

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0094013729 &
0094013730:

MELODY TRAVIS,)	Case Nos. 1094-2010 & 1096-2010
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
STEVE FAECHNER & ACADEMY OF)	
REALISTIC TAXIDERMY,)	
)	
Respondents.)	

* * * * *

I. INTRODUCTION

Melody Travis filed a complaint with the Department of Labor and Industry on May 18, 2009. She alleged that Respondents Steve Faechner and the Academy of Realistic Taxidermy discriminated against her in training or education because of her sex. On January 5, 2010, the department gave notice Travis' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

Hearing Officer Terry Spear convened the contested case hearing in this matter on December 9, 2010 in Havre, Montana. Charging Party Melody Travis attended and participated, with her attorney, Patricia D. Peterman, Patten, Peterman, Bekkedahl & Green, PLLC. Both respondents were in default for failing to be available and participate in the telephonic final prehearing conference, and neither respondent appeared at the hearing.

Kahle Jennings and Melody Travis testified in person and under oath and Exhibits 1 through 6 were admitted into evidence. Travis filed her Findings of Fact, Conclusions of Law and Proposed Order on January 3, 2011, and the Hearing Officer deemed the matter submitted for decision. A copy of the hearing officer's docket accompanies this decision.

II. ISSUES

The two determinative issues here are (1) Whether Travis was subjected to illegal discrimination because of sex, in training or education; and if so (2) What reasonable measures should be ordered to rectify any consequent harm to Travis; and

(3) In addition to an order to refrain from such conduct what should the department require to correct and prevent similar discriminatory practices by respondents? A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. Melody Travis is a young adult female. She enrolled in Evergreen State College, in the state of Washington, beginning in 2007. While a student there, Travis received excellent reports from her professors, who described her as “confident and articulate” demonstrating “a broad understanding of the central concepts of hydrology, biology, ecology and the ability to recognize these concepts in the field.” “Mia [Travis’ nick-name] has developed a firm understanding of science including the scientific method, research design and the statistical analysis of data.” “Mia’s assignment was very well done and indicates that her observational skills and understanding of fish taxonomy are well-developed.” “Melody thoroughly met program expectations and achieved the major learning objectives for this quarter.” “Melody was a reliable, conscientious student in the program. She didn’t miss a single class, was always engaged and enthused, and her comments and questions enhanced our discussions.” “She is well prepared for further study in ecology, evolution, and environmental studies.”

2. The Academy of Realistic Taxidermy (“the Academy”), is a Montana educational institution engaged in the teaching of taxidermy through lecture, discussion and hands on training. Steve Faechner owns and operates the Academy. He represents in the literature of the Academy that he has won numerous awards for his work and that he has served two terms as President of the Montana Taxidermists Association. The Academy and Faechner represent that the school provides the best taxidermy available.

3. The Academy is located approximately 25 miles from Havre, Montana, and had limited cell phone service in January of 2009. Students stay in student housing located at the site although food is not provided.

4. The Academy’s eight-week beginning course ran from January 5 through February 27, 2009. The Academy charged \$12,050.00 tuition for the eight-week course.

5. In the summer of 2008, Travis traveled to the Academy and met with Faechner, in pursuit of her career plan to become a taxidermist.

6. Evergreen State College was willing to recognize Travis’ credits from the Academy and accept them as part of her college study.

7. When Travis visited the Academy in 2008, Faechner told her she would have her own private room.

8. Based on what the Academy had represented to her and on her own research, Travis enrolled as a student with the Academy, for which approximately \$12,050 tuition was paid. Classes were to begin January 5, 2009.

9. On her way to Montana, Travis was in a car accident. Her car was totaled and she had to make alternative arrangements to get to school. Travis notified Faechner that she would be late arriving at the school; Faechner stated it would not be a problem and that she could easily make up her classes. Travis arrived at the Academy on approximately January 10, 2009. She did not have a car while she was enrolled there because of the accident. Travis was the only female student enrolled in the January/February 2009 beginning taxidermy class.

10. During Travis' first week at the Academy, Faechner, started calling her "Spanky" and repeatedly said that Travis "had been bad and he would spank her."

11. During Travis' first week at the Academy, when she wore her hair down, Faechner stated "I was wondering when we going to get to see your long hair . . . it's sexy."

12. During her subsequent 2-3 weeks at the Academy, Faechner told Travis she would look sexier if she wore makeup. When Travis told him there was no reason to wear it at the school, he told Travis that she should "wear it for him."

13. During the first few weeks of the taxidermy course, every time Travis would try to use a battery-operated drill (which is often required to build mounts), Faechner would say, "You like big TOOLS, don't you?" or "She just likes to touch big tools."

14. During the first few weeks of the taxidermy course, while watching Travis put a finger cot (which resembles a condom) onto a vaguely phallic bird neck, Faechner told the other students to watch so they could see how well Travis pleased her boyfriend.

15. During the first few weeks of the taxidermy course, Faechner asked Travis in front of the male students about the most unusual place Travis had ever had sex.

16. During the first few weeks of the taxidermy course, while Travis was alone with Faechner in the showroom, Faechner said "I am very accommodating to my female students. I'll give kisses, hugs, if they ask."

17. During the first few weeks of the taxidermy course, Faechner commented to Travis, "I just want to know how you feel in a . . . know how you feel inside."

18. During the first few weeks of the taxidermy course, in reference to one of the students saying he saw another student fall outside, Faechner stated, “I could show it on replay!” When the other students commented that Faechner had the whole place wired, he continued, “Yeah, I even know what color little Mia’s panties are and if she wears any.”

19. At one point during the few weeks Travis was at the school, Faechner came into Travis’ dorm room without warning and without knocking.

20. During the taxidermy course, Faechner would constantly play inappropriate music, such as the song “Cadillac Pussy” and Eminem CD songs which were degrading to women and sexually explicit. The lyrics to “Shake That” included “I told the guys you like to take it from behind” and “I’m looking for a slut.” Faechner said it was the “school’s theme song.”

21. Travis feared that Faechner was watching everything she did. She began to avoid him whenever possible. As a result, she could not take advantage of the extra hours available to work in the showroom, because she feared running into Faechner. She would sit alone in her room crying and at one point she threw up over the stress. Travis was alone; she had no car; cell-phone service was intermittent; she had no support network. Travis started missing classes.

22. Travis did not want to disappoint her parents or waste the money spent on the Academy’s tuition. Because of her emotional distress, Travis would not use the off-hours or the weekends to work on her projects because she feared being alone with Faechner. She had no one to turn to with her concerns. It would have been impossible for Faechner not to notice that Travis was having problems.

23. After the first four weeks of instruction – in early February 2009 – Travis approached Faechner to address these issues and discuss leaving the school because of these issues; Faechner responded insultingly and told Travis that she had to leave immediately and would never be allowed back on the property.

24. Faechner refused to speak to Travis and made it at least difficult if not impossible for her to give written notice of leaving, which Travis understood was school policy. Faechner was not there when Travis departed, so she left the written notice on her desk so Faechner could easily find it. Her request, which states it was delivered and effective on Sunday, February 8, 2009, included a request for a refund of her tuition. Her tuition has not been refunded.

25. Because of Faechner’s abusive and discriminatory behavior, Travis lost her tuition of \$12,050, and did not obtain the credits that would have transferred back to Evergreen State College. Given her prior successful college performance and her

career interest in taxidermy, the only reasonable explanation for her withdrawal from and failure to complete the taxidermy course of study in which she enrolled is the illegal and discriminatory treatment she received from Faechner.

26. Interest on Travis' unreturned tuition, at 10% per annum, from 30 days after February 8, 2009 (March 10, 2009), through the date of this order is .1 times \$12,050 times 1.86 years (1 plus 314/365), which is \$2,241.30.

27. Travis suffered severe emotional distress as a result of Faechner's conduct. He subjected her to abusive and illegal behavior in front of the other, all male, students. She was the only woman there and, to her knowledge, the only student to receive such treatment. In both public and private, she was humiliated and degraded because she was a young female student. She was alone at the school, isolated 25 miles from town, and had no one to turn to with her concerns. Faechner was in a position of power and she feared retaliation if she said anything to object to or oppose his treatment of her. \$25,000 is an appropriate amount to compensate her for the severe emotional distress that she suffered as a result of illegal sexual harassment and discrimination.

28. Faechner and the Academy, as a separate entity which both he and the Academy represented that he owned and operated, are jointly and severally liable for all damages.

29. Faechner and the Academy must be enjoined from any future sexual harassment of female students enrolled at the Academy, the Academy must be ordered to adopt a policy or policies addressing freedom of its students from illegal sexual harassment (as approved by the department's Human Rights Bureau) and Faechner must be ordered to undergo training in avoidance of sexual harassment in the school of at least 4 hours in duration (as approved by the department's Human Rights Bureau).

IV. OPINION¹

Montana law prohibits discrimination in education; it is an unlawful discriminatory practice for an educational institution to exclude or otherwise discriminate against an individual enrolled as a student in the terms, condition or privileges of the institution because of sex. Mont. Code Ann. § 49-2-307(1).

An "educational institution" includes private institutions such as academies, professional schools, technical schools and vocational schools, and the Academy in

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.

this case is thus an educational institution. Mont. Code Ann. § 49-2-101(9). An agent of an educational institution is included within the definition, *id.*, and “agent” is used within its ordinary sense, *cf.*, *Fandrich v. Capital Ford Lincoln Mercury*, 272 Mont. 425, 901 P.2d 112, 115 (1995). Faechner was the owner and instructor of The Academy, and his continuous conduct acting on behalf of the Academy makes him an agent acting on its behalf. Therefore, he is personally liable for his discriminatory conduct. The Academy itself is also liable, as the educational institution in which Travis enrolled, on whose behalf Faechner acted. Faechner and the Academy are thus jointly liable for Faechner’s conduct.

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).

These sex discrimination prohibitions definitely include the prohibition against sexual harassment that creates a hostile work or school environment. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992).

The appropriate illustrative authority for this particular state law discrimination claim appears in federal Title IX cases, where the court decided whether the harassment was so severe, pervasive and objectively offensive that it “deprive[s] the victims of access to the educational opportunities or benefits provided by the school.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). To establish a *prima facie* case of sexual hostile environment, Travis must show that because she was female: (1) she was subjected to unwelcome harassment; (2) based on her sex; and (3) the harassment was sufficiently severe or pervasive so as to create a hostile or abusive atmosphere (i.e., an environment in which she could not pursue the education she was paying to receive). *Lucero v. Nettle Creek School Corp.* 566 F.3d 720, 731 (7th Cir., 2009). As the 7th Circuit noted in *Lucero*, Title IX can only attach when the employer has at least been deliberately indifferent to the harassing conduct. *Id.*; accord, *Gebser* at 288-93. The requirement that the employer act intentionally is clearly satisfied here – Faechner’s conduct was the harassment, he clearly acted intentionally, thus establishing an even clearer case for liability than that of deliberate indifference.

Travis established a *prima facie* case of sexual harassment. She proved that she was subjected to “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive

[educational] environment. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). Although the harassment need not be both severe and pervasive to impose liability, in this case it was both.

A totality of circumstances test is proper to determine whether a particular claimant has proved that she was subjected to a hostile environment. *Harris* at 23. 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 a [student’s school]² performance.” *Id.* The objective severity of harassment is judged from the perspective of a reasonable person in the claimant’s position, considering all circumstances. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1988), quoting *Harris*, *supra*. Travis’ un rebutted testimony that she was subjected to numerous instances of offensive conduct was sufficient to show that the conduct was pervasive, as well as unwelcome, and that Travis had no one to whom she could complain. *Torries v. Pisano*, 116 F.3d 625, 634-35 (2nd Cir. 1997).

Upon a finding of illegal discrimination, the department can require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to (in this case) Travis. Mont. Code Ann. §49-2-506(1)(b). Courts and quasi-judicial agency tribunals award damages in employment discrimination cases to rectify the harm caused and to make the victims whole from harm. *P.W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); accord, *Albermarle Paper Co. v. Mood*, 422 U.S. 405, 419 (1975). Travis is entitled to recover her tuition in the amount of \$12,050.00 lost because of the illegal sexual harassment and retaliation.

Travis is entitled to prejudgment interest on the tuition lost. When the amount lost and the accrual date for it are proved, prejudgment interest accrues. *P.W. Berry Co.* Prejudgment interest on an amount capable of being made certain by calculation, accrues from 30 days after the presentation of a written statement to the opposing party of the amount due. In this case, the amount of the refund Travis requested was already certain – it was the amount of her tuition, for which she made her written demand on February 8, 2009, 30 days after which simple interest at 10% per year began to accrue. Mont. Code Ann. §27-1-210.

² Cf., *Martinez v. Yellowstone County Welf. Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981) citing *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the requisite elements to establish illegal discrimination to the allegations and proof of the particular case).

Emotional distress is compensable under the Montana Human Rights Act. *Vortex Fishing Systems v. Foss*, ¶133, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. Travis suffered emotional distress as a result of respondents' discrimination. The amount reasonably necessary to compensate her for that emotional distress is a uniquely factual question. It is exceptionally difficult to provide any kind of "scale" upon which such awards are based. Comparing and contrasting this case with others is a poor analytical tool, but is perhaps the best method of explaining the award.

In one case, the charging party who suffered emotional distress as a direct result of the loss of her job, and more emotional distress because of the financial problems she and her family then experienced, enduring substantial anxiety and worry, over a period of at least eight months. The actions of her former employer in discharging her, and the manner in which they did so, cast a cloud over her at an anticipated time of joy after the birth of her child and increased the difficulties she faced as an integral part of a family with a new father and a new child, at the same time that she herself experienced unexpected and serious physical difficulties after the birth. She received \$25,000.00 for emotional distress. "Final Agency Decision," *Barnett v. Beaches Beauty Supplies*, HRB Nos. 055011515/16, Case Nos. 1210/11-2006 (March 15, 2007); reversed on the emotional distress award (and other damage determinations) by H.R.C., "Order Affirming in Part, Reversing in Part and Remanding to Hearings Bureau for Redetermination," Nos. 055011515 and 16, p. 2 (July 25, 2007); emotional distress award (and other damages determinations) reinstated by District Court, "Decision and Order," *Barnett v. M.H.R.C. et al.*, ADV-2007-739, First Judicial District, pp. 17-18 (Jan. 21, 2010).

Although the facts of *Barnett* are very different from the facts of this case, the emotional distress suffered by that charging party is substantially similar to that suffered by Travis, who was isolated at a remote location, fearful and unable to defend herself from the on-going sexual harassment of the owner, operator and main instructor of the taxidermy school. Travis, like the charging party in *Barnett*, was without resources to combat the illegal discharge that precipitated her into substantial anxiety and worry over time. The consequences both suffered stemmed from powerlessness, created by circumstances that left them without any effective immediate defense against conduct that society considers unacceptable.

Travis' emotional distress was severe, but substantially less severe than that suffered by two housekeepers in another department case. The two women were sexually harassed by their employer over an extended period. In addition to subjecting them to frequent and unwelcome sexual comments, the employer coerced them, with threats of discharge, into performing naked massages and masturbating him. Both women were fired when they ultimately refused to submit any longer to

his bullying and indecent behaviors. They received \$75,000.00 each for emotional distress. “Decision,” Lock and Struna v. Portlock Corp., HRB Nos. 0071012074/75 and 0079012119/20, Case Nos. 1504/05-2007 and 1561/62-2007 (Apr. 12, 2008).

In another department decision, the charging party was subjected by her employer, for six months, to regular unwelcome sexual advances, including inappropriate touching, hugging, attempting to kiss her, extremely personal questions about her sexual relationship with her boyfriend and repeated direct sexual propositions. She was discharged for refusing to endure and to consent to his inappropriate behavior. Her employer’s conduct left her a much less secure and trusting person, who (at the time of her hearing) might still require additional counseling and had not resolved all of the emotional distress which she was still suffering. She received \$30,000.00 for emotional distress. “Final Agency Decision,” Loveless v. One Stop Wireless, H.R.B. No. 0051011400, Case No. 506-2006, (Mar. 16, 2007). Because of the severe isolation and helplessness of Travis’ situation, her emotional distress merits only a slightly smaller emotional distress award than the charging party in that case.

The purpose of the remedial portion of the Human Rights Act is to make whole a person who has suffered from discrimination. Emotional distress damages are sometimes termed “soft” damages, because there is neither any standard objective measure of the severity of emotional distress suffered nor a conversion chart assigning monetary values to according to the measurement of severity. The statutory mandate for recovery in Human Rights cases specifies any reasonable measure to correct the practice and to rectify the harm. The Hearing Officer has found in this case that \$25,000.00 is reasonable and sufficient under the law.

The law requires affirmative relief, and both respondents must be enjoined from any further discriminatory acts hereafter, with the Academy required to adopt a policy or policies to insure that sexual harassment is not tolerated, and Faechner required to undergo training. Mont. Code Ann. § 49-2-506(1)(a)(b).

V. CONCLUSIONS OF LAW

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

2. The Academy, and Steve Faechner personally, as its agent, discriminated against Travis because of sex by subjecting her to a sexually hostile and offensive school environment from January 10, 2009, through February 8, 2009, in violation of Mont. Code Ann. §49-2-307(1).

3. The harm Travis suffered as a result of the unlawful discrimination, for which she is entitled to recover from both respondents, jointly and severally, consists of recovery of her tuition paid, of \$12,050.00, with prejudgment interest in the amount of \$2,241.30 to the date of this decision, and an award for her emotional distress valued at \$25,000.00. Mont. Code Ann. § 49-2-506(1)(b).

4. The department must also order the Academy and Faechner to refrain from engaging in such discriminatory conduct and should prescribe conditions on their future conduct relevant to their discriminatory practices as proved in this case. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

VI. ORDER

1. Judgment is in favor of charging party Melody Travis and against respondents Steve Faechner and the Academy of Realistic Taxidermy on the charges that they jointly and severally discriminated against Travis in education because of sex.

2. The department awards Travis the sum of \$39,291.30 (as categorized in Conclusion of Law No. 3), immediately due and payable, for which amount Faechner and the Academy are jointly and severally liable. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondents Faechner and the Academy from subjecting female students at the Academy to illegal sexual harassment by Faechner.

4. The department orders the Academy, within 60 days after this decision becomes final, complying throughout with the directions of the Human Rights Bureau regarding how to implement these requirements, (a) to submit to the Human Rights Bureau proposed policies that expressly state that the Academy will not engage in the conduct prohibited by the permanent injunction, including a written sexual harassment policy that identifies a person other than Steve Faechner to whom complaints of sexual harassment at the Academy can be directed, with an express provision that no action will be taken against an employee for a good faith complaint of such harassment; (b) to define the means of publishing the policies to present and future students; and (c) to adopt and to implement those policies, with any and all changes mandated by the Bureau, immediately upon Bureau approval of them;

5. The department orders Faechner (a) to undertake and successfully complete training regarding Montana law against sexual harassment in education as a condition to his further activity as supervisor and principal of the Academy, with the prior approval of the Human Rights Bureau for the particular training and its duration;

and (b) to document to the Bureau the successful completion of the training, within a time limit set by the Bureau.

Dated: January 18, 2011.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Patricia D. Peterman, Patten, Peterman, Bekkedahl & Green, PLLC, attorney for Melody Travis, charging party, and The Academy of Realistic Taxidermy and Steve Faechner, respondents:

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 Staci Green, (406) 444-3870, immediately to arrange for transcription of the record.