BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0141016720:

CHRISTINE CARRIER,	)	Case No. 1818-2014
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
LARRY RICKS,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Christine Carrier filed a complaint with the Department of Labor and Industry on January 28, 2014, alleging that her employer, Larry Ricks, discriminated against her because of her sex by subjecting her to sexually offensive conduct throughout her employment, culminating in an incident on December 18, 2013, when he touched her breast and groin. She also alleged that Ricks retaliated against her by discharging her because she engaged in protected activity by resisting and complaining about his sexually offensive conduct.

On May 2, 2014, the department certified Carrier's complaint for a contested case hearing. On May 7, 2014, the Hearings Bureau (now the Office of Administrative Hearings) served a notice of hearing upon the parties by mail, appointing Terry Spear as hearing officer. Carrier acknowledged service of that notice by mail and Ricks was served by the Cascade County Sheriff's Office with the notice. Contested case scheduling and then contested case prehearing proceedings followed thereafter.

A contested case hearing convened and concluded September 11-12, 2014, in Great Falls, Montana. Charging Party Christine Carrier attended with her counsel, Alex Rate, Rate Law Office, P.C. Respondent Larry Ricks attended with his counsel, Mark T. Wilson, Jardine, Stephenson, Blewett & Weaver, P.C.

In the order of their first appearance to give evidence, Amanda Kincade, Debbie Jean Logan, Erica Brown, Christine Carrier, Jamie Green, Audrey Herbert, Jerry Badura, Timmy Jay Jones, Larry Ricks (who identified himself as Larry J. Ricks), Officer Jeffrey Edward Bragg, Jr., Brittney Lane and Beth Ricks testified under oath.

Exhibits 1, 2, 3, 4, 6, 7, 8, 9, 10, 104, 106 and 109 were admitted into evidence.[1] With the filing of the last post-hearing argument, the matter was submitted for decision.

II. Issues

The initial issue here is whether Ricks discriminated against Carrier in employment, because of her sex, by subjecting her to a hostile work environment and to quid pro quo demands, and then retaliated against her by discharging her after she engaged in protected activity by resisting and complaining about the discrimination. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. In October 2012, Respondent Larry Ricks hired Charging Party Christine Carrier as a home health care aide, or assisted living worker, to work in his home. Ricks was Carrier's employer. Carrier is and was, at all times pertinent to this matter, a resident of the City of Great Falls, Cascade County, Montana. Ricks is and was, at all times pertinent to this matter, a resident of the City of Great Falls, Cascade County, Montana. Ricks had final say over hiring and discharging home care aides who worked in his home. He had final say over the wages paid to his home care aides. They were his employees, not supplied by any service or business, and were hired as individual employees. Ricks had not formed any business or corporation, hiring home health aides in his individual capacity, to provide him with the total attendant care he needed.

2. Ricks is and was disabled at all times pertinent to this matter. He had polio as a child and youth, but overcame many of his polio-related limitations, learning to walk and to function in his personal life and in his employment. Although he suffered and still suffers from post-polio syndrome, he became self-supporting and had some successes. In 1990, he sustained a work-related injury in Florida which damaged his spine. He developed chronic pain problems, asthma and chronic obstructive pulmonary disease. He now suffers also from severe depression and anxiety. Over the years, he has also developed osteoporosis, which means that his body loses bone mass faster than it can replace it. The result is weak and brittle bones, so that a fall, or even mild stresses like bending over or coughing, can cause fractures. Ricks has suffered a fractured vertebra. He has had a myocardial infarction – a heart attack. He also has atherosclerosis, a disease in which plaque

[1] There were a number of duplicated exhibits, of which one was admitted and the other was withdrawn. Exhibit 1was identical to withdrawn Exhibit 101, Exhibit 2 was identical to withdrawn Exhibit 103, Exhibit 6 was identical to withdrawn Exhibit 105 (with 8 additional pages in Exhibit 6), Exhibit 7 was identical to withdrawn Exhibit 102, Exhibit 9 was identical to withdrawn Exhibit 107, and Exhibit 10 was identical to withdrawn Exhibit 108.

builds up inside his arteries, the blood vessels that carry oxygen-rich blood to his heart and other parts of his body. He has developed coronary heart disease and kidney disease, as well as increasingly poor circulation in his extremities. He has clubfeet, which have rendered him unable to walk.[2]

3. During the time that Carrier worked for him he was not paralyzed, but he could not safely attempt to walk and relied upon his power wheelchair for mobility. He typically was in his wheelchair when not in his bed, and virtually never attempted to stand up. He moved from wheelchair to bed or bed to wheelchair with little to no assistance. He could dress and undress himself. He readily maneuvered his electric wheelchair through his house, and outside of his house, but he had difficulty performing even simple household tasks. Ricks also had poor blood flow and chronic pain, and experienced "severe tension" in his extremities. When this sensation built up in his legs, Ricks regularly asked his aides to massage his legs. Some aides (Carrier was one of them) were not comfortable massaging his legs, and he did not force reluctant aides to massage him. He got some relief from massages of his legs. Carrier didn't want to massage Ricks' legs at his request, although she admitted she did massage his legs the first time he asked, but not thereafter.

4. Required daily tasks during a shift as an aide for Ricks, during the time Carrier worked as an aide, included starting the coffee machine in the morning, letting the dogs out, picking up Ricks' coffee cups, tea glass, water bottle and dinner dishes from the night before, filling a cup with Ricks' coffee and a glass with water for him as well, and checking frequently to be sure he always had hot coffee in his cup and water in his glass. More daily tasks were cleaning the bathrooms, vacuuming, dusting, polishing stainless steel, spraying the house and sweeping the floors. Also included daily was cooking meals, doing laundry, making sure prescribed medication (which had been set out by the supervisor[3]) was taken at the right times and letting the dogs back in. Before leaving for the night, aides were required to make sure front and back doors were locked, check that the oxygen "cups" were full and set to the correct setting. Ricks' teeth had to be brushed and put into fresh water, the dishes had to be done and put away, the sink had to be cleaned, the curtains all closed, the dogs taken out (and brought back in) and the trash cans emptied. Ricks had trouble sleeping, so two mugs of hot coffee, two frozen bottles of water, two thawed bottles of water, a cup of tea or Pepsi, two packets of testosterone and a clean shirt and pants

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[2] In addition to the evidence of record, the Hearing Officer has referred to the Mayo Clinic website, www.mayoclinic.org, for succinct generally accepted medical information about the various disorders Ricks testified he had.

[3] There was conflicting testimony as to which employees acted in supervisory positions at what times, but the substantial and credible evidence of record established that during the entire period of Carrier's employment, Brittney Lane, Ricks' daughter, acted as home manager or supervisor, and also may have worked some shifts with other employees.

for the next day all needed to be set out on his side table or on his nightstand. His urinal had to be emptied before leaving as well.

5. Nora Kreb,[4] an elderly friend of Ricks, lived with Ricks while Carrier worked for him, and his home health aides were responsible for providing daily care to Kreb, including checking her vital signs and blood sugar, assisting her to use the restroom and to bathe, helping her dress and, to the extent possible, trying to assist her in movement inside and out of the home and to protect her from falling. She was at considerable risk of falling. Krebs' medical status and Ricks' susceptibility to infections required employees to wash their hands frequently while at work, to clean all surfaces in the home with chlorine bleach, to wash all clothing with chlorine bleach in addition to detergent, to clean any substance that Kreb touched with bleach water, do a "final wipe-down" in her bathroom before going home, spray the shower chair with bleach mixture and make sure to wear gloves when dealing with her. Kreb's teeth had to be cleaned and put into fresh water, and her lamp by her chair had to be left on "one click."

6. Required weekly tasks included oiling the furniture, some shopping, cleaning the refrigerator and freezer, doing the "dog patch," cleaning the bedrooms and cleaning the oxygen filters. Required monthly tasks included vacuuming the furniture, tending the plants and cleaning the air filters, the furnace filters, crystals, windows, vents, walls, the carpets and cabinets.[5]

7. During the first year of Carrier's employment, Ricks was satisfied with her work.

8. Ricks could be a very difficult employer. His chronic pain escalated to almost unbearable levels at times. Sometimes he was depressed and had difficulty controlling the anger with which he fought against his depression. He sometimes shouted and cursed at and otherwise insulted his employees.

9. Carrier endured his moods and behavior, and observed other employees endure his behavior. She observed him direct loud and angry comments and curses towards female and male employees alike. Despite his dependence upon his electric wheelchair for mobility, Carrier also found Ricks intimidating and even frightening when he was in a rage.

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[4] Nora Kreb currently resides in Missouri River Manor and has various mental health concerns, including an impaired memory. Apart from the parties, she was the primary, if not only, eyewitness to the events of December 18, 2013. She did not testify. No presumption for or against either side's arguments about what happened arises from Kreb's absence.

[5] In addition to the testimony, Exhibit 8 contains work lists identifying many of these tasks, as well as weekly menus for Ricks and Kreb.

10. Ricks also had "good days" when he was handling his pain and interacting without anger, even having some jocular conversations with Carrier, and sometimes with other employees, as she observed. He sometimes told off-color jokes and used sexually explicit language in front of Carrier, and towards Carrier. She observed that he was as likely to indulge in coarse and sexually explicit language and inappropriate ("off-color") and often unacceptable jokes on a good day as on a bad day, directed, as far as she observed, toward any of his employees, as the mood struck him. Carrier was relieved when Ricks was having a good day. She avoided challenging him on inappropriate or even unacceptable language, comments and jokes – on a bad day to avoid making it worse, on a good day to preserve his brighter attitude.

11. Ricks was very interested in what the people he knew were doing when they were not at his house. Carrier shared personal information with Ricks, especially on Ricks' good days. Carrier and, in her observation, some of the other employees, sometimes joked with Ricks and even found humor in his jokes and explicitly sexual comments, occasionally joining in to some extent, especially on Ricks' good days. Carrier and Ricks also indulged in gossiping together. They also sometimes talked by telephone when she was not at work, typically late at night when she would call him. Ricks was usually receptive to calls, which brought a change from the usual routine.

12. Carrier also observed Ricks discover and target the particular sensitivities of other individual employees. She witnessed Ricks use offensive epithets to describe the children of another female employee, and use other sorts of foul terms about the romantic interests of a male employee.

13. Some of Ricks' employees, including Carrier, endured whatever aggravations and problems arose while working for Ricks, because he paid well enough that they stayed with the work as best they could for as long as they could. Eventually, some stopped working for him.

14. In October 2012, Carrier initially earned $800 every two weeks, or approximately $1,738.20 per month (52.143 weeks times $400, divided by 12 months). Carrier received raises during her employment. When her employment ended in December 2013, Carrier was earning $1,100 every two weeks, or approximately $2,389.89 per month (52.143 weeks $550, divided by 12 months). Carrier received her pay every second Friday, which was typically the "pay day" for Ricks' employees. Ricks apparently did no withholding. He frequently paid Carrier in cash.

15. Ricks' daughter, Brittney Lane, was often in the house. Her husband was sometimes also in the house. Ricks had a "female friend" (identified only as "Candi" in the evidence) who visited him. Candi seemed to Carrier to interact with Ricks in a more informal and friendly fashion than his aides did, with more joking and

gossiping. Carrier also observed that Candi flirted with Ricks, but from what Candi said to Carrier, Candi did not allow Ricks to take any physical liberties with her. He gave Candi gifts and money. Ricks' employees, including his daughter, her husband and Candi were often the only people with whom Ricks regularly interacted.

16. Sometimes Ricks would want hugs from his female employees. Carrier was one of the female employees from whom he typically got a hug at the end of her shift if he was awake and asked her for one. Carrier's observations were that some female employees would not hug him under any circumstances and others gave him hugs more freely than she did. Carrier testified credibly that she did not like hugging Ricks, but did so most times when he asked because she needed to keep her job.

17. Carrier and Timmy Jay Jones had been a cohabiting couple for four or five years when she worked for Ricks in 2012-13. During that time, Jones was not able to find work, as a result of an increasing hearing loss. He was getting training from vocational rehabilitation to learn skills that would return him to employability. Carrier's income was the only income the couple had. They were trying to buy the house they were in, were having serious trouble keeping up on the payments, and were often precariously close to losing the house. Thus, her financial situation was an important reason why Carrier did not confront Ricks directly when he failed or refused to respect her boundaries.

18. Ricks had no written sexual harassment or discrimination policy, and had no written procedure for receiving and investigating sexual discrimination or harassment complaints. He had no written employee grievance procedure. The only recourse known to employees, including Carrier, was an informal one of bringing work-related problems to Brittney Lane. No employee, including Carrier, received a written description of that informal policy because it was not in writing. None of the employees (Carrier included) documented any of Ricks' bad behavior in the daily "log" for comments about things that happened during each shift. Carrier did not document Ricks' behavior out of fear of losing her job.

19. Carrier credibly testified that she complained several times to Lane about Ricks behavior, but Lane took no action. On one occasion, Carrier told Lane that Ricks had asked her to stay after her shift ended and engage in sex with him. Lane's response to that report was to tell Carrier "to get a bottle of Crown and Coke and accommodate him" (i.e., do what he asked). Before and after that comment, Lane continued to take no action in response to Carrier's complaints about Ricks' behavior, "pretty much like she didn't even want to hear it." Given the familial relationship between Ricks and Lane, and her responses to Carrier's complaints, Carrier gave up on complaining to Lane, finding this unofficial informal recourse for Ricks' improper conduct was useless. There is no credible evidence about when she complained.

20. Ricks was a study in inconsistencies. On the one hand, Carrier saw him use his employer status to insult and to bully his employees, particular on his bad days, and observed him zero in on specific kinds of improper comments implicating gender, race or sexual preference, that would hit home with the employee to whom he directed the comments. Ricks' own testimony about how he viewed women was that he considered himself "old fashioned" and devout, but at the same time, his testimony showed that he held sexist views of who women were and how they should behave. He apparently saw himself as protective of women, because he tried to schedule a male employee daily, in part to do any heavy lifting that might be necessary. Yet rather than protecting or respecting his female employees he subjected a number of them to coarse language and inappropriate jokes and directed his angry shouting and cursing towards them as much as towards the male employees. He targeted female as well as male employees for selective abrasive comments aimed at their individual tender spots.

21. On the other hand, Ricks mentioned to his female employees (and to at least a few of his male employees, too) that he could and would perform a Native American healing ritual, to address long-term fear or emotional trauma they might be enduring. He displayed gentleness and caring for his little dog, who sat in his lap during a portion of the hearing. The evidence indicated that on good days, he could sometimes be amusing and engaging. On good days he could even treat other people with some respect some of the time, although that was not always what he did on good days.

22. The testimony of former employees to whom Ricks had proffered his healing ritual showed their widely varied perceptions of what it involved and what it meant. At least some and probably most of the female employees suspected that the healing ritual was nothing more than a ploy to get them naked in Ricks' presence, for his viewing pleasure, at the very least. Female employees with these suspicions rebuffed Ricks' initial efforts to interest them in the ritual. Male employees typically responded more decisively and rebuffed any comments about the ritual.[6]

23. Nevertheless, not all employees disliked Ricks and suspected his motives. The first witness at the hearing, Amanda Kincade, was an attractive young woman

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[6] For the limited purpose of establishing how the employees understood Ricks' comments about this ritual, the testimony of all of the other employees who testified about hearing about the ritual and what they thought the ritual was, is relevant and admissible, and has been considered by the Hearing Officer in reaching this decision. It was unnecessary to consider it for corroboration evidence of Carrier's testimony of Ricks' sexual harassment of her – she established that without reference to testimony of other female employees about the alleged sexual harassment they had faced.

who had been a home care aide for Ricks approximately two years before, in 2012.[7] She testified that she and Ricks discussed personal matters while she was employed there and that they were "like a family." She heard about the healing ritual from Ricks after she started working for him. She had been talking to him about "some issues" she had, as the result of "situations" while she was growing up. She testified that she had shared with Ricks her fear of anybody being near her back or her legs and that she could not allow anyone to touch her in those places. Ricks brought up the healing ritual as something that might ameliorate her fear.

24. Kincade testified that she had some friends from Browning who had talked about similar things. She decided that she wanted to participate in the ritual, and she did so, at Ricks' house one night after the end of her shift. The ritual took between 30 and 60 minutes. It involved removing her clothing (being "naked with Mr. Ricks"). There was no evidence about the particulars of the ritual itself. Ricks touched Kincade (he testified it was with a feather). She recalled him touching her back and legs, but not any other parts of her body, and specifically not her breasts or her groin (Ricks testified that he had touched her breasts and groin with the feather). Kincade testified that she had told her husband about the ritual before undergoing it and that although her husband decided not to participate in it, he did not actively oppose her participation. Kincade neither witnessed nor heard of any of the other employees undergoing the ritual. The Hearing Officer was left with the distinct impression that the ritual had been of benefit to Kincade, and that during the ritual Ricks had not treated Kincade in any way she considered inappropriate. Kincade disagreed with a suggestion that Ricks might make sexual advances towards female employees.[8]

25. As noted, Carrier sometimes went along with Ricks' inappropriate comments or even participated when he seemed to be having a good day, in the hopes of preserving the lighter mood. When Ricks went beyond Carrier's zone of tolerance, she sometimes remonstrated about his sexual comments, but not very strongly. Ricks knew about Carrier's financial situation. Pay day was very important to her, and she was immediately worried about any suggestions that her pay might be delayed. More likely than not, she revealed more, in casual conversations at work, than she might have wanted to reveal about her finances and Jones' lack of employment. The credible evidence of record indicates that Ricks could see that Carrier truly was uncomfortable with his explicitly sexual comments. More likely

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[7] Amanda Kincade's entire testimony can be found in Transcript, Christine Carrier v. Larry Ricks, Case No. 1818-2014, Vol. I (September 11, 2014), pp. 7-17. On the present record, she was the only employee who agreed to participate in the ritual, and therefore her entire testimony has been considered by the Hearing Officer in reaching this decision.

[8] There was other testimony suggesting that Kincade and Ricks sometimes argued loudly, with both resorting to cursing. These confrontations obviously did not diminish Ricks in Kincade's eyes.

than not, at some point during Carrier's employment, Ricks began to make more outrageous sexual comments to her, targeting her tender spot as he had targeted other employees whose vulnerabilities he had learned.

26. Ricks vehemently denied ever making any sexual advances towards Carrier. As counsel for Carrier aptly pointed out, Ricks was not a very credible witness, having admitted and attempted to minimize lying under oath and contradicting himself during his testimony. When Ricks and Carrier gave conflicting accounts of what happened between them and there was no credible corroboration or contradiction to either parties' testimony, Carrier was somewhat more credible. Credible evidence of record established that Ricks was impotent even with medication that addressed erectile dysfunction, raising a question about why he would make sexual advances towards Carrier. Carrier's detailed testimony about Ricks complimenting her about her breasts and telling her he wanted to suck them, and making derogatory comments about her bottom, was also credible, and supported her testimony that Ricks eventually began making comments to her at work that were explicit sexual advances. There was no credible testimony directly identifying when his generally inappropriate treatment of his employees began to include, in Carrier's instance, sexual advances, but he did make such advances.

27. Christine Carrier had worked the same shifts as other aides – Jerry Badura, Audrey Herbert (for a short time) and Derrick Schultz. Once in awhile, Brittney Lane would perform aide work while Carrier was working. Schultz did not testify. Herbert testified at hearing. She did not corroborate Carrier's testimony that Ricks engaged in improper behavior towards both of them, and that Herbert and Carrier would commiserate with each other about how badly Ricks was treating them. After Herbert left employment with Ricks, her friendship with Carrier cooled, and there eventually was litigation between them, which raised some question about possible bias by Herbert. However, it is also likely that Herbert left employment before Carrier had been working there a year. It is therefore likely that Herbert was not present for Ricks' sexual advances towards Carrier, and the two women could not have commiserated about such conduct, although they could have commiserated about verbal abuse (but not sexual harassment) in which Ricks engaged while they were both employed.

28. Badura confirmed Carrier's descriptions of Ricks' moods and behavior, including Ricks' targeting behavior toward him. The only possible reason of record for Badura to be biased against Ricks would be as a result of Ricks treating Badura in exactly the manner that both Badura and Carrier testified he did.

29. From the substantial and credible evidence, the Hearing Officer finds that Ricks used sexual advances towards Carrier the same way that he used racial epithets and gay-bashing comments towards other employees who disliked and were

uncomfortable with those remarks, but were (like Carrier) afraid to confront him. There is no evidence that Ricks ever made comments that amounted to sexual advances towards any male employees, and, based upon the substantial and credible evidence of record about Ricks, it was very unlikely that he would ever make such comments.

30. Ricks' sexual advances, continuing from the point of their inception (not established directly) until her discharge from employment, created a hostile work environment for Carrier because of her sex (gender). Ricks was limited in what kinds of sexual activity he could engage in, being impotent, but there was substantial and credible evidence of his interest in bullying Carrier, in an increasingly outrageous fashion, about engaging in sexual activity with him. Whether or not any actual sexual contact would have followed any agreement on her part to what he was suggesting is not certain. Either way, Ricks continued his efforts to coerce her into agreeing to sexual activity with him. His efforts made her visibly uncomfortable, which only prompted him to continue those efforts. His comments about what he wanted her to do with him and what he wanted to do to her became more insistent and more specific. He began to sexualize his ordinary physical contact with Carrier, trying to get his head between her breasts when she hugged him.

31. At some point in August, September or October 2013, Carrier stormed out of Ricks' house, after shouting that she was quitting. Unfortunately, this is another incident for which the timing was not established. When it happened, Ricks pursued Carrier in his wheelchair and persuaded her to come back to work for him. Since there are conflicting accounts of when the incident occurred, it does not help to mark when the harassment began. The incident did not resolve the tension and unhappiness between them. It did nothing to diminish his escalating verbal advances, but it did indicate that he was not seeking to drive her away from his employment.

32. Carrier tried not to tell Jones about what was now happening at work. She knew they needed the money. He knew they needed the money, too, and she attempted to spare him from the choice between doing nothing so she could keep her job, or causing trouble at her work place that could cost them their home. As Ricks' campaign to force Carrier to do his will intensified, she revealed more about it to Jones. Pragmatically, he tried to help her put up with Ricks until he finished his training and found a job. He told her "[J]ust take it as a grain of salt and just walk away and continue on with your duties. You know, just, you know, don't even give him the credence, don't even let him get into your head."

33. On Wednesday, December 18, 2013, two days before the usual pay day for Ricks' employees, the conflict between Ricks and Carrier exploded. Brittany Lane worked the morning shift that day. She woke Ricks up before she and her husband

left at approximately 1:00 p.m. to buy groceries. When they left, Nora Kreb, Christine Carrier and Larry Ricks were the only three people left in the house. Ricks testified that when he woke up on December 18, 2013, he had no intention of firing Carrier, despite what he and Lane testified was an increasing decline in her performance after the first year of her employment. More likely than not, the point at which there was an alleged decline in Carrier's performance marked the point at which Ricks began targeting Carrier for his sexual harassment at work, so that illegal conduct lasted for approximately two or three months.

34. Carrier testified that she came to work on December 18, 2013 expecting to be paid. She testified that as she recalled it was a pay day, a Friday. It was not a Friday, it was not a pay day, and there is no credible evidence that Ricks was paying the employees early, on Wednesday, December 18, 2013. The evidence is clear that Carrier was upset that day. She, Lane and Ricks all attested to her being upset. However, she could not have been upset because she discovered she was not going to receive payment of wages due on Friday December 20, 2013, on that Wednesday. There is no substantial and credible evidence supporting any such scenario in play on December 18, 2013.

35. Sometime during her shift on December 18, 2013, Carrier had at least one conversation with Ricks about getting paid some money that day. Ricks' recollection was that she wanted an advance against her wages. He testified that he told her he had no money to pay her, because of his daughter's overspending, and that she was very unhappy about it.[9]

36. According to the hearing testimony of Lane, she and her husband came back with the groceries at about 4:00 p.m. They dropped off the groceries and she checked with her dad to see if he needed anything before they left. Ricks told her to go home. She told him that she would be out with her husband and cousin at dinner and to call if he needed anything. She did not testify to any argument she had with Carrier, nor to any derogatory terms Carrier used at that time.[10] Lane and her husband left and went to dinner about 4:30 or 4:45 p.m.

37. After Lane and her husband left, only Nora Krebs was left in the house with Carrier and Ricks. Candi, Ricks' friend, had been there earlier that day, but had

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[9] Carrier testified that she observed or heard about other employees getting paid. Regardless of whether Ricks told the truth or not about having no money to pay Carrier and whether some other employees and/or Candi received payments from Ricks that day, it wasn't a pay day or even a Friday.

[10] She did testify at hearing to thinking that she heard Carrier, once or twice, muttering under her breath, refer to her as a "bitch" or "pregnant bitch." She did not testify that either mutter occurred on Wednesday, December 18, 2013, and testified that she did not confront Carrier about either mutter.

left before the last argument. With nobody else present, Ricks and Carrier got into a more serious conflict.

38. Carrier testified that during her shift on December 18, 2013, she had come into Ricks' bedroom to place fresh coffee and tea on his nightstand. He was sitting on his bed. As she leaned over to put down the coffee and tea, he lunged forward and "grabbed" her, making contact with her left breast and her groin. Carrier testified that she pulled away from Ricks and left his bedroom very upset about his alleged physical contact and still angry about not getting paid that day.

39. Had he grabbed her, Ricks could not have held on to Carrier against her will. It was implausible that Ricks could "grab" Carrier by lunging from his bed if the nightstand was in its usual position between Carrier and the bed. If the nightstand was not next to the bed, so that Carrier was closer to him, it would have been very risky for him to lunge at her from his sitting position on his bed. By her own testimony Carrier was near the bed, bending over to deliver fresh beverages (she wrote in her calendar that she was grabbing empty beverage glasses or cups). If Ricks attempted such a lunge, he could very well have toppled over off the bed unless he was able to hold on to her, or if he did initially hang on to her, he would almost certainly fall when she moved backwards away from him and his bed, as she testified that she did do. With his physical infirmities, which included osteoporosis, a fall from his bed to the floor could well have been catastrophic. There was sufficient credible evidence to persuade the Hearing Officer that Ricks more likely than not did not engage in this "grab."

40. Since Carrier did not prove the physical contact, the Hearing Officer cannot find that her anger when she left Ricks' bedroom was because of such contact.[11] Clearly, she was angry that day, about not getting paid, and also about the continuing harassment to which Ricks was now subjecting her.

41. There was some further confrontation between Carrier and Ricks before 5:30 p.m. that afternoon, the time at which Lane testified that Ricks called at the restaurant and asked her to come back to the house because he was afraid. His account to his daughter of what had happened (as she testified to it), cannot be credited because it is not corroborated by any credible evidence.

42. At about the same time that afternoon, around 5:30 p.m., Carrier called her husband and asked him to come pick her up because of what Ricks had done to her. Her account to her husband, and her subsequent account during her testimony,

[11] Carrier testified that she told Candi about Ricks lunging at her and groping her, and that Candi said she would never allow Ricks to do that. But Candi did not testify.

of what had happened cannot be credited because it is not corroborated by credible evidence.

43. Whatever actually happened that evening between Ricks and Carrier, Ricks called the police, who came and investigated. Officer Jeffrey Brag, Great Falls Police Department, testified that he answered a call on the evening of December 18, 2013, about a disturbance at the home of a Larry Ricks. He testified to Ricks' account to him of that disturbance (which, as already noted, cannot be credited for lack of corroboration with credible evidence). He testified that after speaking with Ricks that evening he went to the house of Christine Carrier, and when he went to the door of her house, he was able to see her sitting inside the home. He testified that when he knocked, she did not answer the door. He testified that he announced himself as a police officer, that he shined his flashlight at her and then on himself to display his badge. He testified that he believed she saw him, that she "was looking right at me," and that after staring at him for a few minutes, she got up, walked into what appeared to be a separate room, and closed the door.

44. The conduct of Carrier when Officer Brag attempted to contact her about the incident was not consistent with her account of being sexually harassed and bullied into leaving her employment and fleeing, just a short time before the uniformed police officer knocked on her door. Had that happened, she should have wanted to talk to the officer and make a complaint about Ricks' alleged attack, not ignore the officer and avoid him.[12]

45. Carrier testified that on December 19, 2013, she did report Ricks' conduct to the Great Falls Police Department and that no action was taken.

46. Carrier did not prove that Ricks made unwelcome physical sexual contact with her on December 18, 2013. She did prove that she was subjected to an increasing level of unwelcome sexual comments and advances over the last month or two of her employment, which did create a hostile work environment. Her testimony cannot be credited regarding Ricks' unwelcome physical sexual conduct and charging at her in his wheelchair while throwing groceries and shouting at her to leave his house. It is more likely than not that she was discharged on that date, rather than abandoning her work voluntarily. It is more likely than not that she left because Ricks told her to leave, and because Ricks did so angrily, because of her (to him) "deteriorating" attitude. That deteriorating attitude resulted at least in a crucial part

[12] Carrier testified that when Officer Bragg arrived at her house, she had no idea that it was law enforcement. She testified that she thought it was "Brittney and her husband to come and get Larry's truck" and that she "didn't want to deal with it at the time." Her explanation is not credible in light of Officer Bragg's testimony. The officer, on this record, had no bias for or against either party, and no reason to tell the Hearing Officer anything but the truth.

from his sexual harassment of her, and she was therefore discharged because she resisted his sexual harassment.

47. Carrier did suffer emotional distress during her employment because of the way Ricks treated her. That emotional distress resulted from harsh treatment comparable to the harsh treatment he gave to other male and female employees alike. His harsh treatment was not illegal discrimination because it was not because of protected class status. During the last one to two months of her employment, that emotional distress also resulted from his sexual harassment of her. Her emotional distress continued after her discharge, because with no family income except Unemployment Insurance benefits and assistance from social welfare programs, Carrier reasonably feared that she and Jones would lose their house. In testifying about her emotional distress, Carrier herself attributed some of it to the sexual harassment, some of it to the alleged sexual assault that she did not prove, and some of it to the nasty but not discriminatory treatment that Ricks inflicted upon Carrier and the rest of his employees ("he treated us all like we were nothing"). Only a portion of Carrier's emotional distress resulted from his sexual harassment and Ricks' discharge of her. That portion of her emotional distress is valued at $15,000.00.

48. This would be a relatively small award for emotional distress, over time in employment and immediately following being fired from employment, if the sole cause of the emotional distress was the illegal discrimination. But the illegal discrimination was only one out of at least three causes for her emotional distress, as noted in the previous finding. Also, within about three months after her departure from employment, Timothy Jay Jones, found work, Carrier and Jones were able to pay off the debt on their home and reestablish their lives and their relationship. At that point, Carrier's compensable emotional distress ended.

49. Carrier did not provide sufficient information to determine when Ricks began to target Carrier with sexual harassment, as opposed to the period during which he subjected her to the same harsh treatment ("bucket mouth" was his catch-all term for it) that other employees, male as well as female, endured. The former was illegal because it created a hostile work environment for her because of her sex. The latter was an instance of an employer who sometimes treated all of his employees badly, which was not illegal discrimination. The Hearing Officer has found that, based upon the circumstantial evidence about the deterioration in Carrier's attitude at work, the approximate period of the sexual harassment was during the last one or two months of her employment. It is clear that the deterioration in her attitude would not have occurred without the sexual harassment during the last few months of her employment.

50. The Montana Human Rights Act does not outlaw discriminatory thoughts. It also does not impose a code of civility or of political correctness. Ricks' sexual

harassment of Carrier over time constituted the only illegal acts that Carrier proved, by the preponderance of the evidence, he had committed.

51. On December 18, 2013, Carrier stopped putting up with Ricks, to hold onto her job until her husband finished training and got a job. Although she and Jones still thought that they would lose their house if she lost her job, on that December day she confronted Ricks and he fired her. The failure of Ricks to pay her at least some money two days before pay day appears to have been the immediate "last straw" for her confrontation with Ricks that day. But without the sexual harassment on top of the "bucket mouth" conduct, Carrier would have continued to grit her teeth and put up with Ricks' sexual harassment until her husband found work. Under these circumstances, she is entitled to recover lost wages for the first three months after her discharge, from December 18, 2013, through March 17, 2014, a total of 90 days, or 12.9 weeks. She did not establish any right to lost earnings thereafter, because at that point, even without Ricks' sexual harassment, she would have quit her job because Jones' new job made it possible and safe for her to stop putting up with all of Ricks' bad behavior, the legal as well as the illegal.

52. At $1,100 every two weeks, with the employer taking no deductions, Carrier lost $7,150.00 (and is responsible for any taxes she might owe on that income). 12.9 weeks (the post employment period of her compensable lost wages as well as the last of her compensable emotional distress) divided by 2 times $1,100 for every two weeks totals $7,150.00.

53. Carrier is entitled to interest at 10% per annum on the wages she lost. Her next pay day after December 20, 2013, would have been January 3, 2014. On that pay day, she would have been paid $1,100, which began to accrue interest. For each of the next 5.5 pay days, she would have lost the same amount. Interest accrued at 10% per annum on the wages lost as of each pay day to the date of this decision. That totals $927.30.[13]

54. Nonetheless, the reasonable remedy to rectify the harm, pecuniary or otherwise, suffered by Carrier is: (a) An award of $15,000.00, payable immediately, for the entire value of her emotional distress resulting from the hostile environment she had to endure during the last two to four months of her employment because of Ricks' sexual harassment of her; (b) An award of $7,150.00 for lost wages for three months after her discharge, for the time she would have continued to work for Ricks but for the blow up on December 18, 2013, up to the time that her husband began his new job; and (c) An award of $927.30 in simple annual interest on the lost wages, from the dates her lost wages would have been due to the date of this decision. Post judgment interest accrues on this monetary judgment according to law.

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[13] Appendix "A" recites the calculations for interest, without using a spreadsheet.

55. Ricks must also be permanently enjoined from sexual harassment of any females he employs.

56. In addition, Ricks must be ordered to arrange for 4 hours of training in prohibited sexual harassment in Montana by both state and federal law, as approved by HRB, for Ricks and for his daughter, Brittney Lane, at Ricks' expense, to be completed within two calendar months of this decision unless HRB allows further time or otherwise modifies this requirement, for good cause shown.

57. In addition, Ricks must be ordered to adopt notices for posting in his home within two calendar months of this decision, submit the notices to HRB for approval, and within two weeks after getting that approval, with any modifications required by HRB, post said notices, in at least two locations in his home designated by HRB, stating: (a) He acknowledges and complies with the applicable state and federal prohibitions against sexual harassment because of sex in employment; (b) The name, phone number and mailing address of the local person to whom any complaint of sexual harassment in employment for Ricks by any employee may be submitted and (c) The contact person names, phone numbers and mailing addresses of HRB and the appropriate federal agency office responsible for investigation of any sexual harassment in employment allegations by any of Ricks' employees. These notices must be kept current and remain posted for one year after the date of this decision.

IV. Discussion[14]

A. Applicable Montana Discrimination Law Establishing Sexual Harassment

Montana's Human Rights Act ("HRA") prohibits unlawful discrimination by an employer against an employee because of sex. Mont. Code Ann. § 49-2-303 (2013). Sexual harassment is one kind of such sexual discrimination under the Montana Human Rights Act. Harrison v. Chance (1990), 244 Mont. 215, 221, 797 P.2d 200, 204.

The HRA provides employees a right to a work environment without sex discrimination. Beaver v. DNRC, ¶30, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. "When sexual harassment is directed at an employee solely because of gender, the employee is faced with a working environment fundamentally different from that faced by an employee of the opposite gender. That difference constitutes sexual discrimination in employment." Stringer-Altmaier v. Hafner, ¶18, 2006 MT 129, 332 Mont. 293, 138 P.3d 419 (quoting Harrison at 221, 797 P.2d at 204).

[14] 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.

It is "well established that there are two forms of sexual harassment that violate the prohibition against workplace discrimination: (1) quid pro quo; and (2) hostile work environment harassment." Beaver at ¶29. Workplace sexual misconduct constitutes prohibited "sexual harassment" where "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. Id. at ¶30. That is the nature of Ricks' sexual harassment in this case.

To be actionable, sexual harassment must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment.'" Id. "To be sufficiently severe or pervasive to violate Title VII and establish a claim, the misconduct must create a working environment which is both objectively and subjectively offensive. In other words, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived as hostile and abusive." Id. at ¶ 31 (citations omitted).

Before the time when Ricks began to target Carrier for sexual advances, she was not subjected to an objectively and subjectively offensive work environment. There is no evidence Ricks treated any of his employees any better than Carrier, although some of them handled it differently than she did. It was only from the time (only proved with circumstantial evidence) that Ricks began to target Carrier by making sexual advances towards her that he was subjecting her to sexual harassment (adverse treatment because of her sex). As his advances became more frequent and more specific, the workplace increasingly became objectively and subjectively offensive. Over that time only, for the last two to four months of her employment, Ricks did subject Carrier to a hostile work environment.

B. Character and Other Wrongs Evidence – Inadmissible for Sexual Harassment Evidence Regarding Other Employees

There has been some indications of change in the way in which evidence of sexual harassment, including evidence of sexual harassment of other employees, can be proved. The use of evidence of "other wrongs and acts," such as similar adverse actions against other employees, has been allowed, at least in some federal cases and cases from other jurisdictions, not to prove character ("propensity evidence") but for other purposes approved in the Rules of Evidence in those other venues. Montana cases are not yet supporting a huge sea change in this evidentiary law, but this Hearing Officer, in a few cases, has allowed a wide range of evidence of such alleged "other wrongs and acts" into evidence, subject to being disregarded in making the decision if ultimately the advocate of the evidence fails to establish any proper purpose for it. This is one of those cases. Ricks' motion in limine to exclude evidence of his behavior towards other employees and renewed motion and objections at hearing to that evidence were both denied, subject to revisiting the

question after hearing, when all the evidence related to the motion and objections would be in the record and the Hearing Officer could rule as part of the decision. There being no jury, this allowed for a full record for the ruling and for any review of decision that might follow.

First, the Hearing Officer will address the argument that evidence of Ricks' behavior towards other employees was admissible under the Montana Rules of Evidence (MRE), Rule 404(b), as evidence of other wrongs or acts. Much of the authority in Montana arises out of Montana Supreme Court decisions on criminal appeals E.g., State v. Sigler (1984), 210 Mont. 248, 688 P.2d 749 (overruled on other grounds).

The notice requirements of the "modified Just" rule regarding introduction of other crimes, wrongs or acts in criminal trials have been overruled by the Court. State v. 18th Jud. Dist. Ct., at ¶38, 2010 MT 263, 358 Mont. 325, 246 P.3d 415.[15] The substantive analysis from the modified Just rule is really unchanged, and is still used to determine whether evidence should be admitted or excluded (and kept away from the fact-finders in jury trials). That analysis properly applies in civil cases

At trial the prosecution offered, and the trial judge allowed, over the objections of Sigler's counsel, testimony of several witnesses regarding Sigler's prior harsh discipline and arguably abusive conduct towards the child. Id. at 251-52, 688 P.2d at 750.

On appeal Justice Sheehy, writing for the majority, discussed the precedent cited by Sigler on interpreting the evidentiary rule:

> Sigler attacked admission of the testimony of witnesses relating to other crimes, wrongs or acts by him toward the child. His counsel argued that the elements required in State v. Just (1979), 184 Mont. 262, 602 P.2d 957, and State v. Jensen (1969), 153 Mont. 233, 455 P.2d 631 were not met; that the acts of Sigler as testified to by the witnesses . . . are dissimilar to the acts which brought about the death of the child; and that the acts were no more than normal disciplinary procedures and were not 'unusual and distinctive' so as to qualify for wrongful acts or crimes under State v. Hansen (Mont. 1980), 608 P.2d 1083, 37 St.Rep. 657.

State v. Sigler at 253, 688 P.2d at 751-52.

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[15] Sometimes referred to as the "Anderson" case, using the name of the defendant in the underlying criminal proceeding, but also referenced by the Montana Supreme Court as the "Salvagni" case, using the name of the presiding District Court judge. Herein referred to as "18th JDC."

The opinion analyzed how the precedent applied to the facts in the particular case:

> In Just, we set out a four-element test to determine the admissibility of evidence of other crimes or acts in criminal prosecutions. They are (1) similarity of crimes or acts; (2) nearness in time; (3) tendency to establish a common scheme, plan or system; and, (4) the probative value of the evidence must not be substantially outweighed by the prejudice to the defendant.
>
> The testimony of the witnesses here meets the Just elements in each particular, and in addition, meets our statement in State v. Brubaker (1979), 184 Mont. 294, 307, 602 P.2d 974, 981, relating to evidence of other crimes or acts:
>
> > "For evidence of unrelated crimes to be admissible, as an exception to the general rule, it must appear that the evidence of the other crimes tends to establish a common scheme, plan, system, design or course of conduct similar to or closely connected with the one charged and not too remote; and the evidence must tend to establish crimes so related that proof of one tends to establish the other. Within those words must be found the paste and cover for the admissibility of the unrelated acts . . . ."
>
> The District Court here had a situation where only circumstantial evidence could bring out the case against the defendant. There were many reasons for a jury to distrust the defendant's statement of the incident. We stated in Brubaker, that evidence of other crimes or acts should not be admitted if it leads the jury to surmise that the defendant was probably guilty of the offense. But when evidence of unrelated acts tends toward the conclusion that the defendant is guilty of the crime charged with moral certainty and beyond a reasonable doubt, it is certainly admissible. Brubaker, supra. In Tanner, supra, the Utah court pointed out that the only available link between the specific nature of the child's injuries and the caretaker may be the evidence of prior abusive conduct by the caretaker.
>
> . . . .
>
> We find no error in the admission of the disciplinary acts administered by Sigler to the child.

State v. Sigler at 253-255, 688 P.2d at 751-753 (overruled on other grounds).

That was Sigler, which the Hearing Officer cites as one of the Montana cases which goes the furthest in finding alternative bases for admitting evidence of a defendant's prior conduct which, on its face, certainly looks like propensity evidence.

There is no question that MRE 404(b) applies to civil cases. Evert v. Swick, 2000 MT 191, 300 Mont. 427, 8 P.3d 773, involved an appeal from a jury verdict against the plaintiff, Candice Evert, and in favor of the defendant, Craig Swick, in Evert's action to recover damages for alleged sexual abuse and violation of the Violence Against Women Act, 42 U.S.C.S. § 1981. The appeal issue was whether the trial court abused its discretion, under MRE 404(b), by excluding Evert's older sister's testimony that Swick had also engaged in inappropriate sexual contact with her. The trial judge ruled that unfair prejudice would result from presenting that testimony to the jury.

> This is one of those issues I believe falls under the probative value outweighed by the prejudicial effect . . . . I think that would be tantamount to directing the verdict to – to the Plaintiff, and I realize that if in fact this did happen that, you know, that that's very powerful evidence for – for the Plaintiff that the Defendant perhaps committed the sexual abuse, but, you know, I – looking under the character evidence rules as well as the 404 rules I – I would have a real difficult time based upon the fourth step of the . . . Just and the Matt notices, that the – probative value of the other act must not be outweighed by the danger of unfair prejudice, and I-I-I just think it would.

Evert at ¶15.

Evert argued on appeal that her sister's testimony was admissible, not of course to prove Swick's character, but to prove three other things: (1) The identity of the person who abused Evert; (2) That if Swick had the opportunity to assault Evert's sister while she was at Swick's home, then he also had the opportunity to assault Evert when she was at Swick's home; and (3) That Swick abused Evert's sister shows an absence of mistake on the part of Evert as to who assaulted her and subjected her to abuse. Evert at ¶18.

Justice Trieweiler wrote the opinion for the unanimous five-justice panel, recounting the current "modified Just" rule, Evert v. Swick at ¶19:

> We have previously developed four criteria, referred to as the Modified Just Rule, to be used in determining the admissibility of such evidence:
>
> (1) The other crimes, wrongs or acts must be similar.

> (2) The other crimes, wrongs or acts must not be remote in time.
> (3) The evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[16]
> (4) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, consideration of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> State v. Matt (1991), 249 Mont. 136, 142, 814 P.2d 52, 56.

The opinion then went on to analyze and to uphold the trial judge's ruling: Evert at ¶20:

> Our review of the record discloses no issue about identity, opportunity, or mistake. Swick clearly had the opportunity to abuse Evert. She lived with him. His defense was not that she was mistaken about the identity of her assailant. It was that she was not telling the truth. The only issue was the credibility of the Plaintiff and the Defendant. The evidence was offered to impugn Swick's credibility and bolster Evert's by proof of Swick's character. However, Rule 404(b), M.R.Evid. does not permit evidence of prior acts for that purpose.

Carrier argued that she was not offering evidence to establish Ricks' propensity to engage in sexual harassment (character evidence), but evidence to prove Ricks' opportunity and intent and the absence of mistake or accident. This is the argument in Evert, which the Court rejected. There is no issue here about opportunity. Like Swick in the Evert case, Ricks clearly had the opportunity to harass Carrier – she worked in his home, providing him home care. Ricks' defense was not that he didn't mean to harass her, but that he had not harassed her. His defense was not that she was mistaken about who harassed her but that she was not telling the truth about who harassed her. His defense was not that any harassment on his part was accidental but that there was no harassment on his part. The issue here is the credibility of the two parties. Evidence of sexual harassment of other employees was offered to impugn Swick's credibility and bolster Carrier's by proof of Swick's

[16] Subsection (3) of the Modified Just Rule mirrors the complete text of MRE 404(b).

character. That is impermissible under MRE 404 and Carrier has not established any purpose within the exceptions of the general rule barring very similar character evidence to prove propensity to do the act at issue.

Ricks was once convicted of sexual assault. Testimony rather than documents from that case indicated that he was convicted for grabbing the groin of a former employee. The alleged parallelism of the allegations, in that criminal case and in this present discrimination charge, if proved (they were loosely established but not with sufficient particularity to meet the first two requirements of the modified Just test), would not change the impermissible character nature of that evidence.

Why, then is the "targeting" of two other employees for other sensitivities different and admissible? Because targeting an employee by moving beyond being a rude and angry "bucket mouth" (not in itself illegal) to discovering and focusing upon the particular sensitivities that those employees had about negative and nasty comments about their children or their lovers is also not illegal, unless and until it involves sensitivity related to protected class status. Evidence of other instances of sexual harassment is patently propensity evidence. But, setting aside the precise comments that hit the tender spots for the other female employee and the male employee, the pattern of targeting, similar to that used on Carrier, is indicative of intent, plan and the knowledge with which Ricks targeted his employees. The targeting of Carrier, just like that of the other two, was intentional. It was part of Ricks' plan or practice of targeting employees, and it was carried out by Ricks with full knowledge of the impact of his targeting.

Prior instances of alleged sexual harassment of other female employees were far too powerful, unfairly suggesting a "propensity" to do in the present instance what was done in the prior instances. The Hearing Officer disregarded them. As Evert shows, such behavior is unfairly prejudicial and not proper to present to a jury. The other examples of targeting, without regard to the precise nature of the "tender" spots of the two employees, were not so powerful and did not unfairly lead to propensity-based findings. They were admissible and could be and were used to corroborate Carrier's testimony.

C. Carrier's "Habit" Argument Also Fails

The MRE distinguishes character from habit. "A habit is a person's regular response to a repeated specific situation." Rule 406, M.R.Evid. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

After ruling that evidence of Sigler's harsh discipline of the child was properly admissible "other crimes and wrongs" evidence (see the quotation herein that ends at

the bottom of p. 18 of this decision), and before the final sentence of that decision (quoted at the top of p. 19 of this decision, after the ellipsis), the Sigler opinion also found that the defendant's harsh discipline of the child was properly admitted as evidence of a habit (the following quotation is what appears in that decision where the ellipsis is at the top of p. 4 of this decision).

> Evidence of other crimes, wrongs or acts is an exception to the general rule that evidence of a person's character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Rule 404, M.R.Evid. A trait of character is to be distinguished from habit. "A habit is a person's regular response to a repeated specific situation." Rule 406, M.R.Evid. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.
>
> "Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it." McCormick on Evidence Sec. 162, at 341.
>
> Under Rule 406, M.R. Evid., the acts habitually performed by Sigler in response to his perceived need for discipline of the child were admissible. As a matter of habit, his discipline of the child was excessively harsh.

Sigler at 254-55, 688 P.2d at 753-54.

Carrier argued that the Montana Supreme Court has since followed Sigler again, finding that habit evidence is admissible to prove abusive tendencies of an individual (the mother in more recent case) towards her child. State v. Huerta (1997), 285 Mont. 245, 256, 947 P.2d 483, 489-90. In Huerta, Jose Antonio Huerta sought to establish, through the testimony of witnesses, that the mother of the victim was responsible for abusing the child, Id. at 250, 947 P.2d. at 486, that it was her habit to respond to her child's misbehavior with abusive discipline. Id. at 255, 947 P.2d at 489. Relying on Sigler, the Court ruled that the mother's alleged prior abuse of the child was "evidence of habit." Id. at 256, 497 P.2d at 490. However relevant evidence can still be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury or

by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The trial judge in Huerta found the habit evidence remote in time, cumulative and repetitious and that it would frustrate orderly administration of the trial. The trial judge decided that absent more direct evidence of the mother's connection to the beating at issue, the unfair prejudice of "character assassination" testimony about the mother outweighed the probative value of that testimony. Id. at 256-57, 497 P.2d at 490. The Court agreed and ruled that exclusion of Huerta's habit witnesses was not an abuse of the trial judge's discretion.

These two habit cases cited involved one adult's discipline of a particular child multiple times, with multiple witnesses observing the discipline inflicted by that one adult on that particular child. Repeated instances of the same adult reacting to the same child's conduct in the same fashion is readily and properly distinguishable from multiple witnesses asserting that they each were subjected to sexual harassment by Ricks while in his employ, over a considerable stretch of time, before as well as during Carrier's employment. The two habit cases seem uncomfortably close to propensity cases to this Hearing Officer, but in any event, they involve a significantly different set of facts than those presented in the present case. The evidence of alleged sexual harassment of other female employees is extrinsic propensity evidence, too prejudicial to be used in deciding the case. They were not used.

D. Credibility

The department follows the Montana Rules of Evidence in making contested case fact determinations. "Notice of Hearing," May 7, 2914, p. 2; also see Admin. R. Mont. 24.8.704 and 24.8.746. Applying those Rules, the evidentiary framework for department discrimination cases is the same as that applicable in District Court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. § 26-1-401.

In discrimination cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. Id.; Heiat v. Eastern Mont. College (1996), 275 Mont. 322, 912 P.2d 787, 791, citing Texas Dpt. Com. Aff. v. Burdine, (1981), 450 U.S. 248, 253; Taliaferro v. State (1988), 235 Mont. 23, 764 P.2d 860, 862; Crockett v. City of Billings (1988), 234 Mont. 87, 761 P.2d 813, 818. When the record contains conflicting evidence of what is true, the fact finder must decide the credibility and the weight of the evidence. Stewart v. Fisher (1989), 235 Mont. 432, 767 P.2d 1321, 1323; Wheeler v. City of Bozeman (1989), 232 Mont. 433, 757 P2d 345, 347; Anderson v. Jacqueth (1983), 205 Mont. 493, 668 P.2d 1063, 1064;. In this regard, the standard for deciding facts is still the preponderance of evidence standard. Cf.,

Pannoni v. Bd. of Trustees, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance – "more likely than not" – standard, in the course of arguing that on the particular issue a lighter "plausibility" standard should apply).

In cases in which the primary protagonists tell conflicting stories about what happened, credibility is crucial. Mont. Code Ann. §26-1-302, provides:

> A witness is presumed to speak the truth. The jury or the court in the absence of a jury is the exclusive judge of his credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness's testimony; such matters include but are not limited to:
>
> (1) the demeanor or manner of the witness while testifying;
> (2) the character of the witness's testimony;
> (3) bias of the witness for or against any party involved in the case;
> (4) interest of the witness in the outcome of the litigation or other motive to testify falsely;
> . . . .
> (6) the extent of the witness's capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which he testifies;
> (7) inconsistent statements of the witness;
> (8) an admission of untruthfulness by the witness;
> (9) other evidence contradicting the witness's testimony.

The credibility of both of the protagonists in this case – Ricks and Carrier – were cast into doubt by evidence that tended to controvert and overcome the presumption that each spoke the truth under oath.

Ricks was not unfairly saddled with testimony of other female employees of his alleged sexual harassment of them, as "other acts" or "habit" evidence. That testimony was disregarded. Still, Ricks managed to shred his own credibility. For just some of the examples regarding only the final blow up on December 18, 2013, Ricks testified that before Lane left to "go to the movies" (Lane testified she and her husband were going to dinner) he heard Carrier yelling at her, and the argument was so loud that Ricks could hear that it was about Carrier getting some money (or else he had no idea what it was about, depending upon which of his statements under

oath are credited).[17] He testified about a conversation he had with his daughter just before she left about Carrier shouting at Lane, and testified that Lane reported to him that Carrier had been calling her names. He denied and also admitted that on December 18, 2013, he had told his daughter to "get rid of that bitch" (Carrier). He testified that on December 18, 2013, he told Carrier, to "get the hell out of my house, bitch." He testified that he thought, in his conversation with his daughter on December 18, 2013, he told Lane "to go ahead and leave" (go to dinner) and that he believed he "used the word, 'I'll take care of the bitch.'" He also testified that he did not remember telling his daughter to get rid of Carrier.

Lane testified that she observed that on December 18, 2013, Carrier was upset, but she also testified that she never saw Carrier shouting, stomping around, banging on cupboards or throwing groceries on that day. She testified that she did not hear her father call Carrier "that bitch." There was no credible corroboration of any of Ricks' various accounts of Carrier's conduct that day. Not only did Ricks give inconsistent deposition testimony regarding what happened that day, he explained the inconsistencies at hearing as the result from him "being in a stupor," which further eroded his credibility. Lane, as already noted, did not corroborate his account of what happened. She would have every reason to corroborate her father's account if it was what had happened in her presence that afternoon, but she did not. Therefore, Ricks' testimony about that final blow up, as well as about most other contested fact matters in this case, had substantially diminished credibility.

Carrier's insistence that Wednesday, December 18, 2013, was Friday and a pay day was damaging to her credibility, because she had been very precise about many of details of the sexual harassment (although cloudy about the dates). The events of that Wednesday brought her to the breaking point at which she gave up keeping her job, and confronted Ricks in some fashion, despite the financial disaster that seemed sure to follow. Yet, her recollection of those crucial events was foggy, inconsistent and not very credible. Her inability to establish a time line for the sexual harassment was also damaging to her credibility. After generally agreeing that Ricks had bad days and good days, she testified that he basically was sexually harassing her every day. The substantial disparity between those two accounts of her work environment also diminished her credibility.

Of the two principal witnesses, the parties, Carrier was generally more credible, but sometimes her testimony defied common sense, and sometimes corroborative circumstantial or other evidence tipped the scales against her. Her account of Ricks

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[17] He also testified under oath that he was in his bedroom sleeping most of the day of December 18, 2013, until he was awakened by "Carrier . . . shouting and hollering and carrying on in the kitchen because of a loan issue" and he "could hear her screaming about a loan down the hallway in the kitchen."

on his chair, roaring into the room, taking control of the ammunition (the bags of groceries) and flinging groceries (cans, it seemed) at her and all over the room, was not credible. He more likely than not could and did intimidate Carrier with his anger, but observation of Ricks during the hearing did not persuade the Hearing Officer that he was physically capable of the described behavior. In addition, Ricks, in a sitting position on his bed, would have taken an enormous risk to lunge at Carrier and grab her, leaving himself in a position where he could fall to the floor if Carrier pulled away and exited in a hurry. His physical condition made such a fall likely to result in catastrophic injuries. Carrier was credible in testifying about how he targeted her. She was far less credible testifying about the attack with cans of groceries and the sexual assault.

E. Damages and Affirmative Relief

As already noted, the department has the power to require any reasonable measure to rectify "any harm, pecuniary or otherwise" that Carrier suffered because of Ricks' discrimination. Mont. Code Ann. § 49-2-506(1)(b). Lost wages due to discharge for resisting discrimination is a harm Carrier suffered for the first three months after her discharge.

Prejudgment interest on that lost income is a proper part of the department's award of damages. P. W. Berry, Inc., 779 P.2d at 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times an appropriate rate of interest. E.g., Reed v. Mineta (10th Cir. 2006), 438 F.3d 1063. The appropriate rate is 10% annual simple interest, as is applicable to tort losses capable of being made certain by calculation, only without the requirement of a written demand to trigger commencement of the interest accrual, which has not been required in Human Rights Act cases. Mont. Code Ann. § 27-1-210. The appropriate calculations are both described in the findings (above) and in "Appendix A" at the end of this decision.

Damages to remedy emotional distress resulting from the illegal discrimination likewise within the statutes's scope. Vainio v. Brookshire (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. Gauging emotional distress recovery for illegal discrimination under the Montana Act starts from a federal case, Johnson v. Hale, 13 F.3d 1351 (9th Cir. 1994), which prompted a continuing series of Montana decisions following the same approach. See, e.g., Vortex Fishing Systems v. Foss, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. Violation of the right to be free from invasion of our civil liberties is a per se invasion of a legally protected interest. The Montana Human Rights Act demonstrates that under the laws of this State, a reasonable person is not expected to endure any harm, including emotional distress, which results from the violation of a fundamental human right. Johnson and Vainio, supra.; see Campbell v. Choteau Bar & Steak House (1993), HR No. 8901003828.

The specific facts of each case determine the amount of money appropriate to compensate a charging party who suffered emotional distress due to illegal discrimination. These awards are always difficult, because emotional distress is not readily convertible to dollars. The basis for the award herein is set forth in the findings.

Finally, the affirmative relief mandated by law requires permanently enjoining Ricks from again engaging in sex discrimination in employment because of sex, and can prescribe any conditions on Ricks' future conduct relevant to the type of discriminatory practice found and require any reasonable measure necessary to correct the discriminatory practice found. The findings include statements of the affirmative relief proper in this instance. Mont. Code Ann. 49-2-506(1).

V. Conclusions of Law

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

2. Respondent Larry Ricks illegally discriminated against Charging Party Christine Carrier in employment, because of sex, when he subjected her to sexual harassment during the last one or two months of her employment and fired her when she resisted that sexual harassment, violating Mont. Code Ann. §49-2-303(1)(a).

3. Since the Hearing Officer (acting on behalf of the department) has found Ricks engaged in the discriminatory practice alleged in the complaint, a mandatory permanent injunction against further such discriminatory practice must issue Mont. Code Ann. §49-2-506(1). In addition, the Hearing Officer may (a) prescribe conditions on Ricks' future conduct relevant to the type of discriminatory practice found; (b) require any reasonable measure by Ricks to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to Carrier and (c) require a report on the manner of compliance. Mont. Code Ann. §49-2-506(1)(a), (b) and (c).

4. Attorney fees and costs are recoverable by the prevailing party in an action in district court, in that court's discretion. Mont. Code Ann. § 49-2-505(8).

VI. Order

1. Judgment is found in favor of Christine Carrier and against Larry Ricks on the charge that he subjected Carrier to sexual harassment in employment, in violation of the prohibitions against discrimination in employment because of sex.

2. Ricks is permanently enjoined from sexual harassment of any females he employs.

3. Within two calendar months of this decision, Ricks and his daughter, Brittney Lane, must undertake and successfully complete 4 hours of training in

prohibited sexual harassment in Montana by both state and federal law, as approved by HRB, paid for by Ricks. HRB may modify any provision within this Paragraph 3 for good cause shown.

4. Within one calendar month of completing the training required above, Ricks must adopt notices for posting in his home, submit them to HRB for approval, and within two weeks after that approval, post said notices, in at least two locations in his home designated by HRB, stating that: (a) He acknowledges and complies with the applicable state and federal prohibitions against sexual harassment because of sex in employment; (b) The name, phone number and mailing address of the local person to whom any complaint of sexual harassment in employment for Ricks by any employee may be submitted and (c) The contact person names, phone numbers and mailing addresses of HRB and the appropriate federal agency office responsible for investigation of any sexual harassment in employment allegations by any of Ricks' employees. These notices must be kept current and remain posted for one year after the date of this decision. HRB may modify any provision within this Paragraph 4 for good cause shown.

5. Judgment is hereby entered against Ricks requiring that he is subject to and must comply with Paragraphs 2-4, above. Further, judgment is hereby entered that he must immediately pay to Carrier the sum of $23,077.30, being:

> (a) $15,000.00, hereby awarded for the value of that emotional distress suffered by Carrier as a result of the hostile environment created by Ricks' sexual harassment of her during the last one or two months of her employment and during the first three months following her discharge from employment;
>
> (b) $7,150.00, hereby awarded for lost wages for the first three months following her discharge, during the time she would have continued to work for Ricks but for her discharge by him on December 18, 2013, up to the time that her husband began his new job; and
>
> (c) $927.30, hereby awarded as simple annual interest on her lost wages, from the dates her lost wages would have been due to the date of this decision.

6. Post judgment interest on the monetary judgment accrues according to law.

Dated: October 22, 2015.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Alex Rate, Rate Law Office PC, attorney for Christine Carrier, and Mark T. Wilson, Jardine Stephenson Blewett & Weaver PC, attorney for Larry Ricks:

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, Mont. Code Ann. § 49-2-505 (4), WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
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 Office of Administrative Hearings, 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 transcript has already been prepared and counsel should have complete copies of it.

ANY AND ALL PORTIONS OF THE HEARING RECORD AND/OR THE OAH FILE SEALED BY ORDER OF THE HEARING OFFICER REMAIN PERMANENTLY SEALED UNLESS AND UNTIL A TRIBUNAL EXERCISING JURISDICTION OVER THE QUESTION MODIFIES THE SEALING ORDER APPLICABLE. OAH NO LONGER HAS JURISDICTION TO MODIFY ANY SEALING ORDERS, SINCE WITH THE ISSUANCE OF THE DECISION, ITS JURISDICTION HAS ENDED.

Carrier.HOD.tsp

APPENDIX "A"

CALCULATION OF SIMPLE INTEREST WITHOUT A SPREADSHEET

The following table displays the calculation of simple interest due without a spreadsheet.

When working for Ricks, Carrier had 26.1 pay days (every other Friday) per calendar year (except on leap years, which are irrelevant here). 10% annual interest (.10), divided among 26.1 pay periods, is .03% interest (.003) earned every pay period on past due wages (i.e., wages due before that pay period and not paid). For the January 3, 2014, pay day, the first of 47 pay days as of October 22, 2015, the date of this decision, the evidence does not establish any wages lost from the previous pay period (pay day on December 20, 2013), and so no interest accrued by January 3, 2013. On the January 17, 2014 pay day, interest had accrued on the lost $1,100.00 that would have been due on January 3, 2013. .003 times $1,100.00 is $3.30. For each of the next five pay days, an additional $1,100.00 had been lost, so the total interest accrued for each successive pay period was $3.30 higher than the interest accrued in the previous pay period. Total interest for each of these pay periods was the interest accrued plus the interest previously accrued, as would continue to be true.

For the April 11, 2014, pay day, the last $550.00 of lost income was added to the rest of the lost income, to total $7,150.00. There would be no more added lost income. Thus, thereafter on each of the subsequent pay days, the total amount accruing interest would remain $7,150.00. The interest newly accrued for each of the subsequent pay days would be the same as for April 11, 2014, $21.45. Rather than continuing the table out to the end, a shortcut is to multiple the interest accrued for each subsequent pay day after April 11, 2014 ($21.45), by the number of subsequent pay days (39). $21.45 times 39 equals $836.55. Add the total interest on April 14, 2014, $90.75, and the result is $927.30.

Pay Day Date & #		Total Amount Accruing Interest	Interest Accrued	Interest Previously Accrued	Total Interest
010314	1	- 0 -	-0-	-0-	-0-
011714	2	$1,100.00	$3.30	-0-	$3.30
013114	3	$2,200.00	$6.60	$3.30	$9.90
021414	4	$3,300.00	$9.90	$9.90	$19.80
022814	5	$4,400.00	$13.20	$19.80	$33.00
031414	6	$5,500.00	$16.50	$33.00	$49.50
032814	7	$6,600.00	$19.80	$49.50	$69.30
041114	8	$7,150.00	$21.45	$69.30	$90.75