BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011819:

KELSEY M. BALDWIN,	)	Case No. 116-2007
	)	
Charging Party,	)	
	)	
vs.	)	
	)	**FINAL AGENCY DECISION**
T'N T PIZZA, INC., d/b/a	)	
CHUCK E. CHEESE,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Kelsey Baldwin filed a complaint with the Department of Labor and Industry on December 15, 2005. As that complaint ultimately was presented at hearing, she alleged, that T'N T Pizza, Inc., doing business as Chuck E. Cheese ("CEC"), discriminated against her in employment because of her sex when it permitted her to be subjected to sexual harassment by a supervisor, Jesse Finch. On July 25, 2006, the Hearings Bureau gave notice that the case would proceed to a contested case hearing and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on February 5-7 and 22, 2007, in Billings, Montana. Baldwin attended with her counsel, Connie Camino. CEC attended through its designated representative, Dyan Dockter, with its counsel, J. Troy Redmon, now of Redmon Law Firm, P.C. On February 22, 2007, for good cause shown and with the agreement of the parties, Kelly McLean replaced Dyan Dockter as CEC's designated representative, and charging party was absent.

Kelsey Baldwin, Kelsey Breeding, Chris Brethorst, Jeff Bryson, Donna Clampitt, Tyler Clampitt, Carolyn Cunnington, Dyan Dockter, Jesse Finch, Rick Fox, Kyle Gauthier, Jillian Kimmel, Madelynn (Maddy) Kitchin, Michelle Lindeman, James Novotny, Sarah Merrick Sloan and Cole Turner testified. Exhibits 1-39, 101-122, 124-275, 278-288, 341-365 and 367-368 were admitted. Exhibit 368 was sealed for redaction. The hearing examiner refused Exhibit 366, sustaining an objection that it was untimely produced. With receipt of the last post-hearing filing on May 26, 2007, the case was submitted for decision.

The Hearings Bureau file docket accompanies this decision.

II. ISSUES

The key issue in this case is whether Baldwin unreasonably failed to use a complaint procedure provided by CEC that was reasonably structured, applied and enforced to prevent hostile environment sexual harassment. A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. Respondent T'N T Pizza, Inc., d/b/a Chuck E. Cheese (CEC), operates a number of restaurants in a number of states.[1] Its target customers are adults with young children, as well as young adults and children generally. It features a menu aimed at the target customers and various games (with prizes) involving physical activities and mechanical devices, as well as moving machines designed to simulate cartoon characters and to "perform" for the customers.

2. The employees who work in CEC's restaurants are primarily teenagers. They provide labor and services, and are selected and trained to contribute to an atmosphere of high energy and fun. CEC calls shift workers a "team," and they are also called "the cast." The business purpose is to attract and retain customers because of the atmosphere as much as the food, while providing a safe place for the target customers to come and buy the food and the "fun." The attitudes and interactions of the employees with customers and with each other in front of the customers are part of the atmosphere.

3. Pursuant to CEC policy, newly hired employees received an employee manual which contained the company's sexual harassment policy. New employees were offered a copy of the employee manual (named a "General Information Manual") to keep and were given one copy to take home and review with their parents. Each new employee was required to read the manual and sign an acknowledgment of having read and understood it.

4. In the section of the employee manual regarding sexual harassment, CEC notified its employees that complaints about sexual harassment should be reported to their supervisors, or, if they were uncomfortable speaking to their supervisors about their "concerns or complaints," to contact the company's Vice President of Operations. The same page of the manual advised employees that sexual harassment complaints "should be brought to the attention of the General Manager, Manager or Assistant Manager," and were to be "filed in writing." The same section of the manual gave notice that any employee uncomfortable with or unable to contact the General Manager, Manager or Assistant Manager could report "their complaint and suggestions directly to the Vice President of Operations" via a toll-free number. The number to

[1] T'N T Pizza, Inc., d/b/a Chuck E. Cheese, is not the only legal entity involved in the business enterprise. There is also a management company, which the parties have agreed is not a proper party to this proceeding. The decision glosses the structure of the enterprise, since the management company, to the extent its employees were involved in these events, acted on behalf of CEC, with full authority.

call was in the manual and was also posted in each restaurant. The Vice President of Operations was Dyan Dockter, designated representation for CEC in this case, and a witness who testified during the hearing.

5. CEC operated the restaurant at issue in this case ("the restaurant") in Billings, Montana, near one of three public high schools (Billings West High) in that city. The overall manager of the restaurant was James Novotny, an adult in his forties who was a 15-year management employee of CEC. He was essentially the only adult in a career management position with CEC who worked at the restaurant.

6. Novotny hired Jesse Finch as an assistant manager for the restaurant in October 2002.[2] Finch was 26 years old when CEC hired him. Finch told Novotny during his employment interview that he, Finch, had a permanent eye problem that resulted in people thinking that he was staring at them.

7. Novotny became aware of problems with Finch as a result of two events that occurred during Finch's probationary period as a new hire. The first event was that Michelle Lindeman brought written employee complaints about Finch to Novotny. The second event was Lindeman's subsequent report to Novotny that Carrie Cunnington was asking about sexual harassment.

8. Lindeman had started working at the restaurant in late 2000, when she was 17 years old. It was her first job. She was a trainer, a team leader[3] and a manager in training when Finch began to work as an assistant manager.

9. Within a few weeks of Finch's arrival, Lindeman began to hear complaints about him from other employees. The complaints involved his "rude" comments, his perceived "sneaking peeks" at the women (customers) and his style of interaction with the employees. Lindeman did not like working with Finch. She found him odd and unsettling, in ways she had difficulty articulating. She did not like having Finch, a newcomer to the restaurant, as her supervisor. She felt Finch was changing the way things were done. She did not initially tell Novotny about either the complaints from other employees or her own discomfort with Finch.

10. Cunnington had started working at the restaurant in November 2001, when she was in high school. In October 2002, Cunnington and Novotny discussed whether Cunnington was ready to become a team leader. In their testimony, they disagreed about the particulars of the

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[2] Throughout this decision, the hearing examiner has used approximations rather than specific dates when the specific date is not particularly important to the decision or when the substantial and credible evidence does not establish the specific date. The sequence of events found herein regarding Finch, complaints about him and actions taken by CEC, in late 2002 and early 2003, is based upon the evidence of record, which is not as clear as the hearing examiner would like, but is sufficient to establish what CEC knew at that time about Finch's behavior.

[3] "Team leader" is CEC's term for a lead worker on a crew or shift, not technically a management employee, but a potential candidate for training as a management worker.

conversation, but the end result was that Cunnington did not become a team leader, but remained an employee who might later be offered the position. Like Lindeman, Cunnington did not like working with Finch and was sometimes uncomfortable around him.

11. In October or November 2002, Lindeman brought a notebook to work and invited employees to record in it their complaints and criticisms about Finch. The 10 to 12 pages from the notebook that contained these complaints and comments were not available at hearing. The notebook may have contained written complaints that Finch stood too close to employees, stared at them, participated in their personal conversations at work, shared too much of his own personal matters with employees he supervised, smelled of smoke, spent too much time playing video games, stayed in the office or the cashier area too much, made them feel "weird" (with apparently very little detail of what he did to make them feel "weird") and wore strange clothing.[4]

12. Probably in late November 2002, Lindeman gave Novotny the notebook pages containing the complaints and comments. She suggested that the rest of the employees could not work with Finch, and that CEC had to "get him out of here." She did not report that Finch had engaged in inappropriate touching of or sexual comments to the other employees. Novotny found nothing in the notebook pages that suggested to him that Finch was engaging in such conduct.

13. Novotny was unhappy with Lindeman. He knew that she wanted Finch out of the restaurant and that soliciting written criticism of Finch from the employees Finch supervised was a means to that end. He considered her actions completely inappropriate for a manager in training. He thought she was exacerbating a fairly normal situation that arose when a new hire management employee and young employees who had worked for the restaurant got used to working together.

14. In the first week of January 2003, Lindeman informed Novotny that Cunnington had asked her how she would know if she was being sexually harassed. Lindeman at this point reported that Cunnington was complaining that Finch had "grabbed me in the butt" the previous week.[5] Lindeman told Novotny that she had shown Cunnington the poster about the toll-free number and advised her to call and report the incident.

15. Novotny immediately called upper management (Dockter) in Fargo, North Dakota, and reported his conversation with Lindeman. He understood that Dockter was commencing

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[4] This finding is primarily drawn from witness testimony regarding the January 23, 2003, meeting Novotny called, addressed ***infra***, as well as the testimony about the notebook pages.

[5] Novotny initially denied that Lindeman had ever reported Cunnington's complaint of Finch touching her, then almost immediately acknowledged, when asked specifically, that Lindeman did make such a report. The hearing examiner finds this "change" in testimony to result from Novotny misunderstanding the question rather than trying to conceal evidence by testifying untruthfully.

an investigation of the matter. He was directed to change the schedule to separate Finch and Cunnington. He did so, without first explaining to either why he was making the changes. Cunnington thought the change in her shifts was a reduction in her work to punish her for complaining about Finch.

16. Cunnington, Lindeman and least one other female employee posted resignation notices ("just blowing off steam"). The others took their notices back down, but Cunnington left work ill and failed to take her notice down.[6] Novotny, with the upper management investigation pending, immediately notified Dockter that Cunnington was quitting. Cunnington subsequently attempted to withdraw her notice. Novotny told her that she would have to contact the home office in order to revoke her two-week notice because he had already notified upper management. Cunnington did not contact the home office.

17. In the course of investigating the apparent problems between Finch and the young employees (the rest of "the cast"), Novotny discovered that Finch had been joining in conversations among the young employees about their personal lives–dating, romance, parties, and so forth. Some of the conversations involved inappropriate subject matter and language for CEC management personnel in discussions with the young employees. Novotny counseled Finch that this was unacceptable conduct for a manager, and could not happen again. With regard to issues of Finch invading employees' personal space, Novotny counseled him to pay attention to and to respect the "bubble" of personal space that others had.[7] With regard to smelling like smoke, Novotny counseled Finch to use mints after smoke breaks.

18. At some point during Finch's probation, probably when Lindeman presented the Cunnington situation soon after the notebook complaints, Novotny suggested replacing Finch rather than counseling and training him regarding the problems. Upper management did not support replacing Finch.

19. On January 13, 2003, Novotny issued a written warning to Finch about joining with other employees in ongoing conversations "of an inappropriate nature" instead of stopping the conversations. This was apparently the second warning issued to Finch by CEC, according to the written warning itself.[8]

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[6] She also testified that she called Novotny later and asked him to take it down, and that he told her he would. The hearing examiner finds this testimony incredible.

[7] Novotny testified to an elaborate procedure, in which "cast members" were trained that when Finch invaded their personal space (their "bubble") they would simply remind him to back off by saying "bubble," and Finch was likewise trained in what "bubble" meant when spoken to him by an employee he was supervising. The other employee and former employee witnesses were almost universally unaware of any such procedure or training. Employees hired after early 2003 appeared to have no idea what special meaning, if any, "bubble" had at CEC. If the training actually happened, which CEC did not prove, it was at best a one-time effort that was not sustained after early 2003.

[8] There was no evidence regarding the timing and nature of any other warning.

20. CEC (Novotny and upper management) decided it would be best to have a general employee meeting to remind employees of the ways to report sexual harassment and warn all employees about "language not acceptable" in the CEC workplace. Novotny also wanted an opportunity to put to rest resistance by some of the longer-term employees to Finch's management role.

21. The meeting was conducted for both purposes in late January 2003.[9] Finch was present during the entire meeting. The information from the employee manual about sexual harassment and ways to report it (including the toll-free number) was emphasized. The need for "the cast" to work together with management (including Finch) was also emphasized.

22. Shortly after the end of her employment in early 2003, Cunnington's father filed a Human Rights complaint on her behalf with the department, since she was still a minor. CEC was notified of the complaint in early February 2003, and participated in the Human Rights Bureau's investigation of the complaint.

23. Lindeman quit working for CEC in April 2003. Ongoing personality conflicts with Finch were the primary reason for her departure.

24. Novotny knew that the teenagers working at the restaurant talked between themselves and that anything that occurred at work was generally repeated among them. Novotny relied upon this grapevine, this rumor mill, among the young employees to spread the word of any changes in procedures or practices within the restaurant. He also acted swiftly to track down stories of inappropriate conduct by the young employees, when he heard such stories. Novotny recognized and utilized the reality of how fast the young people shared information, for purposes of getting information out to his employees, as well as for purposes of either verifying or discrediting stories about the conduct of his young employees.

25. In May 2003, with the Cunnington complaint pending and under investigation, Novotny heard by the grapevine that Finch had "snapped" the bra (strap or back) of a young female employee, Shaleen Rankin. Novotny immediately reviewed the security tapes and saw "horseplay," including Rankin giving Finch a "snuggy" (grabbing the top of his underwear and pulling it up) and Finch retaliating by snapping Rankin's bra. No complaint had been filed by anyone, but Novotny contacted Rankin so that he could investigate. He discovered from Rankin that Finch called Rankin "bad kittie" on a number of occasions, apparently because she wore a t-shirt with that phrase on it, and that Finch had said to Rankin, "I bet you're giving sex away for free." There was equivocal testimony about whether Finch received a "write up" for his

[9] There was conflicting testimony regarding whether there were two such meetings or only one, and what the date or dates of the meeting or meetings were. Whether in one meeting, as the hearing examiner finds, or during two meetings in close proximity, the messages to the employees were the same–"(1) Here is how you report sexual harassment, and (2) Jesse Finch is a member in good standing of our management team, and you need to get over it and get along with him."

conduct, but no records were produced of any disciplinary action taken against Finch as a result of Novotny's investigation.

26. After investigating Cunnington's Human Rights complaint, the department's Human Rights Bureau found that the preponderance of the evidence did not provide reasonable cause to believe that CEC had engaged in illegal discrimination in employment because of sex. The complaint was dismissed in August 2003. Cunnington had the right to object to the dismissal and seek review from the Montana Human Rights Commission. She also had the right to file a lawsuit in Montana District Court realleging her complaints of illegal discrimination. She elected not to pursue her claims further.

27. With the dismissal of the Cunnington complaint, Novotny and upper management concluded that allegations that Finch engaged in illegal sexual harassment, involving inappropriately touching female employees as well as having inappropriate conversations and using inappropriate words and gestures with and around female employees, were groundless and false, rather than simply unproved.

28. Novotny did not thereafter react in the same fashion to grumblings about Finch. When he heard his young employees mutter that Finch was continuing to engage in the same kinds of conduct, creating the same kinds of problems with current "cast" members, as had been allegedly occurring in late 2002 and early 2003, Novotny challenged the speakers about whether they had first hand knowledge of the incidents involved. He effectively silenced and disregarded a number of what he regarded as disgruntled comments about Finch.

29. Novotny had several reasons for taking this approach to comments about Finch. First, he suspected that his young employees found Finch "weird" because of Finch's eye problem. Second, aside from the eye problem, Finch, while not a sinister person, was out of the ordinary in appearance, attitude and demeanor. Third, Novotny believed there was still lingering hostility toward Finch left over from Lindeman's collection of written employee complaints the previous year. Thus, Novotny distrusted the employee grapevine when it generated negative comments about Finch, because his experience had taught him that a group of young employees, confronted with a new management employee who seemed "different," as Finch did, could become hostile and cruel without cause. With the dismissal of Cunnington's complaint unchallenged, Novotny doubted the validity of the grumblings (there were no further actual formal complaints) about Finch.

30. Novotny did not intend to allow or encourage any sexual harassment or other inappropriate or illegal treatment of the young employees by anyone. He made a reasonable judgment about whether continued grumbling about Finch had any substance and concluded that it did not.

31. For all of these reasons, Novotny and upper management for CEC did not act upon any indications they may have received in August 2003 through June 2005 that Finch was

engaging in inappropriate conduct toward some of the restaurant's young employees.[10] Their inaction was reasonable.

32. Charging party Kelsey Baldwin was 16 years old when CEC hired her, in February 2004, to work in the restaurant. It was her first job. She worked at the restaurant until June 2005, when she quit. Finch interviewed her, conducted her new employee orientation and became her supervisor when they worked the same shifts.

33. During her employee orientation, Baldwin received notice of the reporting procedures for complaints of sexual harassment set out in the General Information Manual. She signed and dated the Employee Agreement/Authorization.

34. Baldwin took the "General Information Manual Test" of the General Information Manual. Question #28 of that test asked employees, "What should you do if an employee says/or does something that makes you feel uncomfortable?" Baldwin answered this question correctly by writing: "Tell management."

35. Although CEC did not remind Baldwin of its sexual harassment policy at any time after her orientation, she saw, every day she worked at the restaurant, the sign near the employee's break table advising employees to call a specified toll-free telephone number in the event they experienced sexual harassment.

36. During her employment with CEC, Baldwin did not utilize CEC's complaint procedure to report sexual harassment to in-store management at the restaurant. She also did not utilize CEC's toll-free telephone number to report sexual harassment at the restaurant to upper management.

37. During Baldwin's employment at the restaurant, she both witnessed and heard about Finch's dirty jokes, his sexual innuendoes and statements about female customers,[11] his sexual gestures toward female employees (such as "air humping") and his participation with young employees in discussions of sex and sexual matters. In 2005, the discussions with the "cast" went so far that Finch was bragging about sexual exploits with his wife, confirming that he had

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[10] The hearing examiner chose the phrase "may have received" because the evidence is unclear at best about what indications Novotny or upper management actually did receive during this time. Charging party at most proved there there were some indications during this time that some of the "cast" was continuing to have problems with Finch managing them, but that Novotny did not deduce that such indications might result from sexually inappropriate conduct by Finch.

[11] The evidence is replete with sophomoric and wildly inappropriate episodes such as (1) Finch and the male kitchen staff using one or more codes to announce by intercom to each other that an attractive female customer was in sight and (2) Finch applying an acronym ("MILF") to female customers he found particularly attractive. The acronym was a simplified and crude form of the phrase, "mothers [of young kids brought with them to the restaurant] I would like to have sex with." Its direct meaning was well understood by cast members as well as kitchen help.

digital pictures of her private parts on his cell phone, sharing those pictures with some employees and explaining that he had a tongue ring for oral sex.[12]

38. For a short time during her employment, Baldwin was the target of sexual comments, by Finch and some cast members, because she and her then boyfriend, took a "bet" or "dare" and began engaging in oral sex in a Pizza Hut parking lot.[13] The couple quickly changed their minds and ceased the activity, which was not videotaped and for which they did not collect $20.00. Stories of the incident spread among the restaurant employees, and Finch joined others in teasing Baldwin about it.[14]

39. Baldwin sometimes avoided working with Finch as best she could, although this was not a continuing major priority in her life.[15] As time passed, her enthusiasm for working at the restaurant faded, in part because of her distrust of Finch and her discomfort at interacting with him.

40. A month or two before Baldwin quit her job at the restaurant, she learned that Cunnington had filed a sexual harassment charge against Finch, but that apparently nothing had come of it.

41. Baldwin quit, with her last shift at the end of June 2005. She did not tell management that Finch was a reason, let alone the reason, for her departure.

42. Within about a month of her notice and after her actual departure from employment with the restaurant, Baldwin filed a complaint with the Billings Police Department, reporting that Finch had repeatedly and intentionally "grazed" her buttocks with his arm over the course of the last year of her employment with the restaurant. The investigative report summarized her complaint as involving multiple unwanted touches to her buttocks while working, which Baldwin was now reporting on the advice of a civil attorney she had been consulting. The police treated the reported incidents as possible sexual assault and conducted an on-site investigation at the restaurant on or about July 21, 2005. They viewed

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[12] The evidence also suggests that some of the "cast" prompted Finch to engage in this sharing. The impropriety of an adult manager joining in such discussions and carrying them forward, even with encouragement from the teenagers, remains manifest.

[13] The testimony about this occurrence was that a group of teenagers were gathered either at Pizza Hut or in its parking lot, one of whom offered $20.00 to Baldwin and her boyfriend if they would perform oral sex in a car for him to videotape. The context presented by the testimony leads the hearing examiner to find that this was a "dare or bet"–a challenge to teenaged bravado–which the couple initially accepted and then quickly decided to abandon (Baldwin's testimony was they stopped because "that wasn't us, wasn't what we were about").

[14] Baldwin's testimony and her demeanor while testifying about the teasing indicated that she didn't like the subject being broached by anyone, but that participation in the teasing by Finch, an older male, a member of management and someone who was otherwise bothering her, was particularly embarrassing.

[15] Baldwin missed shifts, for various reasons, when she was not scheduled to work with Finch.

video of two of the dates of the alleged touching and could not observe any touching. No criminal charges were ever filed as a result of the investigation.

43. In December 2005, Baldwin filed her discrimination complaint, which culminated in this contested case proceeding. In her complaint, she again alleged constant verbal sexual harassment from Finch whenever they worked together during the last year of her employment, as well as multiple instances of unwelcome touching of her buttocks by Finch over that same time.

44. Baldwin's ultimate testimony was that she exaggerated the number of times Finches touched her buttocks, in sworn statements, because she feared that otherwise her complaint might not be taken seriously. Baldwin also attempted to influence her now former boyfriend not to be truthful about the incident in the Pizza Hut parking lot. After consulting with her attorney, she changed her mind and encouraged him to tell the truth. In short, the record demonstrates that when Baldwin felt it was in her best interests, she gave false sworn statements and tried to influence others to give such false statements as well.

45. CEC's internal investigation into Baldwin's complaint led to discovery by management of the whole series of inappropriate acts in which Finch had been engaging while working as a member of store management at the restaurant. As a result, CEC ended Finch's employment. Had CEC undertaken a thorough investigation sooner, it would have discovered Finch's course of conduct sooner. However, until the Baldwin complaint, CEC did not have sufficient notice of potential misconduct by Finch reasonably to require it to undertake such a thorough investigation.

IV. DISCUSSION[16]

Montana law prohibits adverse employment action toward an employee because of the employee's sex. Mont. Code Ann. § 49-2-303(1). An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from illegal discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment, creating a hostile working environment. *Brookshire v. Phillips,* HRC Case #8901003707 (April 1, 1991), ***aff. sub. nom.*** *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596; ***see also***, *Benjamin v. Anderson*, ¶ 56, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. In this case, charging party Kelsey Baldwin asserted that her immediate supervisor, Jesse Finch, on shifts they both worked, created a hostile working environment by subjecting her to a barrage of sexually explicit comments, jokes, innuendoes and, finally, unwelcome physical contact (touching her on the buttocks) which forced her to resign from her job with CEC.

[16] 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.

An employer has no vicarious liability for a hostile environment created by the employee's immediate supervisor if the employer exercised reasonable care to protect employees from such a hostile environment *Faragher v. City of Boca Raton* (1998), 524 U.S. 775 ***and*** *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742. Baldwin had both the initial and the ultimate burdens of proving her discrimination claims. *HAI v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632. However, if CEC established the elements of the *Faragher* affirmative defense, Baldwin cannot prevail. Therefore, the proper initial inquiry, now that the record is complete, is to revisit the summary judgment motion of CEC, interposing the *Faragher* defense.

The majority opinions in *Faragher* and *Ellerth* held that an employer is vicariously liable for an actionably hostile environment created by a superior to the harassed employee unless the employer exercised reasonable care to protect employees from such a hostile environment, provided that the employer cannot interpose the affirmative defense if the supervisor's harassment resulted in a tangible adverse employment action.[17]

The *Faragher* defense comprises two necessary elements: (a) proof that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) proof that the complaining employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer to avoid harm. As a result, the Circuit Courts of Appeal regularly rule that the *Faragher* defense means that an employee who unreasonably fails to follow reasonable available internal procedures to complain of sexual harassment may be barred from pursuing her claim, with the employer bearing the ultimate burden of establishing that the employee acted unreasonably in not reporting the harassment internally. ***E.g.***, *Leopold v. Baccarat Inc.* (2nd Cir. 2001), 239 F.3rd 243, 246.

There is a paucity of Montana authority (two decisions) regarding applicability of the *Faragher* defense under the Montana Human Rights Act. Montana looks to federal precedent for guidance when there are substantive similarities in the statutory language and public policy considerations and there is no controlling Montana law. *Butterfield v. Sidney Pub. Schools*, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947, 950-51. Before turning to the federal authority, a brief review of the two Montana cases is helpful.

Montana has adopted *Faragher* and *Ellerth* with regard to the rule that (1) the employer is vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with immediate or higher authority over the employee, but (2) if and only if no tangible employment action has been taken, the employer may interpose the *Faragher* defense if it is supported by a preponderance of the evidence. *Stringer-Altmaier v. Hafner*, ¶ 26, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. The *Stringer-Altmaier* opinion does not go further to detail

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[17] *Faragher* ***at*** 807; *Ellerth* ***at*** 765. "Tangible employment action" refers to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth* ***at*** 761.

the particulars of the *Faragher* defense, because there was a "tangible employment action–an 'undesirable reassignment' to a schedule that Angela was unable to work because of her child, thereby forcing Angela to quit" which precluded the defense. *Stringer-Altmaier*, ¶ 28.

The tangible employment action in *Stringer-Altmaier* was taken by the employer–the "undesirable reassignment." In the current case, there is no evidence that the restaurant took any tangible employment action against Baldwin. She did quit, but that was a choice she made. If the *Faragher* defense failed and Baldwin carried her burden of proving the hostile work environment, she would be entitled to recover any losses she suffered because she quit, because the employer would then be vicariously liable for the hostile work environment that caused her to quit. However, her decision to quit does not constitute a tangible act by the employer, unlike the facts in *Stringer-Altmaier*. Thus, CEC can interpose the *Faragher* defense.

The Montana Supreme Court also considered *Faragher* and *Ellerth* in affirming a bench trial defense verdict that a single incident of criminal sexual assault upon the plaintiff by her direct supervisor during a work-related trip was not sufficient to create a working environment which was both objectively and subjectively offensive. *Beaver v. Mont. D.N.R.C.*, ¶¶ 31-50, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. As remarkable as both the district court decision and its affirmation by the Montana Supreme Court seem, the sole application of *Faragher* and *Ellerth* in *Beaver* was to state the general standard by which to determine whether a hostile work environment had been created, ¶ 31:

> To be sufficiently severe or pervasive to violate Title VII and establish a claim, the misconduct must create a working environment which is both objectively and subjectively offensive. In other words, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived as hostile and abusive. *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 21-22, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295, 302; ***also see*** *Faragher v. City of Boca Raton* (1998), 524 U.S. 775, 787, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662, 676 ("[A] sexually objectionable environment must be both objectively and subjectively offensive . . ."). *Faragher* further instructed courts "to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher*, 524 U.S. at 787-88, 118 S. Ct. at 2283, 141 L. Ed. 2d at 676.

Because the Court affirmed the district court determination that no hostile environment had been created, it summarily affirmed the defense verdict on the issue of vicarious liability, *Beaver*, ¶ 52, without addressing any of the *Faragher* defense issues involved in the current case.

In applying both the principles of vicarious liability and the *Faragher* defense to the present case, the hearing examiner will consider the actual rulings in *Faragher* and *Ellerth*, in light of some strong criticism of subsequent federal interpretations of those actual rulings. The details of that criticism are discussed at greater length in the order denying summary judgment in this case.

First, the United States Supreme Court ruled that subjecting an employee either to demands for sexual favors in return for a job benefit or to severe or pervasive sexually demeaning behavior violated federal law prohibiting sex discrimination with respect to terms or conditions of employment. *Ellerth* ***at*** 752, ***citing and explaining*** *Meritor Savings Bank, FSB v. Vinson* (1986), 477 U.S. 57. The requirement that the "sexual harassment" (the sexually demeaning behavior) be "so 'severe or pervasive'" as to "'alter the conditions of [the victim's] employment and create an abusive working environment'" was reiterated in *Faragher* ***at*** 786, ***quoting*** *Meritor* (itself quoting *Henson v. Dundee* (11th Cir. 1982), 682 F.2d 897). For purposes of analysis of the *Faragher* defense interposed by CEC, the hearing examiner assumes that Baldwin did prove that she was subjected to a hostile working environment.[18]

Second, when the illegal conduct comes from a direct or higher supervisor of the victim, the liability of the employer is vicarious (***i.e.***, strict, not dependent upon the employer's knowledge or participation in the wrongful conduct). The court, quoting § 219(2)(d) of the Restatement (Second) of Agency (1957),[19] and numerous other authorities (including *Meritor*) held that when the illegal conduct causes or contributes to a tangible employment action against the victim, the employer is vicariously liable for the illegal conduct because the supervisory authority conferred by the employer aided the supervisor in victimizing the employee. *Ellerth* ***at*** 755-63; *Faragher* ***at*** 790-97.

Finally, as already noted, when the vicarious liability arises in the absence of a tangible employment action, the employer can defend against the discrimination claim by proving both that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid the harm. *Ellerth* ***at*** 765; *Faragher* ***at*** 807. In both cases, the majority goes on to specifically state, ***id.***:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the

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[18] This is an assumption made solely for purposes of analysis. Baldwin's track record of being dishonest when she felt it would further her cause made her less than credible on the frequency and severity of Finch's harassment. There was sufficient evidence both ways on the hostility of the work environment to make it a close question. Since the success of the *Faragher* defense renders the hostility of the environment moot, the hearing examiner has focused upon that issue.

[19] "[T]he servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

> need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

In *Faragher*, in which the majority reversed the Circuit Court and reinstated judgment in favor of the plaintiff, the majority explained the application of the new legal standard to the particular case, *Faragher* ***at*** 808-09:

> Applying these rules here, we believe that the judgment of the Court of Appeals must be reversed. The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry. It is undisputed that these supervisors "were granted virtually unchecked authority" over their subordinates, "directly controlling and supervising all aspects of [Faragher's] day-to-day activities." 111 F.3d ***at*** 1544 (Barkett, J., dissenting in part and concurring in part). It is also clear that Faragher and her colleagues were "completely isolated from the City's higher management." ***Ibid.*** The City did not seek review of these findings.
>
> While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. App. 274. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.

CEC's policies and practices did include a mechanism (the toll-free phone number) that bypassed the entirety of local management and placed an employee harassed by her supervisor in direct touch with upper management. The sexual harassment policies, including that mechanism, were disseminated to the CEC employees, including Baldwin, at the restaurant.

Thus, under the new legal standard in *Faragher*, CEC appears to have established that it did exercise reasonable care to protect its employees from a harassing supervisor.

As *Stringer-Altmaier* suggests, Montana should apply the original holdings of *Ellerth* and *Faragher* regarding vicarious liability and the affirmative defense. There is no valid policy reason why Montana should slavishly follow the subsequent federal decisions, justly criticized in a number of law review articles,[20] that unduly broaden the affirmative defense, thereby defeating the articulated public policy purpose of the original holdings.

Applying the basic rule of *Ellerth* and *Faragher*, the hearing examiner has concluded that CEC did more than promulgate a facially adequate anti-harassment policy with a mechanism to bypass local management that was well suited to address supervisor harassment. CEC proved that it had a "sensible complaint procedure" (*Faragher* ***at*** 809) in application and enforcement as well as on paper, thereby meeting its burden of proving the *Faragher* defense. Management had notice of Cunnington's prior Human Rights harassment claim against Finch, but that complaint was dismissed on a no cause investigative finding. Although there is evidence both ways, the substantial evidence of record supports a finding that CEC did not have sufficient notice of Finch's improper conduct, after dismissal of the Cunnington complaint and before Baldwin quit and filed her Human Rights complaint, reasonably to require it to undertake a further investigation of Finch. Baldwin's Human Rights complaint triggered a thorough investigation that uncovered Finch's conduct, which by 2005 had progressed far beyond what Novotny and Dockter had found in 2003, and CEC ended his employment.

The heart of the *Faragher* defense is unreasonable failure by the charging party to use the reasonable complaint procedure provided by the employer, the second element of the defense. Having first established the reasonableness of the procedure, CEC also had to prove that Baldwin was unreasonable in failing to rely upon the procedure, instead waiting until after she quit to make a complaint.

Baldwin did fail to follow the policy–she did not report Finch to management during her employment.[21] Baldwin (like Cunnington before her) blamed CEC for not finding out about

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[20] "Sexual Harassment in the Eye of the Beholder: On the Dissolution of Predictability in the Ellerth/Faragher Matrix Created by Suders for Cases Involving Employee Perception," 12 Duke J. Gender Law & Policy 81 (Spring, 2005); "Operating in an Empirical Vacuum: the *Ellerth* and *Faragher* Affirmative Defense," 13 Columbia J. Gender & Law 197 (2004); "The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law," 26 Harvard Women's Law J. 3, (Spring, 2003); "Smoke, Mirrors, and the Disappearance of 'Vicarious' Liability: The Emergence of a Dubious Summary Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment," 38 Houston Law Rev. 1401 (Spring, 2002); "Preventing Sexual Harassment: The Federal Courts' Wake-up Call for Women," 68 Brooklyn Law Rev. 457 (Winter, 2002)

[21] Baldwin's self-serving testimony that she made some reports to Novotny was not credible, because of her prior sworn falsehoods. Also, had Novotny received first-hand reports from Baldwin that Finch was harassing her, he would have investigated. He might have suspected that it was more of the same old employee resistance to Finch's supervision, but he still would have investigated and sooner discovered Finch's increasingly outrageous

Finch's conduct without the need for her to complain about it. However, knowing what little she knew about the prior Cunnington complaint, it was unreasonable for Baldwin not to call the toll-free number, get an answer on it, and tell the person answering about Finch's conduct. Baldwin was not an employee when the January 2003 meeting or meetings took place, so CEC's poor handling of that matter (putting together, or in close proximity, the very mixed messages about reporting sexual harassment and about getting over having problems with Finch) could not have contributed to her failure to report Finch.

Because there is no evidence that Baldwin had any reasonable fears about reprisals should she report Finch to upper management, this record is devoid of any reasonable basis for her failure to make that report while still employed. Thus, Baldwin unreasonably quit her job without first following the sexual harassment policy and complaining of Finch's conduct toward her.

Given the facts of this case, there is no need to address the suggestion[22] that the *Faragher* defense applies an "avoidable-consequences" principle, only barring recovery that would not have occurred but for the unreasonable failure to use a reasonable internal complaint procedure. In this case, the unreasonable failure to follow the internal complaint procedure is, in effect, an intervening independent cause of all of the harm resulting to Baldwin.

In the course of discussing the *Faragher* defense, the hearing examiner has made several references to credibility. The balance of this discussion summarizes the credibility questions regarding the key evidentiary questions involved. Credibility determinations depend upon demeanor–behavior–as well as internal and external consistency (or the lack thereof) in the witness' statements. A witness may be incredible without being unsympathetic. In this particular case, there were no unsympathetic witnesses. Even Finch, despite his escalating inappropriate conduct toward the young people he supervised, was a witness for whom the hearing examiner could feel sympathy.

Novotny was a credible witness. Inconsistencies did crop up over the course of his testimony, but the hearing examiner found that those inconsistencies more likely than not resulted from Novotny misunderstanding questions, misstating responses or simply misremembering, without any intent to deceive or to conceal the truth.

In addition, virtually all of the restaurant employees and former employees, except Novotny, Finch and the technical manager, Jeffrey Bryson, were in their teens or early twenties. Those who testified to inappropriate conduct on the part of Finch and those who denied witnessing any such conduct all displayed discomfort at testifying generally and reluctance particularly to talk about inappropriate behavior and language. These young people would not have been any more comfortable and willing to talk to Novotny about such matters. Several of

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behavior.

[22] ***See***, 38 Houston Law Rev. ***at***1403, ***op. cit. at*** footnote 20 herein.

them expressly testified that they were not comfortable talking to Novotny about such matters. Those witnesses who testified that they had told Novotny about Finch acting and speaking inappropriately were simply not very credible. Those witnesses whose testimony was that they "were sure" or believed or thought that Novotny had heard about Finch acting and speaking inappropriately were speculating. Thus, Novotny credibly denied that he had the information about Finch's inappropriate actions and speech until Baldwin's complaint prompted the investigation that brought Finch's behavior to light, so that he was fired.

Finally, Novotny was credible in explaining that keeping the work environment safe for the young employees (in terms of safety from sexual harassment as well as safety from injury) was a priority. Novotny's demeanor and testimony convinced the hearing examiner that he would not be an easy boss for teenage employees to talk to about a slowly escalating series of inappropriate statements and acts, as already noted. On the other hand, Novotny's demeanor and testimony also persuaded the hearing examiner that if Novotny had read and heard the written and oral statements that some of the teenage employees testified they had provided, he would have taken immediate action to find out what was going on in the restaurant, despite his suspicion that much of the talk about Finch was not fact based.

If the parents of his young employees became concerned about inappropriate conduct by an older supervising employee, Novotny's job of hiring and keeping young employees would become much more difficult. Given the inevitable turnover in teenage employees, this could become a serious problem quickly. Novotny would not have ignored indications of genuinely inappropriate conduct by Finch, as opposed to generalized statements that Finch was strange.

Maintaining a safe environment for the young employees and encouraging them to have fun while doing their jobs were both priorities for CEC. The atmosphere of the restaurant was intentionally boisterous and exuberant. Keeping appropriate decorum while allowing "the cast" to have fun required a steady hand and a light touch. Novotny did a reasonable job of maintaining the balance between the cast having fun without (to his knowledge) inappropriate conduct between employees on the premises. When Novotny and CEC finally had information about Finch's inappropriate conduct, Finch's employment was ended. The credible and substantial evidence of record established that had Novotny obtained that information sooner, he would have acted sooner. Novotny had no incentive to protect Finch if there were indications of actual wrongdoing.

Beyond any dispute, it was a major issue for Finch to stop trying to be part of the group. For whatever reason, Finch wanted to act more like one of the regular employees rather than like a manager. As time passed, and Finch's marriage came apart, Finch increasingly lost track of his manager's responsibilities and became more and more inappropriate with the young employees. It is also clear that many of the young employees encouraged and abetted Finch's misconduct, asking him to display the explicit sexual pictures on his cell phone and prompting him to share details of his sex life, but that did not excuse his misconduct.

For a store manager, riding close herd on subordinate managers to be sure they were not behaving like teenagers would be unusual, to say the least. Novotny ultimately discovered that he should not have trusted Finch's judgment about propriety in word and deed. The evidence does not establish that he reasonably should sooner have concluded that Finch needed closer watching. The evidence does not establish that Novotny should have and could have sooner seen and known more about Finch's decline into self-immolation through misconduct.

On the other hand, Baldwin lacked credibility because of her prior lack of honesty. It is understandable that a young person would not want to be honest about her poor judgment in taking a dare regarding sexual activity. It is also understandable that she might fear whether authorities would act on her behalf unless she embellished her story. Still, her dishonesties then necessarily call into question whether she is now being honest about difficult issues, when both now and then her self-perceived best interests might be better served by untruth. It is necessary to look cautiously at the trustworthiness of a witness proven untruthful in prior sworn statements. Mont. Code Ann. §§ 26-1-302 and 303.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. Respondent is not vicariously liable for the conduct of its manager, Jesse Finch, toward charging party, because respondent took reasonable care to prevent and correct promptly any sexually harassing behavior by its supervisors and charging party unreasonably failed to use the preventive or corrective opportunities provided by respondent. *Stringer-Altmaier v. Hafner*, 2006 MT 129, 332 Mont. 293, 138 P.3d 419; *Faragher v. City of Boca Raton* (1998), 524 U.S. 775; *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742.

3. There being no vicarious liability, respondent did not engage in the discriminatory practice alleged by charging party, and her complaint must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

1. Judgment is entered for respondent, T'N T Pizza, Inc., doing business as Chuck E. Cheese, and against charging party, Kelsey M. Baldwin, on the charge that respondent discriminated against charging party in employment because of her sex by permitting sexual harassment of her by a supervisory employee, Jesse Finch.

2. The complaint is dismissed.

Dated: July 11 , 2007.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner