

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

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

DONNA WILSON AND )  
LYNN SCHUMACHER, ) Case Nos. 1122-2005, 1123-2005,  
) 1124-2005, 1126-2005, 1128-2005  
) and 1129-2005  
Charging Party, )  
) *On Remand from the Commission:*  
vs. ) *Modified Final Agency Decision*  
)  
CATHOLIC DIOCESE OF )  
GREAT FALLS-BILLINGS, )  
ST. LUKE'S PARISH AND )  
FATHER PAT ZABROCKI, )  
)  
Respondents. )

\* \* \* \* \*

**I. Procedure and Preliminary Matters**

On July 15, 2005, the hearing examiner issued a final agency decision in these consolidated cases, finding that respondents did not retaliate against charging parties for engaging in activities protected by the Human Rights Act. On March 28, 2006, the Human Rights Commission issued its order modifying that decision and remanding for determination of damages and affirmative relief. The parties have submitted the matter for that determination. This modified decision conforms the liability determination to the Commission's order<sup>1</sup> and proceeds to determine relief and affirmative relief.

**II. Findings of Fact**

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<sup>1</sup> Modified findings: 18-22, 26-28, 31-34, 40. Additional findings: 71-84. Modified conclusions: 2-10. Additional conclusion: 11. Instead of incorporating finding 71 and conclusion 11 from the Commission remand, the hearing examiner deletes his entire original opinion, incorporates by reference the Commission's entire order as the introduction to the new opinion herein, and addresses damages and affirmative relief in that new opinion. The revision of this decision was complicated by the Commission's limited revisions to the 70 original findings. There remain original findings that appear inconsistent with the outcome the Commission directed. The hearing examiner has made the changes and carried out the additional decision-making necessary to determine damages and affirmative relief, all as the Commission mandated. The hearing examiner has not attempted to conform the rest of the original findings to the Commission's mandate, although he did make some changes in the rest of the original findings to avoid duplications, where the Commission's changes to findings were duplicated. *Wilson and Schumacher v. Catholic Diocese of Great Falls, Billings, Montana, Modified Final Agency Decision on Remand, Page 1*

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

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 seven 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 of the other 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<sup>2</sup> received some "spam" (mass-mailing e-mails) that was pornographic<sup>3</sup> and then discovered that the parish internet connection showed repeated access to some web sites that appeared to likewise have pornographic content. Wondering about a connection between the web sites and the spam, 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 reasonably believed that the presence of the access history on the parish computer system constituted sexual harassment by creation of a hostile work environment for users of the parish computer system. They reasonably believed that the access of pornographic sites caused them to receive (at Wilson's e-mail address) pornographic spam. The computer displayed a portion of an e-mail, even if the e-mail was not opened.

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<sup>2</sup> 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.

<sup>3</sup> 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. ~~Wilson's e-mail address was "Wilson@stluke.org" and Schumacher's was "Schumacher@stluke.org".~~

19. On or about January 9, 2002, Wilson told diocesan Vicar General Father Jay Peterson that someone had been accessing adult-only web sites on the parish office computer. Peterson was the supervisor of the bishop's staff and, at times, represented the bishop in his place. 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. It was inappropriate for Peterson to ask Schumacher to write down the history. Loncki observed that Schumacher was upset and distressed.

21. Peterson could tell that both Wilson and Schumacher 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. However, Peterson failed to take appropriate action. Peterson instructed Joe Pipinich to clean up the computer. Peterson made no effort to follow-up with Pipinich and to determine what he had done with the computers, or inform Wilson and Schumacher of what had been done to clean the computers, or ascertain that pornography was no longer appearing on the computers at St. Luke's. The feature of the computer displaying a portion of the content of an e-mail, without the e-mail being opened, was not corrected until 2004.

22. Loncki instructed Wilson and Schumacher not to tell anyone what they had seen. He directed Schumacher not to make copies of the "history" she was to document. However, Loncki failed to take appropriate action. He conducted no follow-up with Wilson or Schumacher. He did not determine whether e-mail accounts at St. Luke's were receiving pornographic e-mails. Although the diocese works with an ISP provider to block spam at the offices of the diocese, he did not contact the ISP provider to block e-mails sent to Wilson. He had no discussion with the person Peterson sent to St. Luke's to clean the computer.

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



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.<sup>5</sup>

31. As part of her job, Wilson had to use e-mail. Wilson continued to receive pornographic e-mails sent to her e-mail account. Both Wilson and Schumacher used the computer that was receiving the pornography. Occasionally Schumacher would check Wilson's e-mail. Hundreds of pornographic e-mails were received each week. Wilson and Schumacher cleaned it up without assistance. Wilson informed Peterson of the continuing pornographic e-mails in person in July 2002. Peterson e-mailed Wilson a program named Mailwasher. Peterson provided no instructions. Wilson tried to use the program, but it was not effective. Except for e-mailing the Mailwasher program, the diocese did nothing to ensure that Wilson and Schumacher would not receive offensive e-mails. Peterson assumed Mailwasher would be effective. Peterson did not follow-up himself or send anyone to determine whether the Mailwasher program was being effective for Wilson.

32. The pornographic e-mails continued to be received at Wilson's e-mail address for the duration of Wilson's employment. The e-mails admitted into evidence were not all of the e-mails received. After Wilson complained about the pornography on the office computer to Peterson in January 2002 and again in July 2002, neither Wilson nor Schumacher complained to Peterson about the pornography. In September 2003, Wilson and Schumacher met with parish member and Great Falls attorney, Neil Ugrin, and reported their work problems. 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 subsequent action as a result of Ugrin's report to Davis.

33. Schumacher felt that if she complained to the diocese, she would not be heard. Schumacher had no knowledge that the diocese had attempted to clean the computers. She did not see any results. When Peterson e-mailed the Mailwasher program, he sent a note that gave Schumacher the impression that it was Wilson's fault that she was getting the offensive e-mails. Schumacher was astonished by this.

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<sup>5</sup> 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 ~~Wilson and Schumacher~~ ~~the Catholic Diocese of Great Falls~~ ~~to Wilson's e-mail address~~, Page 7

34. After the Mailwasher program was ineffective, Wilson tried working with the internet provider. During a conversation with Peterson in 2002, Wilson told Peterson that she and Schumacher were being subjected to retaliation, such as their salaries being frozen. Peterson replied, “I can’t do anything about that.” Wilson and Schumacher felt they could not get help from the diocese. This conclusion was reasonable.

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.

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.<sup>6</sup>

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<sup>6</sup> 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.



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 Vicarate 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 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. However, consideration of past practices and of the timing of Zabrocki's adverse employment actions against Wilson and Schumacher demonstrates the causal connection between their opposition to a work environment containing pornography on computers they were required to use and the adverse employment actions. For two and one-half years, Zabrocki did not exercise his powers as pastor to change parish operations. Deficits in the parish budget had been projected before 2003, but Zabrocki had not previously made staffing changes because of them. Zabrocki began taking adverse actions in February 2002, soon after the complaints about pornography on the office computers.

41. [Deleted in its entirety.]<sup>7</sup>

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.

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<sup>7</sup> The hearing examiner deleted this original finding as entirely duplicative of Finding 32, as modified by the Commission.

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.

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 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.<sup>8</sup>

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.

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<sup>8</sup> 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.

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.<sup>9</sup> 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 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 the staff could serve as resource persons to the councils, that the staff would 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.

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<sup>9</sup> 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. *Wilson and Schumacher v. Catholic Diocese, Modified Final Agency Decision on Remand, Page 12*

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), Wilson and Schumacher. 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.<sup>10</sup> 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.

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<sup>10</sup> Zabrocki decided that volunteers would handle Christian Service efforts. Volunteer rather than paid staff work in Christian Service was more typical in the diocese.

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. 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 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.

71. After Wilson's departure, Zabrocki treated Schumacher in a way that was humiliating, distressing and intolerable. He eliminated most of her jobs from the job description which he wrote. She finally was unable to tolerate the humiliating and hostile work environment and thus resigned.

72. Wilson presented evidence that her total economic losses, including back pay and front pay, as well as lost Social Security retirement income, might total \$507,444.75, over the course of past and future employment and retirement, if she should never work again. Schumacher presented evidence that her total economic losses, including back pay and front pay, as well as lost Social Security retirement income, might total \$193,232.20, over the course of past and future employment and retirement, if she should never work again. The preponderance of the evidence did not establish that either woman was unable to work again as the result of the retaliation. Therefore, it is unreasonable to extend either woman's future losses out further than four years from the dates their respective employment with the diocese ended.

73. Wilson's economic losses total \$40,702.55 per year (projected future wage and benefit losses for 7.75 years of \$315,444.75, according to the figures she presented, divided by 7.75) as those losses accrue. The impact of her losses upon her Social Security entitlement, because she was and is employable, is too speculative to add to this amount. Her economic damages through 2006 are \$122,107.65 (3 years times \$40,702.55 per year), payable on January 2, 2007. Her future economic damages are \$40,702.55, payable in equal monthly installments of \$3,391.88 on the first business day of each calendar monthly beginning February 2007, and ending with January 2008.

74. Wilson is entitled to prejudgment simple interest on her economic damages, at the rate of 10% per year, which amounts, as of January 2, 2007, to \$18,316.17 (.1 times \$40,702.55, times 2.5, for 2004 lost wages, plus .1 times \$40,702.55, times 1.5 for 2005 lost wages, plus .1 times \$40,702.55, times .5 for 2006 lost wages<sup>11</sup>).

75. Schumacher's economic losses during her continued employment from July 1, 2002, through the end of her employment on October 19, 2004, total \$8,650.29

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<sup>11</sup> In each calendar year, the losses for that year accrue so that half the amount of a full year's interest on the losses is due at the end of the year, and thereafter a full year's interest is due for each following year. *Wilson v. Wilson, Schumacher & Cantor, LLC, Diocese of Maryland*, 2004 Final Agency Decision on Remand, Page 15

(according to the figures she presented). Her economic losses thereafter total \$6,613.84 per year (projected future wage and benefit losses for 12 years of \$79,366.11, according to the figures she presented, divided by 12) as those losses accrue. The impact of her losses upon her Social Security entitlement, because she was and is employable, is too speculative to add to this amount. Her economic damages through 2006 total \$23,180.90 (2.197 years times \$6,613.84 per year, plus \$8,650.29), payable on January 1, 2007. Her future economic damages are \$6,613.84 per calendar year, payable in equal monthly installments of \$551.15 on the first business day of each calendar month beginning February 2007, through October 2008, and thereafter in one final payment of \$349.06, due on the first business day after October 19, 2008.

76. Schumacher is entitled to prejudgment simple interest on her economic damages, at the rate of 10% per year, which amounts, as of January 1, 2007, to \$3,312.86 (\$1,831.38, for the interest accruing on her losses during the rest of her employment<sup>12</sup>, plus .1 times \$551.15 times 31/365, plus .1 times 202.09 times 61/365, plus .1 times \$753.24 times 2, for 2004 lost wages, plus .1 times \$6,613.84 times 1.5 for 2005 lost wages, plus .1 times \$6,613.84 times .5 for 2006 lost wages<sup>13</sup>).

77. Wilson and Schumacher presented unrefuted evidence that they suffered, from January 2002 until the date of the hearing and thereafter, substantial, severe, emotional distress.

78. Family practice physician Dr. Nora Norum testified that Wilson had suffered depression, and symptoms of post traumatic stress disorder as a result of her treatment at work, continuing through the date of the hearing, which was more than a year after her firing. Other witnesses, including Carpenter, Murphy, Ugrin, Peterson, Tonkovich, and Schumacher corroborated this testimony with lay observations of Wilson's distress over the two years of employment following the report of pornography to the date of the hearing.

79. Schumacher's husband, Frank, testified credibly that the emotional distress to which Schumacher was subjected was as bad as only one other event during their 31-year marriage, the death of her mother. She lost sleep, had mood changes, cried a

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<sup>12</sup> Calculating the prejudgment interest on the initial lost wages plus the initial benefit losses: (A) for June 2002 through June 2003, .1 times \$248.14 times 4 (.5 for the initial year in which the loss was incurred, plus 3.5 for July 2003 through December 2006 interest accrual over 3 and a half additional years); (B) for July 2003 through December 2003, .1 times 126.82 times 3.25 (.25 for the initial six months plus 3 for January 2004 through December 2006); (C) for January 2004 through June 2004, .1 times \$3,916.59 times 2.75 (.25 for the initial six months plus 2.5 for July 2004 through December 2006); and (D) for July 2004 through October 19, 2004, .1 times \$2,611.58 times 112/365 divided by 2, plus .1 times \$2,611.58 times 2 and 72/365 (initial fraction for July through October 19 of 2004, the following whole number and fraction for October 20, 2004, through December 2006).

<sup>13</sup> In 2005 and 2006, as monthly losses accrued each month, the losses for each year accrued so that half the amount of a full year's interest was due at year end on the losses accrued during that year, and thereafter ~~Wilson and Schumacher accrued additional interest, following Final Agency Decision on Remand, Page 16~~



lot, and nearly constantly talked about her distress caused by respondents' conduct. Other witnesses, including Carpenter, Ugrin, Peterson, Murphy, Tonkovich, and Wilson corroborated this testimony with lay observations of Schumacher's distress over the two years of employment following the report of pornography to the date of the hearing.

80. Wilson and Schumacher's emotional distress originally resulted from their discovery of Zabrocki's use of the parish computer system to access and view internet pornography, rather than from the subsequent retaliation against them for reporting that use.

81. Notwithstanding the initial emotional distress they suffered because of their discovery of Zabrocki's conduct, even more substantial emotional distress was yet to come. When they made and carried out the exceptionally difficult decision to report what they had found, the reaction of their church, to which both women were devoted, devastated them. Again, part of that emotional distress stemmed from their recognition that their church did not take as seriously as they did the implications of Zabrocki's apparent fascination with pornography. Nevertheless, as least as harmful to them was their discovery, over time, that Zabrocki was retaliating against them by cutting hours, reducing responsibilities and pay and isolating them within the parish structure. Of equally substantial import was their dawning realization that the diocese was not going to take any effective action to address Zabrocki's increasingly hostile attitude toward them, his continuing adverse employment actions against them and their continued receipt of pornographic e-mail.

82. In an ideal world, the shortcomings of human beings, even those clothed with the church's authority, would not impede or assail believers' faith. In this real world, these two women were sorely tried by their priest's punishment of them for reporting his internet activities and by the failure of their church to take effective action to protect them both from that punishment and from the ongoing receipt of internet pornography. They presented substantial evidence that the retaliation itself traumatized them and challenged their lifelong beliefs. Although it is exceptionally difficult to parse emotional distress resulting from the discovery that their parish priest engaged in looking at internet pornography from emotional distress that resulted from the subsequent retaliation against them for reporting it, the hearing examiner finds that the preponderance of the evidence supports an award to each woman of \$100,000.00 for the emotional distress resulting from the retaliation.

83. St. Luke's involvement in the retaliation consisted of the actions of Zabrocki, who as the parish priest acted for the parish, and who took control (with the support of the diocese) of the parish councils, thereby being able effectively to retaliate against Wilson and Schumacher. Although Zabrocki orchestrated the adverse actions, his actions were largely endorsed and supported by the parish councils (after he reconstituted them as needed to assure such support). Therefore, St. Luke's, as an entity, did participate in the retaliation, through the parish councils as well as through Zabrocki.

84. There remains a risk of future retaliation against secular employees of the diocese who may, in the course of performance of their duties, discover and report use of church computer systems by members of the clergy for finding and viewing internet pornography. In addition to enjoining any such future conduct, the department should order that the diocese must arrange appropriate training for Zabrocki, Peterson, their successors in the positions they held during this controversy should either or both of them no longer hold those positions, and both of St. Luke's parish councils, to assure future compliance with the law against retaliation.

### III. Opinion<sup>14</sup>

#### Effect of the Commission Mandate upon Issues of Separation of Church and State

In the hearing examiner's prehearing order denying summary judgment, the question of jurisdiction over the retaliation claims of Wilson and Schumacher arose. The hearing examiner, by that order, declined to decide before hearing whether ruling upon the retaliation claims would impermissibly impinge upon the respondents' constitutional right to decide for themselves, free from state interference, matters of church government as well as matters of faith and doctrine. The issue was left open to revisit after hearing. The hearing examiner did not revisit it in the original decision, because he decided there had been no retaliation. The Commission's order resolved any such issue that might otherwise now arise.

The Commission found and concluded that all three respondents retaliated against Wilson and Schumacher, out of hostility toward the opposition of Wilson and Schumacher to what they reasonably viewed as sexual harassment. This retaliation against opposition to reasonably perceived sexual harassment was not and could not have been based upon matters of church government, faith or doctrine. The diocese's sexual ethics policies clearly showed that church government, faith and doctrine did not countenance sexual harassment in the workplace.

As a result, the remand order of the Commission foreclosed the respondents' jurisdictional defenses, which the hearing examiner will not address in this opinion. What remains for this opinion to discuss is the proper application of the Human Rights Act to impose upon the respondents both the appropriate relief for Wilson and Schumacher and the appropriate affirmative relief for these purely secular acts of illegal retaliation.

#### Damages Generally

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<sup>14</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact in *William Schumacher et al. v. Catholic Diocese of St. Louis*, 2014-0005, 2014-0006, 2014-0007, 2014-0008, 2014-0009, 2014-0010, 2014-0011, 2014-0012, 2014-0013, 2014-0014, 2014-0015, 2014-0016, 2014-0017, 2014-0018, 2014-0019, 2014-0020, 2014-0021, 2014-0022, 2014-0023, 2014-0024, 2014-0025, 2014-0026, 2014-0027, 2014-0028, 2014-0029, 2014-0030, 2014-0031, 2014-0032, 2014-0033, 2014-0034, 2014-0035, 2014-0036, 2014-0037, 2014-0038, 2014-0039, 2014-0040, 2014-0041, 2014-0042, 2014-0043, 2014-0044, 2014-0045, 2014-0046, 2014-0047, 2014-0048, 2014-0049, 2014-0050, 2014-0051, 2014-0052, 2014-0053, 2014-0054, 2014-0055, 2014-0056, 2014-0057, 2014-0058, 2014-0059, 2014-0060, 2014-0061, 2014-0062, 2014-0063, 2014-0064, 2014-0065, 2014-0066, 2014-0067, 2014-0068, 2014-0069, 2014-0070, 2014-0071, 2014-0072, 2014-0073, 2014-0074, 2014-0075, 2014-0076, 2014-0077, 2014-0078, 2014-0079, 2014-0080, 2014-0081, 2014-0082, 2014-0083, 2014-0084, 2014-0085, 2014-0086, 2014-0087, 2014-0088, 2014-0089, 2014-0090, 2014-0091, 2014-0092, 2014-0093, 2014-0094, 2014-0095, 2014-0096, 2014-0097, 2014-0098, 2014-0099, 2014-0100, 2014-0101, 2014-0102, 2014-0103, 2014-0104, 2014-0105, 2014-0106, 2014-0107, 2014-0108, 2014-0109, 2014-0110, 2014-0111, 2014-0112, 2014-0113, 2014-0114, 2014-0115, 2014-0116, 2014-0117, 2014-0118, 2014-0119, 2014-0120, 2014-0121, 2014-0122, 2014-0123, 2014-0124, 2014-0125, 2014-0126, 2014-0127, 2014-0128, 2014-0129, 2014-0130, 2014-0131, 2014-0132, 2014-0133, 2014-0134, 2014-0135, 2014-0136, 2014-0137, 2014-0138, 2014-0139, 2014-0140, 2014-0141, 2014-0142, 2014-0143, 2014-0144, 2014-0145, 2014-0146, 2014-0147, 2014-0148, 2014-0149, 2014-0150, 2014-0151, 2014-0152, 2014-0153, 2014-0154, 2014-0155, 2014-0156, 2014-0157, 2014-0158, 2014-0159, 2014-0160, 2014-0161, 2014-0162, 2014-0163, 2014-0164, 2014-0165, 2014-0166, 2014-0167, 2014-0168, 2014-0169, 2014-0170, 2014-0171, 2014-0172, 2014-0173, 2014-0174, 2014-0175, 2014-0176, 2014-0177, 2014-0178, 2014-0179, 2014-0180, 2014-0181, 2014-0182, 2014-0183, 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2014-1003, 2014-1004, 2014-1005, 2014-1006, 2014-1007, 2014-1008, 2014-1009, 2014-1010, 2014-1011, 2014-1012, 2014-1013, 2014-1014, 2014-1015, 2014-1016, 2014-1017, 2014-1018, 2014-1019, 2014-1020, 2014-1021, 2014-1022, 2014-1023, 2014-1024, 2014-1025, 2014-1026, 2014-1027, 2014-1028, 2014-1029, 2014-1030, 2014-1031, 2014-1032, 2014-1033, 2014-1034, 2014-1035, 2014-1036, 2014-1037, 2014-1038, 2014-1039, 2014-1040, 2014-1041, 2014-1042, 2014-1043, 2014-1044, 2014-1045, 2014-1046, 2014-1047, 2014-1048, 2014-1049, 2014-1050, 2014-1051, 2014-1052, 2014-1053, 2014-1054, 2014-1055, 2014-1056, 2014-1057, 2014-1058, 2014-1059, 2014-106

The relief the department may award to a charging party subjected to illegal discrimination include any reasonable measure to rectify any resulting harm she suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. S.D. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord*, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.<sup>15</sup> The harm that Wilson and Schumacher suffered includes lost wages and benefits (back pay), prejudgment interest on those losses, future lost wages and benefits (front pay) and emotional distress, all resulting from the illegal retaliation by the respondents.

### Back Pay

By proving retaliation that cost them their jobs, Wilson and Schumacher established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, at 417-23. They must prove the amount of wages that each of them lost, but not with unrealistic exactitude. *Horn v. Duke Homes* (7<sup>th</sup> Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Co.* (3<sup>rd</sup> Cir. 1984), 747 F.2d 885, 889; *see also* *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6<sup>th</sup> Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award). In this instance, the evidence establishes amounts of wages and benefits lost over time, for both women after they lost or reasonably left their jobs, and for Schumacher before she left her job.

### Front Pay

Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a “rightful place” in the job market. *Sellers v. Delgado Comm. College* (5<sup>th</sup> Cir. 1988), 839 F.2d 1132; *Shore v. Federal Expr. Co.* (6<sup>th</sup> Cir. 1985), 777 F.2d 1155, 1158; *Rasmussen v. Hearing Aid Inst.* (March 1992), HRC Case #8801003988.

Front pay is appropriate when it is impossible or inappropriate to reinstate the victim of discrimination because of the hostility or antagonism between the parties. *Cassino v. Reichhold Chemicals, Inc.* (9<sup>th</sup> Cir. 1987), 817 F.2d 1338, 1347 (front pay award proper based on “some hostility” in spite of testimony that plaintiff and defendant were still friends); *see also*, *Thorne v. City of El Segundo* (9<sup>th</sup> Cir. 1986), 802 F.2d 1131, 1137; *E.E.O.C. v. Pacific Press Publ. Assoc.*, (N.D. Cal. 1979), 482 F.Supp.

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<sup>15</sup> The Montana Supreme Court has approved the use of analogous federal cases in interpreting application of the Montana Human Rights Act. *E.g.*, *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. W.D. Co.* (1982), 198 Mont. 56, 643 P.2d 841; *Final Agency Decision on Remand*, Page 19

1291, 1320 (when effective employment relationship cannot be reestablished, front pay is appropriate), *aff.* (9<sup>th</sup> Cir. 1982), 676 F.2d 1272. In the present case, the hostility between the respondents and the charging parties is patent from the facts, and the women did not need to seek reinstatement as a prerequisite to obtaining front pay. *EEOC v. Prudential Fed. Savings & Loan Ass'n.* (10th Cir.), 763 F.2d 1166, 1173, *cert. den.* 474 U.S. 946 (1985); *Thorne at* 1137 (“failure to seek reinstatement would not preclude front pay if excessive hostility exists”).

Ascertaining future lost wages is necessarily an exercise in reasoned speculation. The hearing examiner cannot hold Wilson and Schumacher to an unrealistic standard of proof (*see Horn, op. cit.*), yet there must be credible and substantial evidence to support a finding that future lost wages extend into the distant future. The facts here do include evidence that both women intended to remain in their employment with the church, for secular and religious reasons. Nevertheless, the uncertainty of future employment security grows as the proposed continued employment recedes further into the future. The parish faced financial problems in the present and there could be further financial problems in the future that would influence retention and pay practices. In addition, both women have employable skills and possibilities, which should not be ignored.

Montana law gives weight to these kinds of concerns about long-range prognostication of future wage loss. In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights complaints, but clearly the legislature wants future lost wages awards to be carefully considered before extending them far into the future. The Human Rights Act empowers the department to require any reasonable measure to rectify harm resulting from illegal retaliation. Mont. Code Ann. § 49-2-506(1)(b). Four years of lost wages after separation from employment, for each woman, is reasonable and supported by the credible and substantial evidence of record. More front pay beyond the four years awarded is not sufficiently supported and would be both unreasonably speculative and unreasonably contrary to the temporary nature of front pay.

#### Prejudgment Interest

Prejudgment interest on lost income is a proper part of the department’s award of damages. *P. W. Berry, Inc.*, 779 P.2d *at* 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times the appropriate rate of interest. *E.g., Reed v. Mineta* (10<sup>th</sup> Cir. 2006), 438 F.3d 1063. 10% annual simple interest is appropriate, as is applicable to tort losses capable of

being made certain by calculation (Mont. Code Ann. § 27-1-210), and the requirement for a written demand to trigger the commencement has not been required in Human Rights Act cases. The appropriate calculations are described in the findings.

### Emotional Distress

Reasonable measures to rectify the harm Wilson and Schumacher suffered because of the retaliation includes an award to compensate them for emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. The evidence supports an award of \$100,000.00 to each woman, under the legal standard set in *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836, for all the reasons stated in the findings. The freedom from unlawful discrimination is a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; **cited in Vortex at ¶33 and Vainio; see also Campbell v. Choteau Bar & Steak Hse.** (1993), HR No. 8901003828. The violation involved here, against both women, was extreme and prolonged. Their emotional distress, as revealed by the evidence, was severe.

### Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondents' future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). The charging parties held secular rather than clerical employment. The respondents took adverse employment actions against Wilson and Schumacher because they reported and opposed Zabrocki's use of the parish computer system to access and view internet pornography. Those adverse employment actions did not involve matters of substantial religious activity, but secular issues such as wage rates, employment responsibilities and effective cleaning and blocking of the computer system from internet pornography. Unlike *Parker-Bigback v. St. Labre School*, 2000 MT 210, 301 Mont. 16, 7 P.3<sup>rd</sup> 361, **cert. den.** (2001) 531 U.S. 1076, the present case involves violations of fundamental human rights, claims "of the highest order and not otherwise served" for which the exclusive remedy is the Montana Human Rights Act. Given the secular nature of the retaliation, the conduct of respondents did not involve the free exercise of religion. Under these facts, the imposition of affirmative relief upon the respondents should proceed exactly as it would for a purely secular employer.

#### IV. 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 retaliate against charging parties for engaging in activities protected by the Human Rights Act. Mont. Code Ann. § 49-2-301.

3. "It is an unlawful discriminatory practice for a person . . . to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter." Mont. Code Ann. § 49-2-301.

4. The statute prohibiting retaliation protects two kinds of activities: (1) opposition to discrimination and (2) participation in investigation of discrimination. Retaliation is prohibited separately from the underlying alleged discrimination. *Mahan v. Farmers Union Cent. Exch. Inc.* (1989), 235 Mont. 410, 422, 768 P.2d 850, 858.

5. A person may establish retaliation without establishing an underlying discrimination claim. **E.g.**, *Fine v. Ryan Int'l Airlines* (7<sup>th</sup> Cir. 2002), 305 F.3d 746, 752; *Trent v. Valley Elec. Ass'n, Inc.* (9<sup>th</sup> Cir. 1994), 41 F.3d 524, 526.

6. A prima facie case of retaliation requires showing that the charging party engaged in protected activity, was thereafter subjected to adverse employment action, and that there was a causal link between the protected activity and adverse action. *Beaver v. Montana Dep't Natural Resources & Conservation*, ¶ 71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857.

7. With respect to Mont. Code Ann. § 49-2-301, to engage in protected activity means to oppose any practices prohibited by Mont. Code Ann. Tit. 49, ch. 2. Title VII of the Civil Rights Act of 1964 contains a similar prohibition against retaliation in 42 U.S.C. § 2000e-3(a). Often the opinions of federal courts that discuss whether there has been retaliation in violation of that provision employ a two-part test with subjective and objective parts. The person alleging retaliation must have a good faith belief that he/she was opposing illegal discrimination. This is the subjective test. In addition, this belief must be reasonable. This is the objective test. **E.g.**, *Lipphardt v. Durango Steakhouse of Brandon, Inc.* (11<sup>th</sup> Cir. 2001), 267 F.3d 1183, 1187. In practice in the Ninth Circuit, the test is easily met. For example, the court found protected activity for purposes of a retaliation claim where an employee attended one mandatory meeting where foul language and sexually offensive references were made. *Trent v. Valley Elec. Ass'n, Inc.* (9<sup>th</sup> Cir. 1994), 41 F.3d 524, 527. Strict application of the threshold test would be inconsistent with the rule that a retaliation claim can be maintained even where there is no underlying discrimination. Furthermore, as the threshold test becomes more strictly

applied, the risk increases that an employer will get away with retaliating against an employee who opposed conduct that was arguably discriminatory. This could discourage others from bringing claims of discrimination. Even an absolute prohibition against retaliating against any employee who had alleged discrimination would not unfairly hamper employers, because the employer would be free to discharge an employee for other legitimate reasons. However, the Commission has not found an opinion of the Montana Supreme Court analyzing the threshold test often employed by federal courts to retaliation claims.

8. The totality of the circumstances is considered to determine whether a work environment is hostile. *Benjamin v. Anderson*, ¶¶ 53, 56, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Here, the charging parties were required to use computers and e-mail as part of their jobs. Beginning late in 2001 they encountered pornography on these computers. In addition to the offensive content of the pornography itself, the quantity and the persistence of the pornography were also distressing. The women subjectively and objectively believed that the pornography created a hostile work environment, establishing the first part of their retaliation case.

9. The causal link can be established by showing that protected activity was closely followed in time by the adverse employment action. *E.g.*, *Cifra v. G.E.Co.* (2<sup>nd</sup> Cir. 2001), 252 F.3d 205, 217; *O'Neal v. Ferguson Constr. Co.* (10<sup>th</sup> Cir. 2001), 237 F.3d 1248, 1255. Here, Zabrocki was assigned to St. Luke's in mid-1999 and did not make changes in the employment of Wilson and Schumacher for more than two and one-half years. Then, soon after the two women complained to the diocese about the pornography on the computers, Zabrocki began a series of adverse employment actions against them. In July 2002, Peterson received reports of both pornography and retaliation and failed to take appropriate, timely, and effective remedial action. The causal link is established.

10. The causal link is also established because after Wilson and Schumacher complained about pornography on the computers used in their workplace, respondents took adverse actions against them and not any others similarly situated on the parish staff. Although a janitor did not receive pay increases, he was not similarly situated because his job performance was deficient.

## V. Order

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

information; (5) cutting their hours and responsibilities; (6) shunning them and (7) creating such a hostile environment that continued employment for charging parties was not possible.

2. Respondents are jointly and severally liable and must:

(a) immediately pay Donna Wilson \$240,423.82, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past lost earnings of \$122,107.65 for January 2004 through December 2006;

(b) immediately pay Lynn Schumacher \$126,493.76, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past lost earnings of \$23,180.90 for July 2002 through December 2006;

(c) hereafter, pay to Donna Wilson \$3,391.88 on the first business day of each calendar month beginning February 2007, and ending with January 2008, making the appropriate employer deductions, contributions and tax payments to reflect that each payment is for lost earnings; and



(d) hereafter, pay to Lynn Schumacher \$551.15 on the first business day of each calendar month beginning February 2007, through October 2008, and thereafter pay one final payment of \$349.06, on the first business day after October 19, 2008, making the appropriate employer deductions, contributions and tax payments to reflect that each payment is for lost earnings.

3. The department permanently enjoins **Catholic Diocese of Great Falls-Billings, St. Luke's Parish and Father Pat Zabrocki** from retaliating against secular employees of the diocese who may, in the course of performance of their duties, discover and report use of church computer systems by members of the clergy for finding and viewing internet pornography, and permanently enjoins **Catholic Diocese of Great Falls-Billings** from allowing the other respondents to engage in such retaliation.

4. The department enjoins and requires **Catholic Diocese of Great Falls-Billings**, within 60 days after this decision becomes final, to confer with and follow the directions of the Human Rights Bureau to obtain proposed training regarding illegal retaliation, what it consists of and how to avoid it, of 4-6 hours for each person trained, for Father Pat Zabrocki (unless he is no longer within the state of Montana and will not again serve in Montana in the future), his successor parish priest at St. Luke's Parish, should he no longer hold that position, the current members of the two involved parish councils at St. Luke's, Vicar General Father Jay Peterson (unless he is no longer within the state of Montana and will not again serve in Montana in the future) and his successor, should he no longer hold that position.

Dated: December 29, 2006.

/s/ TERRY SPEAR  
Terry Spear, Hearing Examiner