cases held that an employer has no vicarious liability to an employee for an actionably hostile environment created by that employee's immediate supervisor if the employer exercised reasonable care to protect employees from such a hostile environment.

The defense comprises two necessary elements: (a) proof that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) proof that the complaining employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer to avoid harm. Here, the corporation failed to prove either element.

Beauchamp complained regarding Bridgeford. Leven and two of Beauchamp's immediate supervisors had notice of the complaints. The corporation failed to investigate the complaints and failed to take any effective action to address the harassment. Indeed, what the corporation <u>did</u> do was act in a hostile manner toward Beauchamp and the others when they filed human rights complaints after getting no action on their internal complaints. While citing the complaints as a reason not to give cost of living increases, the corporation made no effort to address the conduct of Bridgeford.

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[8] Bridgeford harassed male subordinates who worked in the shop area and not female subordinates who worked in the office and sometimes also in the shop. In other words, Bridgeford harassed men he thought were powerless to protect themselves, toward whom he felt attraction, hostility or both.

The corporation presented evidence that the tightening of supervision over the mechanics was for legitimate business reasons – reaction to the cost of overtime, the amount of wasted work time in the shop and the single incident of smears and stains on vehicles and equipment with chewed tobacco and tobacco juice.

This evidence was unpersuasive. With the hiring of Crouch as the new supervisor in the shop, Bridgeford saw a chance to direct and manipulate Crouch in a campaign against the mechanics who had complained. Unchecked and probably abetted by Leven, who was furious about the complaints, Bridgeford carried out that campaign. Evidence of the animosity directed toward Beauchamp and the other mechanics who filed human rights complaints, testimony of admissions by Crouch and hostile comments by Leven and Bridgeford all helped to demonstrate that the corporation, far from acknowledging any of the complaints about Bridgeford, resisted and struck back against the mechanics who had filed the complaints.

The *Faragher* affirmative defense is also unavailable if the harassment causes a tangible employment action, *Faragher* ***at*** 807-08; *Burlington Industries* ***at*** 765, and lost overtime and justifiable resignation are very tangible.[9]

The corporation failed to prove that it exercised due care, or any care at all, to protect the employees from sexual harassment, even with multiple internal complaints followed by formal complaints about it.[10] Beauchamp had the ultimate burden of proving his discrimination claims. *HAI v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett*; *European Health Spa*; *Martinez*. He carried that burden with regard to the *Faragher* defenses.

B.2. The Corporation Failed to Defend against Beauchamp's Proof

Campbell does not address whether evidence that satisfies the *Oncale* test by proving sexual motivation with more than merely the inference prompted by the harassing conduct constitutes direct or indirect evidence. This should logically depend upon the nature of the evidence. To defeat an indirect evidence *prima facie* case of a hostile environment due to sexual harassment, a defendant needs to rebut that case or to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802. If the prima facie case is based on direct

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[9] The corporation also did not prove that it had a known sexual harassment policy.

[10] Beauchamp did not plead a retaliation claim and the corporation abandoned the *Faragher* defense at hearing, but the evidence regarding its reaction to the complaints remained relevant. The evidence of the hostile reaction of the corporation to his complaint established additional justification for his resignation.

evidence, the defendant needs to rebut that evidence or to prove the illicit motive played no part in its adverse employment action against the plaintiff. *Laudert v. Richland County Sheriff's Office*, ¶ 33, 218 MT 2000, 301 Mont. 114, 125, 7 P.3d 386. Obviously, the indirect evidence standard for defense is easier to meet.

The corporation's evidence neither rebutted Beauchamp's case nor established a legitimate business reason for the corporation's actions and inactions. The corporation argued that its evidence established that the harassment was really not so bad, frequent or blatant. Leven claimed a lack of knowledge of the problem. Bridgeford and Leven both testified that they had no notice of the problem. The corporation also argued that the complaints, including Beauchamp's, were false accusations triggered by the corporation's efforts to control and supervise the workers. It argued that Bridgeford's conduct was at worst ambiguous and that several disgruntled workers had seized upon that ambiguity to strike back at the corporation with fabrications about sexual harassment. The corporation failed to prove any of these defenses, which actually were pretexts – after the fact attempts to show events in a more favorable light. Since the corporation could not meet the lower indirect evidence standard for successful defense, it clearly did not meet the higher direct evidence standard, and thus the corporation failed both to rebut Beauchamp's case and to justify its conduct.[11]

C. Relief

Since the corporation illegally discriminated against Beauchamp, the department may order any reasonable measure to rectify any resulting harm that he suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of damage awards in discrimination cases is to make the victim whole for harm caused by the illegal action. *Vortex Fishing Systems, Inc. v. Foss*, 2001 MT 312, ¶ 27, 308 Mont. 8, 38 P.3d 836; *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; ***see***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

C.1. Lost Earnings to Date: Back Pay, Fringe Benefits and Prejudgment Interest

By proving discrimination, Beauchamp established a presumptive right to recover lost wages. *Albermarle Paper Company*, ***supra at*** 417-23. He proved with reasonable accuracy the amount of wages he lost due to the corporation's

[11] Because the corporation did not interpose a successful defense under either standard, the hearing examiner has not expanded this opinion to address which standard applies in a same sex harassment case that satisfies the *Campbell* proof requirements.

adverse actions, which is sufficient to sustain an award. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Company* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626.

Beauchamp did not prove with reasonably accuracy the value to him of certain fringe benefits. The employer's cost for the fringe benefits (health and dental care and life insurance) did not establish the value to Beauchamp of the loss of those benefits. Beauchamp did not prove what it cost him to be without health insurance. He did not demonstrate any loss due to absence of life insurance.

Likewise, without any measure of how much sick leave Beauchamp had taken in the past or was likely to take in the future, loss of his sick leave entitlement had no reasonably accurate value. Without evidence of whether any safety bonuses were paid for 2003, and with no information about the future (or even whether the bonus was mandatory), past payments were not sufficient to prove with reasonable accuracy the value (if any) of the loss for 2003 or thereafter. Thus, for such items, there was no reasonable way to rectify the harm Beauchamp suffered due to these losses.

Beauchamp did establish with reasonably accuracy the value of paid vacation, tool allowances and free garbage service. The hearing examiner was able, from the evidence, to quantify those losses, so that there was a reasonable way to rectify the financial harm from those losses. Likewise, participation in a 401(k) plan with employer contributions had a value equal to the contributions, into either the plan if Beauchamp remains vested in it, or an IRA he creates for receipt of the lost contributions.

The Department is authorized to order interest paid at the rate of 10% per annum on the amount of back pay due. *P.W. Berry, Inc.* ***supra***; *European Health Spa* ***at*** 1033; *Foss v. J.B. Junk*, HRC No. SE84-2345 (1987). The hearing examiner believes it is reasonable to include the quantifiable fringe benefits within earnings lost, for an award of prejudgment interest.

C.2. Front Pay

For future relief from a lost job due to discrimination, the preferred remedy is reinstatement. *Cassino v. Reichhold Chem. Inc.* (9th Cir. 1987), 817 F.2d 1338, 1346. When an order for reinstatement or hire is not an option (and it is not for Beauchamp), front pay is a reasonable remedy. *Fortino v. Quazar Co.* (7th Cir. 1991), 950 F.2d 389, 398. "Front pay" is an award for probable future losses in earnings, salary and benefits, to make the victim of discrimination whole when placement in the lost job is not feasible –

it is usually temporary to permit the victim to reestablish his "rightful place" in the actual job market. *Martinell* ***at*** 439; *Rasmussen v. Hearing Aid Institute*, HR Case #8801003988 (March 1992), ***approved***, *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 635; *Sellers v. Delgado Community College* (5th Cir. 1988), 839 F.2d 1132; *Shore v. Federal Express Co.* (6th Cir. 1985), 777 F.2d 1155, 1158.

Ascertaining future lost wages is necessarily an exercise in reasoned speculation. The hearing examiner cannot hold Beauchamp to an unrealistic standard of proof (***see*** *Horn*, ***op. cit.***), yet there must be substantial credible evidence to support a finding that future lost wages extend into the distant future. The evidence did include evidence of Beauchamp's intent (because of his family) to stay in the Great Falls area. His diligent efforts to find the best available job established his current earnings as his earning capacity for the near future, but not for the limitless future.

Montana law gives weight to these kinds of concerns about long-range prognostication of future wage loss. In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights awards, but clearly the legislature wants future lost wages awards to be carefully considered before extending them far into the future. Four years of overall recovery, mirroring the limitation in the wrongful termination statute, is reasonable and supported by the credible and substantial evidence of record. A longer period of front pay was not sufficiently supported and would be unreasonably speculative.

C.3. Emotional Distress Damages

Beauchamp suffered emotional distress as a result of the unlawful discrimination. The department can award damages for emotional distress as the evidence established it or as inferred from the circumstances of the illegal discrimination. *Vortex Fishing Systems*, ***op. cit. at*** ¶ 33. Beauchamp had the right to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. As a matter of policy, under Montana law it is not reasonable to expect any person to endure emotional distress because of violation of a fundamental human right. *Vainio v. Brookshire* (1993), 258 Mt. 273, 852 P.2d 596; *Campbell v. Choteau Bar and Steak House* (1993), HR No. 8901003828. This is the heart of the holding in *Vortex Fishing Systems* that limitations and enhanced burdens of proof to recover emotional distress damages in tort cases do not apply in discrimination cases. Beauchamp presented substantial credible

evidence that he suffered emotional distress, which, as he proved them, justified an award of $25,000.00.

C.4. Affirmative Relief

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). Because the corporation failed to curb Bridgeford's harassing conduct, failed to respond to complaints about that conduct (except with attacks upon the complainers), injunctive relief is mandatory. It is necessary to enjoin the corporation from further failure to protect employees from supervisory sexual harassment, to investigate allegations of sexual harassment and to act to prevent such harassment after verification through investigation. It is reasonable in addition to require training and the adoption and department approval of policies regarding these three matters.

The department can inspect to assure the corporation's compliance (without the necessity of a new complaint) for not more than one year after this decision becomes final. Mont. Code Ann. § 49-2-506(3). However, the injunction is permanent. Mont. Code Ann. §49-2-506(1)(a).

V. Conclusions of Law

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

2. Montana Waste Systems, Inc., discriminated against Darrell Beauchamp because of sex (male) when it subjected him to a sexually hostile and offensive work environment beginning in February of 2001 and continuing until he left his employment. Mont. Code Ann. § 49-2-303(1)(a).

3. The corporation owes Beauchamp $3,540.04 for past lost wages, $1,706.46 for past lost benefits, $177.76 for prejudgment interest on the past lost earnings and $25,000.00 for emotional distress endured by Beauchamp, for a total now due and payable of $30,246.50. In addition, the corporation must either pay to an IRA created and owned by Beauchamp or (at his election if available, made in writing within 15 calendar days of this decision) pay into Beauchamp's vested account in the corporation's 401(k) plan the sum of $4,249.27. From the date of this final order through September 19, 2007, the corporation will owe Beauchamp an additional $420.23 each month, payable on the nineteenth day of each calendar month or the first regular business day thereafter when the nineteenth falls on a weekend or holiday) beginning on

October 19, 2004, at the same time paying into Beauchamp's IRA or (if he elects) into his account with the corporation's 401(k) the sum of $350.60. For the final payments on September 2007, the amounts shall be 88% of the above amounts. Mont. Code Ann. § 49-2-506(1)(b).

4. The law requires that the department enjoin the corporation from the discriminatory conduct. The department permanently enjoins the corporation from (i) discrimination in employment by subjecting its employees to a sexually hostile and offensive work environment and (ii) failing, by refusing to investigate complaints of such an environment and by responding with hostility against them for making internal and human rights complaints against the discrimination. Mont. Code Ann. § 49-2-506(1)(a).

5. The law also authorizes reasonable prescriptive conditions upon the corporation's behavior and the department orders and requires the corporation, within 60 days after this decision becomes final:

> (a) To submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them. The policies must include appropriate prohibitions against the enjoined discrimination and retaliation and procedures and responsible management persons for investigations of internal complaints and imposition of discipline. Mont. Code Ann. § 49-2-506(1)(a) and (c).
>
> (b) To obtain training in sex discrimination and proper investigation of complaints of sex discrimination under Montana law for its management employees, including Bruce Leven, Roger Bridgeford and Charles Crouch. The duration and specifics of the training is subject to the approval of the Human Rights Bureau. Within the prescribed time the corporation must provide a training plan to the Bureau and implement that plan, with any changes the Bureau requires, immediately upon Bureau approval of it. Mont. Code Ann. § 49-2-506(1)(a) and (c).

VI. Order

1. Judgment is found in favor of **Darrell Beauchamp** and against **Montana Waste Systems, Inc.** on the charge that the corporation discriminated against him because of sex.

2. The corporation must immediately pay to Beauchamp $30,246.50, to rectify harm to date for its illegal discrimination against him and must make the further payments mandated in Conclusion of Law No. 3. Interest accrues on this final order as a matter of law.

3. The Department enjoins and orders the Respondent to comply with all provisions of Conclusions of Law Nos. 4-5.

Dated: September 21, 2004

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

Beauchamp FAD tsp