BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0071012074, 0071012075, 0079012119 and 0079012120:

MICHELLE E. LOCK, and	)	Case Nos. 1504-2007 & 1505-2007
STACY STRUNA,	)	Case Nos. 1561-2007 & 1562-2007
	)	
Charging Parties,	)	
	)	
vs.	)	**DECISION**
	)	
PORTLOCK CORPORATION, successor to	)	
PORTLOCK SOFTWARE and	)	
JOHN HANLEY,	)	
	)	
Respondents.	)	

* * * * * * * * * *

I. PROCEDURE AND PRELIMINARY MATTERS (pp. 1-14)

Michelle E. Lock and Stacy Struna each filed complaints with the Montana Department of Labor and Industry, alleging that John Hanley and Portlock Software, described in the complaints as a company owned by John Hanley, discriminated against each of them in employment because of sex (female) and retaliated against each of them for opposing sexual harassment in their workplace. Lock filed her complaint on August 7, 2006. Struna filed her complaint on September 11, 2006. The department's Human Rights Bureau (HRB) split each complaint into two complaints–one against John Hanley and one against Portlock Software. Lock's complaint against Portlock was assigned HRB No. 007101012074 and her complaint against Hanley was assigned HRB No. 0071012075. Struna's complaint against Portlock was assigned HRB No. 0079012120 and her complaint against Hanley was assigned HRB No. 0079012119.

On March 20, 2007, HRB certified Lock's two complaints for contested case hearing proceedings before the department's Hearings Bureau. On March 20, 2007, the Hearings Bureau issued notice that it was consolidating Lock's two complaints (Case Nos. 1504-2007 & 1505-2007) for prehearing hearing proceedings, and that Terry Spear would be the presiding Hearing Officer.

On March 27, 2007, by agreement with counsel for Lock (James Reynolds and Frederick Sherwood) and counsel for Portlock and Hanley (Michael Manion), the Hearing Officer convened a telephone conference in the consolidated Lock cases, although no party had

previously appeared therein. Effective March 27, 2007, all parties acknowledged service of notice of hearing in the consolidated Lock cases, through their respective counsel appearing on the record in the telephone conference. Counsel acknowledged in the telephone conference that they were also counsel in the Struna cases (Reynolds and Sherwood for Struna, Manion for Portlock and Hanley), which were still in conciliation before HRB. Pursuant to the Human Rights Act, conciliation was a requirement before certification for hearing, when the results of HRB's investigation indicated that there was reasonable cause to believe that illegal discrimination had occurred. Mont. Code Ann. 49-2-504(1)(a) (2005).

During the March 27, 2007, telephone conference, all parties in the Lock and Struna cases agreed to postponement of the scheduling order in the consolidated Lock cases until after the Hearings Bureau received the two Struna complaints and the parties acknowledged service of notice of hearing therein, and waived any right to require, more than 30 days after March 27, 2007, conclusion of the administrative proceedings pursuant to Mont. Code Ann. § 49-2-509(1), even though the department might fail to schedule the hearing on the Lock consolidated cases within 90 days after March 27, 2007.

During the March 27, 2007, telephone conference, all parties in the Struna cases also agreed, thorough counsel, and requested, on the record, that HRB immediately certify the two Struna cases to the Hearings Bureau for hearing. The parties reached this agreement and made this request because their positions for the conciliation in the two Struna cases was substantially the same as it was for the conciliation of the two Lock cases, and therefore would not result in resolution of the two Struna cases any more than it had of the two Lock cases. All parties in the Struna cases agreed that when the Hearings Bureau received the two Struna cases and issued a notice of hearing, the two Struna cases would also be consolidated for all proceedings and all parties would timely acknowledge service of the notice of hearing. All parties in both the Lock and Struna cases agreed that all four cases should be consolidated for all prehearing proceedings. Hanley and Portlock objected to consolidation of the Struna cases with the Lock cases for hearing. The basis for the objection was that separate hearing of the Lock cases and separate hearing of the Struna cases would mean that Lock would only be a witness testifying in the Struna cases and Struna would only be a witness testifying in the Lock cases. This would assure that Struna would be excluded from listening to testimony in the Lock cases until such time as she had testified and been excused and that Lock would be excluded from listening to testimony in the Struna cases until such time as she had testified and been excused.

During the March 27, 2007, telephone conference, all parties agreed to a schedule for briefing, after issuance of and acknowledgment of service of notice of hearing and consolidation of the Struna cases, whether all four cases should be consolidated for hearing or not. The Hearing Officer set that schedule in his subsequent March 29, 2007, order in the consolidated Lock cases.

On March 29, 2007, HRB certified the two Struna complaints for contested case hearing proceedings before the department's Hearings Bureau. The next day, March 30, 2007, the Hearings Bureau issued its notice of hearing in the two Struna cases, of which all parties

acknowledged receipt of service (Struna on April 2, 2007 and Portlock and Hanley on April 9, 2007).

On April 17, 2007, the Hearing Officer issued a scheduling order for all four cases, setting the Lock hearing to begin at 9:00 a.m., July 30, 2007, and conclude by noon, August 1, 2007, with the Struna hearing to begin at 1:00 p.m., August 1, 2007, and conclude by the close of business on August 3, 2007. This schedule created problems for some of the parties, and after a telephonic scheduling conference with counsel on April 24, 2007, the Hearing Officer issued a rescheduling order that same day. That order confirmed that all parties in both cases waived any right to move to dismiss because administrative contested case proceedings extended beyond twelve months after complaint filing, pursuant to Mont. Code Ann. § 49-2-509(1) (2005). The parties agreed to a new hearing date of August 27, 2007, with two days allocated for each case, Lock on the 27th and 28th and Struna on the 29th and 30th of August, 2007.

The parties were still briefing the issue of consolidating the Struna cases with the Lock cases for hearing. The Hearing Officer, as counsel knew, contemplated starting all four consolidated cases at the beginning of the four day hearing setting, with four days to complete all cases, if the motion to consolidate the Struna cases with the Lock cases was ultimately granted.

The last briefs on consolidation of the Struna cases with the Lock cases were filed on May 16, 2007. No timely request for oral argument was filed by any of the parties. On June 1, 2007, the Hearing Officer granted the motion and consolidated all four cases–Lock's two consolidated cases and Struna's two consolidated cases, so that one hearing on all four cases (in other words, one hearing on both original complaints–Lock's complaint against Portlock and Hanley and Struna's complaint against Portlock and Hanley) would convene at 9:00 a.m., on August 27, 2007 and conclude by August 30, 2007. The order also specified that, because counsel for Lock and Struna had agreed to the exclusion of each charging party during the testimony of the other charging party, that exclusion was ordered.

On July 13, 2007, counsel for Lock and Struna also filed and served by mail a notice that they intended to present expert testimony using DNA comparisons to identify semen samples obtained by Lock and Struna as belonging to Hanley, but that Hanley had not yet made himself available to provide a comparator sample.

On July 18, 2007, the Hearings Bureau received (by fax) the motion of counsel for Portlock and Hanley, Michael Manion, to withdraw, citing as cause that he and the client had agreed that he could no longer effectively represent Portlock and Hanley. Manion's filing represented that both Portlock and Hanley were attempting to locate other counsel as expeditiously as possible, and that with depositions scheduled within a week, a continuance of the schedule was necessary. The contested case hearing was still set for August 27-30, 2007, and the telephonic final prehearing conference was still set for August 17, 2007.

Counsel for Lock and Struna filed a response, pointing out some technical defects in the motion (absence of client consent and notice given to the clients, making it unclear which statutory provision was offered in support of the motion), and also objecting to withdrawal of counsel if it occurred without the client's signature upon written discovery responses, without commitments that Hanley would be timely available in Butte to be deposed and give a DNA sample and if its occurrence allowed reopening of deadlines already passed (i.e., if Portlock and Hanley, with new counsel, tried to start over with new discovery requests).

The Hearing Officer's Order of July 20, 2007, reflects what next happened. On July 19, 2007, after reviewing the motion to withdraw and the response, the Hearing Officer convened a telephone conference on the record with all counsel and Hanley.

During that telephone conference, Hanley confirmed that the Portlock and Hanley both consented to Manion's withdrawal. Manion agreed to continue to represent Portlock and Hanley, who expected to have new counsel soon, until new counsel was available. Hanley and Portlock also agreed that administrative proceedings in the Struna cases could extend more than 12 months after complaint filing. Lock and Struna deferred agreement to such an extension of department proceedings in the Struna cases. Also during that telephone conference, Hanley indicated that he would not be available for his deposition the following Monday, July 23, 2007, the date discovery closed. The Hearing Officer indicated that the discovery deposition of Hanley could be taken after the deadline.

In addition, during that telephone conference Manion and Hanley confirmed that Portlock Software had incorporated. Although it appeared to the Hearing Officer that the corporation was the successor to the respondent, Portlock Software, that impression had not been addressed in any detail in filings with the Hearings Bureau. Also, Hanley reported that he had an appointment later on July 19, 2007, with possible new counsel.

The Hearing Officer vacated the motions deadline and set another telephone conference on August 6, 2007, to preserve the status quo of these consolidated cases until the telephone conference, in the hopes that new counsel for Portlock and Hanley could be included in the discussion of how to proceed. The Hearing Officer kept all remaining deadlines (beyond the motions deadline) and the settings for the final prehearing conference and the hearing, in place.

On July 26, 2007, Lock and Struna filed a motion to compel answers and responses to discovery, citing 4 interrogatories and 6 requests for production that they considered deficient.

On August 6, 2007, the Hearing Officer convened the telephone status and rescheduling conference. Counsel of record for charging parties participated. Manion, participated for both Portlock and Hanley, honoring his agreement to continue to represent while new counsel was being retained. New counsel for Portlock and Hanley, Ramina Dehkhoda-Steele, who practiced in the state of Washington, appeared, indicating that her written appearance and pro hac vice application to the Montana State Bar would follow. James Harrington, who Portlock and Hanley expected to serve as their local counsel, with certain schedule changes discussed during

the telephone conference, was not available. Counsel of record for all parties to the Struna cases agreed to extend administrative proceedings beyond 12 months after complaint filing.

On August 7, 2007, the Hearing Officer issued a rescheduling order, with the agreement of all parties, setting the consolidated Lock and Struna cases for hearing on November 5-8, 2007, in Butte, Montana. On August 24, 2007, Harrington filed his notice of appearance for Portlock and Hanley, and Portlock and Hanley (through Harrington here and hereafter, until otherwise noted) also filed notice of service of Portlock and Hanley's second set of discovery requests to Lock and Portlock and Hanley's first set of discovery requests to Struna, by mail.

On October 26, 2007, the Hearing Officer convened the telephonic final prehearing conference in the above consolidated cases. The parties agreed that Portlock and Hanley's motion in limine, motion to file original discovery and motion for partial summary judgment were all submitted on the filings of record. Counsel argued Portlock and Hanley's motion to continue. The parties, through counsel agreed to reschedule the hearing and appropriate prehearing deadlines.

On October 29, 2007, the Hearing Officer's order vacated the hearing and reset the telephonic final prehearing conference for January 7, 2008, and the contested case hearing January 14-17, 2008, as the parties had all agreed.

On November 16, 2007, the Hearings Bureau received (by fax) Harrington's motion to withdraw as counsel for Portlock and Hanley, with a supporting brief. The certificate of service indicated that the motion and supporting brief were served by mail upon John Hanley, individual respondent and President and CEO of Portlock Corporation, apparent successor in interest to respondent Portlock Software. Harrington cited a conflict of interest (about which he provided no information) and nonpayment for fees due. When Harrington filed his motion to withdraw, the final prehearing conference was scheduled in 52 days, and the hearing itself was scheduled to begin in 59 days.

On November 23, 2007, Lock and Struna filed both their joint supplement regarding expert witness and their response to Harrington's motion to withdraw as counsel. Regarding Harrington's withdrawal Lock and Struna took no position on the motion, except to object to any further continuances of the case. No response to the motion to withdraw was filed by either Portlock or Hanley, and no inquiries of any kind were initially made to the Hearings Bureau regarding the motion to withdraw.

On November 28, 2007, the Hearing Officer granted the motion to withdraw, subject to the condition subsequent that if by December 10, 2007, Hanley filed an affidavit containing facts that disputed the two grounds for withdrawal (conflict of interest and failure timely to pay bill(s) for legal services received in this case) and containing a certificate of service upon all other persons served with the order, the Hearing Officer would reconsider the order (although he might decline to modify it). The Hearing Officer also noted that unless and until he modified or vacated the order, respondents were unrepresented. Finally, the Hearing Officer

specifically noted that he would not grant another motion on behalf of respondents to continue the hearing without extraordinarily good cause clearly shown. This order, like the motion of new counsel for respondents to withdraw, was served by mail upon Hanley, at the Redmond, Washington, address of Portlock Corporation.

On December 3, 2007, Lock and Struna served notice upon Portlock and Hanley that they must appear, that hearing was set in January and that default might be taken against them unless they appeared. The notice was mailed to Hanley at the same Redmond, Washington, address.

On December 7, 2007, Hanley filed a letter to the Hearing Officer arguing about the fees due and the billing practices of Harrington, complaining that Harrington was unethical in not explaining the conflict of interest (and in not disclosing it when he took Hanley's case) and unethical in his billing practices. Clearly, Hanley had received the order granting the motion to withdraw. Nonetheless, he did not submit an affidavit in support of his opposition to the withdrawal.

On December 10, 2007, charging parties served an amended notice upon Portlock and Hanley that the final prehearing conference was still set for January 7, 2008, mailing the notice to Hanley at the same Redmond, Washington, address.

On December 10, 2007, Hanley called the Hearings Bureau and told the legal secretary handling this file, Sandra Prebil that he had "proof" that he paid Harrington and would fax in a response and send in his proof–receipts and credit card statements. He did not file any such documents.

On December 10, 2007, the Hearing Officer issued an order reconsidering the motion to withdraw and declining to modify the order granting it. The order warned that the final prehearing conference was still set for January 7, 2008. It also stated, incorrectly, that hearing commenced on January 24, 2008. On December 11, 2007, a correction issued stating that the hearing would commence on January 14, 2008. Both these documents were mailed to Hanley at the same Redmond, Washington, address.

On January 2, 2008, the Hearing Officer issued a draft final prehearing order in this case, which was mailed to counsel for Lock and Struna and to Hanley at the same Redmond, Washington, address, and faxed to fax numbers of record for Hanley and counsel for charging parties.

On January 4, 2008, Sandra Prebil called Hanley and left him a voice mail message (at his number at the business address for Portlock Corporation in Redmond, Washington), requesting that he call so she could arrange to send him additional pages to the draft final prehearing order, because the faxed copy sent to both Lock and Struna's counsel and to Hanley had not gone through completely.

On January 7, 2008, the Hearing Officer convened the telephonic final prehearing conference, calling counsel for charging parties at their phone number of record, and calling Hanley at his number at the business address for Portlock Corporation in Redmond, Washington. Hanley was not available at the business number of record for him. No appearance on behalf of Portlock. The Hearing Officer left a voice mail message for Hanley, requesting that he respond within 15 minutes and warning that the conference would proceed in his absence. Receiving no such message, in accord with the orders and notices herein, the Hearing Officer convened the conference with Lock and Struna's counsel only, and entered the defaults of both respondents.

On January 7, 2008, several hours later, Hanley called Sandra Prebil on his cell phone, asserting that the only document he had received from the Hearings Bureau since his new attorney withdrew was a copy of a January 3, 2008, subpoena letter sent by Prebil to charging parties' counsel. Hanley also told Prebil that he "was in an accident and broke some ribs" and "would like hearing continued because he doesn't have an attorney for the corporation or himself." Hanley also told Prebil during that telephone conversation on January 7, 2008, according to her notes thereof, "What good is it to have a hearing when he doesn't have an attorney to represent him or the corporation. He'll just appeal the decision when it issues."

On January 8, 2008, Prebil called Hanley on his cell phone and spoke to him and called Hanley twice on his home phone and spoke to him. Hanley told her he had broken ribs from an accident and was unable to travel. He also told Prebil he was "not at office" so faxing documents to the office "wouldn't do any good," in response to her offer to fax him copies of the documents already mailed to his office address in Redmond, Washington. She told him to put his request in writing for continuance due to his condition and to provide a doctor's note regarding the broken ribs. Hanley responded that he "didn't see a doctor –saw a nurse," and that "he didn't know if they would provide something in writing but there were enough witnesses to the accident." He reiterated that "they had a problem with mail from Montana," and also stated that "he received a box from his attorney."

On January 10, 2008, Hanley faxed a letter to the Hearing Officer requesting a continuance, reporting his broken ribs and his perception that he could not safely drive to Montana, could not wear a seat belt and might, in the course of traveling to Montana for the hearing, puncture a lung and die. He provided no documentation of any kind regarding his accident and reported injuries. He provided no affidavit. Lock and Struna filed their objections to the continuance request that same day with an affidavit of counsel stating the prejudice delay would cause to the charging parties.

On January 11, 2008, the Hearing Officer denied the letter request for continuance, noting that Hanley had known since October 29, 2007, about the hearing dates and final prehearing conference date and that Hanley's inability to find counsel, after the second occurrence of his counsel withdrawing within two months of a duly scheduled hearing, was not a sufficient basis for another continuance, after the repeated warnings that the hearing was coming and would not be postponed again. The Hearing Officer also noted that Hanley's failure, during

his opposition to withdrawal of his counsel and during his efforts to obtain yet another continuance, to provide any credible documentation of any kind, even his own statements under oath, precluded the Hearing Officer from yet again penalizing the charging parties, who were ready to proceed, by postponing the hearing. The Hearing Officer ruled that the contested case hearing would proceed at the date, time and place set. The Hearing Officer expressly ruled that unless either or both respondents properly appeared and showed good cause at the beginning of hearing to set aside their respective defaults, the charging parties would be the only party participants at the hearing.

On January 14, 2008, the Hearing Officer convened the hearing as scheduled, with a certified court reporter recording the proceedings. The two charging parties, Michelle E. Lock and Stacy Struna, attended with their attorneys, James P. Reynolds and Frederick F. Sherwood, Reynolds, Motl and Sherwood, Helena, Montana.

Hanley had faxed a three-page document to the Hearings Bureau, serving copies by fax upon Lock and Struna's counsel, the night before the hearing convened. The first page of the document was a cover letter indicating that the following two pages were "the medical report as requested."

The following two pages consisted of what appeared to be Overlake Hospital Medical Center's discharge instructions to patient John Hanley, indicating it was prepared on Friday, January 11th, 2008. It indicated that Hanley had been seen in the hospital's emergency department and that his final diagnosis was right rib contusions. The pages contained Hanley's "special instructions," including applying ice to the ribs, avoiding strenuous activities until his symptoms were consistently better for a few days, using Ibuprofen for pain and using Vicodin for more severe pain. The two pages also contained directions to return to the hospital if he experienced shortness of breath, chest pain, abdominal pain, or blood in his urine. The report included a description of injury, including potential complications. There was an indication that there might be fractured ribs, because broken ribs do not always show on x-rays. The document did not contain any statement that Hanley was precluded from driving, talking on the phone, or sitting in a hearing, talking, listening and taking notes. After noting the content of the documents received from Hanley, and making them part of the contested case hearing file, the Hearing Officer ruled that there was no showing of good cause to postpone the hearing or to relieve Portlock and Hanley from their defaults. The in-person contested case hearing thereupon proceeded.

Peggie Rosin, Howard Coleman Michelle E. Lock and Stacy Struna testified. The Hearing Officer granted an unopposed motion by charging parties to permit them to attend the entire hearing rather than excluding them when the other testified. The Hearing Officer admitted exhibits 1-3, 5-7, 14 and 15, 21, 24-26, 34(a) and 34(b) and 35-36 into evidence, without objection. Exhibit 34(b), the semen specimens and their containers, were returned to the custody of counsel for charging parties, for preservation until such time as these consolidated cases are finally concluded. Upon Lock and Struna resting their cases, the Hearing Officer closed the evidentiary record on January 14, 2008.

On January 31, 2008, Lock and Struna filed their proposed decision, in accord with the schedule set at hearing by the Hearing Officer, and this matter was submitted for the Hearing Officer's decision.

II. ISSUES

1. Did Hanley, individually and/or through Portlock Software, engage in the alleged illegal discrimination (including retaliation)?

2. If Hanley illegally discriminated against Lock and Struna as alleged, is Portlock Corporation, the successor to Portlock Software, jointly and severally liable for that discrimination?

3. If Hanley illegally discriminated against Lock and Struna as alleged, what harm, if any, did each of them sustain as a result and what reasonable measures should the department order to rectify such harm?

4. If Hanley illegally discriminated against Lock and Struna as alleged, in addition to an order to refrain from such conduct what should the department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT (pp. 15-18)

1. Charging Parties Michelle E. Lock and Stacy Struna worked for John Hanley at his personal residence. Lock worked continuously for Hanley from July 2004 to April 12, 2006. Struna worked continuously for John Hanley from the spring of 2005 to April 12, 2006.

2. On or about April 12, 2006, Lock and Struna were fired from their jobs.

3. Lock and Struna did not punch a time clock.

4. During Lock and Struna's employment, Portlock Software (Portlock) was a sole proprietorship, and John Hanley was the sole proprietor. Shortly after Lock and Struna's terminations, Hanley incorporated Portlock as Portlock Corporation. Hanley retained all stock ownership in the new corporation.

5. Lock and Struna were paid by Portlock checks but never worked at the Portlock office that is a separate building in Butte.

6. Lock and Struna were paid as employees of Portlock, and received W-2's from Portlock. Lock was employed as Hanley's housekeeper. Struna's duties included housekeeping, cooking, caring for animals and running personal errands. Both Lock and Struna, however, performed essentially the same services for Hanley.

7. During Lock and Struna's employment Hanley required Lock and Struna to give him massages while he was naked. He also told Lock and Struna that he wanted them to masturbate him. When Lock and Struna told Hanley that they did not want to do this, he said that it was a job requirement and that they would not find another job that paid so well. Hanley also stated that this was something a previous housekeeper in Hawaii had done. He also said that if Lock and Struna said anything about what went on in his house, they would be terminated immediately.

8. Lock and Struna did not want to lose their jobs. They also received health insurance at this employment, which was an important new benefit for them and their children. Hanley knew about their financial situations. They complied with Hanley's demands by giving him massages and masturbations.

9. Hanley's actions towards Lock and Struna were part of a pattern and practice of sexual harassment directed at employees who performed housekeeping duties for him. A previous housekeeper, Peggy Rozan, had also been required to give Hanley nude massages, one of them along with Lock, even though she objected and was very embarrassed and upset by having to do so. Rozan refused to touch Hanley's groin area as he requested. She was later fired.

10. Rozan, Lock and Struna all complained to Marilyn Maleyvac, Portlock's personnel manager, about what Hanley was requiring them to do**.** Maleyvac did not do anything in response to these complaints.

11. Hanley also made other unwelcome sexual advances towards Lock and Struna, for example making frequent comments about Struna's breasts.

12. On April 5, 2006 Lock and Struna were required by Hanley to give him another massage and masturbation. Lock and Struna preserved Hanley's semen from this event in a small plastic baggie, and it was eventually sent to Genelex for testing.

13. Genelex is a nationally accredited DNA testing facility. Its president is Howard Coleman. Mr. Coleman has extensive background in DNA testing and has testified as an expert witness in numerous cases throughout the country, including the case of *State v. Weeks,* 270 Mont. 63 (1995). He has authored or co-authored numerous publications on the topic of DNA testing and forensic casework. He has also delivered numerous presentations and continuing education seminars throughout the country. By virtue of his knowledge, experience, training, and education, Coleman qualifies as an expert witness.

14. Coleman testified that the DNA in the semen sample sent to Genelex by Lock and Struna matched the DNA in a known buccal swab provided to Genelex by Hanley, to a degree of 199+ quintillion to 1. This is evidence to a virtual scientific certainty. Genelex was unable to determine a match on a second sample sent to them by Lock and Struna in a small medicine bottle because the sample was so degraded. Genelex was not able to exclude Hanley as the source of this second sample, but could not make any more definite statement.

15. Two or three days before Lock and Struna were fired, Hanley asked Lock for a "massage." She refused. The evening before Lock and Struna were fired, Hanley asked Struna for a "massage." She also refused. Lock and Struna could tell Hanley was upset by their refusals.

16. On the day Lock and Struna were fired, Lock arrived at Hanley's house on time (shortly before 8:00 a.m.) and was outside picking up garbage, which was part of her job. Struna arrived shortly afterwards and spoke to Lock briefly. Struna had picked up Patches Hanley, Hanley's nephew, who was painting Hanley's basement. Struna then went inside where she encountered Hanley who told her to get out of his house as she and Lock no longer worked for him and that they should report to the Portlock office. Hanley then sent an e-mail to Maleyvac directing that she offer Lock and Struna positions at the Portlock office effective immediately as replacements for their positions on his personal staff.

17. No reason for their termination was given to Lock and Struna at the time. Lock and Struna went to the Portlock office where they met with Marilyn Maleyvac and Les Giamona, president of Portlock, and were informed that Hanley had fired them. On the morning they were terminated, Lock and Struna again discussed Hanley's sexually harassing behavior and that they might seek legal remedies against him. After this, Hanley withdrew his direction that Lock and Struna be offered positions in the Portlock office. Lock and Struna were never offered another position with the company although both successfully passed drug and alcohol tests as requested by Maleyvac.

18. Hanley testified in his deposition that the first time that he learned that Lock and Struna had complained to Maleyvac of sexual harassment was immediately after they were fired, which would have been after his directions to Maleyvac to give Lock and Struna jobs at Portlock and before he countermanded those directions.

19. Lock and Struna were the victims of illegal sexual harassment by Hanley.

20. Hanley retaliated against Lock and Struna for opposing and complaining about his sexual harassment.

21. Working under the direction of Hanley was difficult in ways unrelated to his sexual harassment and retaliation. It would be unreasonable to extend the economic losses of Lock and Struna more than 2.5 years beyond their firings. Attribution of further future employment with Hanley would be unreasonable

22. Lock and Struna have suffered and will suffer economic losses because of the sexual harassment and retaliation. The harm of those losses is reasonably rectified by awarding each charging party 2.5 years of lost wages ($16.00 per hour for 2080 hours per year) and lost health insurance coverage ($300.00 per month for 30 months), for a total of $92,200.00 each.[1] This

[1] Lock and Struna requested recovery for vacation leave also, but it would be pure speculation to find that they would never take vacation leave, so that it would accrue in addition to full time work for 52 weeks every year.

amount should reasonably be paid in full immediately, given the Respondents' past performance in ignoring orders in these proceedings. Neither prejudgment interest nor monthly payment of post judgment earning losses are properly a part of this reasonable requirement for a single payment for lost remuneration.

23. Lock and Struna sustained emotional distress and damage by being subjected to Hanley's sexual harassment and retaliation. He took advantage of their status as single mothers struggling to raise children, and required them to perform degrading and highly offensive actions in order to keep their jobs, firing them when they finally did refuse to perform further and complained to his company's management employees. The entirely foreseeable effect on these women was great humiliation and embarrassment. Fair compensation for this emotional distress is $75,000 for each charging party, payable in full upon issuance of this decision.

24. Portlock's transformation into Portlock Corporation left it still owned by Hanley, and there is no evidence that it is now anything other than a new form of the same operation and assets, still under Hanley's control and still acting as little more than his alter ego, at his beck and call.

25. Hanley, and through Hanley Portlock Corporation, appear to have neither respect for nor any inclination to conform their conduct to the dictates of Montana laws against employment discrimination because of sex and against retaliation. Both Hanley and the other management employees of the corporation should be required to receive training in their duties as employers.

IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1) (2007).

2. Portlock Corporation, as successor to Portlock, and Hanley discriminated against Lock and Struna because of sex by subjecting them to a sexually hostile and offensive work environment and by requiring that they, as a condition of their continued employment engage in sexual contact for their employer's gratification, against their wills, all in violation of the law. Mont. Code Ann. § 49-2-303(1)(a); ***see also***, *Stringer-Altmaier v. Haffner,* 2006 MT 129, 332 Mont. 293, 138 P.3d 419; *Benjamin v. Anderson,* 2005 MT 123, 327 Mont. 173, 112 P.3d 1039.

3. Portlock and Hanley retaliated against Lock and Struna by firing them and not offering them substitute positions because they resisted and opposed the illegal employment discrimination against them. Mont. Code Ann. § 49-2-301; ***see also***, *Benjamin*; *Stringer-Altmaier*.

4. As a result of discrimination because of sex and retaliation, both Lock and Struna suffered harm. To rectify that harm, the reasonable measure that should be required of Portlock Corporation, as successor to Portlock, and Hanley, jointly and severally, is payment to Lock and to Struna each of $167,200.00 with proper withholding and contributions to the appropriate

state and federal sources based upon treatment of the payments as being for lost wages, lost health insurance benefits and emotional distress, in the amounts set forth in finding numbers 22 and 23, above. Mont. Code Ann. § 49-2-506(1)(b). Interest accrues on this judgment hereafter as a matter of law.

5. Portlock Corporation, as successor to Portlock, and Hanley must be permanently enjoined from further discriminatory acts of the kinds involved herein. Mont. Code Ann. § 49-2-506(1). Portlock Corporation, as successor to Portlock, must submit to the Human Rights Bureau a list of its management employees, together with proposed employment policies and employee notices that it will not engage in hostile environment and quid pro quo sexual harassment of, and retaliation against for resistance of such employment discrimination, female employees working for Hanley. The corporation must then provide training of 4-6 hours duration, as specified and approved by the Human Rights Bureau and adopt and implement the policies and notices with any modifications directed by the Human Rights Bureau, as soon as said Bureau approves them. Hanley must also undertake the training personally. Portlock Corporation is responsible for the costs of the training for its management employees except for Hanley. Beginning the 91st day after issuance of this decision, unless and until Portlock Corporation and Hanley comply fully with the entirety of this paragraph's requirements, they must cease and desist employing any persons within the state of Montana. Mont. Code Ann. § 49-2-506(1)(a).

6. Portlock Corporation has successor liability for Portlock. In employment discrimination cases, successor liability applies to situations of transfer of the assets of the defendant employer to another entity. *Rego v. ARC Water Treatment Co.,* (3rd Cir. 1999), 181 F.3d 396, 401-402; *citing Rojas v. TK Communications, Inc*., (5th Cir. 1996) 87 F.3d 745, 750. An aggrieved employee can enforce against a successor employer a claim or judgment he could have enforced against the predecessor. ***Id., citing*** *Musikiwamba v. Essi, Inc.* (7th Cir. 1985), 760 F.2d 740, 750 (successor liability under 42 USC §1981). ***See also***, *Bates v. Pac. Mar. Ass'n* (9th Cir. 1984), 744 F.2d 705, 709-10 (imposing liability in a Title VII case on the successor employer); *Slack v. Havens* (9th Cir. 1975) , 522 F.2d 1091, 1094-95 (affirming decision holding original and successor employer as "jointly liable" for judgment in Title VII case). ***See also***, *Mason-Watson v. Nancy's Hallmark, Inc.,* HRC Case No. 0061011773 (7/13/2007). In *Mason-Watson,* the employers, a married couple, fired the charging party six months before they incorporated their business. The Hearing Officer found that the corporation succeeded to the liability incurred by the unincorporated business. The Human Rights Commission upheld these conclusions, while noting that the individuals remained liable as well. Final Agency Decision and Order, November 2007.

V. ORDER

1. Judgment is in favor of charging parties **Michelle E. Lock** and **Stacy Struna** and against respondents **Portlock Corporation,** successor to **Portlock Software**, and **John Hanley** on the charges that the respondents discriminated against the charging parties in employment because of sex and retaliated against them for resisting and opposing the discrimination because of sex.

2. The department orders respondents **Portlock Corporation,** successor to **Portlock Software**, and **John Hanley** to make immediate payments to charging parties **Michelle E. Lock** and **Stacy Struna** of the sums of $167,200, each, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes lost wages of $83,200, lost health insurance coverage of $9,000.00, and emotional distress damages of $75,000.00 for each charging party. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondents **Portlock Corporation,** successor to **Portlock Software**, and **John Hanley** from illegally discriminating against female employees by subjecting them to a sexually hostile and offensive work environment and by requiring that they, as a condition of continued employment, engage in sexual contact for Hanley's gratification, against their wills, as well as from retaliating against female employees who resist and oppose such working conditions and requirements.

4. The department further orders that **Portlock Corporation,** successor to **Portlock Software**, must within 30 days submit to the Human Rights Bureau a list of its management employees, together with proposed employment policies and employee notices that state it will not engage in hostile environment and quid pro quo sexual harassment of, and retaliation against for resistence of such employment discrimination, female employees working for **John Hanley**. The corporation must then provide training of 4-6 hours duration, as specified and approved by the Human Rights Bureau and adopt and implement the policies and notices with any and all modifications directed by the Human Rights Bureau, as soon as said bureau approves them. **John Hanley** must undertake the training personally. **Portlock Corporation** is responsible for the costs of the training for its management employees except for the costs of the training to **John Hanley**. Beginning the 91st day after issuance of this decision, unless and until **Portlock Corporation** and **John Hanley** comply fully with the entirety of this paragraph's requirements, they must cease and desist employing any persons and doing any business within the state of Montana.

5. In accord with the pertinent portions of the proposed Montana Supreme Court Rules regarding privacy, redacted exhibits 1, 3, 7, 21, 25 and 26 are substituted for the original unredacted exhibits, and the original unredacted exhibits are hereby sealed and shall remain sealed, available only to department personnel who need to review them in the performance of their duties, without thereby revealing the records or their contents to the public, to reviewing tribunals who require access to the sealed documents in the course of their review, to counsel for the parties while this case is pending, and, as needed in the judgment of counsel or the tribunal having power over this case, should respondents seek access to these sealed documents, to the parties while this case is pending, and otherwise are only available in accord with subsequent orders of tribunals exercising jurisdiction over the sealed documents. Upon the conclusion of this case and all review thereof, when the department closes its hearing case files, the sealed exhibits shall be removed from the closed files and destroyed, unless charging parties timely retrieve them.

Dated: March 12, 2008.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer

Lock & Struna Decision tsp