

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0081013125 &  
0081013141:

ANNE BOLVES, ) Case Nos. 1462-2009 & 1461-2009  
)  
Charging Party, )  
)  
vs. )  
)  
HOLIDAY VILLAGE MALL AND )  
GK DEVELOPMENT d/b/a )  
NORTH GRAND, )  
)  
Respondents. )

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0089013260:

DARCIE DAVEY, ) Case No. 1545-2009  
)  
Charging Party, )  
)  
vs. )  
)  
IPC INTERNATIONAL CORPORATION, )  
)  
Respondent. )

\* \* \* \* \*

**HEARING OFFICER DECISION  
AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

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**I. PROCEDURE AND PRELIMINARY MATTERS**

Charging Party Anne Bolves filed a Human Rights complaint against her former employer, GK Development, owner of the Holiday Mall in Great Falls, Montana, alleging that it discriminated against her in her employment by permitting her to be subjected to

a hostile working environment at the hands of a Holiday Mall security agent employed by IPC International, the entity hired to provide security at the Holiday Village Mall. Charging Party Darcie Davey filed a complaint against her former employer, IPC International, alleging that it retaliated against her for engaging in protected activity of reporting the security guard's conduct toward Anne Bolves.

Because these two case are factually intertwined, with the consent of the parties they were tried in the same hearing. Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Great Falls, Montana on July 28 and July 29, 2009. Patrick Flaherty, attorney at law, represented both Bolves and Davey. Maxon Davis, attorney at law, represented GK Development and IPC International.

At the hearing, Davey Exhibits 1-53,54-70,74,75,76,77,78,80-126, 127(sealed pursuant to the stipulation of the parties),128,129,130 (Respondent's Discovery Responses),131,133,134,135,136,and 137, Bolves' Exhibits A, C, D, E, H, I, J, K, L, M, and Respondent's Exhibits A, B, C, and D were admitted in to evidence. Bolves, Davey, Devan Hartley (GK Development manager at Holiday Village Mall), Rebecca Hughes (Bolves' mother), Robert Laubach (security co-worker with Davey), Scott Buenemeyer (IPC security supervisor at the Holiday Village Mall), Mike Crane (Executive Vice President and General Manager of IPC International), Janine Hieb, Licensed Clinical Professional Counselor, and James Livingston (former GK Development employee who worked as a maintenance worker at the Holiday Village Mall) all testified under oath.

The parties graciously supplied post hearing briefs to the hearing officer with each brief being received on August 21, 2009. Upon receipt of the briefs, the record in this matter closed. Based on the evidence adduced at hearing and the arguments provided in closing briefing, the following findings of fact, conclusions of law, and hearing officer's decision are made.

## **II. ISSUES**

### *A. Bolves Case*

Was Bolves subjected to a hostile work environment through Security Officer Bruggeman's conduct?

If Bolves was subjected to a hostile work environment, did GK discriminate against Bolves in failing to take action to correct the hostile environment?

If GK discriminated against Bolves in failing to correct a hostile working environment, what are her damages?

B. *Davey Case*

Did IPC discriminate against Davey on the basis of sex in disciplining Davey?

Did IPC retaliate against Davey for reporting Security Officer Bruggeman's conduct by discharging her from employment?

If Davey was subjected to discrimination retaliation, what are her damages?

**III. FINDINGS OF FACT**

A. *Bolves' Complaint*

1. GK Development is the owner of the Holiday Village Mall (HVM) and employs all employees hired by Holiday Village Mall. GK Development is located in Illinois and owns shopping malls in various states around the United States. Laura Kelleher is GK's National Human Resources Manager.

2. Beginning in January, 2008, GK Development contracted with IPC International to provide security services for the mall. Prior to that time, GK hired its own security guards and provided its own security for the HVM.

3. GK utilizes IPC's security services pursuant to a "Property Security Services Agreement" Exhibit 127. Section 6.5 of that agreement permits GK to provide written notice to IPC if GK "determines in good faith that the continued assignment to a property of one of the contractor personnel is not in the best interests of the owner. . .". *Id.* IPC then had ten days to investigate the basis for GK's determination and to either resolve them or define a mutually agreed upon plan for resolving the problems. If, after IPC's investigation, GK determines to "its reasonable satisfaction" that IPC's resolution is not acceptable, then IPC is obligated to replace the offending employee with someone else.

4. At all times pertinent to this inquiry, GK has maintained a "zero tolerance" policy toward sexual harassment. GK's policy does not permit any employee to sexually harass any other employee in any degree or in any manner. Under the policy, any type of conversation that makes an employee feel uncomfortable is strictly prohibited. Testimony of Devan Hartley.

5. At all times pertinent to this case, Devan Hartley worked for GK as its Mall Manager at the HVM. He directly supervised Donna Merriman, GK's customer service supervisor at the HVM. He had ultimate authority over all GK personnel working at HVM.

6. The mall has a hallway where the mall's information desk and the IPC Security Guard Office are housed. The information desk and the security guard office are located right next to each other.

7. GK employed Bolves in October, 2007 as a customer service representative to work at the information desk on the lower level. Merriman supervised Bolves. At the time she worked as a customer service representative, Bolves was an 18-year old high school senior. Bolves worked part-time.

8. At the same time Bolves worked for GK, IPC employed a male security guard by the name of Kelly Bruggeman. Darcie Davey and Robert Laubach also worked as security guards with IPC at the mall. Scott Buenemeyer was the IPC security supervisor for the mall.

9. Beginning in late January or early February, 2008, and continuing for an approximately two and one-half month period thereafter, Bruggeman began to spend a great deal of time at the information desk talking to Bolves. He would talk about some of the girls in the mall that were Bolves' age and comment on how sexy they were. On more than five occasions, he asked Bolves to go fishing with him. He also asked her on several occasions to have lunch with him in the HVM Food Court (a place that was open to the public). On each occasion when Bruggeman asked, Bolves told him "no."

10. On one occasion in mid March, 2008, Bruggeman walked behind the information desk where Bolves was sitting, went behind her chair, leaned his head to within a few inches of her head and looked at the information on the computer screen in front of Bolves. On another occasion, he talked to Bolves about sexual predators that were living in his neighborhood. He also complained to Bolves that his marriage was not going too well.

11. At no time during the time between February and April 24, 2008 did Bruggeman ever touch Bolves. At no time during this period did Bruggeman ever comment to Bolves on her appearance. Other than asking Bolves to have lunch with him or to go fishing with him, Bruggeman never suggested that he and Bolves do anything together.

12. At no time during this entire time period did Bolves ever complain to Bruggeman that his conduct was not appropriate. There is nothing in Bruggeman's actions to suggest that he ever, through his words or conduct, impliedly or specifically posed a physical threat to Bolves. Rather, because of what Bolves had been taught by her father (to just brush off such conduct) and because of Bruggeman's comparatively large size, Bolves did not tell Bruggeman to stop hanging around her and talking to her at the information desk. She also was afraid to be assertive with Bruggeman because she didn't want to start fights with any co-workers as she worried for some reason (not made clear through the evidence) that it might affect her job.

13. During this time period, Bruggeman repeatedly told James Livingston, a mall maintenance worker, how beautiful Bolves was and that if he wasn't his age he would take a chance at her. Bruggeman's remarks were not remarks that Livingston would find to be offensive.

14. Bruggeman's conduct scared Bolves. In mid-February, 2008, she told her mother, Rebecca Hughes, that she was concerned and afraid about Bruggeman's hanging around her at the information desk. Bolves also reported this to Davey.

15. Bruggeman's conduct also affected Bolves ability to study for her tests while she was working at the information desk. There is no evidence, however, that Bruggeman's conduct affected her ability to interact with customers or to carry out her job duties.

16. On February 23, 2008, Davey reported to Buenemeyer that Bruggeman had been making inappropriate sexual comments to Bolves. Davey confronted Bruggeman about the conduct and Bruggeman apologized for his action to Davey. After Davey told Buenemeyer about Bruggeman's conduct and that fact that she had confronted Bruggeman, Buenemeyer told Davey that he would take care of the matter.

17. On March 8, 2008, Davey again reported to Buenemeyer that Bruggeman was still "hitting" on Bolves. Testimony of Buenemeyer. Buenemeyer advised Davey that he needed more documentation on Bruggeman and his treatment of Bolves before he could take any action.

18. Hughes was very concerned with Bruggeman's hanging around the information desk while Bolves was working. In February and March, 2008, she complained to Donna Merriman about Bruggeman's conduct toward her daughter. On March 24, 2008, she wrote to IPC about the problem. Exhibit C. In her letter, she noted that her daughter was being sexually harassed by Bruggeman. She also noted that "no one had addressed her concerns over the past month and it continually had been shoved under the carpet like nothing ever happened. *Id.*

19. In early March, 2008, rumors began to circulate among mall employees that Bolves had sex with another security guard by the name of Kestow Sawyer while they were together in the mall. Bolves believed these rumors had been started by Bruggeman. As a result of these rumors, she talked to Hartley and another mall manager, Charles Geary, on March 7, 2008. During that meeting, Bolves asked that Bruggeman not be allowed to contact her while she was at the information desk. She also complained about the rumors that had been circulated about her and Sawyer.

20. Hughes complained to Donna Merriman in February and March, 2008 about Bruggeman's conduct. Merriman indicated that she would talk to Hartley about the matter.

21. On March 24, 2008, Merriman directed a letter to Mike Cohrs at IPC Development regarding concerns about Bruggeman's conduct toward Bolves. Exhibit B. In the letter, Merriman noted that "it is apparent that SO Bruggeman has been very open in his language with Anne Bolves. Anne is a 17 year old young girl and has made comments to her supervisor, Donna Merriman, that she is uncomfortable with his conversations." *Id.* Merriman went on to note in her letter that "SO Bruggeman is a married man, and is 30 years old, and should not be confronting conversations [sic] that aren't work related to distract form [sic, should be 'from'] her duties. This has made Anne extremely uncomfortable while she is working." *Id.*

22. Hughes again talked to Merriman about Bruggeman's conduct. This time, Merriman told Hughes that Hughes was obsessed with Bolves' problem with Bruggeman.

23. Despite Merriman's letter to IPC and Hughes letter to IPC, Bruggeman's conduct as described in the above paragraphs continued through April, 2008.

24. On April 21, 2008, Hughes, having received no response to her March complaint, contacted IPC Corporate headquarters to again complain that nothing had been done about Bruggeman.

25. At the time that Hartley first learned of the complaint, IPC also began to take steps to investigate Bolves' complaint. Other than monitoring IPC's investigation, GK Development did not complete its own separate investigation of the complaint.

26. On April 23, 2008, Bolves provided Hartley a letter indicating that she would be resigning her position as a customer services representative effective May 29, 2008 "in order to find a full-time position for the summer." Exhibit F.

27. On April 24, 2008, Hughes again wrote to IPC to tell them she had "had enough." This incident was triggered when she observed Bruggeman in the information desk area talking to Bolves. Hughes yelled at Bruggeman and told him she would get a restraining order to keep him away from Bolves.

28. Soon after this incident, Buenemeyer told Bruggeman to stop hanging around Bolves. Bruggeman heeded this advice and, even though Bolves worked another month at the service desk, Bruggeman no longer bothered her.

29. IPC and GK also took steps to ensure that Bruggeman and Bolves would not be working alone on the same shift. See Exhibit H. Specifically, Mike Cohrs and

Buenemeyer compared Bolves schedule and Bruggeman's schedule and then arranged Bruggeman's schedule so that he would not be working when Bolves was. Cohrs informed Hartley of this in an e-mail dated April 30, 2008. Exhibit H.

30. On May 6, 2008, Mike Beckett, Director of Operations for GK Development, sent an e-mail to Scott Bickett and Mike Cohrs at IPC that per their discussion from the preceding week, Bruggeman should have not be allowed to have anymore contact with Bolves. Exhibit I. In response to the e-mail, Mike Cohrs returned an e-mail to Mike Beckett indicating that Bruggeman had been instructed to have no more contact with Bolves.

#### B. *Davey Complaints*

31. Findings of Facts 1 through 30 so far as they are pertinent to the charges brought by Davey are by this reference incorporated into the Davey Findings of Fact.

32. Davey was hired as a security guard at HVM in 1999. Throughout her tenure as an HVM security guard, Davey had an exemplary employment record.

33. In January, 2008, HVM discontinued using its own security guards and began to contract with IPC to provide security guard services. On January 23, 2008, HVM terminated all security guards including Davey. Exhibit 67.

34. When IPC took over the security guard functions, it hired the previously employed mall guards, including Davey and Laubach. At hire, all the guards were informed that they would be on 90-day probationary period, during which time they could be let go for any reason. The employees were asked to sign documents indicating that they were on a 90-day probationary period from the date their employment with IPC began. Davey signed this document.

35. IPC maintains a written set of employment rules and policies (Exhibit 131) which contain's IPC's policies respecting treatment and behavior of its own employees. IPC's policies specifically require employees to report sexual harassment by other employees and to report such harassment to their supervisors.

36. In February, 2008, IPC hired Buenemeyer to fill the security guard supervisor position at HVM. When Buenemeyer began working as the supervisor, Davey helped orient Buenemeyer to the mall.

37. On February 18, 2008, while at the security office with Bruggeman, Davey received a call from a Lenscrafters' store employee stating that a 12- year old child was in the store complaining that an adult male had tried to grab him while he was in the

Herberger's restroom. Davey told Bruggeman to inform Buenemeyer about the incident and asked him to have Buenemeyer meet her at Lenscrafters.

38. Davey went to Lenscrafters and got statements from the 12-year old child and his mother, including a description of the suspect who had tried to grab the child. Bruggeman arrived at the store to assist in the investigation, but Buenemeyer never came to the Lenscrafters' store. Bruggeman told Davey that Buenemeyer was at Herberger's talking to Herberger's loss prevention manager, Ted Barnes.

39. Davey proceeded to Herberger's to find Buenemeyer in order to give Buenemeyer the description of the suspect. She spoke with Barnes, but did not see Buenemeyer in the store. As Davey was leaving Herberger's to search for the suspect, Bruggeman came in and told her that Buenemeyer was in the security office.

40. Davey proceeded to the security office to give Buenemeyer a description of the suspect. When Davey entered the office, Buenemeyer immediately stood up and approached Davey, pointed his finger toward his chest and told her "I'm number one and you need to come to me first." Davey explained her actions to Buenemeyer and then left. At the time, Davey received no written warning from Buenemeyer indicating that she had not acted appropriately.

41. Later that afternoon, pursuant to standard operating procedure, Davey completed a write up of the incident on the incident log computer located in the security guard office. Each time she attempted to save the report, however, the computer would delete the report. Bruggeman also attempted to save the report but was unsuccessful. Buenemeyer came into the office and Davey informed him of the problem with the computer. Buenemeyer indicated to Davey that he would write up the incident report.

42. On February 22, 2008, Bolves complained to Davey that Bruggeman was harassing her. Upon learning this, Davey talked to Bruggeman and told him to "back off" of Bolves. She did this without first notifying Buenemeyer of the situation. Davey spoke to Laubach about Bolves' situation. Laubach and Davey decided that they would inform Buenemeyer.

43. Both Davey and Laubach informed Buenemeyer on February 23 of Bolves complaint of sexual harassment against Bruggeman. Davey also told Buenemeyer that she had told Bruggeman to stay away from Bolves. Buenemeyer told Davey and Laubach that he would take care of the matter.

44. Despite his assurances to Davey and Laubach, Buenemeyer took no steps to investigate the Bolves complaint against Bruggeman. Buenemeyer did not like the fact that Davey had spoken to Bruggeman about the incident without first consulting Buenemeyer.

45. On March 8, 2008, Buenemeyer gave Davey a "Commendable" report for her initiative and success in reorganizing the Lost and Found section.

46. On Saturday, March 22, 2008, Davey was in the security guard office and she decided to take her lunch. She told Buenemeyer that she was leaving for lunch. She then went to the maintenance garage to eat her lunch.

47. While she was eating lunch in the maintenance garage, Laubach, in the process of completing his security rounds, passed through the garage checking the power room and the riser rooms. At the same time Laubach was exiting the garage through the door, Buenemeyer was entering the garage through the same door. Davey and Laubach were not patrolling together in violation of Buenemeyer's earlier instructions not to do so. Nevertheless, Buenemeyer told Davey and Laubach "I hate to do this to you guys, but I am suspending you for one day."

48. As Davey was sitting in the garage eating her lunch and she had just told Buenemeyer that she was going on lunch break, she asked Buenemeyer "Why, what did I do?" Buenemeyer immediately responded "No, you're out of here." Laubach also understandably questioned Buenemeyer's reason for imposing discipline on Davey as Davey was on her lunch break. Their questions fell on deaf ears.

49. Davey then returned to the security office to gather her coat and leave the premises as Buenemeyer had ordered. As she was leaving the office, she again asked Buenemeyer why he was suspending her since she had done nothing wrong. Buenemeyer's only response was to reiterate to Davey "You're out of here."

50. Davey was not scheduled to return to work until the following Tuesday, March 25, 2008. When she came into the security guard office, she noticed that her time card was not at the time clock. She inquired of Buenemeyer as to its whereabouts. Buenemeyer informed her that he had her time card.

51. After telling her this, Buenemeyer directed Davey to sit down in front of his desk. He then slid two written warnings across the desk to her, one for allegedly patrolling with another security officer on March 8, 2008 and the second for the March 22, 2008 incident when Buenemeyer mistakenly believed that Davey and Laubach were patrolling together. Buenemeyer then directed Davey to sign the two write ups. Davey refused to do so. As a result, Buenemeyer told Davey to turn in her keys, get her stuff and "get out of here." Buenemeyer then informed Davey that she was suspended without pay for one week.

52. Prior to March 25, 2008, Davey had no write ups in 8 and ½ years of service of working as a security guard at the mall.

53. On March 28, 2008, Davey returned to the mall to speak with Buenemeyer about what her status was as a security guard. Buenemeyer advised her that he did not know. Davey then asked Buenemeyer if she was fired and Buenemeyer said she should call Mindy Grindy at IPC. When contacted a short time later, Grindy indicated to Davey that Davey had been terminated. Davey asked Grindy why she had been terminated. Grindy responded that it was because Buenemeyer had said that Davey had not completed a report on the February Herberger incident involving the 12-year old boy (even though Davey had in fact completed the report.)

54. Mike Crane at IPC headquarters in Illinois made the decision to terminate Davey's employment during her probationary period. Crane was not aware of Bolves's complaint against Bruggeman nor was Crane aware that Davey had complained to Buenemeyer about Bruggeman's conduct toward Bolves at the time Crane decided to discharge Davey.

#### **IV. DISCUSSION AND ANALYSIS<sup>1</sup>**

##### *A. Bolves Has Failed To Demonstrate that She Was Subjected To A Hostile Working Environment.*

Bolves argues that she was subjected to sex discrimination as a result of a hostile working environment created by Bruggeman's conduct and that her employer failed to take reasonable steps to protect her from the environment and therefore is vicariously liable for the discrimination. GK argues that Bolves was not subjected to a legally cognizable hostile working environment and that it in fact took reasonable steps to protect her once it learned of Bruggeman's conduct. For the reasons that follow, the hearing officer agrees with GK that Bolves failed to demonstrate a legally cognizable hostile working environment that constituted sex discrimination.

To be actionable under the Montana Human Rights Act, sexual harassment must be because of gender. *Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶ 24, 332 Mont. 293, ¶ 24, 138 P.3d 419, ¶ 24. There are two forms of sexual harassment that violate the prohibition against workplace discrimination under state and federal law. *Id.*, ¶ 19 (citation omitted). The form of harassment at issue in this case is hostile or offensive work environment. *Id.* (citation omitted).

State and federal law afford employees the right to work in an environment free from discriminatory intimidation, ridicule and insult. *Id.*, ¶ 20 (citation omitted). Verbal or physical conduct of a sexual nature constitutes sexual harassment when such conduct has the purpose of unreasonably interfering with an individual's work

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<sup>1</sup> Statements of fact in this discussion and analysis are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

performance or creating an intimidating, hostile, or offensive working environment. *Id.* (citations omitted).

In order to be actionable, the complained of conduct “must be so sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Beaver v. Montana DNRC*, 2003 MT 287, ¶ 30, 318 Mont. 35, 78 P.3d 857, citing *Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57, 67. To determine whether an environment is sufficiently “hostile” or “abusive,” courts must look at the totality of the circumstances. *Id.* These circumstances may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee’s work performance. *Benjamin v. Anderson*, 2005 MT 123, ¶ 53, 327 Mont. 173, ¶ 53, 112 P.3d 1039, ¶ 53 (citations omitted). A hostile working environment is not created by the sporadic use of abusive language, gender related jokes, and occasional teasing. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

An employer can have vicarious liability for failing to take adequate steps to protect an employee from a discriminatory hostile working environment created by an employee.. *Beaver, supra, Altmaier v. Haffner*, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. Likewise, an employer can have vicarious liability for the conduct of a non-employee if the employer, being in a position to do so, fails to take reasonable steps to protect its employee from the non-employee’s misconduct. However, where there is no showing of a hostile work environment, it is unnecessary to reach the issue of vicarious liability. *Beaver*, ¶ 53. Additionally, Bolves carries the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. *Heiat v. E.M.C.* (1996), 275 Mont. 322, 912 P.2d 787, 792.

Given Bolves young age, there is some plausibility in her argument that Bruggeman’s conduct was subjectively upsetting to her. However, as the respondent poignantly noted in its pre-hearing brief, a human rights violation is not proven by conduct which is merely subjectively unwelcome. Respondent’s pre-hearing submission, page 6. Rather, the evidence mustered at hearing must demonstrate an objectively hostile working environment. In this respect, Bolves’ claim is wanting.

Totally missing from any of Bruggeman’s comments is any suggestion or intimation of sexual discussion or conduct aimed at Bolves or any other person. At no time did he ever intimate that he was sexually interested in Bolves nor did he even ask her to go on a date. He made no comments to her about her appearance. He made some comments about the attractiveness of other women, but engaged in no sexually explicit discussion about those other women. Bruggemen asked Bolves to go fishing a few times and asked her to eat lunch with him, but, under the circumstances of this case, this is not enough to show a hostile working environment. Bruggeman’s conduct, while perhaps bothersome to Bolves, was not the type of pervasive and severe conduct

which can be found to create a sexually hostile working environment. See, e.g., *Black v. Zaring Homes*, 104 F.3d 822 (6<sup>th</sup> Cir. 1997)(court of appeals reversed a jury determination of hostile working environment in favor of female employee whose co-employees made repeated inappropriate comments over a period of months included such things as “Nothing I like better than sticky buns “ while looking the plaintiff up and down, “that a parcel of land near a Hooters Restaurant be called “Titsville” or “Twin Peaks,” and that the plaintiff “was paid great for a woman” were not sufficient to satisfy the severe and pervasive requirement of a hostile working environment claim). See also, *Byers v. HSBC Finance Corporation*, 416 F. Supp 2d 424 (ED Va. 2006)(summary judgment against male plaintiff’s sexually hostile working environment claim was proper where plaintiff’s female supervisor over a period of six weeks asked the plaintiff to accompany her to her parents’ home in Aruba, asked him about whether he had a girlfriend, asked him whether he was faithful to his girlfriend, had one incident of accidental physical contact with him, but never propositioned him, never discussed sexual subjects with him, never attempted to make inappropriate contact with him, and never propositioned him to have sex or commented on the plaintiff’s appearance). Bolves’ sexual harassment claim thus fails.

*B. Davey Has Failed To Demonstrate that She Was Discriminated Against Based On Her Sex.*

Davey’s complaint argues that her supervisor discriminated against her on the basis of sex in the manner in which she was disciplined. Her complaint also contends that her employer retaliated against her for reporting Bruggeman’s conduct with Bolves. In response, IPC argues that Davey has not shown that she was discriminated against in her employment with IPC because of her sex as she received the same punishment for the March 22, 2008 incident as her male counterpart (Laubach) did. IPC further argues that the decision to discharge Davey was made by Mike Crane alone at the Illinois Corporate headquarters without knowledge of Davey’s report of Bolve’s claim of sexual harassment and, therefore, there is no causal connection between the protected activity and the adverse employment decision. Each of these issues will be considered in turn.

Mont. Code Ann. § 49-2-303(1) prohibits discrimination in employment based on sex. With no direct evidence of discrimination, the multi-tier standard of

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies.<sup>2</sup> *Heiat v. E.M.C.* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Office*, ¶22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Davey must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a prima facie case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). She must show (1) that she is a member of a protected class; (2) that she performed her job in a satisfactory manner, and that (3) she was disciplined under circumstances “which give rise to a reasonable inference that [she] was treated differently because of [her] membership in the protected class.” *Id.*; Admin. R. Mont. 24.9.610(2)(a). If Davey proves a prima facie case of discrimination, the burden shifts to IPC, who must then offer evidence that is sufficient, if believed, to support a finding that its decision to discipline and discharge Davey was based on a factor other than sex. *St. Mary's Honor Center* at 506-07; *Heiat* at 328, 912 P.2d at 791 (quoting *Texas Dept. Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)). Should IPC carry that burden, Davey must then “prove by a preponderance of the evidence that the legitimate reasons offered by [IPC] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont. 24.9.610(3). Davey, however, at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. *St. Mary's Honor Center* at 507; *Heiat*, 912 P.2d at 792.

There is no dispute that Davey meets the first two requirements of her prima facie case. IPC disputes that the third prong has been met with respect to the discrimination claim by arguing that the evidence does not establish circumstances which give rise to a reasonable inference that Davey was treated differently because

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<sup>2</sup> Davey asserts that this case is also a “direct evidence” case in both its alleged discrimination and retaliation aspects (Davey’s post hearing brief, page 13). The hearing officer does not agree. The parties have not agreed that the basis for the discipline against Davey was sex based or that the alleged retaliation resulted from Davey engaging in protected activity. Neither is this a case where the charging party has presented evidence of statements made by a decision maker related to the allegedly unlawful conduct which statements in themselves reflect unlawful discrimination. Without such evidence, this case is properly analyzed under the *McDonnell-Douglas* indirect evidence framework. *Laudert, supra*, at ¶29.

of her membership in the protected class. The hearing officer agrees with the contention for the simple reason that the evidence shows that both male and female employees of IPC were disciplined in a similarly harsh manner by Buenemeyer. Charging Party's exhibit 75 patently demonstrates this point. It shows unequivocally that both male and female security guards were disciplined equally harshly for what Buenemeyer perceived as policy violations. Male guards were suspended and placed on corporate review of their status both at the time that Davey was placed on review and afterwards. Sawyer Kestow was fired for engaging in wheel chair races in the mall prior to Davey's termination. Laubach and Davey received identical punishment-a one day suspension for the March 22, 2008 incident. Under these circumstances, the hearing officer is not persuaded that the evidence presented gives rise to a reasonable inference that Davey was treated differently because of her sex.

Beyond this, the hearing officer is convinced that Buenemeyer's discipline of Davey was not based on a desire to discriminate. Rather, it is obvious from Buenemeyer's testimony, Laubach's testimony and Davey's testimony that Buenemeyer is an unreasonable authority figure who has a zero tolerance for anything that he perceives might challenge his authority as supervisor. This is highlighted by his tirade after the Herberger incident when he told Davey "I'm number one and you need to come to me first." Davey's evidence has failed to convince the hearing officer that Buenemeyer's conduct was based upon a desire to discriminate and her discrimination claim, therefore, fails.<sup>3</sup>

### *C. Davey Has Failed To Demonstrate that She Suffered Retaliation.*

Davey also alleges retaliation as a cause of action. She asserts that her discharge was in fact based on Buenemeyer's desire to retaliate against her for her complaints about Bruggeman's conduct toward Bolves. IPC denies this, arguing that Davey did not oppose a practice forbidden by the Montana Human Rights Act and, therefore, she was not engaged in a protected activity when she told Buenemeyer about Bruggeman's conduct.

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<sup>3</sup> IPC also urges this tribunal to find that in no event could any of Buenemeyer's actions be found to bear a causal link to Davey's dismissal as Mike Crane made the decision to discharge Davey on job factors alone without any knowledge of Davey's complaint about Bruggeman's conduct toward Bolves. While this may or may not be true, the hearing officer does not need to decide that issue as Davey failed to prove a reasonable inference that discrimination was the cause of the adverse employment taken against her.

Montana law prohibits retaliation in employment practices for protected conduct. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after opposing “any practices forbidden *under this chapter*. . .” Mont. Code Ann. 49-2-301(emphasis added) . See also, Admin. R. Mont. 24.9.603 (2). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in protected activity, (2) thereafter her employer took an adverse employment action against her and (3) a causal link existed between her protected activities and the employer’s actions. *Beaver v. D.N.R.C.*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. See also, Admin. R. Mont. 24.9.610 (2).

The basis of Davey’s retaliation claim stems from her opposition to Bruggeman’s conduct toward Bolves which Davey reported to Buenemeyer on February 23, 2008. Thus, the respondent has correctly framed the issue as one of whether Davey has made a prima facie case as to whether she was engaged in protected activity when she informed Buenemeyer of Bruggeman’s conduct.

It is clear that in order to make a prima facie case of retaliation, a charging party must initially prove that she has opposed some practice that violates the Montana Human Rights Act. *Cf. Learned v. City of Bellevue*, 860 F.2d 928, 932 (9<sup>th</sup> Cir. 1988)(holding that in order to make a prima facie case of retaliation based on opposition, the charging party must show that he opposed an act that is prohibited under Title VII’s anti-retaliation provision). A charging party need not prove that a violation of the act actually occurred; however, it is imperative that a charging party at least prove that she had an objectively reasonable belief that the employer has engaged in an unlawful employment practice which the act prohibits. 45 A Am. Jur. 2d *Job Discrimination* §222. See also, *Little v. Windemere Relocation, Inc.*, 301 F. 3d 958, 969 (9<sup>th</sup> Cir. 2001).

It is on this point that Davey’s retaliation claim fails. Bolves was not IPC’s employee and while Davey’s conduct in reporting Bruggeman’s conduct was wholly appropriate, it simply is not protected conduct under the Human Rights Act. Bolves was not an employee of IPC and there is no way to escape that fact. A hearing officer has only such power as provided by rule or statute and it is not within this hearing officer’s prerogative to find a violation where there is no protected conduct.

Moreover, Davey has never suggested that she believed at all, much less reasonably believed, that IPC had some type of employer/employee relationship with Bolves. Davey made no effort at the hearing to establish any type of employment relationship or perceived employment relationship between IPC and Bolves. Indeed,

it is obvious from Davey's testimony that she was well aware that Bolves was not an employee of IPC's at the time she reported Bruggeman's conduct to Buenemeyer. Thus, the respondent is correct in its assertion that Davey did not engage in protected activity in reporting Bruggeman's conduct. Therefore, while Davey is to be commended for bringing Bruggeman's conduct to Buenemeyer's attention, her action in doing so is not protected under the Montana Human Rights Act.

## V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Bolves discrimination claim fails as she has failed to prove that she was subjected to a legally cognizable hostile working environment as a result of Bruggeman's conduct.
3. Because Bolves was not subjected to a legally cognizable hostile working environment, it is unnecessary to decide whether GK is liable to Bolves for Bruggeman's conduct.
4. Davey's discrimination claim fails because she has failed to demonstrate that she was treated differently on the basis of sex and Buenemeyer's conduct was not based on an intent to discriminate based on sex.
5. Davey's retaliation claim fails because her action in reporting Bruggeman's conduct was not protected activity under the Montana Human Rights Act.
6. Because the charging parties have not proven violations of the Montana Human Rights Act, the issue of damages is moot.

## VI. ORDER

Judgment is found in favor of GK Development in the Bolves Case and IPC in the Davey case and the claims of Bolves and Davey are hereby dismissed.

DATED: November 17, 2009

/s/ GREGORY L. HANCHETT  
Gregory L. Hanchett, Hearing Officer  
Hearings Bureau

## NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case.

**Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont.

Code Ann. § 49-2-505(3)(c)

**TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:**

**Human Rights Commission  
c/o Katherine Kountz  
Human Rights Bureau  
Department of Labor and Industry  
P.O. Box 1728  
Helena, Montana 59624-1728**

**You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.**

**ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.**

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

**IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Shawndelle Kurka, (406) 444-3870 immediately to arrange for transcription of the record.**

Bolves & Davey.HOD.ghp