

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

<hr/> <b>Heather Marshall,</b>	)	HRC Case No. 0039010424
	)	
Charging Party,	)	
	)	
vs.	)	<b>FINAL AGENCY DECISION</b>
	)	
<b>FNP of Montana, Inc.,</b>	)	
	)	
Respondent.	)	
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**I. INTRODUCTION**

Heather Marshall filed a human rights complaint alleging that FNP of Montana, Incorporated (FNP) discriminated against her on the basis of gender (female), created a hostile work environment for her because of her gender, and retaliated against her in her employment when she allegedly objected to the improper treatment. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on January 13 and 14, 2004 in Kalispell, Montana. Stacy Tempel-St. John, attorney at law, and Kim Schulke, attorney at law, represented Marshall. Mark Parker, attorney at law, and Casey Heitz, attorney at law, represented FNP.

Exhibits offered by the parties at the hearing were admitted or rejected as set forth in the tape recorded proceedings of the hearing. At the hearing, FNP's objection to Marshall's offer of Exhibits 2, 3, 2040a and 2099a was sustained by the hearing examiner. Upon further reflection, however, it is apparent that those written documents (purportedly contemporaneously prepared by Marshall although several contain no dates) are admissible under rule 801(1) (B) as evidence to rebut an implied charge of subsequent fabrication. Accordingly, for that limited purpose, Exhibits 2 and 3 are admitted. FNP's exhibit 336a was also admitted into evidence. Heather Marshall, Kimberly Heindel, Michelle Grubbe, Rick Bruff, Robert Birkle, Lester Wall, Robert Greenwood, Adam Richardson, Clint Curl, Benny Brown, Pat Evenson, John Peterson, Joe Uzdavinis, Alicia Hitt, and Officer Troy Holt all testified under oath in this matter. Based on the evidence and arguments adduced at the hearing as well as the post hearing memorandams submitted by the parties, the hearing officer makes the following findings of fact, conclusions of law, and order.

**II. ISSUES**

1. Is any portion of Marshall's claim precluded because it was not timely filed?

2. Did the behavior of the employees of the Kalispell FNP store demonstrate gender discrimination against Marshall or a work environment made hostile to Marshall by sexual harassment?

3. Did FNP retaliate against Marshall?

### III. FINDINGS OF FACT

1. FNP owns stores in various cities throughout Montana. FNP stores are pawn brokerages. In an effort to eliminate the stereotypes surrounding pawn brokerages, FNP has tried to build new, well lit stores in reputable retail areas in an effort to attract a broad range of customers.

2. Seth Brown, Benny Brown and Pat Evenson are co-owners of FNP.

3. Marshall began working for FNP as a pawn broker at the FNP Store in Kalispell, Montana on August 9, 2001. FNP discharged Marshall on October 7, 2002.

3. FNP does not maintain a written policy either on discipline or sexual harassment. Management expects employees to treat other employees with respect.

4. Robert Birkle managed the Kalispell store when Marshall started working there. Birkle reported to Benny Brown. Adam Richardson, Lester Wall, Robert Greenwood and Clint Curl also worked as pawn brokers at the FNP store in Kalispell. In Birkle's absence, Wall acted as the supervisor.

5. The employees took turns completing the various tasks necessary for the operation of the FNP Kalispell store. This included cleaning bathrooms. Management expected all employees, including Marshall, to complete the various tasks including cleaning bathrooms.

6. The layout of the Kalispell store is such that there is not much space (between three and four feet) between the cash register on the counter and the back wall of the building. Not infrequently this resulted in employees bumping into each other in the confined space.

7. On occasion, an employee ran into Marshall when she was in this confined area. Marshall never complained to management during her entire tenure at FNP that any employee inappropriately touched her.

8. Marshall on occasion initiated physical contact with other FNP employees. For example, on occasion she "cracked" or massaged Rob Greenwood's back.

9. The employees of the Kalispell FNP store engaged in some “ribbing” of each other on occasion.

10. At various times during Marshall’s working hours, one or more of the staff played different music compact discs (CDs). One of the CDs played on occasion contained songs by a group known as “Nellyville.” Some of the Nellyville songs contained sexually explicit lyrics. Another CD by a group known as “Tool” had a CD cover with sexually suggestive graphics. Marshall did not complain when these CDs were played or exhibited.

11. On one occasion, Birkle orally reprimanded Marshall for wearing a sweater over her FNP issued work shirt (a shirt containing a FNP logo on the front). FNP policy requires employees to wear either FNP shirts or sweatshirts and not cover up the logo. Because the sweater covered up logo, Birkle told Marshall she could not wear the sweater.

12. John Peterson and Joe Uzdavinis were regular FNP Kalispell store customers (Peterson on a daily basis) while Marshall worked there. Peterson has received specific training through his employment about the impropriety of engaging in sexual harassment. Neither saw any type of inappropriate conduct on the part of any store employees directed toward Marshall. Occasionally, employees bumped into each other in the narrow confines of the area behind the cash register. However, neither Peterson nor Uzdavinis saw any inappropriate conduct by any FNP employee.

13. At one point, a customer pawned a paint ball gun in the store. The paint ball gun had a sticker affixed to it which stated, “If you lick it, they will cum.” Exhibit 18. FNP store policy required that all items attached to a pawn be kept at the store until the pawn was returned to its owner or sold. In accordance with this policy, the FNP employees retained the sticker from the paint ball gun, affixing the sticker behind the counter (on the side facing the employees). The sticker remained in place for some amount of time. Marshall, however, never complained about the sticker being in place.

14. A female friend of the wife of Rob Greenwood became involved in marketing sexual paraphernalia sold by an entity called “Slumber Parties, Inc.” The method of marketing these items involved hosting a party where the items could be inspected by potential female purchasers. As part of the marketing, Greenwood’s wife received and distributed pamphlets that promoted the hosting of these parties. Exhibit #19. The pamphlet contained descriptions of the sexual paraphernalia that could be purchased at the parties. Greenwood brought several of these flyers to work and left them on a shelf in the employee break room at the store. At one point, Marshall took one of the flyers home.

15. Benny Brown and Pat Evenson treated Marshall with respect and in appropriate manner during all of their contacts while Marshall worked at FNP. Marshall knew that Brown and Evenson were co-owners of the FNP Kalispell store. Brown and Evenson visited the Kalispell store with some frequency. Evenson, in fact, visited the Kalispell store 6 to 10 times each year. Despite several opportunities to do so, Marshall never complained to either Brown or Evenson about sexual harassment or discriminatory treatment at the hands of the other Kalispell store employees.

16. If Marshall had advised Brown that she had been subjected to sexual harassment, "heads would have rolled." Brown makes it a practice to investigate all employee complaints. Brown requires his store managers to treat employees in a professional manner and to make sure that the working environment is maintained in a professional manner.

17. Evenson had conversations with Marshall when he visited the store, generally inquiring how she was doing and how things were going at the store. In fact, Evenson spent some time working at the Kalispell store along with the other employees. At no time did Marshall report any problems with her treatment at the hands of the other employees. Like Brown, Evenson requires that all employees treat their co-workers in a respectful manner.

18. On May 13, 2002, Birkle was injured by a car and could not come into work. On May 14, 2002, Marshall grudgingly agreed to cover Birkle's shift at work. Wall spoke to Marshall later in the day, asking her if she believed that he had treated her poorly, he would like to know why. Marshall responded that she did not want to talk about it, but made a comment in passing that sexist comments had been made around her by other employees. Wall then talked to Greenwood and Adam Richardson to advise them that no sexual comments or inappropriate jokes should be made around Marshall. Other than this statement to Wall, Marshall made no other complaints about mistreatment.

19. When Wall spoke to them about Marshall's complaint, Richardson and Greenwood had no idea what comments she was referring to. Nevertheless, each agreed that they would watch their language around Marshall.

20. On May 24, 2002, Birkle gave Marshall an oral warning for being 35 minutes late to work without calling in to advise the store that she would be late.

21. Marshall was not the only employee to receive warnings for being late. Clint Curl and Adam Richardson also received such warnings. Exhibit 28.

22. On July 12, 2002, Birkle gave Marshall a written warning for refusing to let a customer buy a movie because Marshall herself had decided to buy the movie. This

violated store policy that prohibited employees from buying merchandise in the store that the employee knew a customer wanted or was interested in.

23. Marshall received a second written warning when she refused to report for work on August 12, 2002. On August 12, 2002, Marshall advised Birkle that she would be taking that day off as a personal day. Birkle told Marshall she could not take that day off because Birkle could not cover her absence. Marshall told Birkle she would be taking the day off any way because Lester Wall had told her some two weeks earlier that she could have the day off and that he would clear the request with Birkle.

24. On October 5, 2002, one of the store employees left a jewelry case containing rings out on a counter in an unsecured manner. Nine rings in the case were stolen. Birkle recalled seeing Marshall as the last person in the area of the jewelry case. Birkle talked to Marshall and the other employees about the importance of not leaving jewelry cases out where things might be taken from them. Marshall denied leaving the case out.

25. Marshall did not receive criticism well. When Birkle discussed mistakes or short comings in Marshall's job performance, she became defensive and refused to acknowledge any responsibility for the problem.

26. On October 7, 2002, Birkle discharged Marshall for insubordination. Wall was present when Birkle fired Marshall. Birkle told Marshall she was not working out and that she was insubordinate. At the time of the discharge, Birkle issued a third "write-up" to Marshall. On that write up, Birkle checked off that Marshall was discharged for insubordination.

27. On December 31, 2002, Birkle discharged a male FNP employee "for multitude of reasons, work performance not up to par." (Exhibit 28, 12/31/02 calendar).

28. In March, 2003, Marshall filed a police report with Officer Troy Holt of the Kalispell Police Department alleging that Richardson and another person chased her around Kalispell in a car making obscene gestures and uttering obscene epithets. In making this report, Marshall never mentioned anything to Officer Holt about an alleged incident during which Birkle supposedly pointed a handgun at her at the store during work hours.

29. FNP has very strict rules regarding the handling of firearms while in the store. These rules include a strict prohibition of brandishing a firearm or pointing a firearm, whether loaded or unloaded, at any person. Birkle is keenly aware of these rules and abides by them.

30. Marshall had problems with her teenage daughter. Because of these problems, Marshall sought an order of protection against her daughter in January, 2003. In prosecuting the order of protection, both in her complaint and during her testimony, Marshall stated under oath that her termination at FNP occurred as a result of the conduct of her daughter. At no time during her litigation on the order of protection did she suggest that the termination was due to any conduct on the part of FNP employees.

31. Marshall filed her complaint with the Human Rights Bureau in February, 2003.

#### IV. OPINION

##### A. *Marshall's Claim Is Not Barred Due To Untimely Filing.*

FNP initially contends that a portion Marshall's complaint (relating to incidents that occurred more than six months before the filing of the complaint) are barred from consideration because of the 180-day filing requirement contained in Mont. Code Ann. § 49-2-501. FNP conceded that some of the alleged discriminatory conduct (such as the discharge) occurred less than 180 days prior to the filing of the complaint.

Mont. Code Ann. § 49-2-501(4) (a) provides that a human rights complaint must be filed within "180 days after the alleged unlawful discriminatory practice occurred or was discovered." The department may not consider any complaint which is not filed within the statutory time limits. Mont. Code Ann. § 49-2-501(4) (c); *Skites v. Blue Cross Blue Shield of Montana* (1999), 297 Mont. 156, 158-59, 991 P.2d 955, 957. *Skites* does not, however, directly address the issue of continuing violation as alleged by Marshall in this complaint. In fact, as Marshall points out, the Human Rights Commission has addressed the issue of continuing violations and has held that the Montana Human Rights Act permits imposition of liability for the entire effect of continuing violations when those acts occurring outside the 180 day limitation are sufficiently related to those occurring within the 180 day period. *See, e.g. Benjamin v. Joker's Wild Bar and Restaurant*, HRC No. 0001009023; *Kundert v. City of Helena*, HRC No. 9301005512. Moreover, even if it was true that some of the acts were not themselves actionable, those acts would nonetheless be relevant to determining whether or not a hostile work environment existed in this case. *Faragher v. City of Boca Raton* (1998), 524 U.S. 775, 787-88.

Here, Marshall contends that the conduct she alleges was part of an ongoing pattern or practice of discrimination. Proof of acts occurring outside the 180-day limitation is relevant and admissible.

B. Marshall Has Failed to Prove Sexual Harassment/Hostile Work Environment.

The Montana Human Rights Act prohibits discrimination in terms and conditions of employment because of sex. Mont. Code Ann. §49-2-303(1)(a). An employer directing or allowing the direction of unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile working environment. *Brookshire v. Phillips*, HRC#8901003707 (April 1, 1991), **affirmed sub. nom.** *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. The Montana courts follow federal discrimination law if the same rationale applies under the Montana Act. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813 88); *Johnson v. Bozeman School District*, (1987), 226 Mont. 134, 734 P.2d 209.

To prove her hostile environment claim, Marshall had to establish by a preponderance of the evidence a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment. *Kortran v. California Youth Authority* (9th Cir. 2000), 213 F.3d 1104, 1110 . She had to prove that her workplace was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher, supra*, 524 U.S. at 787-88. Marshall also had to prove that the hostile workplace resulted from being female (i.e., because of sex). *Oncale v. Sundowner Offshore Servs., Inc.* (1998), 523 U.S. 75, 79. When properly applied, the correct standard will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id. Oncale, supra*.<sup>1</sup>

Marshall contends that she was subjected to a hostile work environment because of inappropriate touching by other male FNP employees, constant verbal degradation, being required to clean bathrooms, and unequal treatment with respect to discipline. Marshall has failed to prove her claim by a preponderance of the evidence.

Marshall's testimony is not credible. Most telling is her recounting of an incident where Birkle allegedly cocked and then pointed a handgun at her while they were working in the store. Marshall suggests that she became so sick over the incident that immediately after it occurred she went into the bathroom and threw up. The credible evidence in this case demonstrates that no such incident occurred. Certainly, had such an incident occurred, Marshall would have filed a report with the Kalispell police (as she did when the incident involving the alleged conduct by Greenwood occurred in May, 2003). Marshall indicated three times during her testimony at the hearing that she at least mentioned the hand gun incident to Officer Holt at the time

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<sup>1</sup> *See also, Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841, 845.

she filed the complaint about Richardson. Officer Holt indicated that Marshall never told him that she had been so accosted by Birkle. Officer Holt further testified, quite credibly, that Marshall's mention of Birkle's alleged conduct even in passing would have resulted in the initiation of an investigation into the matter or at least a discussion with Birkle about the conduct because of the serious nature of such an alleged offense. Marshall's fabrication of this alleged incident, and her continued insistence at the hearing that she mentioned the incident to Officer Holt even though she clearly did not, demonstrates her lack of credibility to the hearing examiner. Furthermore, in this case, it renders all of her testimony suspect. *See, e.g.*, Mont. Code Ann. § 26-1-302 (the presumption that a witness speaks the truth may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness' testimony, which includes evidence contradicting the witness' testimony).

Marshall's credibility is further impugned by her failure at any time to discuss any of the alleged offensive employee conduct with Brown or Evenson. Marshall indicated at hearing that neither Brown nor Evenson had never demonstrated any ill treatment of her. Brown visited the store on occasion and Evenson even worked there on occasion. Each specifically inquired of Marshall as to how things were going. Marshall never complained of any improper treatment at the hands of any of the other employees. Although Marshall contends that she felt Evenson was unapproachable, she failed to articulate any reason why that was so and why his inability to be approached would have prevented her from telling him about conduct she found to be so reprehensible.

Marshall's testimony is not bolstered by consideration of the hand-written notes she claims to have prepared somewhat contemporaneously with the alleged conduct. Many of the documents are not specifically dated. Furthermore, the fact that Marshall prepared them renders them suspect in the opinion of the examiner. Under the circumstances presented at the hearing in this matter, the hearing examiner cannot find Marshall's testimony to be credible.

The testimony of Marshall's three additional witnesses, Kimberly Heindel, Michelle Grubbe, and Rick Bruff, is directly contradicted by the credible testimony of FNP employees Lester Wall, Adam Richardson, Clint Curl, Robert Birkle, and Robert Greenwood. The strength of these five FNP witnesses establishes contradictory evidence sufficient to find that Heindel's, Grubbe's and Bruff's testimony should be discounted in this matter.

Indeed, even if Heindel's, Grubbe's and Bruff's testimony is taken at face value, it does nothing to diminish the credibility of the FNP witnesses or the strength of the evidence presented by the FNP witnesses, including the two witnesses not employed by FNP who indicated they saw nothing out of the ordinary during their frequent (and

in the case of John Peterson, daily) visits to the FNP store. In other words, consideration of the testimony of Marshall's additional witnesses against the testimony of FNP's witnesses results at most in a draw which is insufficient to meet Marshall's burden.

At best, Marshall established that there were occasions where horse play resulted in things being thrown between employees or employees bumping into each other in the narrow confines around the cash register. She has not shown that she endured a workplace environment that a reasonable person would objectively find to be hostile and abusive.<sup>2</sup>

All employees at the Kalispell store, including Marshall, cleaned bathrooms as part of their regular job duties. The mere fact that Greenwood brought the pamphlet into the workplace, under the circumstances of this case, is not sufficient to show a hostile work environment. Greenwood did not, for example, force Marshall to look at the pamphlet or parade the pamphlet in front of her in a relentless fashion. There is no credible evidence that he brought it into the work place intending anything offensive toward Marshall. The occasional playing of the Nellyville song was not done with the intent to offend Marshall nor was it done with any type of reckless disregard for reasonable sensibilities of a person in Marshall's position. Marshall never complained about the playing of the music to anyone. With respect to the sticker, again there is no evidence to show that the sticker was placed or allowed to remain in place with the intent to offend Marshall or with reckless disregard to the reasonable sensibilities of a person in Marshall's position. In all likelihood, the sticker was maintained because of the store policy that required all objects attached to a pawned item to remain in the store until the object was returned to the owner or sold. Furthermore, the discipline imposed upon Marshall was not disproportionate to discipline imposed on other employees. Marshall was written up when late, just like other employees. Marshall was discharged for insubordination and because she was not working out, just as another male employee was discharged just a short time later because he was not working out. In sum, the substantial, credible evidence in this matter is simply insufficient to show that FNP discriminated against Marshall on the basis of gender or created or permitted a hostile work environment to exist.

*C. Marshall has Failed to Prove Retaliatory Conduct.*

The Montana Human Rights Act prohibits retaliation because an individual opposes illegal discrimination or participates in a proceeding under the Act (including filing a complaint). Mont. Code Ann. § 49-2-301. An employer who takes significant

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<sup>2</sup> Indeed, the fact that Marshall never reported any of the alleged harassment, except in a passing manner without any further discussion is strong evidence that she did not subjectively find any of the conduct of the other employees to be offensive.

adverse employment action against an employee because of the employee's protected activity violates that employee's right to be free from retaliation. Admin. R. Mont. 24.9.603.

To establish her prima facie case of unlawful retaliation, Marshall must prove three elements. First, she must prove that she engaged in activities protected by the Act (opposition or participation). Second, she must prove that FNP subjected her to significant adverse acts. Third, she must prove that there was a causal connection between the significant adverse acts and her protected activities. Admin. R. Mont. 24.9.603(1).<sup>3</sup>

The evidence in this matter is insufficient to show that Birkle or any member of FNP was aware that Marshall had begun her inquiry at the Human Rights Bureau at the time she was fired or at the time she received written warnings. Marshall did not file her complaint with the Human Rights Bureau until February, 2003. In fact, Marshall received her first written warning in July, 2002 before Marshall had made any inquiry to the Human Rights Bureau. Thus, the only kind of retaliation claim Marshall can assert is retaliation for opposition to sexual harassment.

The substantial evidence does not support a finding that Marshall opposed the sexual harassment she perceived to be occurring and thereby triggered retaliatory conduct on the part of Birkle or any other employees. The only complaint that Marshall registered was mentioned in passing to Lester Wall, contained no specifics, and related only to Richardson and Greenwood. When further asked, Marshall did not want to talk about specifics. Wall spoke to both Richardson and Greenwood and indicated that neither of them should make any sexual comments or jokes around Marshall. Under the circumstances, the evidence is insufficient to show that FNP retaliated against Marshall.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).
2. The statute of limitations contained in Mont. Code Ann. § 49-2-506 does not apply to prevent consideration of Marshall's claim in this matter.
3. Marshall has failed to show by a preponderance of the evidence that FNP or its Kalispell store employees either created a hostile work environment or

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<sup>3</sup> Sub-chapter 6 of the Commission's rules applies to this contested case before the department, including section 603. Admin. R. Mont. 24.9.107(1)(b).

discriminated against Marshall on the basis of sex in violation of Mont. Code Ann. § 49-2-303.

4. Marshall has failed to show by a preponderance of the evidence that FNP or its Kalispell store employees retaliated against Marshall in violation of Mont. Code Ann. § 49-2-301.

5. Because Marshall has failed to show that FNP or its Kalispell store employees engaged in any illegal conduct, issues regarding lost wages and compensation for emotional distress are moot.

6. Because Marshall has failed to show that FNP or its Kalispell store employees engaged in any illegal conduct, this matter should be dismissed pursuant to Mont. Code Ann. § 49-2-507.

## VI. ORDER

Based upon the foregoing, judgment is entered in favor of FNP and Marshall's complaint is dismissed.

DATED this 7th day of May, 2004.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREGORY L. HANCHETT  
Gregory L. Hanchett, Hearing Examiner  
Hearings Bureau

Marshall FAD ghp