

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NOS. 0049011005-0049011010

DONNA WILSON AND)	Case Nos. 1122-2005, 1123-2005,
LYNN SCHUMACHER,)	1124-2005, 1126-2005, 1128-2005
)	and 1129-2005
Charging Party,)	
)	
vs.)	<i>Final Agency Decision</i>
)	
CATHOLIC DIOCESE OF)	
GREAT FALLS-BILLINGS,)	
ST. LUKE'S PARISH AND)	
FATHER PAT ZABROCKI,)	
)	
Respondents.)	

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I. Procedure and Preliminary Matters

On April 7, 2004, Donna Wilson and Lynn Schumacher filed a complaint with the department alleging that the Catholic Diocese of Great Falls-Billings, St. Luke's Parish and Father Pat Zabrocki, the Roman Catholic priest assigned to St. Luke's Parish, discriminated against them on the basis of sex and retaliated against them by (1) subjecting them to a sexually hostile and offensive work environment; (2) failing to take action after they reported sexual harassment; (3) denying them raises; (4) excluding them from interoffice information; (5) cutting their hours and responsibilities and (6) shunning them.¹ The department's Human Rights Bureau assigned six consecutive case numbers to the complaint. On December 8, 2004, the department gave notice that the charges would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

¹ Wilson and Schumacher filed a single complaint. The Human Rights Bureau assigned separate claim numbers to each claimant's claims against each defendant. All 6 claim numbers are still involved in this proceeding--Wilson's retaliation claims (3 claim numbers) and Schumacher's retaliation claims (3 claim numbers) against each of the 3 respondents.

On March 8, 2005, in Cause No. ADV 04-1207, Montana Eighth Judicial District Court, Cascade County, Donna Wilson and Lynn Schumacher, plaintiffs, versus the Montana Department of Labor and Industry, Defendant, Judge Sandefur issued a declaratory judgment that ordered the department immediately to dismiss Wilson and Schumacher's sex discrimination claims. Later on March 8, 2005, the hearing examiner began the hearing early, to accommodate schedules of witnesses, and received a copy of the declaratory judgment. The hearing examiner deferred acting on that order, because the department's time to appeal had not commenced, nor had the department decided whether to seek a stay.

The contested case hearing proceeded on March 8-11, 2005, in Great Falls, Cascade County, Montana. Wilson and Schumacher attended. The designated representative for the Diocese and St. Luke's, Father Jay Peterson, and Zabrocki attended. Elizabeth Best, Best Law Offices, represented both charging parties. Greg Hatley, Davis, Hatley, Haffeman & Tighe, PC, represented all respondents. Sister Mary Murray, Frank Schumacher, Father Pat Zabrocki, Phyllis Carpenter, Carla Murphy, Lois A. Wilz, Neil Ugrin, Lynn Schumacher, Nora Norum, Jeanne Tonkovich, C. Mark Davis, Donna Wilson, Father Jay Peterson, Joseph Loncki, Ron Korb, Bishop Anthony M. Milone, Father John Neneman, John Gagnon, Mary Lynn Wojtowick and Max Davis attended and testified. The transcript² reflects exhibits.

After the conclusion of the hearing, the hearing examiner verified that the department intended to appeal the declaratory judgment but would not seek a stay. Therefore, on March 22, 2005, the hearing examiner complied with the district court order and dismissed the sex discrimination claims of Wilson and Schumacher from this case, leaving the retaliation claims.³ The parties filed proposed decisions and post-hearing arguments and submitted the case for decision. A copy of the Hearings Bureau's contested case docket for this case accompanies this decision.

II. Issues

The issue in these consolidated cases is whether any of the respondents retaliated against charging parties because they engaged in activity protected under

² There is no certified transcript to date. The hearing examiner received e-trans electronic copies from the court reporter who recorded the hearing, for use in decision-writing. Any party requiring a transcript (for appeal purposes or otherwise) or a copy of the transcript must order and pay for it through the reporter.

³ Dismissal of sexual harassment claims leaves intact the retaliation claims, which can stand alone as discrimination claims. *Mahan v. Farmers union Central Exch., Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 858.

the Montana Human Rights Act. A full statement of issues appears in the hearing examiner's "Final Prehearing Order," March 3, 2005.

III. Findings of Fact

1. All parties to this contested case were employees of or entities within the Roman Catholic Church, an international Christian religion. The internal organization and operation of this religion are governed by the Roman Catholic Code of Canon Law.

2. Consistent with the canon law, particular Catholic churches within a defined geographical area are organized as a diocese. Each diocese is under the direction of a bishop. At all pertinent times, the Diocese of Great Falls–Billings, in Eastern Montana, was directed by the Most Reverend Anthony M. Milone, Bishop. Milone was responsible for all affairs within the diocese.

3. This diocese is made up of numerous parishes, including St. Luke's Evangelist in Great Falls, Montana. The internal organization and operation of the diocese and the parishes within it are governed by canon law. Each parish is governed by a pastor, an ordained Roman Catholic priest, appointed by the bishop.

4. Parishes can have lay councils to assist the pastor in governing the parish. Canon law allows for the establishment in each parish of a pastoral council acting solely as a consulting body to each parish pastor. Canon law mandates the existence of a lay parish finance council, again to serve strictly as a consulting body to each parish pastor. St. Luke's had both a pastoral council and a finance council. Within the parish, the pastor at all times retained the final responsibility and authority for all spiritual, pastoral and temporal matters.

5. St. Luke's pastoral council had the tasks of advising the pastor regarding priorities for the spiritual life, ministry, broad goals, strategic planning and policy making of the parish. The pastor was the pastoral decision-maker for the parish.

6. St. Luke's finance council had the task of advising the pastor regarding finances and parish administration. The finance council participated in the preparation of the parish's annual budget, based on goals and objectives that the pastor and parish council determined. The pastor was the financial decision-maker for the parish.

7. Donna Wilson and Lynn Schumacher were office workers at St. Luke's. Wilson was a loyal 29 year employee, who dedicated her adult life to the parish. She received no complaints or notices of any deficiency in her work. Schumacher was also a loyal, dedicated employee who served for 7 years and assisted Wilson, performing bookkeeping and other administrative duties.

8. Schumacher's job title was Parish Secretary/Bookkeeper. At no time did Schumacher occupy a "ministerial" position. She had no responsibility for determining the spiritual priorities of the parish.

9. Wilson's job title was Pastoral Assistant for Business Administration and Pastoral Assistant for Christian Service and Advocacy. Her job duties primarily involved business administration for the parish. She also participated in efforts to reach nonmember and former members (social outreach) and to welcome newcomers, recruiting, encouraging and assisting volunteers (with particular emphasis on young people). She also identified where to attempt social outreach and what social issues and needs the parish might address. She acted as a liaison between the parish community and various social outreach services and organizations and acted as a lay advocate for parish members seeking church annulments. Although she participated in identifying, planning and carrying out the various functions of the parish, she did not occupy a "ministerial" position and had no responsibility for determining the spiritual priorities of the parish.

10. On June 30, 1999, Father Pat Zabrocki, an ordained Roman Catholic priest since June 22, 1988, arrived at St. Luke's and assumed the responsibilities of pastor for that church.

11. Zabrocki, as the pastor, was responsible for teaching, sanctifying and governing, with the cooperation of other clerics assigned to the parish and the assistance of lay members of the church. At the time of the hearing, Zabrocki remained the pastor of St. Luke's.

12. Zabrocki's immediate predecessor had been relatively passive in governing the parish. St. Luke's pastoral council and finance council had assumed independent decision-making roles within the parish. As both councils enlarged their areas of independent decision making, Wilson and (to a lesser extent) Schumacher reported directly to the councils regarding their work and took increasingly active roles in the discussion and decision-making. Wilson had acted as the secretary of the pastoral council for approximately 25 years. By the time Zabrocki became pastor,

Wilson formally participated in council discussion and action, in general and in executive sessions.

13. Zabrocki, finding that the councils were accustomed to making decisions rather than proffering advice to him, struggled to regain authority. The members of the councils did not welcome Zabrocki's efforts to reduce their powers. Some parishioners and parish employees agreed with the council members. Wilson and Schumacher, who had both been very loyal to Zabrocki's predecessor, were among the employees who tried to support the councils in any way possible, resisting Zabrocki's attempts to take control.

14. In addition to the unusually active and authoritative roles of the councils, Zabrocki found internal staff conflicts the previous pastor had left unresolved, and which continued to flare. Wilson and Schumacher were involved in some of these unresolved conflicts and resisted Zabrocki's efforts to mediate or otherwise to address the continuing conflicts.

15. By the end of 2001, Zabrocki was very frustrated by his inability to restore his authority as decision-maker, with the employees reporting to him and complying with his directives and the councils serving strictly as advisors to him. Zabrocki felt himself still to be an outsider to an organization that, as much as it could, ran around him and without him.

16. St. Luke's had a computer system that included an internet server. Although it had been upgraded in 2001, it remained a limited system. Anyone using the system could access the internet connection and internet use history. This included anyone who either accessed the system by typing in a valid password or sat down at one of the computers when the previous user had not signed out.

17. In early January 2002, Wilson and Schumacher discovered that the parish internet connection showed repeated access to what appeared to be pornographic web sites. They⁴ had received some "spam" (mass-mailing e-mails) that was pornographic.⁵ Wondering about a connection between the pornographic spam

⁴ Schumacher shared Wilson's e-mail box at St. Luke's. In late 2001, during the upgrading of the parish computer system, Wilson and Zabrocki had both shared, with the parish itself, one e-mail "box" to which e-mail addressed to all 3 separate addresses came.

⁵ The e-mails included advertisements for sexual enhancement pills, gels, etc., descriptions of available sexual content pictures, movies, audios and writings and explicit descriptions or depictions of sexual conduct. The label "pornography" captures the e-mails' common predominant subject-matter.

and the web sites, they opened some of the sites and verified the pornographic nature of the sites' contents. Upset at finding this material in the parish computer system, the two women suspected that Zabrocki might have accessed the sites. They also knew that other employees and parishioners (including some youths) had access to the computer system, and either could have accessed the sites or might access them in the future.

18. To view the web sites, Wilson and Schumacher had to locate the access history and open the sites from that history. They could not reasonably have believed that the presence of the access history on the parish computer system constituted sexual harassment of any person, whether parish employees (including them) or other users of the parish computer system. Nor did they have any facts from which they could reasonably have believed that access of pornographic sites caused them to receive (at Wilson's e-mail address) pornographic spam.

19. On or about January 9, 2002, Schumacher told diocesan Vicar General Father Jay Peterson that someone had been accessing adult-only web sites on the parish office computer. Peterson and Joe Loncki, diocesan business manager, went to St. Luke's and confirmed this access by viewing one of the web sites. The web site had explicit pictures of varieties of sexual intercourse and sexual activities.

20. Not wishing to view any further web sites, Peterson instructed Schumacher to copy, in her own handwriting, three weeks' worth of web site "history" (seven handwritten pages), to document what they had seen, and to deliver it to the Pastoral Center. Schumacher complied with this instruction.

21. Peterson could tell that both Schumacher and Wilson were very distressed by their discovery of the history of pornographic sites accessed on the parish computer system. He could see that the women were even more upset by the content of the web sites they had accessed to verify the subject matter and content. He knew that copying the "history" of parish computer access to pornographic web sites was extremely distressing to Schumacher. He assured the women that action would be taken so they would not again find pornography on the parish computer system.

22. Loncki instructed Schumacher and Wilson not to tell anyone what they had seen. He directed Schumacher not to make copies of the "history" she was to document.

23. Confronted by his superiors with the web site access history, Zabrocki admitted that he had accessed pornographic adult-only web sites on the parish computer system at night. Zabrocki thought that he had deleted all records of his access from the system, so that nobody else could find or access it. At the direction of the bishop, Zabrocki met with Wilson and Schumacher the following week, and grudgingly apologized for their encounter with the history of his access of the pornographic web sites.

24. Zabrocki's apology to Wilson and Schumacher, in the presence of Peterson and another parish employee, Jeanne Tonkovich, was carefully limited to an expression of regret that they had viewed images from the pornographic adult-only web sites that he had visited. He did not promise to change his behavior.⁶ All three of the women saw that Zabrocki did not manifest any actual regret for his conduct. Peterson knew or reasonably should have known that the apology was at best an expression of regret that the women had found the access history on the computer system, and that Zabrocki resented being forced to apologize to two employees of his parish for his conduct, particularly when the employees were resisting his efforts to assume control of St. Luke's.

25. The diocese directed Zabrocki to see a counselor for a psychological evaluation, to ascertain if his access of the web sites was a symptom of a problem that could affect his ability to serve as pastor. Zabrocki saw Ned N. Tranel, Ph.D., with Psychological Services in Billings, Montana, on January 22-23, 2002.

26. Tranel had previously evaluated Zabrocki when he was an applicant for seminary training. He had concluded then and he concluded again in January 2002 that Zabrocki was an emotionally healthy, stable person. He decided that Zabrocki's recourse to browsing pornographic internet web sites was a result of a "very unhealthy social milieu" at St. Luke's. Tranel concluded that the environment at St. Luke's was "saturated with psychosocial stressors," including: "unusual" financial record keeping and accounting procedures; "a lack of a system of checks and balances" in finance, supervision and personnel matters; a "long-standing conflict" regarding youth ministry, related to serious personality conflicts among staff members; "lack of clear lines of communication, authority and responsibility;" and intense generalized feelings of "anger, hostility and resentment." Tranel concluded that all five of these "stressors" resulted from hostilities and conflicts between staff members and from resistance to Zabrocki's attempts to wrest control of the affairs of the parish from the

⁶ Zabrocki understood the sexual ethics policies of the diocese to proscribe certain conduct involving "relationships between two parties." He did not consider accessing adult-only web sites to violate those policies. He viewed his conduct as a matter the policies did not address.

staff and the councils. Tranel reached his conclusions based solely upon Zabrocki's report.⁷

27. Tranel concluded that Zabrocki did not need counseling, but instead that the parish needed to be brought into line with normal operational modes. Tranel suggested formation of a "task force" to identify "appropriate remedial procedures" and submit those procedures "for consideration to the appropriate administrative offices." This was a recommendation that the diocese assist Zabrocki in bringing the staff and councils under his control and direction.

28. Zabrocki remained pastor at St. Luke's. The diocese itself did not take action to obtain a third-party evaluation of the "social milieu" at St. Luke's. Instead, the diocese assisted Zabrocki in bringing the staff and councils under his control and direction by encouraging him to take more aggressive actions to assume control and direction over the parish activities.

29. Wilson and Schumacher believed strongly that Zabrocki's conduct in accessing pornographic web sites proved that he was not qualified to be the pastor at St. Luke's. Their belief fueled their continued resistance to his attempts to take control of the parish.

30. Wilson and Schumacher continued to receive pornographic spam after they reported the web site access history. They opened some of it. They checked boxes on some of the opened spam to confirm that they did not want any additional mailings. In taking these actions, they unknowingly confirmed that Wilson's e-mail address at the parish was an actual active address to which further pornographic spam could be sent. Although they blamed Zabrocki, he caused neither the start nor the continuation of them.⁸

31. The flow of pornographic e-mails continued. Later in 2002, Wilson and Schumacher appealed to Peterson for help in stopping it. He forwarded a computer program designed to block such spam, which the two women did not understand and did not install. He also directed Joe Pipinich of the Diocese of Pastoral Offices, a

⁷ Tranel also met with Peterson, but Peterson did not provide information as much as listen to Tranel's conclusions about the causes of Zabrocki's "dysfunctional and maladaptive behaviors."

⁸ Zabrocki's blanket denials of hostility toward the two women were questionable, given his subsequent adverse employment actions against them. His denials of acting or intending to act to cause them to receive pornographic spam were credible, because there was no evidence that his access of pornographic internet sites caused the pornographic spam to come to Wilson's e-mail address.

staff employee with a background in computer operation, to remove any downloaded adult-only web sites from the computer and clean the computers of such materials. Peterson assumed these actions adequately addressed the problems of the e-mails and the web history, pending any further reports of continuing problems.

32. Wilson and Schumacher received pornographic e-mails for two years following January 2002.⁹ They did not again complain to Peterson or anyone else at the diocese that they continued to receive unsolicited pornographic e-mails. They concluded that since the diocese had not removed or suspended Zabrocki for his web site activities and had not somehow stopped the spam after their first complaint, it would take no further action to stem the flow of the spam. This conclusion was not reasonable.

33. In July 2002, Peterson asked Wilson how she and Schumacher were doing. Wilson responded that Schumacher was still having difficulties and had stopped attending mass at St. Luke's because of Zabrocki's conduct. Peterson replied that although it was unfortunate, it was Schumacher's decision not to attend mass at St. Luke's. Wilson did not mention the pornographic e-mails in this conversation.

34. With no notice that the pornographic spam was continuing, the diocese did not follow up either to find out if the e-mail was still coming in or to assist Wilson and Schumacher in dealing with it if they were still receiving it.

35. In 2002, Zabrocki began to exclude Wilson and Schumacher from decision making and to remove duties that they had performed for years. He also began to work more actively with other staff members. He took over from Wilson the preparation of agendas for the pastoral council meetings in February. In April, he removed Wilson as secretary of the pastoral council. In June, he froze the salaries of Wilson, Schumacher and a third parish employee, a janitor whose job performance was deficient. In July, Zabrocki changed the process for choosing new members on the pastoral council from parish election to his selection.

36. Wilson and Schumacher feared for their jobs. Nonetheless, they both continued actively to disagree with and to oppose many of Zabrocki's decisions about the direction the parish would take in spiritual, pastoral and temporal matters.

⁹ The exhibits include 102 pornographic or "adult" e-mails to Wilson, over a period from February 2002 through December 2003. The dates on these e-mails suggest that there was not a steady flow, but rather barrages of e-mails, followed by slack periods, followed by further barrages.

37. In July 2002, while Zabrocki was on vacation, Wilson reported to Peterson that she and Schumacher had duties taken from them and had their wages frozen, when no other employee had wages frozen. Peterson, deferring to the parish pastor to make decisions about the operation of the parish, took no action and made no inquiry.

38. During the winter of 2002-2003, Wilson and Schumacher checked web site address history on the St. Luke's computer system and discovered evidence of further pornographic web site access in May and June of 2002. Using a home video camera, Schumacher recorded some of the web site history and opened and recorded some of the pornography on the various web sites. By this time, the two women believed the diocese would not support them against Zabrocki in decisions about parish direction. The recordings were made for the purpose of using them against Zabrocki. His apology omitted any promise never to access pornographic web sites on the parish computer system (*cf.* Finding 24), but still the women hoped that Peterson's assurance that they would not again find such sites on the parish system (*cf.* Finding 21) meant that proof of further such access by Zabrocki might weaken his position in the parish, or even lead to his ultimate departure.¹⁰

39. Through 2002 and 2003, Zabrocki continued to work to take control of the parish. In doing so, he continued to change the conditions of employment for Wilson and Schumacher, always in the direction of reducing their responsibilities and roles in the parish. He did not notify Wilson of the Vicariate meeting for Finance Council members and business administrators (which she had previously attended). He offered to discuss budgeting considerations with Wilson and Schumacher, but avoided doing so, although he did discuss such considerations with other staff members. He stopped fund-raising functions for which Wilson had been responsible. He transferred areas of responsibility (such as the Teen Social Justice Group and maintenance of Time and Talent cards for volunteers) away from Wilson. He contracted out printing and mailing work which Wilson and Schumacher had accomplished on parish equipment with the help of volunteers.

40. Many of the adverse employment actions Zabrocki took against Wilson and Schumacher were matters clearly related to the mission of St. Luke's as a center of Catholic worship, ministry and organization. Decisions to decrease activity in some areas (youth ministry, for example), affected the jobs of Wilson and Schumacher, but were the kinds of decisions reserved to the pastor. For another

¹⁰ If the women reported the new evidence of Zabrocki's internet activities to the diocese (which is not clear from the evidence), the diocese took no action.

example, removing Wilson, a staff member, from being a signatory for the parish checking account was consistent with church financial practice. All of the adverse employment actions he took against the two women were within the scope of his power as pastor.

41. In the summer of 2003, Wilson and Schumacher sought help from a parish member and Great Falls attorney, Neil Ugrin. Beginning in September 2003, Ugrin repeatedly contacted Maxon Davis, a partner in the law firm that represented the diocese. He told Davis about the adverse employment actions taken against Wilson and Schumacher. The diocese took no action.¹¹

42. The fiscal year for St. Luke's Parish is from July 1 through the following June 30. The 2003-04 budget would normally have been finalized in June 2003. At that time, the parish expected that an additional priest, Father John Neneman, would be assigned to St. Luke's as an associate pastor. The final budget decisions were deferred until after Neneman's arrival.

43. At the June 19, 2003, finance council meeting, Zabrocki advised the council, which had historical responsibility for budgeting, that no budget adjustments were anticipated for the upcoming year, even in the context of the impending arrival of Neneman. Before any further discussion with the staff or the finance council, Zabrocki, who had been a certified public accountant years before, reworked the budget and projected a \$33,000.00 deficit. In August 2003 he showed Wilson this budget. Zabrocki's tentative plan was to cut costs in maintenance and administration to balance the budget.

44. On September 25, 2003, Zabrocki presented his reworked budget to the pastoral council. The finance council had not seen or discussed this budget and its cuts before the pastoral council received it from Zabrocki. Zabrocki's proposed cuts to balance the budget were included in the discussion. He asked the pastoral committee to consider possible actions, for decisions at the next meeting.

45. After the September 25, 2003, pastoral council meeting, Zabrocki went on vacation. In his absence and without his knowledge, members of the finance committee worked with Wilson and Schumacher to find alternatives to his budget cuts. They believed that the parish could fund the original budget. They prepared a list of proposals to restore most or all of the original budget, and to make any necessary cuts in liturgy and education instead of maintenance and administration.

¹¹ The evidence did not establish whether Davis relayed the information to the diocese.

46. In mid-October 2003, after Zabrocki's return, the finance council met and presented him with their proposals. He was not pleased. He pointed out that the council had not properly consulted with him about their proposals and that the council had met in his absence and without his consent. He also said that the council's budget was both unrealistic and in disregard of proper pastoral priorities. The meeting grew heated, and was very adversarial.

47. One major difference between Zabrocki's budget and the finance council's budget was that the finance council considered it appropriate to spend money received from a sale of land donated to the parish to meet regular budget expenses. Zabrocki considered this money a capital fund, not appropriately available to meet ordinary expenses.

48. Shortly after the October finance council meeting, Zabrocki met with Loncki and Peterson and discussed his continuing problems gaining control of the parish. On behalf of the diocese, they confirmed that he held ultimate responsibility and authority over both spiritual and temporal matters occurring within the parish, that the councils were only consultive in nature and that it should be the pastor who appointed the members and convened and presided over all meetings. They also confirmed that the pastoral council was to consult with the pastor to shape the budget in accord with pastoral priorities of the parish, while the finance council was to consult with the pastor to manage the funds and to help assure that expenditures were maintained in accordance with the budget.

49. On October 23, 2003, Wilson wrote to the bishop to protest Zabrocki's reassignment of the Teen Social Justice Group from her supervision to the supervision by another staff member who also supervised other teen functions and activities within the parish. Wilson reported to the bishop that the division of teen functions and activities had originally stemmed from conflict between that other staff member and Wilson's assistant in the Teen Social Justice Group. Wilson predicted that the change would result in the departure of her assistant, who would not work with the other staff member. On November 5, 2003, the bishop sent a responding letter, stating that he recognized and respected Wilson's past and continuing contributions to the operation and activities of St. Luke's, but necessarily supported the decisions of the priest he had appointed over the parish.

50. The next pastoral council meeting convened on October 30, 2003. During the meeting, Phyllis Carpenter, chair of the finance council, presented the finance council's proposals. Members of the pastoral council had questions regarding this proposed budget and its attempt to address the \$33,000.00 deficit Zabrocki had

identified. Among the questions were specific concerns about (1) a downward trend in collections and (2) assuring that cuts were made in areas of lesser pastoral priorities. Carpenter did not address these questions, instead asking the pastoral council to accept the finance council's budget as presented without asking questions. The pastoral council, which by then included two members Zabrocki had selected after changing the method of choosing new members, was frustrated by finance council and staff members' conduct in the meeting.¹²

51. Ron Korb, a pastoral council member, believed that the finance council was trying to shut the pastoral council out of budget discussions. Korb approached Zabrocki, indicating that he wanted to resign because the pastoral council was powerless. Zabrocki suggested that the pastoral council meet in executive session to discuss the parish and its operations, including the budget. Korb saw that balancing the budget in accord with Zabrocki's priorities would result in staff reorganization, and agreed it would be wise to discuss the issue without staff members or other "outsiders" to the pastoral council present.

52. Neneman was also supportive of the pastoral council's executive session and a need to discuss parish governance and operations. Based upon his perception during his short time at St. Luke's, he believed the parish was being run by a small group of individuals in opposition to Zabrocki, a situation that needed to be addressed.

53. The pastoral council's executive session met on November 13, 2003. Encouraged by Zabrocki, pastoral council members decided that they should reach and share with the pastor their recommendations about which programs should be funded and at what levels. Zabrocki told them that he had decided to replace the current finance council members because they were unable or unwilling to work with him.¹³ The pastoral council discussed the two competing budgets and recommended that Zabrocki implement his proposed budget. The pastoral council made this recommendation knowing that the salaries of Wilson and Schumacher would be cut. The pastoral council agreed with review and updating of staff job descriptions to

¹² As already noted, the finance council's role was to advise the pastor. Presenting a competing budget to the pastoral council was not part of the finance council's role under the diocesan guidelines.

¹³ Zabrocki removed the finance council members on December 11, 2003, instituting a new policy of appointing members to the finance council rather than having the parish elect them. He had previously asked for Carpenter's resignation after he refused her request to attend the November 13, 2003, executive session of the pastoral council as liaison for the finance council. She had refused to resign.

reflect the changes in roles and responsibilities (*i.e.*, reduced hours leading to reduced wages) for the coming year. The council agreed that job descriptions should be reviewed and rewritten with assistance from the diocesan business office.

54. On November 17, 2003, the next executive session of the pastoral council met. Pursuant to Zabrocki's request, Loncki, Peterson and Sister Mary Murray, the Chancellor and Executive Coordinator for the Diocesan Pastoral Council, attended this council meeting. One purpose of this meeting was to obtain diocesan guidance regarding the operation of the pastoral and finance councils, the interplay between the two and their ongoing relationship with the parish pastor. The diocesan representatives explained during that meeting that the practices of staff reporting to other staff and of staff reporting to the councils, were not recommended procedures. These practices had developed at St. Luke's. The normal and recommended procedures were that the staff report to the pastor, the councils advise the pastor, and although staff could serve as resource persons to the councils, staff not serve on the councils. Sister Mary Murray concluded from the discussion that staff had both served on and directed the pastoral council.

55. During the course of the meeting, the participants reviewed and discussed all staff job descriptions to determine how these positions and their associated programs related to pastoral priorities.

56. On December 16, 2003, the next executive session of the pastoral council met. Council members reviewed the revised and rewritten job descriptions and contracts for all staff positions. The job descriptions were again examined in relation to the parish pastoral priorities, which Zabrocki had set in the following order: (1) Liturgy and Sacraments; (2) Education and Formation; (3) Christian Service; and (4) Maintenance and Administration. In light of budgetary concerns and taking into account the pastoral priorities, the council agreed that there was a need to reduce hours of work and thereby pay for three positions. The three positions were those of the janitor (with whom the parish had some performance issues), Schumacher and Wilson. All other staff positions were involved in either liturgy and sacraments or education and formation, which were assigned the highest pastoral priorities. Wilson, Schumacher and the janitor held positions with duties involving the lower pastoral priorities.

57. At the time the parish pastoral council members agreed with the reorganization of staff positions, they were unaware either that Zabrocki had accessed adult-only web sites or that Wilson and Schumacher had reported the access to the diocese. Asked at hearing, the members who testified agreed that had they been

aware of these facts, they would still have agreed that the reorganization of staff positions was an appropriate means to address legitimate budgetary concerns.

58. All job descriptions and contracts presented and discussed in the course of the December 16, 2003, executive session were approved. The staff contracts were for a 6-month duration, because the parish was already in the middle of the 2003-04 budget year. All contracts expired on June 30, 2004. The expirations of the contracts signified the end of the budget year, not the end of the staff's employment.

59. Wilson's job description eliminated almost all of her Christian Service responsibilities. Under Zabrocki's new pastoral priorities, with which the pastoral council agreed, Christian Service, to the greatest extent possible, was to be handled by volunteers.¹⁴ Wilson's hours, without Christian Service responsibilities, dropped from 40 hours per week to 20 hours per week, with a commensurate reduction in her salary. Her job title changed to that of an assistant bookkeeper.

60. With Wilson serving as an assistant bookkeeper, Schumacher's work schedule went from 24 to 10 hours per week, at \$9.75 per hour.

61. Except for the janitor, the rest of the office staff retained their existing positions, responsibilities and benefits, and got raises.

62. On December 17, 2003, Zabrocki met with the parish staff (except Wilson, who was not present) about the new job descriptions and the new contracts.

63. Wilson subsequently met with Zabrocki and Peterson on Friday, December 19, 2003. At that time, she received formal notice of her new job description and salary range, under the six-month contract the parish offered to her. It required her to give 60 days notice if she resigned, and forbade her to take a second job without approval from Zabrocki. She asked if the job description and salary were negotiable. The two priests told her that they were not. She said she would get back to them. Schumacher likewise had not decided whether to accept her new contract.

64. Zabrocki wanted an answer from Wilson regarding whether she would sign the contract before he left on vacation the day before Christmas. Wilson delayed deciding about signing the contract. She had chronic health problems. Reduced health insurance coverage through her employment was potentially devastating.

¹⁴ Zabrocki decided that volunteers would handle Christian Service efforts. Volunteer rather than paid staff work in Christian Service was more typical in the diocese.

However, leaving her job to seek other employment after so many years, and having no insurance coverage, was an even more daunting prospect.

65. On January 5, 2004, Schumacher told Zabrocki that she did not want to sign the new contract, but would work under it. Zabrocki accepted her proposal. She remained an employee of the parish under the terms of the contract that she refused to sign.

66. On January 6, 2004, Wilson told Zabrocki that she had not decided whether to sign the contract. Zabrocki then required that she sign a document stating that she refused to sign. Wilson refused to sign that document. She also effectively refused the new terms and conditions of her employment by the parish. Zabrocki then told her that her rejection of the new terms and conditions of her employment meant that her employment ended “effective December 31, 2003.” When she asked about her insurance coverage, Zabrocki, after consulting with the diocese, told her it was no longer in effect after December 31, 2003. Wilson elected to take an early retirement.

67. After Wilson’s employment ended, Zabrocki continued to reduce Schumacher’s responsibilities. She felt “shunned” by the rest of the staff. She lost all of the authority she once had.

68. Wilson and Schumacher filed their joint human rights complaint on April 4, 2004.

69. Zabrocki did not complete Schumacher’s job evaluation before the end of the 2003-04 budget year. He completed job evaluations for the rest of the staff, notified them that they would receive cost of living increases for the next budget year and provided their new contracts. Schumacher had not signed the prior contract. When she asked if she had continued employment and would get a cost of living increase, Zabrocki mentioned the lack of a job evaluation and said she would not get a cost of living increase. He later confirmed that she still had her a job after the end of June. In July she discovered from her check that she had received a cost of living increase.

70. Schumacher ultimately resigned on October 19, 2004.

IV. Opinion¹⁵

It is an unlawful discriminatory practice for a “person” to retaliate against an individual who opposes any practice forbidden by the Montana Human Rights Act. Mont. Code Ann. § 49-2-301; *Mahan v. Farmers Union Central Exch., Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 857-58. “Person” means individuals, employers and organizations. Mont. Code Ann. § 49-2-101(18). The department exercises exclusive original jurisdiction over complaints of illegal discrimination under the Human Rights Act. Mont. Code Ann. § 49-2-509(7); *Great Falls Public Schools v. Johnson*, 2001 MT 95, 305 Mont. 200, 26 P.3d 734; *Shields v. Helena S. D. No. 1* (1996), 284 Mont. 138, 943 P.2d 999; *Fandrich v. Capital Ford Lincoln Mercury* (1995), 272 Mont. 425, 901 P.2d 112; *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 900 P.2d 901; *Chance v. Harrison* (1995), 272 Mont. 52, 899 P.2d 537. Wilson and Schumacher alleged retaliation by the respondents. The department has jurisdiction over those discrimination claims.

I. Denial of Respondents’ Renewed Motion to Dismiss

Respondents have renewed their motion to dismiss these claims, on the grounds of religious freedom. Montana cannot dictate the religious practices of any religious organization. Art. II, Sec. 5, Mont. Const. The conduct of religious entities is not subject to court (or administrative) review if the conduct at issue is in fact “intertwined with religious principles [to such a degree] that a court cannot properly make the determination . . . without interfering with a legitimate claim to the free exercise of religion.” *Miller v. Catholic Diocese of Great Falls* (1986), 222 Mont. 113, 728 P.2d 794, 797.

The First Amendment to the U.S. Constitution contains a similar prohibition, reserving to religious organizations the “power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, 116. The Establishment Clause of the First Amendment bars excessive government entanglement with churches. *Lemon v. Kurtzman* (1971) 403 U.S. 602, 613. “Excessive entanglement” can consist of “pervasive monitoring,” *Agostini v. Felton* (1971), 521 U.S. 203, 234, or continuing governmental inspection of the “day-to-day operations,” of a religious organization, *Jimmy Swaggart Ministries v. Bd. of Equalization* (1991), 493 U.S. 378, 395. “[R]eligion and government . . . best work to achieve

¹⁵ 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.

their lofty aims if each is left . . . within its respective sphere.” *McCollum v. Bd. of Ed.* (1948), 333 U.S. 203, 212.

In *Miller, op. cit.*, the Montana Supreme Court, in deciding whether a tort claim of bad faith in a wrongful discharge claim by a teacher against a parochial school was precluded by the state and federal constitutional rights of free exercise of religion, cited and applied a United States Supreme Court decision:

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Miller, 728 P.2d *at* 796, *quoting* *Wisconsin v. Yoder* (1972), 406 U.S. 205, 215.

Miller ruled that maintenance of proper discipline in a parochial school implicated an integral part of the religious mission of the Catholic Church, involving substantial religious activity and purpose (religious instruction), and therefore was not comparable to cases involving secular issues such as wage rates in parochial schools or division of property claimed by various members of a church group. *Miller, id.* The Court held, 728 P.2d *at* 797:

A judicial determination of the presence or absence of good faith on the part of Father Wagner would require the court to examine the school’s discipline policy as applied to classroom instruction covering both religious and nonreligious subjects, and to evaluate Father Wagner’s interpretation and application of that discipline policy. Such an examination of necessity would impinge upon elements of the teaching of religion, or the free exercise of religion. We conclude that discipline in the classroom is so intertwined with teaching which in turn is intertwined with religious principles that a court cannot properly make the determination requested here without interfering with a legitimate claim to the free exercise of religion.

The breach of the covenant of good faith and fair dealing in employment is a common-law tort . . . recently recognized in Montana but is not universally recognized. *Gates v. Life of Montana Ins. Co.* (1982), 196 Mont. 178, 638 P.2d 1063, 39 St.Rep. 16. We apply the *Yoder* standard as our guide and conclude that [Miller’s] tort claim is not a right “of the highest order and not otherwise served” so as to overbalance defendants’ claim to the free exercise of religion. We hold

that this suit is barred by the free exercise of religion clauses of the United States and Montana Constitutions.

This holding in *Miller* was subsequently applied in the reasoning of *Parker-Bigback v. St. Labre School*, ¶16, 2000 MT 210, 301 Mont. 16, 7 P.3d 361:

Nor has any authority been offered to persuade us that Bigback's conduct at issue involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices as guaranteed by the First Amendment to the United States Constitution and our decision in *Miller v. Catholic Diocese of Great Falls* (1986), 224 Mont. 113, 728 P.2d 794.

The real question here is whether the allegations of retaliation, a genre of illegal discrimination, are claims "of the highest order and not otherwise served." Unlike *Parker-Bigback*, the retaliation claims on their face implicate a right of the highest order—the right to be free from illegal discrimination for engaging in protected conduct. The protected conduct alleged here is opposition to sexual harassment, by reporting the web site access history on the office computer system and by complaining about the pornographic e-mails.

Sexual harassment is a form of illegal discrimination based upon sex. 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 unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination if the conduct is sufficiently abusive to (1) alter the terms and conditions of employment and (2) to 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 Constitution, Art. II, Sec. 4, expressly prohibits interference in any person's civil rights by reason of sex. Freedom from sexual harassment in the work place is a right of the highest order and therefore the right to oppose sexual harassment in that workplace free from retaliation is also a civil right protected by Art. II, Sec. 4.

The Human Rights Act is the exclusive remedy for these retaliation claims. Mont. Code Ann. § 49-2-509(7). Thus, the allegations of retaliation do involve rights of the highest order that are not otherwise served. The department again denies the motion to dismiss. If the retaliation claims are proved and can be resolved without undue encroachment on religious principles, relief is appropriate.

2. Failure of Proof of a *Prima Facie* Case of Retaliation

To establish their *prima facie* cases of unlawful retaliation for opposition to illegal discrimination, in violation of Mont. Code Ann. § 49-2-301, Wilson and Schumacher must prove three elements: (1) that they each acted to oppose illegal discrimination; (2) that the respondents subjected them to significant adverse acts and (3) that there was a causal connection between the adverse acts and Wilson and Schumacher's opposition to illegal discrimination. Admin. R. Mont. 24.9.603(1) and 24.9.610¹⁶; *Beaver v. Montana D.N.R.C.* (2003), ¶ 71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857; *Foster v. Albertson's, Inc.* (1992), 254 Mont. 117, 127, 835 P.2d 720, **citing** *Holien v. Sears, Roebuck & Co.* (Or. 1984), 689 P.2d 1292; *Schmasow v. Headstart* (June 26, 1992), HRC Case #8801003948; **accord**, *Laib v. Long Construction Co.* (August 1984), HRC Case #ReAE80-1252, **quoting** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793.¹⁷

2.a. Failure to Prove Opposition to a Prohibited Practice

Wilson and Schumacher must prove they opposed a practice that the Act prohibited. *Evans v. Kansas City Missouri School District* (8th Cir. 1995), 65 F.3d 98, 101; *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1987), 813 F.2d 1406, 1411-12.¹⁸ Wilson and Schumacher need not prove that they opposed a practice that actually was sexual harassment to establish this first element of their retaliation claims. "All that is required is that [they] 'reasonably believed in good faith that the practice [they] opposed violated [the Act].'" *Fine v. Ryan International Airlines* (7th Cir. 2002), 305 F.3d 746, 752; **citing** *McDonnell v. Cisneros* (7th Cir. 1996), 84 F.3d 256, 259; *Alexander v. Gerhardt Enterprises, Inc.* (7th Cir. 1994), 40 F.3d 187, 195-96 **and** *Dey v. Colt Constr. & Dev. Co.* (7th Cir. 1994), 28 F.3d 1446, 1457-58; **quoting** *Alexander at* 195.

To establish that they opposed a prohibited practice, Wilson and Schumacher must prove both that they (1) had a subjective good faith belief that they were opposing an illegal discriminatory practice and (2) that this subjective good faith

¹⁶ Both regulations apply to this case. Admin. R. Mont 24.9.107(1)(b).

¹⁷ This is the first tier of the three-tier indirect evidence test adopted by Montana from *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. **E.g.**, *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813, 816; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209; *Euro. Hth. Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029.

¹⁸ Montana follows federal law if the same rationale applies. *Crockett, supra*, note 16; *Johnson, supra*, note 16.

belief was also objectively reasonable. *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1187 (11th Cir. 2001); *Hamner v. St. Vin. Hosp. and Health Care Ctr.* (7th Cir. 2000), 224 F.3d 701, 707; *Sullivan v. Nat'l R.R. Passenger Corp.* (11th Cir.), 170 F.3d 1056, 1058, *cert. den.* 528 U.S. 966 (1999); *Clover v. Total Syst. Serv., Inc.* (11th Cir. 1997), 176 F.3d 1346, 1351; *Little v. United Techs., Carrier Transicold Div.* (11th Cir. 1997), 103 F.3d 956, 960; *Howell v. N. Cen. College* (N.D. Ill. E.Div. 2004), 331 F. Supp. 2d 660, 664.

The objective standard is higher than the subjective standard, but both require substantial and credible evidence. Subjectively, Wilson and Schumacher clearly believed that Zabrocki's access of adult-only web sites was improper behavior. They both found it appalling that a priest would repeatedly seek out and review such content. It shook Schumacher's faith in the Church. Both women questioned Zabrocki's fitness as a pastor, and perhaps even as an active priest. However, there is no credible evidence that Wilson and Schumacher considered Zabrocki's web site activities to be sexual harassment, discrimination based upon sex or unwelcome sexual conduct toward any person, let alone an employee of the parish.

The two women presumed prurient interest as the motivation for Zabrocki's web site activities. Their presumptions reinforced their unwillingness to accept Zabrocki as the spiritual and temporal leader of the parish. They may have sincerely believed that the presence of the web site history on the parish computer constituted a risk to younger parishioners who might stumble across it and view the graphic sexual content. They may have speculated that Zabrocki's interest in the content indicated that he might be capable of violating the sexual ethics policy of the diocese by engaging in improper sexual conduct. But there is no evidence that either woman believed that accessing adult-only web sites at night on the parish computer system constituted actual unwelcome sexual conduct toward any person.

Even if Wilson and Schumacher had a subjective good faith belief that accessing adult-only web sites at night on the parish computer system constituted unwelcome sexual conduct toward employees or parishioners, that belief was not objectively reasonable. The web-sites' contents were distasteful and worse. However, there was neither a logical connection nor evidence in this record to link Zabrocki's access of the pornographic web sites to any sexual harassment.

Wilson and Schumacher had no need to review Zabrocki's web access history in the course of performing their normal job duties. They had no work-related reason to review what web sites he had accessed. Thus, he had no reason to expect that

review, and could not at any time have created or left the web history on the parish computer system to subject them to seeing it.

A simple mistake about what they perceived as sexual harassment would not defeat this first element of Wilson and Schumacher's *prima facie* retaliation case. *Mattson v. Caterpillar, Inc.* (7th Cir. 2004), 359 F.3d 885, 892; **cited in** *Firestine, supra*. However, no reasonable person could objectively construe Zabrocki's access of pornographic web sites as sexual harassment. Reporting this conduct to the diocese was not opposition to illegal discrimination. *Firestine v. Parkview Health System, Inc.* (7th Cir. 2004), 388 F.3d 229, 234, ("a groundless claim 'resting on facts that no reasonable person possibly could have construed as a case of discrimination,'" does not establish opposition to illegal discrimination), **quoting** *Fine, op. cit. at* 752.

Reporting abuse of the office internet system may have been whistle-blowing for the benefit of the employer, or perhaps even a good faith report of improper conduct by the pastor. It was not opposition to illegal discrimination, because even if Zabrocki's conduct was inappropriate use of the parish computer system it was not *per se* unwelcome sexual conduct directed toward any person.

Wilson and Schumacher subsequently blamed Zabrocki for the endless flood of pornographic spam, but they failed to pursue relief from the spam with the diocese after their initial complaint. As a result, they got no further assistance from the diocese. They never asked and therefore had no chance to learn that Zabrocki had nothing to do with the spam. The evidence in this case provides no proof that Zabrocki's continued visits to the adult-only web sites caused or contributed to the continued receipt of genuinely vile spam at Wilson's e-mail address. To the extent that the two women subjectively perceived their very limited requests for help in stemming the tide of pornographic spam as opposing illegal discrimination, that subjective belief also was not objectively reasonable without some evidence, rather than supposition, that Zabrocki's web site visits caused or contributed to the deluge.

2.b. Failure to Prove a Causal Link Between Adverse Action and "Opposition"

Wilson and Schumacher also failed to establish a causal connection between the adverse actions and either their reporting of Zabrocki's web site activity or their reporting of the pornographic spam. Thus, their *prima facie* case also lacked proof of the third requisite element.¹⁹

¹⁹ Wilson and Schumacher proved significant adverse actions by Zabrocki, ultimately leading to the end of their employment with the parish, the second element of their *prima facie* case.

Wilson and Schumacher carried the ultimate burden of proving that the respondents took adverse employment actions against them because they opposed illegal discrimination. *Rasmussen, op. cit.*, p. 20, note 16; *Crockett, op. cit.*, p. 20, note 16; *Johnson, op. cit.*, p. 20, note 16; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029; *Martinez v. Yellowstone County Welfare Department* (1981), 192 Mont. 42, 626 P.2d 242, 246. Their anecdotal evidence did not demonstrate that either the diocese or the parish had any animosity toward them. The anecdotal evidence of Zabrocki's rancor toward the two women was not specifically tied to either their turning him in for accessing pornographic web-sites or their limited complaints about the pornographic spam.

Clearly, Zabrocki had a conflict with Wilson and Schumacher. That conflict arose out of their resistance to his efforts to take control of the parish and it generated hostility on both sides. Given the history of that conflict, before and after the women found and reported the web access history, it is more likely than not that his hostility toward them resulted from their resistance to his efforts to assume the pastor's leadership role. They failed to prove his hostility toward them instead resulted their reporting of his web site access, of the pornographic e-mails, or of both.

Wilson and Schumacher also argued that despite repeated requests for help and protection, all three respondents failed and refused to stop the delivery of pornographic e-mails to Wilson's e-mail address, where it appeared to both Wilson and Schumacher. This, they argued, created a sexually hostile work environment by continuously exposing them to unwelcome, offensive sexual content, and by making receipt and tolerance of this continuous delivery of pornography to their workplace a condition of their employment.

Significant adverse acts that can constitute retaliation include "coercion, intimidation, harassment" under Admin. R. Mont. 24.9.603(2)(a). Clearly, infliction of a hostile work environment upon the two women would be a significant adverse act. However, they failed to prove that any of the three respondents made receipt and tolerance of the pornographic spam a condition of their employment.

Wilson and Schumacher argued that the diocese had an obligation to investigate the continuing flow of pornographic spam. They failed to prove that they informed the diocese of the continuing flow—their assertion of "repeated" requests for help was an overstatement. Because they gave up on the diocese and did not make repeated requests for help, they got no further assistance from the diocese after Peterson e-mailed the "mail washer" program to them. The failure of the diocese to make further inquiry about the e-mail is not proof of a retaliatory motive, without

additional notice to the diocese that the spam continued. Without specific information about the continued flow of pornographic e-mail, the diocese had no duty to take further action or make further inquiry. It never received such information.

The only way for the parish to be aware of the continued flow of pornographic spam would be for the two women to tell Zabrocki it was continuing, which they never did. Since they provided no substantial evidence that Zabrocki caused the pornographic spam to begin and to continue, there was no evidence the Zabrocki, individually or on behalf of the parish, knew of it. Thus, none of the respondents, on this evidentiary record, caused or contributed to the flow of pornographic e-mail. Thus, also, none of the respondents had notice which triggered a duty to investigate further and then take further action to stop the flow.

In the face of substantial evidence of problems between Zabrocki and both Wilson and Schumacher about pastoral decision-making in the parish, both women failed to carry their burden to prove that the adverse actions resulted from a retaliatory motive.

3. Conclusion

In the face of the failure of Wilson and Schumacher's *prima facie* case, it is unnecessary to analyze further the reasons for the actions taken by the respondents. It is likewise unnecessary to inquire whether those actions were pretexts for retaliation. Taking the evidence as a whole, the hearing examiner remains unconvinced that the respondents engaged in unlawful retaliation against Wilson and Schumacher. The entire record of this proceeding, taken as a whole, supports the conclusion that it is more likely than not that conflicts over pastoral decisions about the proper direction for the parish to take were at the heart of the conflicts between Zabrocki and the charging parties in this case (among others).

This decision does not endorse or approve Zabrocki's treatment of Wilson and Schumacher. The resistance of the two women to Zabrocki's exercise of his pastoral powers ultimately caused his harsh treatment of them. They failed to prove that they opposed what they reasonably believed to be illegal discrimination. They also failed to prove that their reporting, both of Zabrocki's access of pornographic web sites and of the beginning of the pornographic spam, caused the adverse actions that followed. Without such proof, the retaliation claims should be dismissed.

V. Conclusions of Law

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

2. Respondents did not retaliate against charging parties for engaging in activities protected by the Human Rights Act. Mont. Code Ann. § 49-2-301.

VI. Order

1. Judgment is for respondents **Catholic Diocese of Great Falls-Billings, St. Luke's Parish and Father Pat Zabrocki** and against charging parties **Donna Wilson and Lynn Schumacher** on the charges that the respondents retaliated against them for protected activities by (1) subjecting them to a sexually hostile and offensive work environment; (2) failing to take action after they reported sexual harassment; (3) denying them raises; (4) excluding them from interoffice information; (5) cutting their hours and responsibilities and (6) shunning them.

2. The complaint is dismissed.

Dated: July 15, 2005.

Terry Spear, Hearing Examiner

Certificate of Service

I served copies of this document by U.S. Mail, postage prepaid upon:

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Certified this ____ day of _____, 2005.

Legal Secretary, Hearings Bureau
Department of Labor and Industry

Lynn Schumacher and Donna Wilson FAD.wpd