BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Joan Forseth, Charging Party,	)	**Human Rights Act Case No. 9809008317**
vs.	)	*Final Agency Decision*
Billings School District No. 2, Respondent.	)	

I. Procedure and Preliminary Matters

Charging party Joan Forseth filed a complaint with the Department of Labor and Industry on September 27, 1997. She alleged the respondent, Billings School District No. 2, retaliated against her for complaining of sexual harassment when it involuntarily transferred her to an aide position with a different school. On May 29, 1998, the department gave notice Forseth's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. On June 11, 1998, the hearing examiner issued a scheduling order setting hearing for August 17, 1998. On August 17, 1998, the parties stipulated that the department could retain jurisdiction for more than 12 calendar months after the complaint filing. At the parties' requests, the hearing examiner reset the hearing date by orders dated August 11, 1998, December 4, 1998, April 8, 1999, September 20, 1999, and March 15, 2000.

On March 11, 1999, the hearing examiner denied the district's motion in limine to limit Forseth's case to evidence relating to her transfer from Skyview High School to Beartooth Elementary School. In the order, the hearing examiner ruled that Forseth could proffer evidence of actions of the district from March 8, 1997, the date of her internal written complaint of harassment, in support of her claim of retaliation. [1] The hearing examiner also ruled that Forseth's allegations in this contested case gave notice to the employer of the nature of her claims, including her claim that the district was culpable for the sexual harassment because of its inaction or inadequate action after it had notice of her complaints of harassment. Although Forseth failed to make a formal motion to amend her complaint, her contentions in this contested case properly triggered an amendment of her complaint by prehearing order. Under *Simmons v. Mountain Bell*, 246 Mont. 205, 800 P.2d 6 (1990) the hearing examiner allowed that amendment.

This contested case hearing convened on June 13, 2000, in Billings, Yellowstone County, Montana. Forseth attended. Pierre Bacheller represented

[1] The hearing examiner also ruled that if Forseth proffered evidence of complaints and notice to the district before her formal complaint of sexual harassment, earlier acts of the district would also be admissible as potential proof of retaliation.

Forseth. The district's designated representative, Sandra Colman, attended.[2] Laurence Martin, Felt, Martin & Frazier, represented the district.

The hearing examiner excluded witnesses on Forseth's motion. Joan Forseth, Gaye Christianson, Paul Johnson, Lance Orner, Robert Whalen, Vicki Jacobson Smith, James Kimmet, Pat Gum and Gary Garlock testified. The parties stipulated to the admission of exhibits 11, 201 through 242 and 244 and 245. The hearing examiner admitted exhibit 243 without objection. The hearing examiner's exhibit docket accompanies this final decision. In the exhibit docket, the hearing examiner cross-referenced Forseth's exhibit numbers for duplicative exhibits, so that reference in the evidence to exhibits by Forseth's exhibit numbers can relate to the exhibit by its admission number.

The hearing examiner closed the evidentiary record on June 15, 2000. The parties filed the final brief in this matter on September 18, 2000, and the department deemed the case submitted for decision.

II. Issues

The primary legal issue in this case is whether the respondent unlawfully retaliated against Forseth because she resisted and complained of sexual harassment by a co-employee. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Billings School District No. 2 has employed Joan Forseth as a special education assistant since January 1986. She worked initially at the Montana Center for Handicapped Children and transferred in August 1987 to Eagle Cliffs Elementary School. In 1993 she transferred to Castle Rock Junior High School and in 1995 she transferred to Skyview High School. Her primary work has been assisting students with severe physical disabilities. During the 1991-92 school year, she began working one on one with a student (called "Nick" herein) who was a fifth grader at Eagle Cliffs. She continued to work one on one with Nick for the next six years, up through Nick's sophomore year at Skyview, the 1996-97 school year. Her transfers from Eagle Cliffs to Castle Rock and then Castle Rock to Skyview allowed her to continue her work with Nick. At all pertinent times, Nick was wheel chair mobile. He used a "stander" to help him to stand up. He required Forseth's assistance for personal hygiene. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 1; testimony of Forseth.

2. When she transferred to Skyview in the fall of 1995, Forseth met Bryan Garton, a hall monitor at the school. She would see Garton in the halls over the course of the year, and exchange conversation. They were casual acquaintances.

[2] When Forseth moved to exclude witnesses, the district identified two designated representatives--Robert Whalen and Sandra Colman. Forseth objected and the hearing examiner sustained the objection. The district then selected Colman as its designated representative.

This casual acquaintance grew during the 1996-97 school year. Forseth noticed that Garton "kept being where I was" at Skyview during the work day, but she found him funny and interesting. The two became friends. Both Forseth and Garton were married. Their friendship was apparent to other members of the staff at Skyview. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 2; testimony of Forseth and Christianson.

3. During Nick's freshman and sophomore years at Skyview, Forseth accompanied Nick to each of his classes at Skyview. To avoid the crush of students in the halls between classes, Nick and Forseth could go from one room to the next before the normal ends of periods. Nick also had one hour during the school day in the special education classroom of Gaye Christianson, a special education teacher. Nick had toilet facilities available in Christianson's room, as well as a stander. He also used that hour for homework. As part of a plan to encourage Nick's independence, Forseth would only remain with him in his classes as needed. Whenever she did not need to remain with Nick, she would return to Christianson's room and assist with special education students. Testimony of Forseth and Christianson.

4. Christianson signed the time sheet when Forseth needed time off, and worked with Forseth when she had problems or needs within the school. Although Christianson acted informally as Forseth's supervisor, she never received a formal assignment to supervise Forseth. Christianson was not a member of the Skyview administration. Testimony of Forseth and Christianson.

5. Forseth enjoyed her job very much. She loved working at Skyview and loved working with Nick. She felt that she related well with Nick's parents, and although there were some disagreements about Nick's progress, Forseth considered those disagreements "nothing we couldn't settle." Testimony of Forseth.

6. From January 31, 1997 to February 14, 1997, Forseth went on a vacation, a cruise ship trip. Before she left, Garton had begun touching her when they talked. The day before she left, Garton followed her down a hall at Skyview and asked her to tell him that she would miss him. Although Forseth began to wonder about Garton, she still considered him a friend. Although he had already behaved toward her in ways she considered inappropriate, she put off confronting the situation until she came back from her cruise. Testimony of Forseth; Exhibit 11.

7. When Forseth returned from her cruise in February 1997, Garton escalated his contacts with Forseth. He was no longer just joking with her. Instead, he said things like, "I want to date you," "I would like to make love to you" and "I want to take you places." In mid-February, Garton pushed Forseth against a wall in a Skyview hallway, and tried to get her to kiss him. Garton now was constantly appearing in Forseth's work space, waiting for her to come out of classrooms, moving too close to her, pushing her into tight spaces and pulling her into corners in the halls. He also made sexual comments to her. Forseth now

refused to walk with him in the halls. She told him to stop his behavior toward her, saying, "I don't do this." She warned him that his conduct was sexual harassment. She asked him why he was bothering her. She said to Garton, "I need to be here, I need to work here," and continued to ask him to stop. When she would confront him, he would cease his behavior, but within a day or two he would begin again. Testimony of Forseth; Exhibit 202.

8. Garton persisted in seeking a kiss from Forseth. He convinced her that he had told Dean Orner that Forseth was having an affair with another staff member.[3] When she demanded that he go to Orner and tell him the statement was false, Garton bargained with Forseth, offering to correct the falsehood for a kiss. She finally did agree. He waited for her in the laundry room, and got the kiss when she came to the laundry room with a student to do some laundry. Testimony of Forseth; Exhibits 202 and 214.

9. Forseth stopped walking the halls of Skyview alone. She began to skip going to Nick's classrooms to see if he needed help, unless she could find someone to accompany her. Each time he ceased his unwanted attentions toward her, she hoped he would not begin again, so she did not at first report his conduct. Testimony of Forseth.

10. In mid-March 1997, Forseth received a flower delivery at work at Skyview. She became upset, because she believed the flowers were from Garton. Christianson asked her about the flowers. Convinced that Garton would not stop his unwelcome advances at her requests, she told Christianson about the problem. Christianson asked if Forseth wanted her to notify the administration of the problem and Forseth said, "Yes." Testimony of Forseth.

11. Christianson told Forseth that she had talked with Lance Orner, a Skyview Dean. Christianson told Forseth that she needed to present her complaint in person. Forseth believed Orner to be a "close personal friend" of Garton, based on comments Garton had made to her. Forseth refused to speak to Orner about the problem. Testimony of Forseth.

12. On March 19, 1997, at the urging of Christianson, Forseth met with Paul Johnson, a Skyview Dean and the Title IX Officer for the high school. She reported that Garton was subjecting her to unwelcome sexual comments, touching and advances. Forseth did not recount to Johnson all of the incidents that led to her concern. She did not agree to file a formal complaint, but did authorize Johnson to talk to Garton. She told Johnson that she did not want to get anyone in trouble, but that she wanted to be left alone. Johnson gave her permission to go home after the conversation. She was afraid that if she stayed at work, Garton would seek her out. That same day, Johnson spoke with Garton and instructed him to leave Forseth alone. Testimony of Forseth and Johnson; Exhibit 201.

[3] Orner had no recollection of Garton making such a statement. Exhibit 214.

13. Garton told Johnson that he had done nothing wrong. Johnson reiterated that Garton should nonetheless leave Forseth alone, and Garton agreed. Testimony of Johnson; Exhibit 201.

14. After making her initial complaint to Johnson on March 19, 1997, Forseth was afraid of Garton's reaction. She continued to ask other members of the staff to accompany her when she was going with Nick to his classes. Her husband, Eric Forseth, came to school and walked the halls with her part of the time. She stayed even more often in Christianson's room, instead of assisting Nick. She believed the only reason Garton had not already confronted her was that she had so far avoided him. Testimony of Forseth and Christianson.

15. On April 2, 1997, Forseth again contacted Johnson, and provided additional information about Garton's conduct toward her. Johnson recorded the additional comments Forseth provided, and the district transcribed the tape. Forseth asked Johnson why Garton was still at Skyview despite her report of his harassment. Johnson asked if since his first meeting with Forseth Garton had left her alone. Forseth said that he had. Testimony of Forseth and Johnson; Exhibits 201 and 202.

16. When she reported, on April 2, 1997, that Garton had left her alone since her first meeting with Johnson, Forseth did not tell Johnson that she had been staying in Christianson's room more, instead of assisting Nick. She did tell Johnson again that she did not want to get anyone in trouble. Forseth left that April 2 meeting believing that Johnson would prepare a Title IX complaint on her behalf and inaugurate an investigation of Garton's conduct. Testimony of Forseth and Johnson.

17. After his April 2 meeting with Forseth, Johnson again spoke to Garton and again instructed Garton to leave Forseth alone. Testimony of Johnson.

18. During first weeks of April 1997, Forseth had no encounters with Garton. She stayed in Christianson's classroom, and had another staff member or her husband[4] walk with her when she went to provide help to Nick. Garton stayed out of the hall outside of Christianson's classroom. Testimony of Forseth.

19. Forseth heard nothing from the administration about Garton for a week after April 2, 1997. She then called Johnson at his home to ask about the status of her complaint and the investigation. Johnson told her that Garton had denied the accuracy of her account of his behavior. Believing the district would do nothing more, Forseth then asked to file a complaint and asked to meet with Robert Whalen, Skyview Principal. Testimony of Forseth.

[4] Eric Forseth was not an employee of the district. Skyview administration learned that he was sometimes in the school to accompany his wife during the school day, and allowed him to continue in that practice by doing nothing to discourage him.

20. Forseth and her husband met with Whalen and Johnson the next day. Whalen told her the district needed to have her meet with Vicki Smith, the district's Director of Human Resources. Forseth specifically asked that Skyview remove Garton from the facility. Whalen told her that Vicki Smith would handle the matter. Testimony of Forseth, Johnson and Whalen.

21. Forseth told Whalen that on one occasion Garton had known the color of her underwear. She told Whalen that Garton had been waiting in a locked laundry room at Skyview to "force himself upon me" when she entered the room. She told Whalen that Garton had called her at her outside job at Corral West to tell her, "I've been watching you." She also told Whalen that she had stopped answering her phone at home, and had purchased an answering machine. Testimony of Forseth.

22. On April 8, 1997, during her meeting with Whalen, Forseth signed an internal complaint against Garton on a "Harassment/Discrimination Complaint Filing Form" the district provided (a "Title IX" complaint[5]). She alleged sexual harassment. She met the next day with Smith at the district's administration building (Lincoln Center). She recounted for Smith some of the incidents involving Garton, and expressed her fear of Garton. She also told Smith of her fears that Garton had friendships with members of Skyview's administration.[6] Forseth also confirmed to Smith that Garton had stayed away from her since before her first meeting with Johnson. Smith told her a formal investigation would begin at Skyview. Testimony of Forseth and Smith; Exhibits 203 and 239.

23. On April 15, 1997, Smith wrote to Garton, giving him notice of Forseth's complaint and requesting that he respond to her allegations in writing. On April 16, 1997, Garton signed an internal complaint against Forseth on the same "Harassment/Discrimination Complaint Filing Form" that the district provided to Forseth (a "Title IX" complaint).[7] On April 17, 1997, Garton submitted a written response to Forseth's complaint, in which he denied essentially every allegation of improper conduct in the workplace. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 2; Exhibits 204, 205 and 206.

24. On April 22, 1997, Smith wrote to Forseth, giving her notice of Garton's complaint and requesting that she respond to his allegations in writing. On April 23, 1997, Forseth submitted a written response to Garton's complaint, in which she denied some of Garton's allegations about her conduct, while admitting other allegations and denying that her conduct was improper.[8] She

---

[5] Some of the witnesses called Forseth's internal complaint a "Title IX Complaint."

[6] To illustrate the basis of Forseth's fears, one of the comments Garton made to her regarding his friends in the administration was, "If you want to make love to me, administration would find a place for me to do it in the school and they would condone it." Testimony of Forseth; Exhibit 204.

[7] Some of the witnesses called Garton's internal complaint as "Title IX Complaint."

[8] For example, Forseth admitted that on March 11 and 12, 1997, she participated in dancing to a tape of the Righteous Brothers in Christianson's classroom. Another staff member

also reiterated some of her allegations regarding Garton's improper conduct. Exhibits 207 and 208.

25. In April 1997, Whalen offered Forseth three options to address the problem with Garton. She could take a paid leave of absence; she could accept a transfer away from Skyview; or she could remain and perform all of her normal duties, including being out in the building as needed. Whalen told Forseth that the district would provide Garton with her schedule, to assure that Garton stayed away from her. Whalen also indicated to Forseth that Nick's parents had called the school expressing concern about Nick not getting the help he needed on a day-to-day basis. Forseth told Whalen she wanted to stay and work. Testimony of Forseth and Whalen.

26. Whalen mentioned to Gary Garlock, the Executive Director of Pupil Services, that Nick's parents wanted him to develop more independence. Testimony of Whalen and Garlock.

27. On April 28, 1997, Forseth accompanied Nick to his English class. After class began, she and Nick left the classroom to return to Christianson's room. They encountered Garton in the common area. Forseth considered it an instance of Garton stalking her, and complained in writing to Robert Whalen. Testimony of Forseth; Exhibits 210 and 214.

28. The same day that Forseth complained about Garton stalking her in the hall, Whalen again warned Garton to stay away from Forseth. Garton had the same three options the district offered to Forseth. He elected to take a paid leave of absence. He confirmed that election through his MEA representative, Steve Henry, on May 3, 1997. Thereafter, he was not at Skyview for the rest of the school year. Exhibit 213 and 214.

29. On April 30, 1997, Maggie Copeland, Forseth's MEA representative, wrote a letter on her behalf confirming her election to stay and work at Skyview. By then Garton had elected to take a leave of absence. Testimony of Forseth; Exhibit 212.

30. The district conducted a lengthy investigation, interviewing more than 25 witnesses identified by Forseth and Garton. During the interviews, in the first part of May 1997, virtually every staff member and student interviewed already knew about at least one of the two complaints. The investigation continued until the end of May 1997.[9] Smith issued her report to the Superintendent on May 29, 1997. The report recounted various allegations from witnesses about Garton's

---

made the tape for Garton, who was present for most of the time. Forseth danced with Garton, as well as with others. She asked Garton and a male student to teach her to dance. Proud of learning some dance steps from them, she said, "Let's go dancing." Exhibit 208.

[9] Pursuant to district policies, the district had 30 days after April 8, 1997, in which to investigate Forseth's complaint and provide a written recommendation to the superintendent regarding the complaint. In this case, the district asked for and obtained additional investigative time from Forseth's representative. Exhibits 215, 216 and 241.

conduct with other females (staff and students). However, Smith found no evidence that Skyview administration had any notice of or complaint about inappropriate conduct toward females by Garton before Christianson's March 18, 1997, conversation with Orner. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 2; testimony of Johnson, Orner and Smith; Exhibits 214 (report of interviews), 215, 216 and 217 (report).

31. James Kimmet, the district's Superintendent, was out of the district at the beginning of June 1997. When he returned, he concurred with Smith's recommendation and concluded that Garton had violated the district's Title IX policy and had sexually harassed Forseth but that Forseth had not violated the policy. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 2; testimony of Kimmet; Exhibit 218, 219 and 225.

32. Smith also recommended consideration of transfers from Skyview for both Forseth and Garton. Smith did not mean to rule out a voluntary transfer by one of the two people, but felt that an involuntary transfer of only Garton would create continued friction, rumors and "side taking" at the school. Whalen was not involved in the discussion about transferring both Forseth and Garton, but he felt there might be continued tension or gossip if either Garton or Forseth remained at Skyview. Testimony of Smith and Whalen; Exhibit 217.

33. Kimmet indicated to Smith that she might appropriately transfer Garton or Forseth, or both. Smith, in turn, discussed potential transfers of special education assistants with Pat Gum, Director of Special Education in the district and with Garlock. They discussed transfers for both Garton and Forseth, because of the situation at Skyview, at least twice during the latter part of the 1996-97 school year. Testimony of Smith, Gum and Garlock.

34. On June 23, 1997, in accord with Smith's recommendations, Kimmet advised Forseth to obtain Title IX training. The district also required Garton to cease his behavior, receive Title IX training, seek counseling, never violate the sexual harassment policy again and have as little as possible to do with Forseth in the future. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 2; Exhibits 220 and 221.

35. Forseth learned of the district's resolution of her complaint against Garton on July 1, 1997. She appealed that determination to the Board of Trustees on July 6, 1997, alleging that the discipline the district meted out to Garton was insufficient. Testimony of Forseth; Exhibits 222-226.

36. In mid-July 1997, Gum and Garlock worked on special education staffing for the 1997-98 school year. Gum made the decision to transfer Forseth to Beartooth. She considered Forseth an excellent "fit" for the Beartooth position. Other special education assistants likewise were suitable for transfer to Beartooth, but Gum looked first at Forseth because of the prior conversations regarding her transfer. Garlock and Gum discussed the potentially volatile

situation at Skyview resulting from the sexual harassment complaints and investigation. Testimony of Gum and Garlock.

37. On July 16, 1997, Garton (through his MEA representative, Steve Henry) asked Smith for information about a transfer from Skyview. Testimony of Smith; Exhibit 245.

38. Unaware of Garton's request, Gum decided to transfer Forseth to Beartooth. On July 22, 1997, Gum prepared a list of special education assistants transfers, and initiated a Personnel Action Request for the transfer of Forseth to Beartooth. Gum then left on vacation. Testimony of Gum; Exhibits 227 and 228.

39. While Gum was on vacation, Smith learned of the decision to transfer Forseth to Beartooth. She knew that Garton would not be at Skyview in 1997-98. She talked with Kimmet and he agreed that there was no longer any particular reason to transfer Forseth, leaving the final decision to her. Smith countermanded Gum's decision, acting to keep Forseth at Skyview and transfer another assistant to Beartooth. Testimony of Kimmet and Smith; Exhibit 227.

40. On July 30, 1997, Smith wrote to Garton's MEA representative, telling Garton that the district would be transferring him from Skyview to another school for the 1997-98 school year. Testimony of Smith; Exhibit 246.

41. Smith resigned her position with the district to take other work. Her last day as Director of Human Resources was July 30, 1997. Testimony of Smith.

42. Gum returned from her vacation at the end of the first week of August 1997. She learned from Kimmet that Smith had decided not to transfer Forseth. Gum argued that she had valid reasons to transfer Forseth, and Kimmet left the decision to her. She discussed the matter again with Garlock, and he agreed with the transfer. She proceeded to reinstate the transfer of Forseth. Testimony of Kimmet and Gum.

43. Garlock perceived the situation at Skyview to be the primary impetus for the transfer of Forseth to Beartooth. Testimony of Garlock.

44. The district transferred Forseth, on or about August 22, 1997, to a position as special education assistant at the Beartooth Elementary School commencing with the start of the 1997-98 school year. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 2.

45. On August 26, 1997, Forseth received a call from the district, notifying her that she would be working at Beartooth Elementary School during that school year. Forseth questioned the legality of the transfer, since she had received no written notice of it. She subsequently received a letter dated August 22, 1997, giving notice of the transfer. Forseth did not want the transfer. Testimony of Forseth; Exhibit 231.

46. Forseth filed a formal complaint of illegal discrimination with the Department of Labor and Industry on September 27, 1997. Her complaint charged that the district retaliated against her for complaining of sexual harassment when it involuntarily transferred her to an aide position with a different school. After the department set a contested case hearing date within 90 days of service of notice of hearing, the parties mutually agreed to permit the department to retain jurisdiction for more than 12 months after the complaint was filed and stipulated to a schedule for proceedings to be established by the department. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 6.

47. Forseth and Garton belonged to the BCEA. The district's labor contract with BCEA permitted the district to transfer employees in its discretion and without cause. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 3; Exhibit 242.

48. Forseth filed an appeal of the transfer decision to the Board of Trustees, who heard the appeal on January 20, 1998. Forseth appeared in person at the hearing. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 4.

49. Before that appeal, Maggie Copeland contacted the district's counsel to inquire about a settlement of the issues. Copeland also notified the district that Forseth had filed a complaint with the Human Rights Commission concerning her transfer from Skyview High School to Beartooth Elementary School. The district then proposed a settlement by which Forseth would return to Skyview High School to fill the next available opening, in exchange for withdrawing her Human Rights Act complaint and her appeal of the transfer. Forseth rejected the settlement. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 5; testimony of Forseth.

50. Throughout her career with the district, Forseth had been an excellent employee, always receiving good performance ratings. Exhibit 11; testimony of Forseth, Christianson, Lance Orner, Johnson and Whalen.

51. Forseth began working as an aide in August 1997 at Beartooth Elementary School. She remains employed at that site. She has continuously received good performance evaluations. Final Prehearing Order, "III. Facts and Other Matters Admitted," Par. No. 1.

52. Forseth suffered no economic loss because of the transfer to Beartooth. She did suffer the loss of the on-going relationships with Nick, with Christianson and with other students and employees at Skyview. She suffered the emotional distress of a transfer triggered by her unwillingness to endure harassment. The transfer reinforced her feeling that the district had not taken her seriously, and was punishing her for complaining of harassment. She was angry, fearful and sad. She suffered emotional distress as a direct and proximate result of the district's decision to transfer her from Skyview to Beartooth. The

sum appropriate to compensate her for that emotional distress is $7,500.00. Testimony of Forseth.

IV. Opinion

The District Acted Properly to Protect Forseth from Harassment

Montana law prohibits employment discrimination based on sex: "It is an unlawful discriminatory practice for . . . an employer . . . to discriminate against a person . . . in a term, condition, or privilege of employment because of . . . sex." §49-2-303(1)(a) MCA. Sexual harassment at work is an unlawful discriminatory practice prohibited by §49-2-303(1)(a) of the Montana Human Rights Act. An employment environment permeated with unwelcome and sufficiently abusive sexual comment or action alters the terms and conditions of employment and creates a hostile working environment that violates the employee's right to be free from discrimination. *Brookshire v. Phillips*, HRC Case No. 8901003707 (April 1, 1991), ***affirmed sub. nom.*** *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). Nevertheless, the employer only is liable if it knew or should have known the hostile environment existed. *Burell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994).[10]

The district had notice of Garton's conduct when Christianson spoke with Orner on March 18, 1997 and Forseth spoke to Johnson the next day. After those discussions, the district had a duty to address Garton's conduct. Until then, only fellow employees of Forseth who were not management employees knew of the developing problem. The Ninth Circuit adopted the EEOC Compliance Manual to gauge the culpability of an employer for sexual harassment by a co-worker: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct." *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991), ftnt. 16, ***quoting*** EEOC Compliance Manual (CCH) §615.4(a)(9)(iii), ¶ 3103, at 3213 (1988). ***See also***, *EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir. 1989).

Once the district learned of Forseth's problem with Garton, it could only avoid liability by undertaking action "reasonably calculated to end the harassment." *Ellison*, ***supra.*** Once Johnson met with Forseth, the day after the administration first learned of Garton's unwelcome conduct, the district acted immediately, with Johnson directing Garton to leave Forseth alone.

> Employers should impose sufficient penalties to assure a work place free from sexual harassment. In essence then, we think that the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the

[10] Montana follows federal discrimination law if the same rationale applies under Montana's HRA. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987).

adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct.

Ellison, ***supra.***

The employer's obligation is not "discharged until action--prompt, effective action--has been taken." *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). Garton did not speak to Forseth again after he first received directions to leave her alone. As soon as Forseth took the further step of signing a complaint, the district began an investigation of her complaint. It reinforced, both before and after she submitted her complaint, Johnson's initial order to Garton to leave Forseth alone. The district did take prompt and effective action. Forseth herself reported to the district, several times during March and April, that while she still feared contact with Garton, he had left her alone.

When Forseth complained in writing (at the end of April) that Garton had confronted her, the district made immediate inquiry into that incident.[11] Garton then elected to go on a leave of absence. The district acted properly throughout this time.

> [U]nder federal law, an employer's failure to investigate may . . . impose liability on the employer. ***See*** *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2292-93, 141 L.Ed.2d 662 (1998); *Torres*, 116 F.3d at 636; *Snell*, 782 F.2d at 1104; 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."). Moreover, the knowledge of corporate officers of such conduct can in many circumstances be imputed to a company under agency principles. ***See*** *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2265-71, 141 L.Ed.2d 633 (1998). As a result, an employer must consider not only the behavior of the alleged offender, but also the response, if any, of its managers. Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at a victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment. ***See*** *Faragher*, 118 S.Ct. at 2283. . . . .

[11] Forseth testified that there was a prior incident of contact in the hall, and asserted she had given the district a prior note about that incident. There was no corroboration for this testimony. The district investigative report and the testimony of Orner both suggest that Garton was aware that he was under scrutiny and would approach Forseth at risk of losing his job.

Malik v. Carrier Corp., __ F.3rd __, 2000 WL85200, *7 (2nd Cir. 2000).[12]

Forseth also contended that the district's failure to remove Garton immediately from Skyview makes it culpable for his harassment. Since Garton engaged in no further harassment, and since the district responded promptly to Forseth's subsequent encounter with Garton in the hall, her contention fails. The district did its job of protecting Forseth from Garton once it was aware of the harassment. It responded with sufficient promptness. It took the kind of prompt and effective remedial action the law required.

The District Retaliated against Forseth when It Transferred Her

Montana law also prohibits retaliation against an employee for opposition to discrimination or exercise of her right to participate in a Human Rights case:

> It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

§49-2-301 MCA.

The basic elements of the claim require proof that (i) Forseth engaged in protected activity; (ii) after which the district took adverse action against her; and (iii) there was a causal link between the adverse action and the protected activity. **See**, *Laib v. Long Construction Co.*, HRC Case #ReAE80-1252 (August 1984), ***quoting*** *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982); ***accord***, *Schmasow v. Headstart*, HRC Case #8801003948 (June 26, 1992); ***see***, *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); ***see*** *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 195 (7th Cir. 1994).

Forseth resisted unwelcome sexual contacts and overtures from a fellow employee. She complained to the Skyview administration about those contacts and overtures. Clearly, she engaged in protected activity, the first of the three basic elements.

An employer can argue that it has no vicarious liability to an employee for an actionably hostile environment created by that employee's immediate supervisor if the employer exercises reasonable care to protect employees from such a hostile environment. This affirmative defense is only available if the employer took no tangible employment action against the complaining

[12] ***Incomplete citations in the quote:*** *Torres v. Pisano*, 116 F.2d 625, 636 (2d Cir. 1997) ("[A]n employer may not stand by and allow an employee to be subjected to...harassment by co-workers. [O]nce an employer has knowledge of the harassment,...the employer [has] a duty to take...steps to eliminate it."); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986).

employee.[13] The district has admitted, in brief, that the *Faragher* defense is inapplicable here. "Post Hearing Brief of Billings School District No. 2," p. 26. However, the district could still attempt to defeat the second basic element of Forseth's case by presenting, the legal argument that the transfer had only a trivial impact on Forseth. The definition of adverse action blends into that of tangible action, so cases addressing the *Faragher* defense can bear upon the district's defense that the transfer was not an adverse action.

The federal cases involving adverse employment action are diverse and sometimes contradictory. The district correctly argued that federal cases are illustrative authority when no Montana cases address a particular point. In brief, the district quoted *Brooks v. City of San Mateo*, 214 F.3d 1082, 1093 (9th Cir. 2000)[emphasis added]: "By contrast, we have held that declining to hold a job open for an employee, bad mouthing an employee outside the job reference context and transferring an employee where salary is unaffected do not constitute adverse employment actions." After the district filed its brief, the Circuit Court withdrew the *Brooks* opinion and superseded it with a new opinion. In *Brooks v. City of San Mateo*, 229 F.3d 917, 2000 WL 1568680 (9th Cir. 2000)[14], the same section of the opinion left out the emphasized phrase upon which the district relied in its discussion of "adverse employment action" at head note 18:

> The next question is whether Brooks alleged that she was subjected to an adverse employment action. In *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859 (9th Cir.1996), we noted that "[n]ot every employment decision amounts to an adverse employment action." ***Id.*** at 869. We recognize the countervailing concerns in this area of the law. On the one hand, we worry that employers will be paralyzed into inaction once an employee has lodged a complaint under Title VII, making such a complaint tantamount to a "get out of jail free" card for employees engaged in job misconduct. On the other hand, we are concerned about the chilling effect on employee complaints resulting from an employer's retaliatory actions. In an effort to strike the proper balance, we have held that only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation. ***See*** *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000) ("[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."). Among those employment decisions that can constitute an adverse employment action are termination, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion. By contrast, we have held that declining to hold a job open for an employee and badmouthing an

[13] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

[14] Publication pagination was not available in Westlaw at this time on the new opinion. The hearing examiner cites the head note number as the only available reference.

> employee outside the job reference context do not constitute adverse employment actions. [Footnotes omitted.]

The Ninth Circuit appears to be retreating from its prior view that a transfer without change of salary is not an adverse employment action. The rest of the Circuits do not consistently construe "adverse employment action." ***Compare*** *Smart v. Ball State Univ.*, 89 F.3d 437, 442 (7th Cir.1996) (unjustified performance evaluations do not alone constitute adverse employment action) ***with*** *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) (10th Circuit liberally construes "adverse employment action").

Even in Circuits that view transfer generally as not being an adverse employment action, there are exceptions:

> [T]he Supreme Court has recently suggested that Title VII liability can arise from a "tangible employment action," which the Court defined to include not only "hiring, firing, failing to promote, ... [and] significant change in benefits," but also "reassignment with significantly different responsibilities." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998) (discussing "tangible employment action" as trigger for employer's strict liability under Title VII for supervisor's discriminatory acts); ***see also*** *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172, 175 (4th Cir.1998). In light of the clear precedent indicating that Title VII awards damages "only against employers who are proven to have taken adverse employment action" for a discriminatory reason, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), and based on our certainty that Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment, however, we conclude that reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect on her.
>
> *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir., May 17, 1999).

The *Boone* opinion concedes that "As the trial court rightly noted, a change in working conditions may be a factor to consider in assessing whether a reassignment qualifies as an adverse employment action that could give rise to Title VII liability." ***Id.***

The Ninth and Tenth Circuits construe the federal law consistently with the intent of the Montana Human Rights Act. An employee of the district who observed the events and aftermath of Forseth's complaint at Skyview High School would be very reluctant to come forward with a complaint of co-employee harassment, unless she wanted a transfer to another school. In addition, Forseth's testimony establishes that her transfer was not a "trivial discomfort" to her.

Consistent with the more liberal construction by the federal courts, the department considers this involuntary transfer from one school to another an adverse employment action for purposes of determining whether retaliation occurred. Forseth objected strenuously to the transfer. It subjected her to emotional distress. The sexual harassment complaint was a matter of common knowledge at Skyview, and the transfer suggested that Forseth had been guilty of some wrongdoing. She left a school at which she was happy, a teacher (Gaye Christianson) with whom she was happy working and a primary student assignment (with Nick) she enjoyed. Not every transfer would necessarily constitute adverse employment action. On the facts, this one did, even though Forseth made the best of her transfer and successfully worked at Beartooth.

Having successful established that she engaged in protected activity and then was subject to adverse employment action, Forseth had to prove that the district would not have transferred her but for her protected activity in resisting and complaining of Garton's advances. ***See***, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513-1514 (9th Cir. 1989); *Ruggles v. Cal. Poly. State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986); ***cf.*** *Foster v. Albertson's*, 254 Mont. 117, 127, 835 P.2d 720 (1992), ***citing*** *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292 (Or. 1984).

Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979). Direct evidence of discrimination, including retaliation, establishes a civil rights violation unless the defendant responds with substantial, credible evidence rebutting the proof of discrimination or showing legal justification. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). In Human Rights Act employment cases, direct evidence relates to the employer's adverse action and to the employer's discriminatory intention. *Foxman v. MIADS*, HRC Case #8901003997 (June 29, 1992); *Edwards v. Western Energy*, HRC Case #AHpE86-2885 (August 8, 1990); *Elliot v. City of Helena*, HRC Case #8701003108 (June 14, 1989) (age discrimination).

Forseth proved by direct evidence that, but for her internal complaint against Garton, the district probably would not have picked her to transfer to Beartooth. Gary Garlock, James Kimmet, Vicki Smith and Pam Gum all testified, albeit sometimes reluctantly, that the controversy at Skyview over Forseth's allegations prompted consideration of her transfer. The series of discussions about transferring Forseth because of the situation or "mess" at Skyview led Gum and Garlock to select Forseth when a change at Beartooth Elementary School became part of their agenda. After Vicki Smith countermanded the transfer, Gum reinstated it because the district, having selected Forseth for transfer, had matched her to a suitable new position that needed filling. Rather than try to find another good match for Beartooth, Gum proceeded to transfer Forseth. But for the internal complaint against Garton that brought her to the administration's attention, Forseth would not have been the easy "best choice" for Gum in August 1997.

Since Forseth established her *prima facie* by direct evidence, but the

parties do not agree upon the motivation of the district, *Reeves v. Dairy Queen*, 287 Mont. 196, 953 P.2d 703, 706-708 (1998) is not applicable. The district failed to rebut the evidence that Forseth's internal complaint triggered the process of her transfer. Therefore, the district had to prove by a preponderance of the evidence that a retaliatory motive played no role in its decision to transfer Forseth. *Laudert v. Richland County Sheriff's Department*, 7 P.3d 386, 2000 MT 218, ¶41 (2000).

The district produced admissible evidence of legitimate, nonretaliatory reasons for the transfer. Principal Whalen had suggested that Nick's parents wanted to see him become more independent, and a change in the assistant assigned to him might address that concern. The "fit" between Forseth and the supervising teacher at Beartooth led Pat Gum to insist upon the transfer, even after Vicki Smith had countermanded it. Under *Laudert*, this evidence must convince the fact-finder that the district would have transferred Forseth in the absence of her complaint against Garton, or the district's defense fails.

> Accordingly, whether Laudert was entitled to compensatory damages depends on whether RCSD proved by a preponderance of the evidence that it would have made the same decision in the absence of Laudert's disability. ***See*** Rule 24.9.611, ARM; ***see also*** *Price Waterhouse*, 490 U.S. at 244-45, 109 S.Ct. at 1787-88. The hearing examiner found that RCSD proved that Laudert would not have been hired in any event. [Emphasis added.]
>
> *Laudert*, ***supra.***

The fact-finder was not convinced that without the complaint of harassment the district would still have selected Forseth for the transfer to Beartooth Elementary School, for the reasons already discussed. It was the harassment complaint that brought Forseth to the attention of Smith, Kimmet, Garlock and Gum. But for that attention, there is no credible evidence that the district would have selected Forseth, from all of its special education assistants, to fill the opening at Beartooth. In August 1997, when the district decided for a second time to transfer Forseth, Gary Garlock still believed, and told Forseth, that her transfer resulted from the situation at Skyview. The district failed to prove that without the internal harassment complaint it would still have selected Forseth for a transfer in 1997. Forseth proved retaliatory transfer.[15]

Damages Suffered and a Reasonable Remedy for those Damages

The damages the department may award include any reasonable measure to rectify any harm Forseth suffered. §49-2-506(1)(b) MCA. The purpose of an award of damages in an employment discrimination case is to ensure that the

[15] Directing Forseth to training on sexual harassment was not retaliatory. The purpose of that direction was to provide Forseth with more information about how to identify and oppose harassment in the future.

victim is made whole. *P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); ***accord***, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).

Since the law requires "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against,"[16] the power and duty of the department to award money for proven emotional distress is clear as a matter of law. *Vainio,* ***op.cit.***, 852 P.2d at 601. A broad range of damages is available in discrimination cases precisely so that the awards rectify all harm suffered. *P. W. Berry, Inc.,* ***op. cit.***; *Dolan,* ***op. cit.*** Emotional distress recovery is proper upon proof that Forseth suffered emotional distress because of the illegal discrimination. *Campbell v. Choteau Bar and Steak House,* HRC#8901003828 (3/9/93)[17].

Under federal civil rights law, "compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms." *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994) (emphasis added) (increasing award of $125.00 to $3,500.00 for overt racial discrimination). This make-whole remedy is different from the standard used for assessing whether emotional distress is compensable in common law tort cases, but it is consistent with the principles announced in the Montana cases. *Choteau Bar and Steak House,* ***supra***, pp. 3-7 and 39-50.

Emotional distress can be compensable in tort claims where there has been both a substantial invasion of a legally protected interest and a significant impact upon the wronged party. *First Bank of Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989) ***and*** *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984). Infliction of illegal discrimination can *per se* result in emotional distress, based upon the testimony of the victim. *Johnson v. Hale,* 940 F.2d 1192 (9th Cir. 1991) (reversing refusal to award emotional distress damages). The fact-finder can infer that the emotional harm did result from the illegal discrimination. *Carter,* ***op. cit. at note 7***; *Seaton,* ***op. cit. at note 7***; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172 (1985); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, ***rev. denied***, 287 Ore. 129 (1979); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314 (1970).

The law expressly recognizes a person's right to be free from unlawful discrimination. §49-1-101, MCA. Unlawful discrimination is a *per se* invasion of a legally protected interest. The enforcement and remedial provisions of the

---

[16] §49-2-506(1)(b) MCA

[17] ***See*** *Carey v. Piphus*, 435 U.S. 247, 264, n. 20 (1978); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C.Cir. 1984); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7thCir.1974); *Brown v. Trustees*, 674 F.Supp. 393 (D.C.Mass. 1987); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475 (1984); *Hy-Vee Food Stores v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 525 (Iowa, 1990).

Human Rights Act make clear that Montana does not expect a reasonable person to endure any harm, including emotional distress, resulting from a violation of the right to be free from unlawful discrimination. *Vainio*, ***op. cit.***; *Choteau Bar and Steak House*, ***supra***; *Johnson v. Hale*, ***op. cit. and supra***. Thus, in Human Rights Act cases, emotional distress becomes a potential element of damages, and thereby recovery, without the high burden of proof present in other kinds of torts.[18]

The hearing examiner addresses Forseth's emotional distress in the findings and in this opinion at page 18. For that distress, Forseth is entitled to recover the sum of $7,500.00.

Because the parties agreed to extend jurisdiction to prepare for this hearing, a far greater time passed between the transfer of Forseth and this decision than would ordinarily be the case. During that time, Forseth has adjusted to her transfer, and is performing well and enjoying her work at Beartooth. She did not request an order returning her to Skyview, and such relief would be a detriment to both Forseth and the district.

Affirmative Relief

Because the district has the contractual right to transfer staff without consent, there is a risk that other retaliatory transfers may occur. The risk is significant because any staff member who complains of discrimination thereby assures that he or she will come to the attention of members of the administration who make transfer decisions. On the other hand, any staff member who, fearing a transfer, pre-emptively files a complaint to forestall transfer should not hold the district hostage. The only fair way to protect staff without unreasonably restricting the district's rights is to separate the people who respond to internal discrimination complaints and the people who make transfer decisions. At the highest administrative level, the Superintendent will be aware of both pending discrimination complaints and transfer decisions. That official must exercise the utmost discretion and judgment to avoid contaminating either process with information about the other. Below that level, the district can separate the necessary handling of discrimination claims from the equally necessary and proper decision-making about transfers.

[18] Unlike most civil cases, in a Human Rights Act case the award of damages for emotional distress is purely a matter of whether the evidence adduced convinces the fact-finder that the claimant did suffer serious emotional distress. In other civil cases, the issue often involves whether the plaintiff proved the elements to establish liability for intentional or negligent infliction of emotional distress. ***See***, *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995). Liability in discrimination cases does not arise from those freestanding torts. It flows directly from proof of the illegal discrimination, as an element of damages. Thus, the pure fact question for emotional distress recovery involves the degree of actual harm suffered by the claimant, not the degree of egregious conduct on the part of the respondent.

V. Conclusions of Law

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

2. Forseth did not prove that the district unlawfully discriminated against her in employment by any failure of the district's personnel to support or protect Forseth from sexual harassment by Garton. §49-2-303(1)(a) MCA.

3. The district unlawfully discriminated in employment against Forseth when it retaliated against her by transferring her from Skyview High School to Beartooth Elementary School in August 1997 for opposing Garton's harassment. §§49-2-303(1)(a) MCA.

4. The district must pay to Forseth the sum of $7,500.00 for her emotional distress resulting from the retaliatory transfer.

5. Affirmative relief is necessary in this case, to eliminate the risk of further discrimination in the future. §49-2-506(1)(a) MCA. The district must refrain from engaging in any further unlawful retaliatory practices in transferring its staff. Within two months of this decision, the district must submit a draft policy and procedure to the department's Human Rights Bureau, by which members of the administration who do not participate in decisions regarding staff transfers will receive and handle internal discrimination complaints. The Human Rights Bureau can approve the draft or direct amendments therein, and accept, direct amendments in or reject any amended proposals from the district following any initial directions from the Bureau. The department's Human Rights Bureau must approve the final policy and procedure within six calendar months of this decision and upon such approval, the district must immediately adopt the policy and procedure.

6. Pursuant to §49-2-505(7), MCA, Forseth is the prevailing party.

VI. Order

1. The department awards judgment in favor of Billings School District No. 2 and against Joan Forseth, on the charge that the district illegally discriminated against her in her employment because of her sex by failing to support or protect Forseth from sexual harassment by a fellow employee in 1997.

2. The department awards judgment in favor of Joan Forseth and against Billings School District No. 2, on the charge that the district illegally retaliated against Forseth for complaining of sexual harassment when it involuntarily transferred her to an aide position with a different school in August 1997.

3. Billings School District No. 2 must pay to Forseth the sum of $7,500.00. Interest hereafter accrues on this award as a matter of law.

4. The department enjoins Billings School District No. 2 from further discriminatory acts and orders it to comply with Conclusion of Law No. 5.

Dated: November ___, 2000.

_____
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

Certificate of Service

I served copies of this decision by first class mail, postage prepaid, on:

Pierre Bacheller
PO Box 2078
Billings MT 59103

Laurence Martin
Felt Martin & Frazier
PO Box 2558
Billings MT 59103-2558

Signed this ____ day of _____, 2000.

_____
Administrative Assistant
Department of Labor and Industry