BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014036:

KAYCEE GROVEN,	)	Case No. 1877-2010
	)	
Charging Party,	)	
	)	
vs.	)	ORDER AFTER REMAND
	)	
HAVRE AERIE EAGLES #166,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

The Human Rights Commission has remanded this matter to the Hearings Bureau for "reconsideration of the emotional distress award for the purposes of making Groven whole." The respondent appealed this hearing officer's emotional distress award to the Commission arguing that it was excessive. In opposition to the respondent's appeal, the charging party argued to the Commission that the emotional distress award was supported by substantial evidence and should be affirmed. Despite the charging party's position, the Human Rights Commission found error in the hearing officer's decision on emotional distress, noting that the Commission was "left with the definite and firm conviction that the hearing officer made a mistake in his determination that $75,000.00 is sufficient to compensate Groven for the extreme emotional distress that she experienced over the years of her employment." The commission then ordered this tribunal to reconsider the emotional distress award after concluding that "the record designating the severity of the abuse, the intensity of Groven's suffering, and the length of time that the sexual harassment persisted supports a higher damage award." In addition, the commission affirmed all the hearing officer's findings of fact save that one which found that $75,000.00 was sufficient to compensate Groven for her emotional distress.

After the remand, the hearing officer conferred with the parties regarding the need for additional testimony and /or written or oral argument. The parties advised the hearing officer that they had no further evidence to adduce nor further argument to make as all evidence and arguments regarding emotional distress damages had

been proffered at the hearing. The parties then agreed to submit the matter on the basis of the existing evidence and arguments.

The hearing officer, for the reasons stated below, finds that an award of $100,000.00 in emotional distress damages is appropriate in light of the commission's finding that the $75,000.00 is insufficient to compensate the charging party.

FINDINGS OF FACT:

In conformity with the commission's order, the hearing officer hereby incorporates all his previous findings of fact except for the last sentence of Findings of Fact #48, which, in conformity with the commission's order, is rejected. The following sentence is substituted for that last sentence:

"Under the circumstances of this case, an emotional distress award of $100,000.00 is reasonable and appropriate to compensate Groven for the emotional distress she has endured as a result of the employer's unlawful conduct."

OPINION[1]

As this tribunal previously noted in its hearing officer decision, the department has the authority to award money for emotional distress damages. Vainio v. Brookshire, 258 Mont. 273, 852 P.2d 596 (1993). The freedom from unlawful discrimination is a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. Johnson v. Hale, 940 F.2d 1192 (9th Cir.1991); cited in Vainio, supra; see also Campbell v. Choteau Bar & Steak Hse. HR No.8901003828. (1993). The severity of the harm governs the amount of recovery. Vortex Fishing Systems v. Foss, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3rd 836. An award of emotional distress damages can be based upon humiliation and emotional distress established by testimony or inferred from the circumstances. Foss, supra. While damages need not be proven to a mathematical certainty, there must be some evidence to show that the damages reasonably approximate the harm inflicted upon the charging party as this tribunal can only require reasonable measures to rectify

[1] 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.

pecuniary harm resulting from the discrimination. Mont. Code Ann.§49-2-506(1)(b).

Other than the general precepts set forth above, the hearing officer is unaware of and the parties have not directed this tribunal's attention to any Montana case that sets forth a mathematical formula for quantifying emotional distress damages in Human Rights Cases. Federal cases relating to discrimination have looked to existing decisional law to measure the propriety of the amount of emotional distress damages awarded by the trier of fact. See, e.g., Johnson v. Hale, 13 F. 3d 1351, 1354 (9th Cir. 1994). In Johnson, the 9th Circuit Court of Appeals criticized the trial court for its disregard of case precedent which supported a higher amount of emotional distress than the $125.00 per claimant amount awarded by the trial court. The court of appeals then raised the award to each claimant to $3,500.00, noting that amount"would appear to be the minimum that finds support in recent cases." Id. In order to ensure that an award of emotional distress damages reasonably approximates the harm inflicted upon a charging party in any given case, this hearing officer's practice has been to search for factually similar cases in order to ascertain a reasonable approximation of damages for emotional distress. That methodology was utilized in the original decision in this matter and will be utilized again because it is supported by the case law.

As this hearing officer previously noted, the credible evidence at hearing demonstrated that Groven suffered substantial emotional distress. She was subjected to repeated inappropriate touching and even sexual assault during the trip to Chinook. This had a profound effect on her mental well-being, her relationship with her boyfriend, and her social life. She was forced to leave a job that she loved and by all accounts was extremely good at.

As the hearing officer noted in his original decision, from a factual standpoint, Groven's case is very similar to the case of Benjamin v. Anderson, .2005 MT 123, 327 Mont. 173, 112 P.3d 1039. In that case, the hearing officer imposed an emotional distress award of $75,000.00 when the charging party suffered emotional distress from a direct supervisor whose conduct included sexually assaulting the employee while driving the employee home from a party and the supervisor's use of his management position to brush up against her and touch her unnecessarily while at work. Benjamin, ¶18, ¶24. Groven suffered many of the same facets of distress that the charging party in Benjamin suffered.

In Vainio, supra, the Montana Supreme Court upheld an award of $20,000.00 for a woman who, while employed as a waitress in a casino, was subjected to sexual

harassment by her supervisor "which included, among other things, brushing his body against [the charging party's buttocks, putting his hand up her skirt, grabbing her breasts, and requesting that the [charging party]have sex with him." The court held that the Human Right's Commission award of $20,000.00 "was not clearly erroneous." Vainio, supra, 258 Mont. at280-81, 852 P.2d at 599. While there is no discussion of any of the symptoms the Vainio charging party might have suffered or whether or not the discrimination impacted her other relationships, it is clear that the Vainio claimant was subjected to the similarly egregious conduct that was inflicted upon Groven.

Aside from Benjamin and Vainio, the hearing officer's research has discovered only two other Montana Human Rights cases that even approach the amount of the award originally proposed by the hearing officer. The first is Lock and Struna v. Portlock Corp., HR Bureau Case Nos. 0071012074 and 0071012073 (2008), where the hearing officer ordered an emotional distress award of $75,000.00 to each of two charging parties. In that case, the charging parties were at various times during their two year employment as housekeepers for the respondent required as a condition of employment to massage the respondent while he was nude and to masturbate the respondent. Lock and Struna decision, page 12. In addition to the discrimination, the employer retaliated against the charging parties after they reported the respondent's conduct to their immediate supervisor (not the employer) by firing the charging parties. Id at page13. As the hearing officer in that case noted:

> Lock and Struna sustained emotional distress and damage by being subjected to [the respondent's] sexual harassment and retaliation. [The respondent] took advantage of their status as single mothers struggling to raise children and required them to perform degrading and highly offensive actions in order to keep their jobs, firing them when they finally did refuse to perform further and complained to [the respondent's] management and employees. The entirely foreseeable effect on these women was great humiliation and embarrassment.

Lock and Struna, Page 14.

The second case which the hearing officer has uncovered is Wilson and Schumacher v. Diocese of Great Falls-Billings, St. Lukes Parish and Father Pat Zabrocki, HRB Case Nos. 0049011005-0049011010 (2008). That case involved two female employees from a church in Great Falls, Montana who were subjected to retaliation from their pastor after they discovered and reported that the pastor was viewing pornographic material on a computer he shared with the charging parties.

The pastor cut their work hours and the church counsel began to shun the charging parties. The emotional distress described in that case, which included the charging parties' substantial distress from the fact that the pastor was retaliating against them over a period of time by cutting their hours in retaliation for their reporting of his conduct and the realization that their church was not going to do anything to stop the conduct, resulted in an award of $100,000.00 to each charging party.

Turning back to Groven's case, the case law cited by the parties at hearing and the case law revealed to the hearing officer through his own research seems to support the original determination of an award of $75,000.00 for emotional distress. Benjamin, supra, Vainio, supra and Lock and Struna, supra. However, as the commission has determined that the award is insufficient, the hearing officer is constrained to increase the award. At hearing, Groven requested an award of $100,00.00 in emotional distress damages. The Human Rights Commission's findings in Wilson and Schumacher (which was not cited to this tribunal by Groven's counsel at the hearing or during post-hearing briefing) regarding the emotional distress visited upon those charging parties certainly supports an award of $100,000.00 in this case if such distress supported that amount in Wilson and Schumacher. Wilson and Schumacher suffered a substantial amount of distress both in their work relationships and in their private and church relationships. And they were not subjected to the repeated offensive touching endured by Groven in this case. Combining both the offensive touching and the other emotional distress suffered by Groven, an award of $100,000.00 in emotional distress is merited in this case.

ORDER:

In light of the foregoing, Paragraph 2 of the Hearing Officer's decision is modified to read as follows:

Within 30 days of the date of this decision, Respondent shall pay to Groven the sum of $218,502.47, representing $44,069.00 in lost wages and benefits to date, $5,187.47 in prejudgment interest, and $100,000.00 emotional distress damages. In addition, Respondent shall pay Groven $69,246.00 in front pay damages in monthly payments as follows: Beginning on June 1, 2011 and continuing through November 1, 2011, Respondent shall pay Groven $2,187.00 on the first of every month. Then, beginning on December 1, 2011 and continuing through November 1, 2012, Respondent shall pay Groven $2,288.00 on the first of every month. Then, beginning on December 1, 2012 and continuing through November 1, 2013, Respondent shall pay Groven $2,389.00 on the first of every month.

DATED: September 28, 2011

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

* * * * * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Phil Hohenlohe, attorney for Kaycee Groven, and Lindsay Lorang, attorney for Havre Eagles Club No. 166:

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 original transcript is in the contested case file.