BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013593:

KATIE SMITH,	)	Case No. 655-2010
	)	
Charging Party,	)	
	)	
vs.	)	**HEARING OFFICER DECISION**
	)	**AND NOTICE OF ISSUANCE OF**
CYNERGY ADVERTISING, INC.,	)	**ADMINISTRATIVE DECISION**
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Charging Party Katie Smith brought this complaint alleging that her employer, Cynergy Advertising, Inc., discriminated against her on the basis of sex through the conduct of Cynergy's president, John Skousen, by creating a sexually hostile work environment. Smith further alleged that Cynergy retaliated against her by discharging her from employment.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on February 26, 2010. Elizabeth O'Halloran, attorney at law, represented Smith. Despite adequate and timely notice of the hearing, Cynergy did not appear at the hearing. For the reasons stated on the record at the time of hearing, the respondent's failure to appear was inexcusable and willful. Furthermore, for the reasons stated by the hearing officer at the time of the hearing and for the reasons stated in the charging party's response to respondent's objection to hearing, the respondent's due process rights have not been violated.[1] To the contrary, those rights have been scrupulously observed throughout the entirety of this proceeding.

[1]At all times during the proceeding, Daryl Moss has acted as Cynergy's attorney and Cynergy has acknowledged that Moss is its attorney. The chronology of this case demonstrates that after Smith filed her complaint with the Human Rights Bureau, Cynergy was promptly notified of the complaint and voluntarily appeared and filed a response through Moss, on March 23, 2009. A subsequent request for additional information from the Human Rights Bureau resulted in an additional response

At hearing, Smith, Leslie Croot, Sonya Germann, Chris Johnson, Rebecca Morgan, Danica Sandoz, Pia Montana, Wendy Ramos, and Mike Ramos appeared as witnesses and testified under oath. A copy of the hearing officer's docket accompanies this decision.

The preponderant evidence in this matter demonstrates that the respondent created a sexually hostile environment and unlawfully retaliated against Smith. Smith is entitled to lost wages, front pay, and emotional distress damages because of the Respondent's unlawful conduct. The basis for this decision is set out below.

II. ISSUES

A complete statement of the issues in this case is found in the final prehearing order which issued in this matter on February 23, 2010.

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from Cynergy through its attorney on July 22, 2009. A reasonable cause finding issued this matter on September 2, 2009, after which Moss and Cynergy engaged in settlement negotiations which proved unfruitful. Due to the parties' inability to settle the case through mediation, on October 7, 2009, the bureau sent a letter to Cynergy through Moss indicating that settlement was not possible and advising the parties that the "case will be heard in approximately four months and the hearing will be conducted pursuant to §49-2-205, M.C.A." Thereafter, the matter was forwarded to the Hearings Bureau.

On October 14, 2010, Moss spoke to this hearing officer's legal assistant, Sandra Prebil and indicated that he would acknowledge service of the notice of hearing. Based on Moss' representation, Ms. Prebil sent Moss a letter on October 14, 2009 which provided him an acknowledgment of service along with a notice of hearing packet and a postage prepaid envelope addressed to the Hearings Bureau. The letter instructed Moss to return the acknowledgment to the Hearings Bureau in the postage prepaid envelope. Moss received that letter, but did not act on it.

Because Moss did not act on the letter, on November 18, 2009 Ms. Prebil followed up with a telephone call to Moss about the acknowledgment. During the conversation, Moss indicated that he would get the acknowledgment in to the Hearings Bureau. Despite this promise, however, Moss did not return the acknowledgment to the Hearings Bureau. After three more calls to Moss went unanswered, Ms. Prebil spoke to Moss on December 9, 2009 about the failure to return the acknowledgment. Moss again apologized and indicated that he would get the acknowledgment in the mail that day to the Hearings Bureau. As a result of Moss' representation, this hearing officer issued the order setting contested case hearing date and the prehearing schedule on December 10, 2009. This notice was sent to charging party's attorney and to Moss. Both parties received the order no later than December 14, 2009 and from that date were on notice of the hearing date as well as the prehearing deadlines that had to be met.

III. FINDINGS OF FACT

1. Smith moved to Missoula, Montana in 2008 from Michigan. She moved here to start her life over again after an acrimonious divorce in that state. Upon arriving in Missoula, Smith moved in with her friend, Sonya Germann.

2. Smith began looking for full time employment with a graphics design, web firm. She has two associates of arts degrees related to designing and implementing computer web sites.

3. In 2006, Smith had taken part-time employment with a firm known as Excelisis. She was able to do work for this entity in her spare time, so her work for Excelisis did not impede her ability to work full time for another corporation.

4. In September, 2008, Smith interviewed with Cynergy. John Skousen is the president of Cynergy and the majority shareholder of the company. All of his conduct in this case was undertaken in his capacity as CEO of Cynergy and he was, therefore, acting as Cynergy's agent. Cynergy did not maintain any employment policy manuals and did not have a company policy regarding sexual harassment.

5. Skousen interviewed Smith by himself without any other management members of Cynergy being involved. Other managers at Cynergy, such as Chris Johnson and Human Resources Manager Rebecca Morgan found this to be odd. Indeed, Morgan, who is certified in human resources management, advised Skousen against doing this, telling him its was more appropriate to have multiple persons in the interview and to have predetermined questions. Skousen ignored this advice.

6. During the interview, Skousen kept prodding Smith to tell him why she had moved to Montana. Smith felt the question was inappropriate in an interview and she declined to answer. Nonetheless, Skousen continued to prod until Smith reluctantly admitted that she had moved to Missoula to get away from a difficult divorce in Michigan.

7. Skousen immediately hired Smith but told no one, not even his business partner, Mark Ramos, that he was doing so. When Smith arrived at work the next morning to start, the other employees were surprised since Skousen had said nothing to anyone about hiring Smith. Ramos felt that Cynergy had no need to hire at that point.

8. Within 3 weeks time, Skousen asked Smith to accompany him on a work trip to Zion National Park in Utah to do some photography. Smith was reluctant because she was a new employee and there were many other senior employees who could have accompanied him. Other workers were also surprised that Skousen had invited Smith because Smith was such a new worker. Danica Sandoz was surprised that the trip was being undertaken at all since taking photographs of Zion was not pertinent to any projects Cynergy had going on at the time. Johnson thought it odd that the trip was being made and even more peculiar that Skousen had invited Smith, since Smith's job with Cynergy had nothing to do with photography and Smith was such a new employee.

9. Ramos, who also functioned somewhat as a comptroller for the company, was also surprised that Skousen was inviting Smith on the trip. Indeed, Skousen concealed the purpose of the trip from Ramos, telling Ramos that he was going to drive down to Las Vegas to pick up a Cynergy employee. Skousen said nothing about stopping at Zion and taking pictures. It was not until Skousen was on his way back from Zion, having never gone to Las Vegas, that he revealed to Ramos that he was not going down to Las Vegas.

10. Despite Smith's reluctance, Skousen implored her to come along on the trip. Smith told her she was concerned about her pet dog, and Skousen said it would be no problem, the dog could come along with them. Smith finally agreed to go on the trip.

11. A third employee, Colby, also joined them on the trip. The plan was to camp out along the way and to camp out at Zion.

12. After leaving Missoula, the first night the three camped out at Antelope Island State Park near Salt Lake City, Utah. Skousen and Smith went on a walk together and Skousen suggested that they should go camping together more often.

13. On the second day out of Missoula, they reached Zion and set up camp. Smith, Skousen and Colby each had their own tent. While sitting around the campfire than evening, Skousen wanted to know all about Smith's life. After they talked for some time, Skousen hugged her and told her that she was "like a sister to him." He then grabbed Smith's hand without her permission and started to rub her hand. This made Smith feel uncomfortable.

14. Later in the evening, as they were setting up chairs around the campfire, Skousen set his chair right next to Smith's. Skousen grabbed a sleeping bag and put it over both of them. Skousen then began rubbing Smith's back without her consent. He even put his hand under her shirt and continued to rub her back.

15. Skousen's conduct upset Smith and understandably made her feel very uncomfortable. In order to get him to stop, she told him that sitting next to him in that position made her neck hurt so that she could move away.

16. The next morning, a park employee left a ticket on their campsite advising the three that only two tents were allowed on a single campsite. Skousen decided to go to the park lodge to inquire about this and Smith accompanied Skousen to the lodge. On the way there, Smith told Skousen that his conduct of the night before was inappropriate and made her feel uncomfortable. She told him that she was a firm believer in marriage and that Skousen's wife would not like what Skousen had done to Smith the night before. Skousen agreed that his conduct was inappropriate, telling Smith "I feel like shit."

17. In the evening after returning to the campsite, Skousen, Smith and Colby were sitting around the campfire. Skousen suddenly "changed his tune" about the inappropriateness of the back rubs. He went on a rant in front of Smith and Colby about how back rubs were completely appropriate. He then approached Smith and began rubbing her shoulders without her consent.

18. Later that evening, under the guise of working, Smith asked Skousen to come into his tent to look at some video footage that he had shot at the park. While the two were sitting in Smith's tent, Skousen grabbed Smith's hands and put them on his shoulders to force her to rub his back. Skousen also put his hands on Smith's shoulders and rubbed her back. Smith was very uncomfortable and upset by Skousen's conduct.

19. The next day Smith, Skousen and Colby hiked the Zion Narrows. They still had three tents set up. While they were gone, they received another ticket on their camp site indicating that only two tents were allowed. Despite the fact that Skousen had a larger three man tent, he insisted on taking his tent down. This left Colby's one man tent and Smith's three man tent as the only available sleeping arrangements.

20. That evening, Skousen asked "So where am I going to sleep tonight?" Colby said nothing. Smith told Skousen that he could stay in the truck or he could sleep in her tent, but her dog had to stay between her and Skousen.

21. Smith and Colby each retired to their respective tents. Skousen stayed up late and then came into Smith's tent. Despite her earlier admonition, Skousen laid down next to Smith.

22. Smith was sleeping in her jeans and a tank top. Without Smith's consent, Skousen got on top of Smith, straddled her and ripped her tank top off of her, making her completely naked from the waist up. Smith was terrified and wondering to herself how she was going to get out of the situation. Skousen then turned Smith over and pulled her chest to his chest. Smith yelled "No! No! No!. She grabbed her tank top and then put it back on.

23. The next day, Skousen, Smith and Colby left Zion park and drove to a hotel. When they arrived, Skousen told Smith and Colby "this is how its going to go down." Skousen then told Smith and Colby that Skousen was going to get two rooms "since Katie can't keep her hands off of me." Skousen then instructed Smith to get beer . Smith went out, got the beer and then returned to the hotel.

24. When Smith returned to her room, Skousen was there working on his computer. Smith went into the bathroom, took a shower, changed clothes and came out of the bathroom. When she came out, Skousen told Smith "I've already had three beers and you need to catch up." Smith then began to drink a beer. Skousen told Smith to hurry up and drink more beer. Skousen also said to Smith "Katie I just want you to know that back rubs don't mean anything." He then described how his wife would give back rubs to other men and it didn't mean anything and he would give back rubs to his 50 year old mother-in-law and that didn't mean anything.

25. After Skousen made this comment, Smith reminded him that she was not his 50 year old mother in law, she was a 26 year old woman. He said "I don't care what you think, you're going to give me another back rub tonight." Smith then told Skousen that she was not attracted to him. Skousen responded "well that's good because if you were then we would really have a problem." Later, Skousen got up and asked Smith "you're really not attracted to me?" Smith responded "Nope."

26. While they were sitting on their respective beds later that evening, Skousen got up and came over to Smith's bed where she was sitting looking at her

computer. Skousen got behind her and wrapped his legs around her. He then started rubbing Smith's back and placing her hands on his legs. Smith would move away from Skousen and Skousen would again move behind her, put his legs around her, and put her hands on his legs. After three times, he stopped.

27. After the third time, Skousen told Smith "I want to kiss you." Smith told him "absolutely not"and went outside to smoke a cigarette. Skousen followed Smith outside and told her he felt terrible, stating "asking you to kiss me is just as bad as doing it."

28. She went back upstairs to go to bed., Skousen objected, saying she did not want her to go to bed. Skousen, however, did leave. Later, as she was sleeping, Skousen came into her room uninvited and sat down next to her on the bed and began rubbing her back again without her consent. Skousen then told Smith " Katie, I thought I was going to feel guilty today, but I don't feel guilty at all and I wanted to say thank you for being good last night because if you had not been, I would have done everything."

29. Skousen, Smith and Colby then left the hotel headed back to Missoula. When they stopped at a McDonald's for lunch, Skousen told Smith that he loved his wife and that what Skousen had done was "what any man would have done being on a trip with a good looking woman." Later, Skousen further admonished Smith and Colby that none of them was to talk about the trip at work.

30. Smith was understandably quite upset about the ordeal the trip had been. She had made it clear to Skousen several times that she was not interested in his romantic advances yet he persisted. Smith spoke to her roommate and her parents about the ordeal. Indeed, it caused her so much anguish that on one occasion she simply could not come into work and face Skousen.

31. After returning to work, Skousen acted strangely toward Smith. When he was in the office (which was not frequently), he would stare at her all the time. He would also come in and kick her chair and throw candy at her.

32. Skousen also talked to Johnson and admitted to Johnson that he had engaged in inappropriate conduct with Smith while on the trip.

33. In December, 2008, Skousen decided on his own without input from any other employee to discharge Smith on the basis that there was not enough work for

her. Contrary to his assertion, Smith had weeks of work encompassing several projects. Skousen met with Johnson, Sandoz and Morgan to discuss releasing Smith. Johnson, Morgan and Sandoz objected to releasing Smith, pointing out that Smith's talents were a real asset to the company and that Smith was needed. They all suggested releasing another employee. Skousen would hear none of it and insisted on discharging Smith.

34. When Smith came in on January 6, 2009, Johnson indicated that he had to speak with her. Skousen left the building and Johnson informed Smith that she was being discharged. The discharge, having no legitimate basis, was clearly retaliatory. The sole purpose of the discharge was to retaliate against Smith for opposing Skousen's illegal conduct by telling him to stop his conduct.

35. Smith was devastated by the discharge. She began seeing a counselor, Leslie Croot, because of the anguish she was feeling. She completed counseling sessions with Croot from the spring and through the summer of 2009 in order to deal with the emotional distress she felt as a result of Skousen's conduct and her being discharged from her job.

36. As an employee of Cynergy, Smith earned an annualized salary of $31,200.00 per year. She also received a membership to Gold's Gym. She did not receive any other benefits.

37. The respondent's conduct, both through Skousen's conduct at Zion and in discharging Smith, has resulted in substantial emotional distress for the charging party. Skousen's conduct, especially tearing off Smith's shirt, was terrifying and incredibly demeaning for Smith. Her anguish over the incident was prolonged and accentuated when the respondent discharged for no reason other than to retaliate against her for spurning his sexual advances. Her emotional distress is clear not only from her testimony, but also that of her counselor, Leslie Croot and her former roommate, Sonya Germann. A reasonable and appropriate amount for the severe emotional distress that Smith endured at the hands of Skousen is $40,000.00.

38. Smith will be unable to gain her rightful place in the work force for at least a period of one year from the date of this hearing. Reinstatement at Cynergy, in light of Skousen's conduct toward Smith and Skousen's position in the company, is not appropriate. Her ability to reintegrate herself into the work force will be delayed for at least one year. Because of this, front pay for a period of one year in the amount of $31,200.00 is reasonable and appropriate.

IV. OPINION[2]

A. *The Respondent Discriminated Against Smith By Creating A Sexually Hostile Work Environment.*

Montana law prohibits employment discrimination based on sex. §49-2-303(1), MCA. An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), *aff'd sub. nom. Vainio v. Brookshire*, 852 P.2d 596 (1993). As the Montana Supreme Court has explicitly recognized, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" and violates the Montana Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204, (1990) citing *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57,64 (1986) .

The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e ***et seq***. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

A charging party establishes a *prima facie* case of sexual harassment with proof that she was subject to "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). "Harassment need not be severe and pervasive to impose liability; one or the other will do." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted). A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. *at*

[2] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

23; *see also Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998). The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Oncale*, *supra*, *quoting* Harris, 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. *See Ellison*, *op. cit. at* 879.

Unwelcome, intentional touching of a charging party's intimate body areas can be sufficiently offensive to alter the conditions of her working environment, according to the EEOC's Policy Guidance on Sexual Harassment, (*see* 8 BNA FEP Manual 405:6681, 405:6691,Mar. 19, 1990); *accord*, *Barrett v. Omaha Nat. Bank*, 584 F. Supp. 22, 23-24, 30 (D. Neb. 1983) *aff'd*, 726 F.2d 424 (8th Cir. 1984).

Direct evidence "speaks directly to the issue, requiring no support by other evidence," proving the fact in question without either inference or presumption. *E.g.*, *Black's Law Dictionary*, p. 413 (5th Ed. 1979); *see also*, *Laudert v. Richland County Sheriff's Department*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. Direct evidence of discrimination establishes a violation unless the respondent proffers substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert, supra*; *see also*, *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985).

When a charging party establishes a *prima facie* case of sexual harassment with direct evidence, the burden is then on the employer to prove, by a preponderance of evidence, "that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief." 24.9.610(5) A.R.M. *applicable to complaints filed after July 1, 1997*, 24.9.107(1)(b) A.R.M.; *cf.*, *EEOC Compliance Manual*, "EEOC: Policy Guidance on Sexual Harassment", No. 137, No. 4046-47, pp. 104-05 (BNA, April 1990).

Smith's testimony is wholly credible in this matter. Skousen, the respondent's CEO, while on a business trip with Smith, engaged in repeated, unsolicited and unwelcome touching despite Smiths' protestations. His conduct culminated in conduct that approached sexual assault by tearing off Smith's tank top. This evidence is sufficient to demonstrate a prima facie case of a sexually hostile working environment. The respondent, by not appearing at the hearing, did not rebut the prima facie case at all. Therefore, Smith has proven by a preponderance of the evidence that she was subjected to a hostile working environment through Skousen's conduct.

B. *Cynergy Retaliated Against Smith By Discharging Her From Her Position With Cynergy Because She resisted Skousen's Sexual Discrimination.*

Montana law prohibits retaliation in employment practices for protected conduct. 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.*, 2003 MT 287, ¶71, 318 Mont. 35, ¶71, 78 P.3d 857 ¶71. See also, Admin. R. Mont. 24.9.610 (2).

Circumstantial evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group,*, 79 F.3d 859, 868 (9th Cir. 1996).

Here, Smith has proven a *prima facie* case of retaliation in her discharge. Within two month after she spurned Skousen's sexual advances, she was discharged. After returning from the Zion trip, Skousen began to treat her poorly, throwing candy at her and kicking her chair. Skousen insisted on discharging Smith even though she was an integral part of the operation and there were other persons who should have been discharged first as a part of downsizing, but were not. Skousen insisted on discharging Smith even though all of his management group told him he should not and told him that she was a valuable asset to the company. There was no logical or rational basis for discharging Smith other than to retaliate against her for her telling him she did not want to be subjected to his sexual advances. Smith has thus made out a prima facie case of retaliation.

As Smith made her prima facie case, the burden shifted to Cynergy to rebut it by showing a legitimate basis for the discharge. Cynergy did not appear at the hearing and, therefore, did not put on any evidence to rebut the prima facie case. Smith's evidence establishes by a preponderance of the evidence that Cynergy discharged her for spurning Skousen's sexual advances. Specifically, the testimony of Johnson, Sandoz and Morgan conclusively demonstrates that there was no legitimate

basis for her discharge. Smith has thus demonstrated by a preponderance of the evidence that Cynergy retaliated against her in violation of the Montana Human Rights Act.

C. Damages.

The department may order any reasonable measure to rectify any harm Smith suffered as a result of illegal retaliation. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. *E.g., P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523, (1989). See also, 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 (1975).

A charging party who has proved a human rights violation has a presumptive entitlement to an award of back pay. *Dolan*, *supra*. Back pay awards should redress the full economic injury the charging party suffered to date because of the unlawful conduct. *Rasimas v. Mich. Dpt. Ment. Health*, 714 F.2d 614, 626, (6th Cir. 1983). Back pay is computed from the date of the discriminatory act until the date of the final judgment. *EEOC v. Monarch Tool Co.*, 737 F.2d 1444, 1451-53 (6th Cir. 1980).

The charging party may also recover for losses in future earnings, if the evidence establishes that future losses are likely to result from the discriminatory acts. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 439. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a "rightful place" in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *see also*, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2 628 (1993). Prejudgment interest on lost income is also a proper part of the damages award. *P.W. Berry*, *op. cit.*, 779 P.2d at 523; *Foss v. J.B. Junk*, HR No. SE84-2345 (1987).

Smith has demonstrated lost past earnings of $36,600.00 in lost wages from the date of her discharge to the time of the hearing in this matter. She earned only $2,000.00 during that time period due to her inability to find substantial gainful employment in her field. Smith is entitled to lost wages in the amount of $34,600.00 ($36,600 - $2,000.00=$34,600.00). She is also entitled to interest on

the lost wages through the date of decision at the rate of 10% per annum. That interest amounts to $2,203.05.[3]

Smith has also sought an award of front pay. Due to the nature of Skousen's and Cynergy's discriminatory conduct toward Smith as well as Cynergy's assertion that the corporation no longer has employees, she cannot be reinstated at Cynergy and she will be unable to reestablish her rightful place in the work force for at least a period of one year. Front pay equal to one year's salary in the amount of $31,200.00 is reasonable and appropriate in this case. This amount reasonably approximates the loss she will suffer during that time period due to Cynergy's illegal conduct.

Smith is also entitled to damages for emotional distress inflicted upon her as a result of Skousen's and Cynergy's unlawful conduct. The Montana Supreme Court has recognized that compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, ¶ 33, 38 P.2d 836, ¶ 33. The severity of the harm governs the amount of recovery. *Id.* Here, Smith has unquestionably suffered emotional distress. Her testimony adequately proves this point. Smith's humiliation at being subjected to Skousen's conduct during the trip, especially having her top torn off her, coupled with the anguish she encountered after the business trip and compounded by the humiliation of being discharged justifies an award of $40,000.00 in this case.

D. *Affirmative Relief*

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). Skousen's sexually discriminatory and retaliatory conduct was egregious. Affirmative relief in the form of both injunctive relief and training to ensure that the conduct does not reoccur in the future is necessary to rectify the harm in this case.

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[3]The hearing officer calculated interest on the amount of lost wages by determining the daily value of interest on the monthly income lost by the unlawful discharge and then calculating the number of days that have elapsed between the month of lost income and the date of the judgment in this matter, March 25, 2010. This process was applied to each of the months of lost income, and then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income. The daily interest value for the period of lost income following her discharge is $.71 per day (10% per annum divided by 365 days =.00027% x $2,600.00 (the net monthly lost income) =$.71 per day). The interest due on this lost income through March 25, 2010 is $2,203.05.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. Skousen and Cynergy, through Skousen's conduct, violated the Montana Human Rights Act by sexually discriminating against Smith and then retaliating against her by discharging her.

3. Smith is entitled to be compensated for damages due to loss of back pay and expenses she incurred in seeking new employment. She is also entitled to interest on those damages. In addition, she is entitled to front pay through May 31, 2009 and emotional distress damages.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Cynergy must pay Smith the sum of $36,600.00 in damages for lost wages and $2,203.05 in prejudgment interest on those damages through March 26, 2010, as well as $40,000.00 as damages for emotional distress. In addition, Cynergy must pay Smith front pay totaling $31,200.00.

5. The circumstances of the retaliation in this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Katie Smith and against Cynergy Advertising, Inc., for discriminating and retaliating against Smith in violation of the Montana Human Rights Act.

2. Within 90 days of this order, Skousen must complete sixteen (16) hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of discrimination and terms and conditions of employment, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Skousen shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred and that Skousen attended for the entire period. Skousen must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. Cynergy is enjoined from taking any adverse employment action or retaliating in any way against any employee who engages in any activity protected by the Montana Human Rights Act.

4. Cynergy must pay Katie Smith the sum of $108,003.05, representing $34,600.00 in damages for lost earnings, $2,203.05 in prejudgement interest on those lost earnings, $40,000.00 for emotional distress and $31,200.00 in front pay.

Dated: March 26, 2010.

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Elizabeth O'Halloran, attorney for Katie Smith; and Darrel Moss, attorney for Cynergy Advertising, Inc.:

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.