BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Lisa Williams, Charging Party, vs. **Joe Lowther Insurance Agency, Inc.**, Respondent.	)	HRC Case No. 0041010741
	)	*Final Agency Decision*

I. Procedure and Preliminary Matters

Lisa Williams filed a complaint with the Department of Labor and Industry on November 21, 2003, alleging that Joe Lowther Insurance Agency, Inc., discriminated against her on the basis of sex (female) when it subjected her to unwelcome *quid pro quo*[1] sexual harassment culminating when respondent terminated her employment on or about August 4, 2003. On July 15, 2004, the department gave formal notice that Williams' complaint would proceed to a contested case hearing, appointing Terry Spear as hearing examiner.

The contested case hearing proceeded on October 18 and 19, 2004, in Billings, Yellowstone County, Montana. Williams attended in person with her attorneys, Phillip R. Oliver and Jeff A. Turner, of Oliver & Associates. The corporation attended through Joe Lowther, owner and designated representative, with its attorney, John L. Amsden, of Beck, Richardson & Amsden, PLLC. Tom Crawford, Cindy Doffinger, Karen (Murnion) Dutton, Kelli Johnson, Eugene (Tip) Lavey, Cleora Lowther, Joe Lowther, Gary McClure, Jack O'Donnell, Carla Templet, Darryl Weber, Lisa Williams and Jody Winter testified. The hearing examiner admitted Exhibits 1-9, 12, 18, one paragraph of Exhibit 33 (for a limited evidentiary purpose), 34-35, 101, 104-105, 109-110 and 112 into the record, refusing Exhibits 102 and 103 on relevance objections. The parties submitted post hearing arguments. A copy of the Hearing Bureau case docket accompanies this decision.

II. Issues

The issues are whether the corporation, through Joe Lowther, owner, made continued employment of Williams on the existing terms and conditions of that

[1] A Latin phrase meaning "what for what," or "something for something," originally used in contract law to refer to the exchange of one valuable thing for another between the contracting parties. In common usage it now means more generally "something given or received for something else." ***Compare, i.e.***, the definitions in *Black's Law Dictionary* and *Webster's New Collegiate Dictionary*.

employment contingent upon her maintaining a sexual relationship with Lowther and whether the corporation, through Lowther, took adverse employment actions against Williams when she refused to maintain that sexual relationship. For a full statement of the issues, ***see*** "Final Prehearing Order," December 22, 2003.

III. Findings of Fact

1. At all pertinent times, charging party Lisa Williams, a woman, lived in Billings, Montana, with her husband and two children. Respondent Joe Lowther Insurance Agency, Inc., was a Montana corporation with its principal place of business in Billings, Montana. Its owner and manager was Joe Lowther, divorced father of three children.

2. Lowther's father, Joe Lowther, Sr., had formed the corporation, which operated as an insurance agency in Billings, Montana, in 1968. Lowther, Sr., managed the corporation and served as a district manager for Farmers Insurance Group (FIG) for 27 years, until his death in September 1995.

3. After graduating from MSU Bozeman, Lowther began working for FIG in the corporate office in Los Angeles in May 1988. After several years working for FIG in Los Angeles, he returned to Billings and went to work for the corporation.

4. Lowther assumed management of the corporation during his father's terminal illness and became sole shareholder and owner after his father's death. Lowther applied for his father's district manager position and was appointed to that position by FIG in November 1995. A large part of the corporation's business and revenues over the years came from FIG insurance matters, because Lowther, Sr., and then Lowther, held the FIG district manager position.

5. Lowther wanted to marry again, and had a "dream" of marrying a woman who would work with him in the insurance business, as his parents had done.

6. Lowther met Williams in 1997 or 1998, while he was a patient of Heights Eye Care in Billings, where Williams worked as a receptionist. They became friends, discussing how Lowther had attended elementary school with Williams's brother, Mike, how they both grew up in Billings Heights and how Williams, as an infant, was in a videotape of kindergarten play in which Lowther had participated. Lowther had more friendly contacts with Williams later when she worked at Costco in the optical department. He shared with her some poetry he had written for his ex-wife.

7. Lowther twice approached Williams about coming to work for the corporation in 2001. Williams had no experience in the insurance field, but Lowther thought she was "great" at customer service and could "pick it up." She accepted his second employment offer in May 2001. Lowther was her supervisor throughout her employment by the corporation. Williams's initial responsibilities were to perform receptionist and administrative duties in the office.

8. In May 2001, two other women worked in the corporation's office, Tammy Keller and Karen Dutton (at that time Dutton used her prior name of Murnion, and may also have gone by "Murnion-Dutton").

9. Keller had decided to leave employment with the corporation to take another job, and Lowther hired Williams to learn and perform Keller's duties. Keller was an excellent employee. Lowther left her in charge of the office when he traveled. She also provided training to FIG insurance agents in eastern Montana.

10. Lowther and Williams agreed upon her part-time hours (20 hours each week) and salary ($24,000.00 per year). In 2001, she also continued to work for Costco on a part time basis.

11. Dutton, too, was an excellent employee. She handled the bookkeeping, including payroll and bank statements, with some assistance from Lowther's mother, Cleora Lowther. Dutton also handled work on the insurance line outside of FIG insurance which Lowther handled, "Grizzly Peak" Farm and Ranch Insurance Agency.[2]

12. Grizzly Peak was a gateway agent for farm and ranch policies, providing services to customers in the Great Falls and Billings district. These policies, providing insurance coverage not available from FIG, were issued by OneBeacon Insurance, an out of state company for which Lowther was a general agent. Insurance agents in the eastern Montana district sold the policies and Grizzly Peak handled the transactions for OneBeacon, paying sales commissions to the selling agents.

13. In August 2001, Williams voluntarily entered into an intimate personal relationship with Lowther. The two engaged in sexual relations and exchanged numerous gifts and cards expressing love and affection for one another. They frequently shared outside activities involving his children and hers, including some birthdays and holidays. Williams concealed the intimacy from her husband.

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[2] The Montana Secretary of State shows Grizzly Peak Ag. Insurance, Inc., as an inactive Montana corporation, Joe Lowther, registered agent, involuntarily dissolved on December 1, 2003.

14. Dutton left employment with the corporation in November 2001. Williams began to assume her responsibilities as well as those of Keller, becoming a full-time employee beginning in January 2002. Although Cleora Lowther, Lowther's mother, continued to do some work for the corporation, she was not regularly in the office. Williams and Lowther were the only regular corporate office employees.

15. As the intimate relationship continued, Lowther began to express his desire that Williams divorce her husband and marry Lowther. Initially, Williams seemed receptive to his proposal about their future together. Lowther believed he would now be able to realize his "dream" of having a spouse who worked with him.

16. Lowther and Williams never discussed what might happen should their intimate relationship end. They never reached an agreement that she would voluntarily leave employment with the corporation in that event.

17. As far as the record in this case shows, Williams continued to be exclusively an employee of the corporation, despite her work for Grizzly Peak.

18. Williams obtained a license to sell life insurance. While she worked for the corporation, her only sales were of eight FIG policies to her family members.

19. During her employment, Williams received two raises. She received favorable performance reviews. She was never disciplined for her work performance.

20. During Williams's employment, Lowther received accolades and bonuses for his work. He purchased furniture for Williams from one of his bonuses.

21. As 2002 progressed, Williams was not sufficiently trained and did not have enough time to perform all of the work previously done by both Keller and Dutton. Receiving no negative feedback, she believed she was performing her job well. Besotted with their affair, Lowther did not notice that some of the necessary work of the business was not being performed in a timely manner.

22. In June 2002, Williams and her husband started proceedings to adopt a third child, Hope, a newborn. Williams brought Hope to work until January 2003. Lowther welcomed Hope in the office, and expressed his desire to parent Hope with Williams when she, as he continued to hope, divorced her husband. He treated Hope as one of his own children.

23. Dave Dela Torre, FIG's state representative for Montana (state executive agent), also had an office in Billings. He happened to come to Lowther's office when Lowther was holding and feeding Hope at his desk. Dela Torre was visibly uncomfortable about the situation.

24. In the summer of 2002, OneBeacon notified Lowther that they were no longer going to have any general agents in the State of Montana. Subsequently, Lowther sold the business of Grizzly Peak to an out of state company. This reduced the revenues of the corporation.

25. Lowther began to press Williams to initiate divorce proceedings against her husband. He told Williams repeatedly that it was her choice whether to leave her husband, at the same time as he repeatedly asked her to make that choice, inviting her to be with him instead of her husband and extolling the virtues of the marriage he wanted with her. While saying that it was her decision, he pressed her to decide in his favor.

26. Through the end of 2002 and into early 2003, Williams did not tell Lowther that she was going to stay with her husband. She used both the pending adoption of Hope[3] and the holiday season as reasons for deferring any action or decision regarding her current marriage.

27. In May 2003, Williams's husband lost his job and decided to stay home with the children. Lowther was furious. Williams had still taken no action to divorce her husband. He felt it was unfair and "taking advantage" for Williams to support her stay-at-home husband with the wages his corporation paid her. He felt betrayed.

28. Feeling insecure and manipulated, Lowther increased his efforts to persuade Williams to divorce her husband and marry him. He escalated his negative comments about her husband and wooed her more zealously.

29. Lowther's efforts backfired. In late May 2003, Williams ceased having sex with him. With Williams clearly detaching from him, Lowther intensified his campaign to persuade her to divorce her husband and marry him.

30. Williams was not going to leave her husband. Had she planned to divorce him, she would not have begun the process, with her husband, of adopting Hope. Williams needed the money from her job to support her family. She was afraid to tell Lowther that she was staying with her husband.

31. Lowther was upset every time he interacted with Williams because she was still his employee but no longer his lover. He knew he could not force her to love him and leave her husband, but he could not restrain himself from pressuring her to do that very thing. The work environment was tense. Lowther spent more and more time out of the office. The unhappy duo began to quarrel in public.

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[3] According to Williams, Hope's adoption was not final until November 2003.

32. Lowther felt pressure from the state FIG office, even though he had been made President's Council District Manager the year before, about the corporation's current performance for FIG. He also thought his dreams were evaporating and the working situation with Williams was becoming untenable.

33. On June 20, 2003, Lowther had a breakfast meeting with Williams at a local restaurant. Lowther told Williams that he could not "take" the situation between them anymore. He told her that he needed her more personally than professionally. He offered her a severance package consisting of her wages through the end of July plus a lump sum payment. Lowther clearly gave Williams a choice between resuming an intimate relationship with him (and promising eventually to leave her husband) or leaving her job.

34. Williams was shocked and angry. By June 2003, Williams's salary was $36,000.00 per year. Compared to the apparent security of her existing job as a district manager training assistant and office manager, the lump sum plus one more month's salary was not attractive. With two children and a pending adoption of a third child, an unemployed husband and no other source of income, she could not afford to leave her job. She was not willing to leave her husband, resume the intimate relationship with Lowther and perhaps eventually marry him. She refused both options that Lowther offered.

35. On Saturday, June 21, 2003, Lowther and Williams had a telephone conversation in which she told him that she had gone to an attorney, and if Lowther tried to pay her less or end her employment he would be in "big trouble." Lowther offered Williams a larger lump sum payment in addition to her wages through the end of July. She refused the offer.

36. Lowther feared a lawsuit, which might prompt FIG to terminate his district manager contract. He suspected that if Williams did not leave amicably, she could cause him serious difficulties with FIG, with or without a lawsuit. His lump sum offers were made with the expectation that he might be able to borrow the money to make the promised payments, in the hopes that with an amicable departure by Williams, he might be able to sustain the business and somehow pay Williams enough to prevent her from making trouble for him.

37. Williams was not seeking a chance to sue Lowther. She wanted to keep her job. Her threats of litigation were efforts to prevent Lowther from firing her unless she resumed her affair with him and agreed to leave her husband.

38. Lowther was out of the office for most of the remainder of June 2003 and most of July 2003. He still had not ruled out the possibility of reconciling with

Williams if she agreed to leave her husband and resumed her intimate relationship with him. He felt that the previous sexual relationship had been an implicit promise by Williams to leave her husband at some later time. He wanted her to make that promise explicit now. He wanted Williams to come back to him or to leave her job, but if she left the job he did not want FIG or the business community at large to know about his intimate relationship with Williams.

39. During the summer of 2003, Daran Wyckoff, who worked recruiting telephone commission sales agents for AFLAC, was attempting to recruit Williams's husband. Wyckoff learned of Williams's current employment and tried to recruit her as well, with extravagant descriptions of the potential earnings in commission sales.

40. Williams was not interested in a non-salary commission position. She did make inquiries about the AFLAC commission sales job, on behalf of her husband. Some of those inquiries came to the attention of Lowther's acquaintances and family members, and he eventually heard about Williams' inquiries. He also discovered AFLAC recruiting material in the company car Williams used. Lowther wanted Williams to leave if she would not resume their affair and promise to leave her husband, but he also felt betrayed that she might be looking for other work, because he wanted to resume the affair and make her promise to get a divorce.

41. Williams's inquiries about AFLAC confirmed that the job would be a high risk, no salary, no benefit job. Neither she nor her husband was interested in taking such a job. As the sole support of the family, she in particular could not afford to leave her current position for such a dubious prospect.

42. On August 4, 2003, Lowther terminated Williams's employment with the corporation. He had previously exchanged company vehicles with Williams, explaining the switch as an effort to put fewer miles on the vehicle he normally drove. Lowther arrived at work with all of Williams's personal belongings from the company vehicle she normally drove (which he did not drive to work that day), which he returned to her. After a lengthy discussion of the status of various pending business matters for the corporation, Lowther again told Williams that he needed her more personally than professionally, and again offered her the choice between leaving her husband and resuming their intimate relationship or leaving her job. He told her that if she left her job he would pay her salary through the end of August. She refused to leave her husband and resume their intimate relationship. He fired her, and paid her for August.[4] He demanded that she tell her husband why she had lost her job.

[4] Williams later requested her "benefits" for August, which Lowther also paid.

43. Williams got a ride home from work from her mother, since she no longer had access to the corporation's vehicles. She told her husband that she had lost her job, and told him why. They talked the rest of the day about her affair, the events of the last two years and why things had gone wrong between them.

44. The next day Williams went to Dela Torre and William Koeppen, state executives for FIG and complained that she had been wrongfully discharged. She was visibly upset, and alleged that Lowther had harassed her and that this was not the first time that Lowther had conducted himself in an inappropriate manner. Williams told Dela Torre that she and Lowther had an "emotional" relationship, involving personal matters, but denied having a "physical" relationship with Lowther. Williams also told Dela Torre that Lowther had wanted "more" from her, and had tried to give her gifts as well as sending her notes and cards. Williams led Dela Torre to believe that Lowther had pursued a sexual relationship with her and that she had found his attentions, throughout her entire employment, unwelcome as well as inappropriate. She did not tell the truth about the actual intimate relationship she had with Lowther. That omission gave FIG an erroneous understanding of the nature of the problems between Lowther and Williams.

45. Williams also told the FIG executives that Lowther had a drinking problem.

46. At the time she spoke to the FIG executives, Williams knew that Dela Torre did not like Lowther.

47. Dela Torre called Lowther and arranged a meeting with him concerning his career at Farmers. At the meeting, Lowther, who rightly believed his FIG district manager position was at risk, lied about firing Williams and denied having a physical relationship with her. He admitted much of the rest of his relationship with Williams, including his gifts to her, their exchange of cards and notes, his disparaging comments about her husband and telling her that he did not need her professionally, only personally.

48. Soon after that meeting, on August 15, 2003, Dela Torre and Koeppen visited Lowther at his office, and gave him the choice between resigning his district manager position with FIG or having it terminated. Because a termination would be more damaging for his future insurance business, Lowther resigned.

49. Williams lost $18,000.00 in wages (her salary from September 2003 through February 2004) as a result of the corporation's termination of her employment because she would not resume her intimate relationship with Lowther and promise to leave her husband. Interest to date on the sum, at 10% simple per

annum, is $2,155.13 ($3,000.00 x 514 days since 9/30/03 x .1 divided by 365) + ($3,000.00 x 483 days since 10/31/03 x .1 divided by 365) + ($3,000.00 x 453 days since 11/30/03 x .1 divided by 365) + ($3,000.00 x 422 days since 12/31/03 x .1 divided by 365) + ($3,000.00 x 391 days since 1/31/04 x .1 divided by 366) + ($3,000.00 x 362 days since 2/29/04 x .1 divided by 365).

50. Williams also suffered emotional distress, for which she sought counseling. She suffered depression and loss of self esteem. The firing, together with the necessary disclosure to her husband of the long-term affair, caused Williams shame, anguish, anger, depression and shock. Because she and her husband were able to reconcile and improve their relationship after the disclosure, the longer term emotional distress she suffered resulted from the firing and not from the disclosure.

51. Williams suffered emotional distress resulting from the corporation's illicit conduct, for which she is entitled to recover the sum of $10,000.00.

52. Williams believes that FIG employees in Billings have treated her differently since the filing and that her social activities have been affected negatively by public knowledge of her firing. However, her perceptions of these impacts result from the disclosure to FIG and the public of her affair with Lowther. Williams as much as Lowther caused that disclosure. Any effects from it are not the result of the corporation firing her. Williams also suffered emotional distress as a result of continuing disclosures of her past conduct during proceedings on her human rights complaint, which also do not result from the corporation firing her.

53. The department must enjoin further discrimination. The department can reasonably require training and adoption of appropriate policies by the corporation as a condition of any future operations, including training for Lowther if he continues to own, operate or work for the corporation in the future.

IV. Opinion[5]

A. Discrimination in Employment Because of Sex

The Montana Human Rights Act bans employment discrimination because of sex. Mont. Code Ann. § 49-2-303(1)(a). *Quid pro quo* sex discrimination claims are cognizable under the Act. *Campbell v. Garden City Plumbing and Heating, Inc.*, ¶15, 2004 MT 231, 322 Mont. 434, 97 P.3d 546; ***quoting*** *Beaver v. Montana D.N.R.C.*, ¶29, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. As *Campbell* noted, ***at*** ¶14,

[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.

Admin. R. Mont. 24.9.1407 adopted the definition of actionable sexual harassment set forth in 29 CFR § 1604.11:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . . .

This case involves a claim of *quid pro quo* sexual harassment–Williams alleged that Lowther[6] made her continued employment contingent upon her agreement to resume their prior sexual relationship and to leave her husband. Thus, she alleged that Lowther made sexual advances and requests for sexual favors which were unwelcome and that (1) her submission to that conduct was an explicit condition of her continued employment and (2) her rejection of that conduct resulted in her discharge from employment. Those allegations embody the essence of *quid pro quo* sexual harassment.[7]

A.1. Federal Quid Pro Quo Discrimination Case Law Does Not Change the Analysis

There is virtually no case law in Montana addressing the specifics of *quid pro quo* harassment claims. Just as the administrative rule adopts federal regulations, the federal cases can help to interpret Montana law, when that federal law provides appropriate guidance. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209. One federal district court has defined the precise application of the law to *quid pro quo* conduct by the employer, calling it a "job detriment claim":

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[6] Lowther clearly was the agent of the corporation, and as such is within the statutory definition of the employer. Mont. Code Ann. § 49-2-101(11). No one else acted for the corporation in dealing with Williams, and therefore "Lowther" refers both to Joe Lowther and to the corporation in this discussion.

[7] Lowther pointed out that Williams previously denied that they had a sexual relationship and alleged hostile environment sexual harassment based upon unwelcome sexual advances throughout her employment. She dropped those claims and limited her complaint to her *quid pro quo* claim well in advance of the contested case hearing, so only the legal theory of *quid pro quo* claims is relevant here. Lowther and Williams both lacked credibility as witnesses, because they had both made false and misleading statements in the past about their relationship, to protect their own interests. This credibility issue is discussed at greater length later in the opinion.

> Harassment on the basis of sex is a form of sex discrimination which violates Title VII. *Miller v. Bank of America,* 600 F.2d 211 (9th Cir. 1979); *Barnes v. Costle,* 561 F.2d 983 (D.C.Cir. 1977). Title VII is violated by sexual harassment which creates a hostile, offensive, or intimidating work environment (work environment claim) *or by the conditioning of tangible job benefits on acquiescence to requests for sexual favors or other conduct of a sexual nature* (job detriment claim). *Katz v. Dole,* 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee,* 682 F.2d 897 (11th Cir. 1982); *Vinson v. Taylor,* 23 FEP Cases 37 (D.C. Cir. 1980).
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> *Priest v. Rotary* (N.D. Ca. 1986), 634 F.Supp. 571, 581 (emphasis added).

This is a definition consistent with the Montana regulation.

The prior intimate relationship, although not the particulars of the prior sexual conduct, is obviously relevant to Williams's claim. Harassment claims sometimes arise from failed office romances. ***Cf.***, *Mosher v. Dollar Tree Stores, Inc.* (7th Cir. 2001), 240 F.3d 662; *Succar v. Dade County Sch. Bd* (11th Cir. 2000), 229 F.3d 1343 (***per cur.***); *Place v. Abbott Labs* (7th Cir. 2000), 215 F.3d 803; *Parks v. City of Warner Robins* (11th Cir. 1995), 43 F.3d 609; *McCollum v. Bolger* (11th Cir. 1986), 794 F.2d 602; *Huebschen v. Department of Health & Social Services* (7th Cir. 1983), 716 F.2d 1167; *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, L.L.P.* (S.D.N.Y. 2001), 153 F.Supp. 2d 219, 225; *Smith v. Nat'l R.R. Passenger Corp.* (E.D. Pa. 1998), 25 F. Supp. 2d 578; *Keppler v. Hindsdale Township H. Sch. D.86* (N.D. Ill. 1989), 715 F. Supp. 862; *Freeman v. Continental Tech. Servs., Inc.* (N.D. Ga. 1988), 710 F. Supp. 328; *Mauro v. Orville* (N.Y. App. Div. 1999), 697 N.Y.S.2d 704. The prior relationship between Lowther and Williams provides the context for the alleged subsequent illegal conduct.

The federal cases have often held or commented in ***dicta*** that adverse employment action is not "because of sex" if it results from personal animosity incident to a messy breakup. This does not mean that a former paramour can never experience illegal harassment at the hands of her former sweetheart. To prevail she must usually rebut evidence that the alleged harassment is just fallout from the breakup. In *Keppler*, ***supra at*** 868-699, the federal district court analyzed a prior governing Circuit Court opinion (*Huebschen*, ***supra***) and its application to a claim of *quid pro quo* discharge after the female employee stopped having consensual sex with her boss (emphasis added in the first paragraph of the quotation):

> *The [Huebschen] Court could not have meant that an employer who has engaged in consensual copulation with an employee may thereafter demand it as a condition of retaining job benefits.* The Court, however, may have been

> saying that when an employer penalizes an employee after the termination of a consensual relationship, a presumption arises that the employer acted not on the basis of gender, but on the basis of the failed interpersonal relationship–a presumption rebuttable only if the employee can demonstrate that the employer demanded further sexual relationships before taking the action he did.
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> Read in this way, *Huebschen* makes a great deal of sense. Title VII prohibits discrimination in the workplace. An employee has the right to work in an atmosphere free from sexual abuse, and to obtain the privileges and benefits of her employment without having to provide sexual favors to her employer. An employee who chooses to become involved in an intimate affair with her employer, however, removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which Title VII says have no place in the employment setting.
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> Such an employee, of course, always has the right to terminate the relationship and again to sever her private life from the workplace; when she does so, she has the right, like any other worker, to be free from a sexually abusive environment, and to reject her employer's sexual advances without threat of punishment. Yet, she cannot then expect that her employer will feel the same as he did about her before and during their private relationship. Feelings will be hurt, egos damaged or bruised. The consequences are the result not of sexual discrimination, but of responses to an individual because of her former intimate place in her employer's life. ***Compare*** *Volk v. Coler*, 845 F.2d ***at*** 1433 ("Discrimination and harassment against an individual woman *because of her sex* is a violation of the equal protection clause.") (Emphasis added).

Adopting such a presumption in favor of an employer, as *Keppler* speculates that 7th Circuit intended, is not appropriate under the Montana Human Rights Act. The department and the Human Rights Commission, by statute, must maintain the highest standards of objectivity and impartiality in judging claims of discrimination, and "not favor, directly or indirectly, complainants or respondents with procedural or substantive matters." Mont. Code Ann. § 49-2-205. Presuming a "romantic" rather than "sexual" motivation for Lowther's heavy-handed efforts to force Williams to resume the relationship would be neither objective nor impartial, and would directly favor the respondent, in contravention to the statute.

It is appropriate, however, to consider Lowther's legal argument that adverse action because of rejection of sexual advances is *quid pro quo* discrimination, although adverse action because of rejection of romantic advances is not. Lowther argued that it was not sufficient that he "merely wanted their relationship to continue," and that Williams could prevail only if she proved that Lowther fired her because she refused his request "to engage in copulation or some form of erotic engagement." Respondent's "Proposed Decision," p. 37 (taking the language from *Keppler*[8]).

In considering this argument, it is remarkable that the federal courts make the distinction between romance and sex to defeat *quid pro quo* claims, yet at the same time cite current romantic relationships to defeat claims of otherwise inappropriate sexual conduct and contact in the workplace. ***Cf.***, Frank, "The Social Context Variable in Hostile Environment Litigation," 77 Notre Dame L. Rev. 437, 460 (Feb. 2002).[9] Apparently these courts view efforts to rekindle a past romance as untainted by illicit sexual motivation, while a current romance legalizes sexual comment and conduct as presumptively, "not unwelcome" or at least "quite normal." This distinction is essentially factual rather than legal. The facts of a particular case could conceivably involve efforts to resume a platonic romance rather than an erotic one, although the particulars of such efforts are hard to imagine. There is no basis for the premise that as a matter of law that all romantic overtures coming after the termination of an erotic romance are platonic unless proven otherwise.

A more pertinent comment in *Keppler* addresses the appropriate analysis when there is evidence that the employer conditioned maintenance of the employee's current employment upon further sexual favors:

> Had Ms. Keppler presented evidence that Dr. Miller threatened her with reprisals if she declined his efforts to continue their sexual relationship, he still could have argued that it was her rejection of him, not her rejection of sex, that motivated his subsequent actions. *In that case, however, it would have been for the jury to resolve the matter.*

Keppler, ***op. cit.***, footnote 6 (emphasis added).

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[8] "Because the two had engaged in a prior consensual relationship, Ms. Keppler could establish sexual discrimination only by rebutting the presumption that Dr. Miller penalized her not because she was a woman, but instead because she was his former lover. To do this, she had to show (at this stage, provide evidence from which a jury could find) not merely that Dr. Miller wanted their relationship to continue, but that Dr. Miller threatened punishment if copulation or some form of erotic engagement was refused." ***Keppler at*** 869.

[9] "Frequently, the record indicates that the 'harassment' occurred during the relationship, and the complained-of touching and excessive attention are quite normal in the context of a romantic relationship."

Williams's *quid pro quo* claim thus turns on the facts in evidence, and Montana law does not add (nor is there good reason to add) any extra burden to the requisite elements of a *quid pro quo* case. Frank comments that a defense[10] that the adverse action was motivated by the breakup rather than by sex "will become irrelevant if the harasser threatens the victim with termination if she does not continue the relationship, thereby creating a *quid pro quo* case." 77 Notre Dame L. Rev. ***at*** 461.

Lowther tried to portray his conduct as manifesting his desire that "their relationship . . . continue," and testified, in effect, that he was not demanding that she immediately resume copulation or some form of erotic engagement with him. This distinction is one of fact, rather than law. The appropriate analysis asks whether the proof established the requisite elements of a *quid pro quo* claim, including the requisite sexual motivation. Lowther's legal defense that he did not fire Williams because of sex depends upon the facts, and not the convoluted legal analyses that appears in some of the federal cases.

A.2.a. Credibility of Williams and Lowther

For the most part, this case turns upon evidence of what Lowther and Williams did and said, and their motives for their actions and statements. Usually, the best evidence of what a person did and said is the testimony of that person and all other persons present about the actions and statements. Likewise, the best evidence of an individual's motives usually comes from that individual's testimony about motivation. However, Lowther and Williams were not particularly credible.

As already noted, Williams and Lowther made false statements about their actions, statements and motives, in efforts to protect themselves by concealing their affair. Their false statements were sometimes simply untrue and other times untrue by omission of pertinent facts about their actual romantic involvement. Williams made such false statements to her spouse, to FIG executives and to the department's Unemployment Insurance Division (UID). Lowther made similar false statements to FIG executives and the UID. The usual presumption that they were telling the truth in their testimony was thereby controverted and overcome by both their prior inconsistent statements and their admissions that those prior statements were untrue. Mont. Code Ann. § 26-1-302(7) and (8). Clearly, they told the prior falsehoods to protect their individual interests against the consequences that the whole truth might bring. Therefore, they could not be trusted to tell the truth under oath where that truth might likewise result in adverse consequences for them.

A.2.b. Williams Proved Her Prima Facie Case

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[10] Under the *Huebschen* analysis, Frank calls it a "presumption" rather than a defense.

Some of the events and even motives were undisputed. Lowther and Williams had a torrid affair. But for the hearing examiner's rulings that the particulars of the sexual conduct were irrelevant, Lowther would have presented considerable evidence of the details of that affair. During that affair, Lowther decided that Williams was the woman he wanted to marry, so that the two of them could work and raise their separate children together as well as live and love together.

While Lowther's motives, to this point, were clear, Williams's motives were murky at best. The evidence did not clearly establish whether she was actually considering leaving her husband for Lowther at any point. Whatever her feelings when the affair began, thereafter she and her husband commenced the process of adopting Hope, a sibling of Williams's other children (whom the Williamses had already adopted). The law presumes that persons intend the ordinary consequences of their voluntary actions. Mont. Code Ann. § 26-1-602(3). The ordinary consequences of the adoption proceeding included strengthening the bond between Williams and her husband by adding another child to their household and adding additional legal and emotional consequences to a subsequent divorce because of the common parent-child relationship with the adopted daughter.

Even if Williams somehow thought the adoption would not make it harder to leave her husband, at some point during that process she made the decision not to leave her husband. Her testimony that she feared telling Lowther about that decision was credible because the fear was reasonable and normal under the circumstances, rather than because she was a trustworthy witness. Her testimony about ending the sexual relationship by rebuffing Lowther's advances in May 2003 (without specifically saying what she was doing or why) was credible in the same fashion.

Lowther claimed that sex was not particularly important, and if the sexual contact ended when Williams said it did (which he disputed), it was because he was no longer seeking sex, but instead an emotional commitment. Williams claimed she ended her sexual relationship with Lowther because she was not willing to leave her husband. Both explanations are suspect, since both are conveniently suited to the ultimate arguments presented in this case.

Williams's testimony that she made the decision and ultimately communicated it to Lowther is consistent with the undisputed evidence that, when pressed, she finally told Lowther she would not leave her husband. It is consistent with the substantial evidence of record that Lowther, denied further sexual contact with Williams, intensified his campaign to influence her to leave her husband, eventually forcing Williams to articulate her choice of her husband over Lowther.

Lowther's testimony that sex (as contrasted with love) did not matter to him is inconsistent with his efforts to woo, charm, argue, bully or manipulate Williams into leaving her husband. Enjoyment of their sexual contact was obviously part of the intimate relationship. It is inherently incredible that Lowther, who by his own account was doing everything he could think of to influence the "choice" he believed Williams needed to make, was not trying to use resumption of sexual contact as a point of leverage. It is likewise inherently incredible that his desire to marry Williams was not motivated by his continued desire to resume and maintain his former physical intimacy with her, but only by a "romantic" attraction that had become devoid of physical attraction.

Although Lowther denied, in his contentions and arguments as well as in some portions of his testimony, that he had fired Williams because she stopped being his lover, he also effectively admitted that motivation in other testimony. In addition, what he testified that he wanted–for Williams to divorce her husband and marry him–involved the continuation and formalization of a relationship in which sexual intimacy had played and would normally continue to play an integral part.

The substantial and credible evidence of record thus established, by direct evidence, that when Williams ended the intimate relationship, Lowther responded by confronting her with a choice between resuming it or losing her job. When she refused to resume that relationship, he fired her. Williams established her *quid pro quo* case with direct evidence. After their sexual affair ended, Lowther made sexual advances and requests for sexual favors which were then unwelcome. He made her submission to that conduct an explicit condition of her continued employment. When she refused, he fired her. This was not a sad story of unrequited love. This was a clear case of an employer's abuse of power after his employee and lover stopped making love with him.

Direct evidence "speaks directly to the issue, requiring no support by other evidence," proving the facts without inference or presumption. *Black's Law Dictionary* (5th Ed. 1979), p. 413; *Laudert v. Richland County Sheriff's Department*, ¶¶28-29, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. Once direct evidence establishes a *prima facie* case, the employer must prove "that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief." Admin. R. Mont. 24.9.610(5); ***cf.***, *EEOC Compliance Manual*, "EEOC: Policy Guidance on Sexual Harassment", No. 137, No. 4046-47, pp. 104-05 (BNA, April 1990); ***see also*** *Laudert* ***at*** ¶¶24-27. Despite his protestations of chaste romantic love in those last few months of Williams's employment, Lowther completely failed to prove either that he no longer desired Williams physically or that his desire to resume sexual contact with Williams played no role in his firing her.

B. Affirmative Defenses

Lowther presented several affirmative defenses. He argued that Williams entered into a "love contract" with him, agreeing that she would leave employment if the relationship ended. He argued that he had to discharge Williams because the business had declined. He argued that her poor performance caused or contributed to the decline of the business and that poor performance justified her discharge. He also argued that Williams failed to mitigate her damages.

As already noted, Lowther failed to prove that an unlawful motive played no role in his decision to fire Williams. Admin. R. Mont. 24.9.610(5). His affirmative defenses failed to establish any basis upon which fell far short of meeting that standard.

B.1. The "Love Contract"

Lowther's "love contract" defense failed on the facts.[11] His testimony about such an agreement was not credible. All of the evidence of record regarding the romantic relationship–the documentary evidence as well as testimony about the conduct of Williams and Lowther–is inconsistent with these two lovers discussing and agreeing, either before or during their affair, that should their romance turn sour, Williams would leave her job voluntarily.

Even if Lowther had presented substantial and credible evidence of such an agreement, it would be unenforceable as contrary to public policy under Montana law, for at least three reasons. Factually, such an agreement between supervisor and subordinate would expressly condition her continued employment on continuation of the affair. This, on its face, would constitute a waiver of Williams's right, under the Human Rights Act, to be free from adverse employment action because of sex. As such, it would have no more validity than an agreement to waive overtime pay rights, ***cf.***, ***e.g.***, *In re Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232, 234-35, or any other statutory employment right adopted as a matter of public policy. It would also be a contract of adhesion, given the disparate bargaining positions of supervisor and subordinate. Finally, it would probably amount to a contract in derogation of Williams's marriage, a legal relationship defined and protected by Montana law, and, as such, would be void as contrary to public policy given her marital status.

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[11] The "facts" did not include expert testimony by Peggy Larson that human resources professionals recognize and approve of "love contracts." The hearing examiner excluded such testimony, in part because it involved a legal question about which neither party presented any appropriate authority and which was not a proper subject of expert testimony.

B.2. Declining Business and Poor Performance as Legitimate Business Reasons for Firing Williams

Lowther did present evidence that his business was declining. However, his testimony that it was because of that declining business that he discharged Williams was incredible. His testimony about his continuing desire to rekindle the romance established that if only Williams had, even at the very end, agreed to resume their affair and promised to leave her husband, he would not have fired her. His belated concerns about the business were a pretext for firing her rather than a legitimate business reason.

The same factual analysis applies to the evidence Lowther presented that Williams was not performing all of her job duties, to the detriment of the business. He did not fire her because of her job performance, which he would readily have excused or continued to ignore if she had returned to his arms.

B.3. Failure to Mitigate Damages

Lowther's mitigation defense had two components, only one of which actually involves mitigation. Lowther argued that Williams could have found another job in the insurance business, which is potentially a proper mitigation defense. He also argued, in effect, that Williams' complaints to FIG after her discharge applied the killing blow to his ailing business, which is not a proper mitigation defense.

B.3.a. Failure to Mitigate Damages–AFLAC

With regard to the assertion that Williams could and should have found another job in the insurance business, Lowther had the burden of proving a lack of reasonable diligence in mitigating damages by at least a preponderance of the evidence. *P. W. Berry, Inc. v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Hullett v. Bozeman School Dist. #7* (1987), 228 Mont. 71, 740 P.2d 1132.

Williams had to make reasonable efforts to mitigate her losses by seeking comparable employment. *Ford Motor Co. v. EEOC* (1982), 458 U.S. 219, 231. She did not have the obligation exhaustively to seek out all possible employment opportunities. She could exercise reasonable discretion in pursuing offers of work. Factors such as whether the opportunity was in her chosen field of work, whether it was comparable to the opportunity lost as a result of discrimination, and whether it was economically feasible in light of her actual circumstances, can be considered. *Ford Motor Co.*, ***supra at*** 231; ***accord***, *Hullett*, ***supra***; ***see also*** *Goss v. Exxon Shipping Co.* (5th Cir. 1984), 745 F.2d 967, 978 ("duty to minimize damages, however, does not obligate the employee to accept a position that is not consonant with [her] particular

skills, background and experience, or which involves conditions that are substantially more onerous than her previous position").

The AFLAC commission sales position was not at all comparable to the salary position Williams held with Lowther. There is no evidence that Williams could have found and obtained a comparable salary position during the six months following her abrupt firing. In addition, given Williams' emotional state at the time, Lowther did not establish a lack of reasonable diligence in mitigating her damages.

B.3.b. Failure to Mitigate Damages–Williams' Complaint to FIG

Williams, in an effort to strike back at Lowther for firing her, went to FIG and complained about Lowther. Her complaint triggered a series of events leading to FIG ending its business relationship with Lowther. There is no substantial and credible evidence that Williams's complaint to FIG impacted her ability to find and to obtain a comparable salary position during the six months following her abrupt firing. Thus, the evidence of her complaint to FIG did not establish a failure to mitigate her damages. Her complaint to FIG could contribute to an inability on the part of the corporation to satisfy her award, but that is still not proof of failure to mitigate.

C. Relief

Since the corporation illegally discriminated against Williams, the department may order any reasonable measure to rectify any resulting harm that she 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 from September 2003 through February 2004 and Prejudgment Interest

In prehearing proceedings, the hearing examiner granted the corporation's motion for summary judgment that no damages could accrue after February 2004, because Williams at that point made a decision to stay home with her children and was no longer seeking gainful employment. This decision conforms to that ruling.

Williams' proof of illegal discrimination established a presumptive right to recover lost wages. *Albermarle Paper Company*, ***supra at*** 417-23. She proved with reasonable accuracy the amount of wages she lost due to the corporation's 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 Sys. Co.* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626.

The Department can award prejudgment 10% annual interest on the back pay due. *P.W. Berry, Inc.*, ***op. cit.***; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1032-33; *Foss v. J.B. Junk* (1987), HRC No. SE84-2345.

C.2. Emotional Distress Damages

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. Williams had the right to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. It is unreasonable to expect any person to endure emotional distress caused by the violation of a fundamental human right. *Vainio v. Brookshire* (1993), 258 Mont. 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 the limitations and enhanced burdens of proof which must be met to recover emotional distress damages in tort cases do not apply in discrimination cases. Williams presented substantial credible evidence that she suffered emotional distress resulting from the corporation's illicit conduct, which, as she proved it, justified an award of $10,000.00. She also suffered additional emotional distress, which resulted from her conduct rather than Lowther's, and for which the department cannot reasonably award her any recovery from the corporation.

C.3. 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). Lowther, at all times pertinent to this case, was the sole source of corporation decisions. The corporation is now apparently not a going business concern. That situation, if it is indeed the true situation, can change. Injunctive relief is mandatory under the statute. It is necessary to enjoin the corporation from further supervisory discrimination based upon sex. It is reasonable in addition to mandate, by injunction, training for Lowther as well as the adoption and department approval of corporate policies about *quid pro quo* sexual harassment.

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. Joe Lowther Insurance Agency, Inc., acting through its agent, Joe Lowther, discriminated against Lisa Williams because of sex, after she ended her affair with Lowther, when he subjected her to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature and made submission to his conduct a term or condition of her employment, ending her employment when she rejected it. Mont. Code Ann. § 49-2-303(1)(a); Admin. R. Mont. 24.9.1407.

3. The corporation owes Williams $18,000.00 for past lost wages, $2,155.13 in interest upon those lost wages from September 2003 through the date of judgment, and $10,000.00 for her emotional distress that proximately resulted from the illegal discrimination she endured. 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 discrimination in employment both by subjecting female employees to a sexually hostile and offensive work environment and by taking adverse employment action against them upon refusal to accept that environment, in the fashion detailed in Conclusion No. 2. 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.
> Mont. Code Ann. § 49-2-506(1)(a) and (c).
>
> (b) To obtain training in sex discrimination for Joe Lowther. Within the prescribed time the corporation must submit a training plan to the Bureau and implement that plan, with any changes mandated by the Bureau, immediately upon Bureau approval. Mont. Code Ann. § 49-2-506(1)(a) and (c).

VI. Order

1. Judgment is found in favor of **Lisa Williams** and against **Joe Lowther Insurance Agency, Inc.**, on the charge that the corporation discriminated against her because of sex.

2. The corporation must immediately pay to Williams $30,155.13, to rectify harm to date for its illegal discrimination against her. 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: March 7, 2005.

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