BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013674:

CATHY MORRIS,	) Case No. 823-2010
	)
Charging Party,	)
	)
vs.	) HEARINGS OFFICER DECISION
	) AND NOTICE OF ISSUANCE OF
IBEW 1638,	) ADMINISTRATIVE DECISION
	)
Respondent.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Cathy Morris brought this complaint alleging that her employer, IBEW Local 1638 (IBEW), discriminated against her on the basis of sex by creating a sexually hostile working environment.

Hearings Officer Gregory L. Hanchett convened a contested case hearing in this matter on March 31 and April 1, 2010 in Forsyth, Montana. Patricia D. Peterman, attorney at law, represented Morris. Tom Buescher and Stephen Mackey, attorneys at law, represented IBEW.

At hearing, Morris, Rick Nees, Tessa Ash, Duane Morris, Brett Bowen, Jennifer Conwell, Tom Jankowski, Bob Reid, Fritz Mehling, Casey Steffans, John Lei, Diana Nees and Pat Nees testified under oath. Charging Party's Exhibits 2, 3, 5, 6, 7, 15, 16, 17 and Respondent's Exhibits 101, 102, 103, 104, 105, 107, 109, 110, 111, and 113 were admitted. Charging Party's exhibits 14 (Patrick Nees' deposition) and Charging Party's Exhibit 19 will not be admitted for the reasons stated below.

The parties submitted post-hearing briefs, the last brief which was timely received in the Hearings Bureau on October 18, 2010 and at which time the matter

was deemed submitted for final decision.[1] Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearings officer decision is rendered.

II. ISSUES

A complete statement of issues is found in the final pre-hearing conference which issued in this matter on March 24, 2010.[2]

III. FINDINGS OF FACT

1. IBEW 1638 employed Morris as an assistant to the IBEW business manager at the IBEW office in Colstrip, Montana. Except for short periods of time when a part-time person archived records in the back room, Morris was the only woman in the office and was the assistant to the business manager for the union and assisted the IBEW Executive Board which was all male.

2. John Lei served as the business manager for IBEW until 2004. He hired Morris for the job of assistant to the business manager in July, 2000.

3. Lei had a very good working relationship with Morris. He found that Morris did a great job, she worked hard to get everything done and she was truthful and trustworthy.

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[1]The charging party provided an unofficial transcript which both parties have used in reciting to the record in this matter. Recording file Number 3 was not transcribed as part of that unofficial transcript. Of that over one hour recording, the last 25 minutes were lost and the record reconstructed as noted in this tribunal's June 7, 2010 Order. The balance of the recording is available to be transcribed but was not transcribed by the charging party. The hearings officer presumes that the parties intend to utilize at least in part that unofficial transcript in any appeal to the Human Rights Commission. Based on this assumption, the hearings officer has incorporated appeal rights into this decision that presume the presence of a transcript and do not advise the parties of the need for any appealing party to pay for the preparation of a transcript. The commission, however, may require that the available recordings be transcribed in any appeal.

[2]In her post-hearing brief, Morris listed as an issue the question of whether there had been retaliation in this case. Morris, however, filed no retaliation charge against and mentioned nothing about it in her November 30, 2009 preliminary pre-hearing statement. She has not argued in any of her final post-hearing briefing that she was subjected to retaliation. At the hearing in this matter, she attempted to argue retaliation as a separate basis for imposing liability, but that effort was truncated when the hearings officer sustained a relevance objection to questioning in that area. Morris' failure to file a timely retaliation charge precludes its consideration in this matter. Mont. Code Ann. § 49-2-501, Centech Corp.v.Sprow, 2006 MT 27, ¶26, 331 Mont. 98, 128 P.3d 1036.

4. The IBEW office in Colstrip never developed or maintained a sexual harassment policy. In addition, there was never any type of grievance procedure for sexual harassment within the local union. Likewise, there is no evidence that any type of procedure for filing a grievance or complaining to someone other than her supervisor was ever relayed to Morris.

5. Lei left his position in 2004 to become the an international representative to the International Brotherhood of Electrical Workers international union (international). In his position as international representative, Lei is aware that it is the employer's obligation under the law to maintain a workplace free of sexual harassment.

6. Although the local has no policy on sexual harassment, the international does. The international's training manual recognizes that sexual harassment is against the law, and that propositioning, explicit jokes, sexual innuendos, discussing sexual activity, reading or displaying sexually suggestive materials, demeaning or inappropriate terms are sexual harassment. The manual also indicates that victims may be reluctant to complain about sexual harassment because they may feel humiliated and afraid or because they may be afraid of losing their jobs.

7. Pat Nees became Morris' supervisor when he took over the position of business manager after Lei left. Because Pat Nees had no experience with being a business manager, Cathy Morris did whatever she could to help him with the job and was an asset to Nees.

8. Ron Chase has been the president of IBEW for four years . The IBEW Executive Board members include Bob Reid, Bret Bowen, Local 1638 treasurer, and Tom Jankowski, Local 1638 recording secretary/chief steward.

9. Pat Nees and Cathy Morris had adjoining work spaces and shared the same e-mail. All e-mails that went to Ness's computer also went to Morris' computer. Morris had no ability to cut off or redirect e-mails directed to Nees without also cutting off Nees' e-mail.

10. From 2005 through the date that Morris left her employment with IBEW in March, 2009, Rick Nees and Mike Nees would send pornographic e-mails to Pat Nees at the Colstrip IBEW office. Exhibit 7, the Mardi Gras video, was typical of e-mails Pat Nees would receive from Rick and Mike Nees and which were also sent to Morris' computer on an ongoing basis from 2005 to 2009. The Mardi Gras video (which the hearings officer has reviewed) establishes that such videos were indeed

pornographic and would be highly offensive to any reasonable woman in the workplace. Morris also was subjected to an e-mail showing a man "screwing a donkey" and a man and woman "screwing on a bridge." Testimony of Cathy Morris. As the respondent has conceded, and the hearings officer finds, the e-mails were both pervasive and highly offensive.

11. There was no way for Morris to know for sure which e-mails were offensive or pornographic. If Morris could tell from the e-mail title that it was inappropriate or offensive, she would delete the e-mail. However, as even Nees conceded, the e-mail title might not foretell its pornographic or offensive nature and the recipient could not tell what was in the e-mail until it was opened. Morris could not know for sure what was in the e-mail until the e-mail was opened.

12. In addition, while some of the e-mails came as attachments and had to be opened, others automatically opened up when the e-mail was received on Morris' computer. Therefore, it was not within Morris' power to avoid the e-mails.

13. Pat Nees knew the e-mails were inappropriate in the work place and knew that the e-mails were going to Morris. He knew they were objectively offensive and Morris let him know that the e-mails were embarrassing, raunchy and gross. Morris also told Pat Nees to tell his brother to stop sending the offensive e-mails to the office.

14. Pat Nees' wife, Diana Nees, worked for a brief time at the union office in late 2008. She had the misfortune of opening one of Mike Nees' explicit e-mails and was embarrassed by its content. Morris told her that she had to be very careful of what she opens from Mike Nees.

15. Shortly after Nees came to work in 2005, he began to talk to Morris about his sex life with his wife. This conversation made Morris uncomfortable. On one occasion, Nees asked Morris if she would go to bed with someone as good looking as him. Morris was embarrassed to respond. She found it difficult to say anything because he was her boss and she thought "she would lose her job if she raised heck."

16. During conversations with Morris about PPL's Human Resources Officer Barbara Ward, Nees would refer to Ward as a "fucking cunt." Nees also referred to Tresa Cody, a union member employed at PPL as " a drama cunt queen."

17. On February 19, 2008, Pat Nees, Morris and other members of the IBEW negotiating team went over to the Colstrip PPL plant to participate in contract negotiations. While walking into the plant, Patrick Nees put his arm around Morris and called her "schweetie" (something akin to calling her "sweetie"). Morris told him to stop putting his arm around her and to not call her that anymore. Nees complied.

18. Nevertheless, the barrage of pornographic and explicitly sexual e-mails never stopped and continued until the day she left her job. In addition, Nees continued to use the term "fucking cunt" when referring to PPL's female human resources officer in his conversations with Morris.

19. Morris was deeply offended when Pat Nees would call Barb Ward a "fucking cunt." Further, when he called Tresa Cody a "drama queen cunt," Morris was embarrassed "because that is not how you talk in an office about other employees." Tr. 18.

20. On one occasion during a negotiating session at the IBEW office, Pat Nees, Tom Jankowski, Ron Chase and Rob Messner were watching a sexually explicit e-mail on the union office's computer screen. When Morris came into the office, one of the group asked her about whether she was okay with the video. Morris told them that some of the videos were disgusting while others were cute.

21. Morris complained to Bob Reid and Ron Chase about the sexual harassment (the continuing barrage of e-mails and Pat Nees' use of language) in February, 2008 and February 2009. Reid told her he would talk to Pat Nees and get back to her. No action was taken on her complaints.

22. Duane Morris, Cathy Morris' husband, noticed a change in Cathy Morris when she started working for Pat Nees. Shortly after Pat Nees took over the office, Cathy Morris would come home upset, angry and irritable. Cathy would tell Duane about the e-mails, Pat Nees' foul language and that Nees had been talking to her about Nees' sex life.

23. Cathy Morris talked with her husband about the e-mails because they were disgusting. Morris was very embarrassed by the explicit e-mails, it would almost make her sick to her stomach. Duane Morris offered to talk to Pat Nees and put a stop to it, but Cathy Morris told him not to do that because she did not want to lose her job.

24. For a period of about 2 ½ to 3 years before she filed her complaint, Morris talked with Tessa Ash (Morris' niece) about the things happening in the office. Morris talked to Ash about the e-mails and some of the things that Pat Nees would say to her and Morris would become upset and angry.

25. By March, 2009, Morris determined it was not going to do her any good to complain. Her complaints to Reid in February 2008 and February 2009 had not been acted upon.

26. On March 11, 2009, Morris walked into Nees' office to give him a check. She noticed that Nees had been keeping track of Morris' hours. Morris was upset that Nees had been keeping track of her hours. At that point, the ongoing sexual harassment and the fact that Nees had been keeping track of her hours pushed Morris over the proverbial "edge" and she quit her job.

27. At the time she quit, Morris she wrote out a check for herself for her unused FLEX time. She also talked to Bob Reid, Bret Bowen and Tom Jankowski to advise them that she had quit. At that time she reiterated her concerns to all three men about Pat Nees' sexual harassment, telling both men about the pornographic e-mails and Pat Nees' continued use of vulgar language (the repeated references to Barb Ward and Tresa Cody).

28. When Morris quit, Nees was involved in a negotiating session at the PPL plant. During the session, a PPL employee informed him that Morris had quit. After the conclusion of the session, Nees went back to the IBEW office.

29. Shortly after leaving, Bowman instructed Nees to stop payment on Morris' check because Bowman and Nees could not ascertain that Morris had correctly paid herself. Approximately two weeks later, IBEW issued a new check for the same amount to Morris.

30. On March 16, 2009, five days after Morris had left, IBEW hired a new assistant to the office manager, Casey Steffans. When Steffans looked at her computer, the Quick Books program and some other templates had been removed.

31. Jennifer Conwell investigated Morris' complaint for the Montana Human Rights Bureau. Pat Nees told Conwell that he would "warn people that came to the office that there was going to be some pretty rough language used so don't be offended, it's just him, you know, he, he would scream at his computer." "He'd get

very frustrated at his computer, he would use very bad language in that tirade or whatever you might call it, but that's just normal." Tr. 103.

32. Conwell also interviewed Reid. Reid told Conwell that, on the day Morris quit, she had told him about the pornographic e-mails and foul language Pat Nees used in the office, that Pat Nees was calling women derogatory terms, as well as screaming at his computer, and just generally using vile language. Bret Bowen told Conwell that Morris had called him on the day she quit and told Bret Bowen about the e-mails sent by Pat Nees' brother.

33. At the time she left her position at IBEW, Morris earned $28,788.00 per year. She also accumulated FLEX vacation time . IBEW furnished her with a life issuance policy with a death benefit of $30,000.00. She also had a SEP plan to which IBEW contributed $4,030.00 during her last year of employment.

34. Morris is due $43,182.00 in back pay and $4,640.30 in interest on that back pay.

35. In light of the conduct of Nees and the present animosity that exists between Nees, the Local Union and Morris, reinstatement in the position that Morris held is not feasible.

36. Substantial animosity exists between Morris and IBEW and Pat Nees. This is due to the sexually hostile working environment and the animosity generated as a result of Nees' and IBEW"s false assertions that Morris had been dishonest. The animosity between Morris and IBEW is so great that reinstatement is not feasible in this matter.

37. Given Morris' training as an accountant, she should be able to restore her rightful status in the workplace within one year. Because reinstatement is not possible and because Morns should be able to restore her rightful place in the work force within one year, Morns is entitled to one year of front pay in the amount of $28,788.00.

38. Affirmative relief in the form of injunctive relief prohibiting future conduct and requiring IBEW Local 1638 to develop reasonable policies against sexual harassment, procedures for reporting such harassment and providing training to IBEW Local 1638 officers, managers, office supervisors and office personnel on sexual harassment is necessary in order to eliminate the discrimination in this case.

IV. OPINION[3]

A. Evidentiary Issues Raised At Hearing

1. Claim For Sanctions Based On Destruction Of Evidence.

The charging party has again requested that liability be imposed on the respondent due to the respondent's deletion of the offending e-mails close in time to Morris' resignation. The hearings officer declined to do so for the reasons stated in his final pre-hearing order. Nothing at the hearing has convinced the hearings officer that sanctions are warranted because the respondent has stipulated that the e-mails were both offensive and pervasive. In light of this, the hearings officer declines to impose sanctions against the respondent for the deletion of the e-mails.

2. Wholesale Admission of Pat Nees' deposition.

The charging party argued that the entirety of Pat Nees' deposition should be admitted into evidence. The charging party was permitted to impeach Nees with his deposition testimony at hearing and did not and does not suggest that any material matter of the deposition was not covered at the hearing through either direct or cross examination testimony. The respondent has objected to the admission of Nees' testimony.

Rule 32(a)(2), M. R. Civ. Pro. provides that the deposition of an officer, director or managing agent may be used for any purpose. "Any purpose," however, cannot mean that a deposition is admissible without regard to other considerations such as relevance or preventing the admission of cumulative evidence. Here, the admission of the deposition would add nothing to the proceeding that was not accomplished through the hearing testimony and the opportunity to impeach Pat Nees with his deposition. Thus, the hearings officer declines to admit wholesale the deposition of Pat Nees because it would be cumulative. Cf., Walsh-Anderson Co. v. Keller, 139 Mont. 210, 362 P.2d 533 (1961); Jim's Excavating Serv., Inc. v. HKM Associates, 265 Mont. 494, 878 P.2d 248 (1994).

[3] 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.

3. Admission Of Exhibit 19

At the hearing, the respondent objected to the admission of Exhibit 19 which is a letter that Pat Nees sent to the State of Montana Unemployment Insurance Division in response to Morris' claim for unemployment insurance. Nees admitted at hearing that he authored the letter and the statements in the letter are wholly consistent with statements that Nees made at hearing. Impeachment of a witness with prior inconsistent statements is permitted. Where a witness testifies consistently with prior statements, no impeachment purpose is served in admitting the prior statement and the document has no relevance. State v. Coloff, 125 Mont. 31, 36, 231 P.2d 343, 345 (1951). Here, the letter has no relevance since Nees testified consistently with his statements in the letter. Therefore, Exhibit 19, not being relevant, is not admissible.

B. The Respondent Discriminated Against Morris By Creating A Sexually Hostile Work Environment.

The charging party argues that she was subjected to a sexually hostile working environment because of repeated unwanted exposure to pornographic e-mails and Nees' repeated use of the terms "fucking cunt" and "drama cunt queen" when discussing other women with Morris. The respondent, who does not dispute that the e-mails were both offensive and pervasive on an objective level, argues that Morris' testimony is not credible, that she was not offended by the e-mails, and that Nees did not use the term "cunt" when speaking about other women to Morris. As the charging party correctly notes, this case really boils down to the question of whether the complained of conduct was unwelcome by the charging party.

Montana law prohibits employment discrimination based on sex. Mont. Code Ann. §49-2-303(1). The Montana Supreme Court has explicitly recognized when a supervisor 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). A charging party makes a prima facie showing of sexual harassment when she proves the offending conduct (1) was not welcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive environment, and (4) the conduct is imputable to the employer. EEOC v. Fairbrook Medical Clinic, 609 F.3d 320, 327 (4th Cir. 2010); Stringer -Altmeir v.Haffner, 2006 MT 129, ¶22, 332 Mont. 293, 138 P.3d 419.

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). As the Montana Supreme Court has recognized:

> Harassment on the basis of sex is a violation of sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Harrison v. Chance, 244 Mont. 215, 221, 797 P.2d 200, 203-04 (1990), citing 29 C.F.R. § 1604.119a) (emphasis added).

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). Here, the respondent has conceded that the e-mails were both offensive and frequent.

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. Benjamin v. Anderson, 2005 MT 123, ¶53, 327 Mont. 173, 112 P.3d 1039; 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 23; see also Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998). There is both a subjective and objective component to the severity of the harassment. The charging party must find it offensive and the conduct must also be offensive from an objective viewpoint. Harris, 510 U.S. at 21-22. 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 v. Sundowner Offshore Services, Inc., 523 U.S. 7581 (1998). It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. See Ellison, supra, 924 F.2d at 879. In addition, it is not necessary that a plaintiff enumerate with precision the exact number of times that she was subjected to offensive conduct in order to demonstrate the pervasiveness required to prove a hostile working environment. Testimony that the plaintiff was subjected to numerous instances of offensive conduct can be sufficient to show that the conduct was pervasive. Torres v. Pisano, 116 F.3d 625, 634-635 (2nd Cir.1997).

Not surprisingly, many courts have found that "the mere presence of pornography in the workplace is sufficient to alter the status of women in that workplace and is relevant to assessing the objective hostility of the environment." See, e.g., Adams v. City *of Gretna, 2009 U.S. LEXIS 49565 (E.D. Louisiana, 2009), citing Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007) (per curiam); see also Waltman v. Int'l Paper Co., 875 F.2d 468, 478 (5th Cir. 1989); Lee v. City of Syracuse, 603 F. Supp. 2d 417, 438-39 (N.D.N.Y. 2009); Avery v. Idleaire Technologies Corp., No. 04-312, 2007 U.S. Dist. LEXIS 38924, 2007 WL 1574269, at *18 (M.D. Tenn. May 29, 2007); Greene v. A. Duie Pyle, Inc., 371 F. Supp. 2d 759, 763 (D. Md. 2005). Indeed, as the district court judge remarked in City of Gretna, "[a]lthough most cases involving pornography in the workplace include other elements such as threatening or offensive remarks, . . ., there is no necessary reason why the presence of pornography alone could not create a hostile work environment so long as the pornography was sufficiently severe or pervasive." Id.

In this case, Morris was relentlessly subjected to explicitly pornographic e-mails through no fault of her own. Morris' testimony establishes that she found the e-mails subjectively offensive. Her testimony in that regard is corroborated by the testimony of Diana Nees who testified that Morris had told her to be careful of e-mails that she opened from Mike Nees. The objective offensiveness of the e-mails is patent not only from the content but also from Diana's and Cathy's reaction to the e-mails. Diana Nees, the only other woman who ever worked in the office, testified that she was embarrassed by some of the e-mails she opened.

Morris worked at a computer where, because of the e-mail set up, she would necessarily receive all the pornographic e-mails that Pat Nees received from Rick Nees and Mike Nees. She was required to use that computer to do her job. Simply telling her to delete the e-mails she found offensive was no solution at all since sometimes the title would not indicate the pornographic nature of the e-mail and sometimes the pop up that came with the e-mail would display the offensive material. These facts

are alone sufficient to demonstrate both a subjective and objective hostile working environment. C.f., Wilson and Schumacher v. Diocese of Great Falls, H.R. # 0049011005 (2006)(in determining that elements of retaliation were proven, the Montana Human Rights Commission held that women charging parties subjectively and objectively believed they were subjected to a hostile working environment because of the quantity and persistence of the pornography and the offensive content of the pornography despite the fact that the e-mails were not directed to them.) Taken in conjunction with Nees' continuing exclamations in Morris' presence that Barb Ward was a "fucking cunt," there is no question that Morris was subjected to a hostile working environment. The question that remains is whether that conduct was unwelcome.

Morris' testimony establishes that she did not welcome the e-mails or Pat Nees' comments. Morris testified at hearing that she told Nees to stop the e-mails. She complained about the e-mails to Reid on at least two occasions before she quit. Moreover, she told Nees that the e-mails were raunchy and gross. While she may herself have used an invective like the word "cunt" on one occasion (as suggested by Lei's testimony) under the circumstances of this case it is not sufficient to show that she welcomed the conduct to which she was subjected. As the charging party correctly notes in her post-hearing briefing, the fact that a charging party may use foul language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome conduct. Swentek v. US AIR, Inc., 830 F. 2d 552, 557 (4th Cir. 1987). In this case, at most, Morris' occasional use of such language might affect her credibility with respect to how offensive she perceived Pat Nees' use of the word "cunt" or "fuck" to be. It does nothing to offset her credible and wholly understandable offense at the continuing barrage of pornographic e-mails.

The hearings officer is persuaded that Morris did not welcome the e-mails. Her testimony that she complained to Nees and Reid demonstrates it was unwelcome. Even if that portion of her testimony were discounted, however, she told Nees that some of the e-mails were raunchy and some were gross. She had no ability whatsoever to stop the barrage of e-mails. Her employer gave her no real option to resolve the problem and he took no steps to stop the problem until after Morris had quit her job. Morris has proven that she was subjected to a hostile working environment.

In arguing that it has no liability for a hostile working environment, the respondent argues that the e-mails were not directed at her because of her sex, that Pat Nees offered to have the e-mails stopped but Morris refused, and that she made no effort to filter the e-mails on her computer "even after Mr. Nees directed her to

view emails in a way that would not show any text unless the e-mail was opened." Respondent's opening brief, page 3. None of the arguments is persuasive.

The first argument is problematic because to adopt it would ignore the teaching of cases like City of Gretna, supra, which have specifically held that the mere presence of pornography in the workplace is sufficient to alter the status of women. If adopted, respondent's position would exempt an employer who regularly sent unwelcome pornography to his female employees if the employer utilized the simple expedient of sending it to both male and female employees. Moreover, both the commission and the Montana Eighth District Court have rejected the respondent's argument. Wilson and Schumacher v. Diocese of Great Falls, H.R. # 0049011005 (2006), aff'd sub. nom., Diocese of Great Falls v. Wilson and Schumacher,207 Mont. Dist. LEXIS 111 (January 3, 2007)(holding the offending supervisor, whether he intended or not that the female charging parties' view the pornographic e-mails left on the computer, knew or reasonably should have known that the charging parties might view such information).

The second and third arguments contend that Morris' testimony that she told Nees to stop the e-mails is not credible. The hearings officer does not agree. Morris' testimony was impeached to an extent. However, she did state in her log that "I have told him [Nees] numerous times it is vulger and offensive and to have his brother quit sending it." Exhibit 104, page 7. She certainly told Diana Nees that Diana had to be careful about what she opened. She also told Pat Nees that while some were cute, others were raunchy and gross. All of this, taken in conjunction with the clearly pornographic and pervasive nature of the e-mails corroborates her testimony that she told Nees to stop. Morris' testimony, therefore, is credible.

The third argument is also problematic because it ignores the evidence that the e-mails would sometimes come in the form of a pop-up which no e-mail user could stop. Pat Nees did not take the simple expedient of stopping the e-mails from coming in to the office by asking the purveyors to stop sending the e-mails despite Morris' complaints. Morris has proven that the e-mails were not welcome.

As Morris' supervisor and manager of the office, Pat Nees had the responsibility to stop the e-mails. He did not do so and, as mentioned above, essentially put the onus on Morris to stop the e-mails even though she had no control over them. The office had no policy on sex harassment and Morris had no way to grieve or otherwise go around Pat Nees to address the problem. Indeed, when she complained to Reid and Bowen, her complaints fell on deaf ears. Therefore, the sexually hostile working environment is attributable to the employer.

In sum, there is no dispute that Morris was the member of a protected class. The credible evidence shows that Morris was subjected to a hostile working environment for a period of years, both through the Pat Nees' words and through the relentless pornographic e-mails which Ness took no steps to stop. Morris did not welcome the conduct. Pat Nees was Morris' supervisor and there was no sexual harassment policy to prevent the conduct and no protocol in place to permit Morris to deal with the problem other than through Pat Nees. And when Morris attempted to do so by reporting it to other Board members (such as Reid), her complaints fell on deaf ears. Morris has proven by a preponderance of the evidence all elements of her case and, therefore, has proven discrimination as a result of a sexually hostile working environment.

C. Damages.

The department may order any reasonable measure to rectify any harm Morris suffered as a result of the illegal discrimination. 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). Once a charging party has established a prima facie case of discrimination and the damages that are due as a result of that discrimination, the burden shifts to the respondent to show by clear and convincing evidence that a lesser amount is proper. P.W. Berry, op. cit., 239 Mont. at 187, 779 P.2d at 524.

To determine whether a charging party has been subjected to a constructive discharge as a result of a hostile working environment, a tribunal must look at the totality of the circumstances. Martinell v. Montana Power Company, 268 Mont. 292, 315, 886 P.2d 421, 435. A charging party's evidence of constructive discharge must be supported by more than an employee's subjective judgment that working conditions are intolerable. Id.

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, op. cit. 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).

The respondent makes two arguments in opposition to the charging party's efforts to obtain back pay and front pay. First, the respondent argues Morris failed to prove that she was subjected to a constructive discharge because she quit for reasons unrelated to the discrimination.[4] This argument relies in great part on the respondent's assertion that Morris' testimony is not credible.

Morris' testimony is sufficient to establish a causal link between the hostile working environment and Morris' quitting. Morris specifically testified that Pat Nees' keeping track of her hours was not the sole reason for her quitting. Rather, it also included the sexual harassment (which included the e-mails) and the asking to "go to bed with him." The hearings officer finds that Morris' testimony that she quit at least in part because of the harassment is credible. Furthermore, the pervasive and the patently offensive nature of the e-mails themselves, combined with Nees use of the term "cunt" and other obscenities provides the objective proof necessary to show that a constructive discharge occurred. Morris' evidence establishes the causal link between the hostile work-environment and the damages claimed by Morris.

As a second argument, the respondent contends that Morris' conduct of allegedly sabotaging the computer (by deleting programs) immediately before she left is the type of conduct that will result in precluding an award of back pay and front pay because such conduct would have resulted in her termination in any event. The

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[4]The hearings officer does not understand the respondent's argument to be a lack of notice that the charging party was seeking back pay and front pay. While she did not articulate the issue as one of a constructive discharge, she has plainly argued throughout this case that she is entitled to back pay and front pay. See, e.g., Charging Party's preliminary pre-hearing statement, pages 6-7, Charging Party's final pre-hearing statement, page 9, and this Tribunal's Final Pre-hearing Order, page 7. The respondent has been on notice that the charging party sought back pay and front pay since the inception of the litigation in this matter.

respondent must prove this by a preponderance of the evidence. See generally, Admin. R. Mont. 24.9.611, Laudert v. Richland County Sheriff's Department, 2000 MT 218,¶41, 301 Mont 114, 7 P.3d 386.

The hearings officer rejects the second argument for two reasons. First, such a defense at most cuts off only front pay. McKennon v. Nashville Banner, 513 U.S. 352, 360 (1995)(As a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy). Secondly, the evidence does not preponderantly point to Morris deleting programs as the respondent suggests. Missing from this scenario is a motive for Morris to do so. There is no evidence that she had anything to hide and for that reason deleted programs. Furthermore, while Morris was certainly upset that her pleas to stop the pornographic e-mail went unheeded, there is no substantial basis from which the hearings officer can find that Morris out of vindictiveness deleted programs. There is no history or other evidence to suggest that Morris would react in this fashion. The respondent has not demonstrated any other plausible basis to believe that Morris willingly and intentionally deleted the programs from her computer. Moreover, it is clear that other persons (for example, Pat Nees) had access to Morris' computer after she left. For these evidentiary reasons, the hearings officer rejects the argument that Morris is not entitled to damages based on allegedly sabotaging her computer.

In light of the evidence presented, Morris has demonstrated that she was subjected to a constructive discharge. She is entitled lost past earnings of $43,182.00 in lost wages from the date of her discharge to the time of the hearing in this matter ($2,399 per month x 18 months= $43,182.00). 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 $4,640.30.[5]

Morris has also sought an award of front pay. Due to the nature of IBEW's discriminatory conduct toward Morris, and that fact that Nees continues to be the office manager of the local IBEW, she cannot be reinstated at IBEW. Furthermore,

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[5]The hearings 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, January 14, 2011. 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 $.65 per day (10% per annum divided by 365 days =.00027% x $2,399.00 (the monthly lost income) =$.65 per day). The interest due on this lost income through January 14, 2011is $4,640.30.

given the rural nature of the area and the paucity of similar jobs, Morris will be unable to establish her rightful place in the market for at least a period of one year. Morris has argued for an award of two years, arguing that in addition to the inability to have her placed back in the position at IBEW, the job market in that area of Montana will not be conducive to getting a similar job for that period of time. The problem with this argument is that there is no substantial evidence of the amount of time it will take to find a similar paying job in that part of Montana. Morris's testimony indicated that she has an accounting degree of some sort from Miles City Community College. With such a degree, it would seem that she should be able to put herself into a similar paying position within one year. Pay equal to one year's salary of $28,788.00 is reasonable and appropriate under the facts in this case. This amount reasonably approximates the loss she will suffer during that time period due to IBEW's illegal conduct.

Morris is also entitled to the benefits she has lost as a result of IBEW's conduct. Those benefits are the life insurance policy that had a value of $30,000.00 and the value of the contribution to the SEP fund of $4,030.00.

Morris is also entitled to damages for emotional distress inflicted upon her as a result of IBEW'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. Morris has suffered emotional distress as a result of the conduct. $30,000.00 is adequate to compensate her for this harm.

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). 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.

V. CONCLUSIONS OF LAW

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

2. IBEW violated the Montana Human Rights Act by sexually discriminating against Morris in permitting her to be subjected to a hostile working environment. .

3. Morris is entitled to be compensated for damages due to loss of back pay. She is also entitled to interest on those damages. In addition, she is entitled to front pay for period of one year and emotional distress damages.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), IBEW must pay Morris the sum of $43,182.00 in damages for lost wages and $4,640.30 in prejudgment interest on those damages through January 13, 2011, The value of the premiums for a life insurance policy with a face value of $30,000.00, the value of the SEP contribution in the amount of $4,030.00, as well as $30,000.00 as damages for emotional distress. In addition, IBEW must pay Morris front pay totaling $28,800.00.

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 Morris and against IBEW Local 1638 for discriminating against Morris in violation of the Montana Human Rights Act.

2. IBEW Local 1638 is enjoined from discriminating against any employee on the basis of sex.

3. IBEW Local 1638 must pay Morris the sum of $110,652.30, representing $43,182.00 in back pay, $4,640.30 in interest on that back pay, $4,030.00 that would have been paid into her SEP fund, $30,000.00 for emotional distress, and $28,800.00 in front pay. In addition, IBEW shall provide a term life insurance policy for Morris in the face of amount of $30,000.00 for a period of one year from the date of judgment in this matter.

4. IBEW Local 1638 must develop and implement specific policies to prohibit discrimination in the work place and to ensure that both employees and management are properly trained about preventing sexual discrimination in the work place. IBEW Local 1638 must also develop an appropriate mechanism to ensure that employees can effectively seek protective measures from the corporation in the event any employee is subjected to discrimination by a supervisor. In developing and

implementing this plan, IBEW Local 1638 shall work with the Montana Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau. In addition, IBEW Local 1638 shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

5. Within 120 days of this order, IBEW Local 1638 officers, managers, office supervisors and office personnel must complete four 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, IBEW Local 1638 shall obtain a signed statement of the trainer indicating the content of the training and the date it occurred. IBEW Local 1638 must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

Dated: January 14, 2011

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Patricia D. Peterman, attorney for Cathy Morris, and Thomas B. Buescher and Stephen Mackey, attorneys for IBEW 1638:

The decision of the Hearings 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 Hearings 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).

MORRIS.HOD.GHP