BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 2266-2016

SAMANTHA J. STOVER,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
JEFFREY LYNN,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

On February 1, 2016, Samantha J. Stover filed an original complaint with the department's Human Rights Bureau (HRB), charging sex discrimination in housing and retaliation by Jeffrey Lynn. On June 21, 2016, the Office of Administrative Hearings (OAH) received an HRB "Request to Certify Case for Hearing" forwarding to OAH the original complaint. On June 28, 2016, OAH issued a "Notice of Certification for Hearing" regarding this matter. On July 11, 2016, OAH received Stover's "Acknowledgment of Service," signed by her counsel herein. On July 15, 2016, OAH received Lynn's "Acknowledgment of Service," signed by his counsel herein. On July 21, 2016, OAH issued an "Order Setting Contested Case Hearing and Prehearing Schedule."

The contested case hearing convened on November 1, 2016, in Kalispell, Montana. Stover, James Miller and Jeffery Lynn presented sworn testimony. Charging Party's Exhibits 1-4[1] and Stipulated Exhibits 5 & 6 were admitted into the evidentiary record. The parties filed their post hearing submissions, and the Hearing Officer now issues the following decision.

[1] Exhibited 3 was substituted post-hearing with a version that redacted Stover's birthdate and social security number.

I. Findings of Fact

1. Samantha J. Stover, the charging party, at all relevant times is and was a resident of Columbia Falls, Montana.

2. Jeffery Lynn is the property owner and the landlord of property on which Stover was a twice a tenant. At all relevant times he resided at 690 South Hilltop Road, Columbia Falls, MT 59912.

3. Stover rented housing from Lynn May 2002 through March 2006. She subsequently rented housing from Lynn a second time from June 2012 through mid-October 2015, at 696 South Hilltop Road, Columbia Falls, MT 59912. Stover's rental for the second tenancy was a two bedroom, one bathroom mobile home. At some time between her two tenancies with Lynn, Stover married James Miller. After a very brief time, Miller and Stover had their marriage annulled. When she commenced her second tenancy in 2012, Miller came with Stover as her roommate.

4. In June 2014 Stover was struck by a truck and suffered a traumatic brain injury ("TBI"), broken arm, a concussion and now suffers from seizures, neuropathy and post-concussion syndrome. As a result, her mental health deteriorated and she developed seizures. Since her TBI she has not worked, and Miller was the only wage earner. Stover's second tenancy with Lynn was month to month, with rent of $500.00 per month. There was no written lease. The only explicit condition agreed upon regarding this tenancy was that Stover could not have a horse on the premises.

5. Stover and Lynn had consensual sexual intercourse together over quite a few years, including part of her first tenancy with Lynn and part of her second tenancy with Lynn. During those periods, either party could suggest sexual intercourse, which would then follow if the other party agreed. Over the years of their sexual interactions, Lynn extended invitations to Stover to have sex together and Stover extended invitations to Lynn to have sex together, they were each other's "booty call." There was no set way for bringing up the idea of having sex together. Sometimes the initiating party used indirect language that would not necessarily have been understood by any third party as an invitation to sexual intercourse, such as Stover suggesting "having fun" together. Other times, the suggestion came in frank sexual statements, such as Lynn paying a supposed compliment to Stover by telling

her she could "suck a golf ball through a garden hose."[2] Neither the invitations nor the acceptances were one-sided. Both made invitations. Both sometimes accepted invitations, and other times turned down invitations.

6. During at least most of the time over which the consensual sex occurred, it was part of their friendship. Over that period, Lynn was lenient about collecting rents due from Stover and accepted late rent payments without comment or concern. During the second tenancy, Miller not only paid the rent, but on occasion Lynn gave credit against the rent due for work Miller performed on the premises. Whether she meant to or not, every time Stover agreed to engage, and then did engage, in sexual intercourse with Lynn, as well as every time she suggested sexual intercourse and then joined Lynn in having sex, she confirmed their "neighbors with benefits" relationship.

7. At some point Stover experienced a "life change" and made some decisions about her life, including adopting certain religious beliefs and making a purity vow.[3] From whenever the life change occurred, Stover did not immediately implement these decisions with regard to her sexual relationship with Lynn. At some point, after she embarked upon changing her life, she still sometimes did engage in sex with Lynn. After more time had passed, she began saying that she did not want to have sex with him. He might well have thought that she meant right then, rather than forever. He continued to bring up his desire to resume their sexual relations. He would ask her whether she "wanted to have fun." At times Stover still agreed to and then engaged in sexual intercourse with Lynn.[4] Stover admitted that she had sex with Lynn twice

---

[2] Stover complained about this "compliment" in her voluntary statement to the Flathead County Sheriff's Department. Exhibit 3, p. 1. However, after she cited this and other instances of Stover's behavior she noted, in the same statement, that "in the past we had interacted that way" [emphasis added].

[3] Stover gave different accounts of when this "life change" occurred, ***i.e.***, December 2013 or December 2014.

[4] Stover's testimony about these more recent instances of sexual intercourse included a justification that she feared Lynn might be less lenient about rent or might require Miller, her roommate, to move out of the rental house. The implication was that Stover agreed to have sex with Lynn to mollify his hostility toward Miller. Miller did not testify that Lynn behaved hostilely toward him. Lynn never agreed under oath that he had been hostile toward Miller. The only evidence offered to corroborate this implied hostility was Stover's allegation (in her September 21, 2015, letter) that Lynn had exhibited a "belligerent, manipulative" attitude toward Miller. But Lynn gave full credit against Stover's rent for Miller's work on the premises. Lynn testified that he did not refer to or show off the "neighbors with benefits" aspect of his friendship with Stover in Miller's presence. Stover's implicit allegation that Lynn treated Miller poorly and indicated that he might force Miller to leave,

in 2015. The last time she engaged in sexual intercourse with Lynn was in Spring 2015.

8. At the time of Stover's last sexual intercourse with Lynn, he was starting work in North Dakota as an oil truck driver. Thereafter, he was often at work in North Dakota for weeks at a time, spending perhaps one week each month at his residence in Columbia Falls. His prolonged absences led to some downward adjustment of the rent due for Stover's tenancy, because she and Miller were present on the premises at all times, and could act on Lynn's behalf during his absences.

9. In the Fall, Lynn spent the entire month of September back at his residence in Columbia Falls. On three occasions he proposed to Stover that they engage in sexual intercourse. She consistently turned him down. On September 4, 2015, Lynn approached Stover's rental, opened the kitchen window, and asked Stover if she wanted to have fun. Understanding this to be a suggestion of sexual intercourse between them, Stover replied to Lynn that she "didn't see that happening." He left.

10. September 7, 2015, Lynn and Stover had a conversation, in the course of which, she gave him an alternate Power of Attorney and some guardianship papers she had signed, appointing him to act on her behalf on legal issues should she become incapacitated. Clearly, as of September 7, 2015, she still considered Lynn a friend upon whom she could rely. Stover testified that Lynn initiated the conversation, coming to the door of Stover's rental and asked her to go on a walk outside with him to talk, and they then walked over to Lynn's shop for that conversation. Miller testified that he was inside Stover's trailer and heard one part of that conversation through the open windows. Lynn testified that the conversation he had with Stover, during which she gave him the legal papers, occurred inside Stover's trailer, after Miller left to go to the store.

11. Stover testified that during that conversation outside Lynn's shop, he suggested they resume their consensual sexual intercourse, saying to her "Once a month in lieu of interest on late fees will be good." Stover reported that she replied, "Isn't that kind of like prostitution?" She testified that Lynn seemed surprised at her comment. Stover asked about Lynn's wife, "What -- does she suck in bed?" or "Does she suck in bed or something?" She testified that Lynn replied, "No. I just like

---

influencing Stover to agree to further sexual encounters, was not proved.

variety." Stover testified that she responded by asking Lynn if it was like her ex-husband liking chocolate -- having favorites doesn't mean not liking other varieties of pleasures. She testified that Lynn replied, "Something like that." Lynn denied the "once a month in lieu of interest on late fees" occurred during the conversation in Stover's trailer. He was not specifically asked about the rest of the sexual comments, so Stover's uncontroverted testimony established that the two of them engaged in a fairly frank conversation about Lynn's sexual intercourse with his wife and that Lynn's continued interest in sexual intercourse with Stover was not based upon any inadequacies in his marital sexual relations. This conversation took place away from Miller – either Miller was in Stover's trailer while the conversation occurred outside of Lynn's shop, or the conversation took place in Stover's trailer while Miller went to the store.

12. There was no evidence that somehow a "late fee" for late rental was an agreed upon term of the month to month tenancy. The evidence did not establish that Lynn at any time ever proposed, tried to collect or collected any late fees from Stover or Miller.

13. Miller testified that on September 7, 2015, he was inside the trailer where he and Stover lived, and overheard Lynn say to Stover, with both of them over by Lynn's shop, "Once a month in lieu of interest on late fees will be good." According to his testimony, Miller did not hear or could not remember anything else from the conversation. The parties stipulated (with the introduction into evidence of Google Earth images of the property) that the distance from the middle-point of Lynn's shop to the middle-point of Stover's second rental (the distance between where Lynn and Stover were allegedly located to where Miller was allegedly located) was 89.6 feet, roughly the distance between home plate and first base on a professional baseball diamond. The weather outside was nice on September 7, 2015, and Miller and Stover had opened the windows on their rental. If Miller heard the "once a month in lieu of interest on late fees would be good," why didn't he hear the sexual discussion that Stover reported followed the one sentence Miller testified he heard? What made his hearing more acute and his memory better for one comment, when he could not hear the rest of the same conversation?

14. Miller also testified that he deduced that this single comment he heard Lynn make had to do with sexual intercourse between Lynn and Stover. Miller never testified that he was aware of the "neighbors with benefits" behavior by Stover and

Lynn. Lynn did not do anything in Miller's presence that revealed his "neighbors with benefits" arrangement with Stover. Stover never testified that she revealed the "neighbors with benefits" relationship to Miller before the September 21, 2015 letter to Lynn. Since Miller, on this record, was unaware of what was transpiring between Stover and Lynn, how would he deduce that "Once a month in lieu of interest on late fees would be good" referred to sexual intercourse? Finally, if Lynn's recollection is correct that the conversation (whatever its content might have been) occurred in the trailer after Miller went to the store, how could Miller have heard any of it? Miller's testimony regarding the "Once a month in lieu of interest on late fees" was not credible.

15. Stover's general testimony (that on September 7, 2015, Lynn again suggested resumption of their sexual intercourse) was credible, given his prior behavior. But standing alone, her specific testimony (that Lynn proposed she have sex with him once a month in exchange for his agreement not to insist upon interest on late fees) was not credible. Lynn was capable of crude comments, but the particulars of this suggestion make virtually no sense in light of the evidence regarding Stover's month to month tenancy. Late fees, let alone interest on late fees, were not part of the tenancy. As casual as his sexual relationship with Stover appears to have been, Lynn's alleged proposal (offering a waiver of interest he had never asked for and had no basis to claim for resumption of sexual relations), quite aside from the "sex for money" nature of the suggestion, would have been insultingly one-sided.

16. The testimony of Miller and Stover about the "once a month" comment did not include an explanation of what exactly each of them believed Lynn was proposing. Their testimony did not explain why Miller could not recount any other part of a conversation some 30 yards away and outside, with the trailer windows open, yet could hear, remember and decipher this one peculiar comment. The evidence was insufficient to establish that, more likely than not, Lynn ever made the alleged comment.

17. A week later, September 14, 2015, Stover invited Lynn into the rental trailer to do a walkthrough so she could identify the many repairs it needed. Lynn did not suggest they have sexual intercourse. The next day, Lynn walked to a window of Stover's rental while Stover was in her kitchen and suggested he and

Stover have sexual intercourse. Stover testified that she fabricated a "sexual dysfunction" and displayed how distraught she felt. Lynn left.

18. On September 15, Lynn moved a double-wide trailer onto his property which would become a house for he and his girlfriend (sometimes referred to as his wife) to live in.

19. September 18, 2015, Lynn allegedly attempted to open Stover's kitchen window once again. Stover testified that she had barred the window so he could not open it easily. According to Stover, Lynn then tried to open Stover's locked screen door by force. She testified that she then told him that she had nothing to say to him until she spoke to her attorney, and he responded, "Did I do something wrong?" and went away.

20. This alleged attempt at forced entry into the rental would have been a departure from Lynn's usual tactics. Stover's testimony was uncorroborated and less than credible. Lynn's attempts to convince Stover to resume sexual intercourse with him can fairly be characterized as insensitive and argumentative. He pestered her about it several times in September. This evidence did not establish he became abusive, threatening or violent. Any actual attempt to force open a locked screen door should have succeeded, at the price of damaging Lynn's own property. It makes no sense that Lynn would engage in either a real or feigned effort to break into his rental trailer. It is also implausible, to say the least, that Lynn would make a violent attempt to break into the trailer, and then ask Stover, "Did I do something wrong?"

21. Lynn's September sexual advances did bother Stover. She thought about whether the promptness and completeness of Lynn's maintenance work on her trailer had worsened since she began declining first some and now all of his invitations to have sex.[5] She thought about whether she wanted to remain a tenant of a landlord who kept trying to persuade or to manipulate her back into a "neighbors with benefits" relationship that she no longer wanted. Stover testified that the September 2015 incidents led her to decide that she would not remain a tenant of Lynn. She decided to terminate her month to month tenancy and leave the premises as soon as she could, no matter what Lynn now did.

---

[5] She apparently did not consider that Lynn had been out of state for most of the summer months, and therefore unavailable to maintain the premises most of the time.

22. September 21, 2015, Stover gave Lynn a five-page typed and notarized letter. Exhibit 1. The first two full pages, and all but the last four lines on the third page (beginning at "On a friendship note") related to poor conditions in the trailer Stover was renting, and allegedly inadequate responses to her complaints about those conditions. The last four lines on page 3, the first thirteen lines on page 4 and the first three words on the fourteenth line of page 4, addressed the sexual harassment claim presented in the current case.

> I have been informed that your sexual advances towards me are considered sexual harassment even though at one point our friendship included those interactions. Even though I had said no time and time again you continue to ask me if I "want to have fun." On Monday the 7th of September, you stated that "once a month would be good in lieu of interest on late fees' . . . I find it pathetic that I felt I had to fabricate a sexual dysfunction story (9-15-2015) and have a breakdown causing me to begin dumping my possessions for you to back off some. I am not okay with you walking up to my kitchen window and opening it anytime you feel like it, usually to try and solicit sex. With the continued body language and hand gestures and comments I have come to a decision that your behavior is criminal I feel I have no choice other than to move . . . .

23. This was the first time that Stover had ever told Lynn that his continued efforts to obtain sexual favors from her were so unwelcome that she felt he was subjecting her to sexual harassment and engaging in criminal behavior. There is no credible and substantial evidence that after receiving this letter Lynn ever again proposed to Stover that that they have sexual intercourse together.

24. After the first two bullet points on p. 4 of the letter (Exhibit 1), which dealt with past due rent and the secondary Power of Attorney papers, Stover returned to the sexual harassment issue with her third bullet point, on pp. 4-5.

> With the issue of your repeated physical and sexual advances towards me I find no other acceptable solution other than to say you've caused me emotional trauma/harm and I hereby order you to have no contact with me in any way. This includes but is not limited to by phone, mail,

electric mail, text messages, whether personally or three third party. If you do I will contact the Sheriff's Department for assistance . . . ."

25. The final bullet point on p. 5 (Exhibit 1) accused Lynn of a "belligerent, manipulative attitude" toward Miller, and threatened that Stover would "file a complaint personally as a first hand witness to what I observe" unless Lynn stopped displaying that "attitude" and began to treat Miller "with dignity."

26. Stover's letter did not mention Lynn's alleged effort to pull the screen door open after he allegedly could not open her kitchen window to proposition her. Stover testified to the screen door incident during the hearing, but yet she had not mentioned it in the letter she wrote just three days after that alleged incident.

27. On September 23, 2015, after receiving Stover's September 21, 2015, letter, Lynn approached Stover (who was in her car, with Miller in the passenger's seat). Lynn was carrying a "30-Day Notice to Terminate Tenancy," Exhibit 2, dated September 22, 2015. When he walked up to Stover's car, she quickly rolled up her window and began calling the Flathead County Sheriff's Department on her cell phone. Lynn threw the notice into Stover's passenger vehicle's window, where Miller was sitting, saying to Stover, "Consider yourself served."

28. The deliveries of Stover's September 21 letter and Lynn's September 23 notice constituted a mutually hostile exchange between them. Lynn responding to Stover's letter with the notice was not, on its face, sexual harassment or illegal retaliation for opposing discrimination. Lynn and Stover both referred to his 30-Day Notice, at various times during the hearing, as an "eviction notice." On its face it was not an eviction notice, but a notice of termination of the month to month lease. The notice defined when Stover would no longer be entitled to peaceful possession of the premises, but it was not a ***per se*** eviction notice. Lynn could commence eviction efforts if Stover did not move out by the date set in the notice. Since Stover had already notified Lynn that she intended to move out of the rental trailer, the only effect of the notice was to set the date by which she had to be out of the rental.

29. After receiving the notice, Stover filed a written statement alleging Lynn's sexual harassment and retaliation. Exhibit 3. The written statement does not identify the name of any member of the Sheriff's staff to whom the statement was given. It does not contain a date the statement was written. It does not contain

Stover's signature, but only her initials, with "retains all rights without prejudice" written above her initials, on each of the three pages. There is no evidence that any officer from the Sheriff's department contacted Lynn to inquire about the events alleged in the statement. Thus, the record does not establish that Lynn ever had notice of the statement.

30. On September 28, 2015, Lynn returned to North Dakota. He returned to Columbia Falls on or about October 26. Stover and Miller had vacated the mobile home.

31. Stover moved out of the rental in mid-October 2015. She moved to a friend's house. She did not engage in any conversations with Lynn between September 23, 2015 and the date she moved out of the rental.

32. Stover testified that she provided the written statement to the Sheriff's Office at about the same time she moved out of the rental. That statement mentions inappropriate physical touching, but it does not mention the alleged effort to force open the screen door on September 18, 2015.

33. On October 26, 2015, Stover received a text from Lynn's phone, which said, in its entirety, "Cunt." Exhibit 4. There is no evidence explaining why, after Stover had moved out and there was no longer any need for these two people to communicate, Lynn would send any text message to Stover. As already noted, there is no evidence that Stover's written statement to the Flathead County Sheriff's office reporting Lynn's alleged sexual harassment and retaliation had prompted law enforcement to contact Lynn. There is no evidence that Lynn discovered damages to the trailer after Stover moved out. Whatever caused Lynn to send the text, the message, albeit crude and hostile, was an isolated hostile epithet that did not amount to retaliation or sexual harassment.

34. Since Stover moved out of Lynn's rental trailer, she has not found steady housing. At times she has stayed with friends. At times she has lived in a tent. This has been very stressful for her. However, there is no evidence that Lynn caused or contributed to her difficulties finding steady housing after her second tenancy ended.

35. Stover signed her complaint herein on January 29, 2016 ("Complaint of Sex Discrimination in Housing and Retaliation"). That complaint also does not

reference, let alone detail, the alleged screen door incident on September 18, 2015 to which Stover testified at hearing.

II. Opinion[6]

The Montana Human Rights Act ("MHRA") prohibits an "owner, lessor, or manager" leasing a "housing accommodation or improved or unimproved property" from discriminating on the basis of sex "in a term, condition, or privilege" relating to the property's "use" or "lease." Mont. Code Ann. §49-2-305(1)(b), *Bates v. Neva*, ¶10, 2014 MT 336, 377 Mont. 350, 339 P.3d 1265. In the same place, the *Bates* decision notes that "[S]exual harassment is sexual discrimination under the [MHRA]," ***citing*** *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204 (1990). ***Id.*** The MHRA also prohibits any person from taking adverse action against an individual because that individual opposed any practices forbidden by the Act. Mont. Code Ann. §49-2-301. The burden is on Stover, at all times, to prove the illegal practices she alleged. ***E.g.***, Mont. Code Ann. §26-1-401; *Heiat v. E.M.C.* (1996), 275 Mont. 322, 328-29, 912 P.2d 787, 791. *Taliaferro v. State* (1988), 235 Mont. 23, 28, 764 P.2d 860, 862; *Crockett v. Billings* (1988), 234 Mont. 87, 95, 761 P.2d 813, 818.

For the sexual harassment charge, the dispositive evidentiary question is whether Stover proved that Lynn subjected her to sexual harassment when he insisted that she continue to provide him with sexual favors as a condition of maintaining her lease. In short, Stover charged that Lynn engaged in ***quid pro quo*** sexual harassment against her. ***Quid pro quo*** sexual discrimination claims are cognizable under the MHRA. *Williams v. Joe Lowther Insurance Agency, Inc.*, ¶21, 2008 MT 46, 341 Mont. 394, 177 P.3d 1018, ***citing*** *Stringer-Altmaier v. Haffner*, ¶¶16-17, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. Both *Williams* and *Stringer-Altmaier* involved employment discrimination. The same prohibitions against sex discrimination in employment also apply against sex discrimination in housing. Both provisions bar discrimination against a person because of sex, in employment and in housing. ***Compare***, Mont. Code Ann. §49-2-305(1)(b) ***with*** Mont. Code Ann. §49-2-303(1)(a) [emphases added]:

> 49-2-303. **Discrimination in employment.** (1) It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a

[6] 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.

person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction . . . .

49-2-305. **Discrimination in housing -- exemptions.** (1) It is an unlawful discriminatory practice for the owner, lessor, or manager having the right to sell, lease, or rent a housing accommodation or improved or unimproved property or for any other person: . . . . (b) to discriminate against a person because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of the housing accommodation or property . . . .

This is a direct evidence case, but one in which the parties disagree in some instances about what the respondent, Lynn, did as well as why he did it. The burden shifting tests of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for circumstantial evidence cases about "pretext" (unlawful discrimination), do not apply here. *Laudert v. Richland County Sheriff's Dept.*, ¶20, 2000 MT 218, 301 Mont. 114, 7 P.3d 386, ***citing*** *Reeves v. Dairy Queen, Inc.*, ¶15, 1998 MT 13, 287 Mont. 196, 953 P.2d 703.

In *Reeves*, the Montana Supreme Court had ruled *McDonnell Douglas* shifting burden tests "inappropriate" and "unnecessary" for such cases. *Reeves* provided the appropriate burdens of proof for cases in which "the parties do not dispute the reason for the employer's action, but only whether such action is illegal discrimination." *Laudert* ***at*** ¶21, ***quoting*** *Reeves* ***at*** ¶16. In *Reeves* the employer stated in writing that it had discharged the charging party because she had high blood pressure and was working as a fast food clerk under "conditions of pressure, stress and heat." *Laudert* ***at*** ¶21, ***quoting*** *Reeves* ***at*** ¶7. The Court held that that *Reeves* presented a case of direct evidence of discriminatory intent because the parties did not dispute the fact that Reeves' employer fired Reeves because of her high blood pressure. ***Id.***

However, in *Laudert* the Montana Supreme Court adopted a new standard, relying upon federal cases under federal discrimination law, for a situation that neither *McDonnell Douglas* nor *Reeves* addressed.

In *Price Waterhouse* [*Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)] the United States Supreme Court addressed, for the first time, an employment discrimination claim in which a plaintiff presented direct evidence of discriminatory intent, but the parties did not agree on the reason for the challenged employment decision. The plaintiff, Ann Hopkins, a senior manager for Price Waterhouse, was denied partnership after the partners in her office submitted her name as a partner candidate. During the review of her candidacy for partnership, Price Waterhouse partners described Hopkins as "macho," suggested she "overcompensated for being a woman," and advised her to take "a course in charm school." *Price Waterhouse*, 490 U.S. ***at*** 235, 109 S. Ct. ***at*** 1782. In explaining to Hopkins what she could do to improve her chances of becoming a partner at Price Waterhouse, one partner advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." [***Id.***] Hopkins filed a claim of unlawful employment discrimination on the basis of gender. Price Waterhouse contended that it denied Hopkins' bid for partnership because of her poor "interpersonal skills."

A majority of the court concluded that Hopkins had submitted sufficient evidence to prove that gender stereotyping was a motivating factor in Price Waterhouse's denial of partnership. A plurality of justices observed that "Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from [gender] stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the [gender] linked evaluations." *Price Waterhouse*, 490 U.S. ***at*** 251, 109 S. Ct. ***at*** 1791. The plurality concluded that direct evidence that an unlawful consideration played a motivating role in an employment decision is sufficient to support a finding that the plaintiff was unlawfully discriminated against. *Price Waterhouse*, 490 U.S. ***at*** 241-42, 109 S. Ct. ***at*** 1786. . . . .

. . . .

In *European Health Spa*, [*European Health Spa v. HRC* (1988), 212 Mont. 319, 687 P.2d 1029], we observed that we had adopted the *McDonnell Douglas* test for employment discrimination cases which

> involve disparate treatment because the provisions of Title 49, of the Montana Human Rights Act, are closely modeled after Title VII of the Federal Civil Rights Act. *European Health Spa*, 212 Mont. ***at*** 325, 687 P.2d ***at*** 1032. For the same reason, we hereby adopt the analysis of *Price Waterhouse*. . . . .
>
> *Laudert* ***at*** ¶¶24-25, 27.

Montana has a statute that defines "direct evidence. "'Direct evidence' is that which proves a fact without an inference or presumption and which in itself, if true, establishes that fact." Mont. Code Ann. §26-1-102(5). In MHRA cases, direct evidence can relate both to the employer's adverse action and to the employer's discriminatory intention. *Foxman v. MIADS*, HRC #8901003997 (6/29/1992) (race discrimination); *Edwards v. Western Energy*, HRC #AHpE86-2885 (8/8/1990) (disability discrimination); *Elliot v. City of Helena*, HRC #8701003108 (6/14/1989) (age discrimination). "Direct evidence" can be overcome by establishing doubt about the accuracy of the testimony providing the direct evidence. *State v. Snell*, ¶¶10-12, ¶25 and ¶30, 2004 MT 334, 324 Mont. 173, 103 P.3d 503.[7]

In *Laudert* ***at*** ¶26, the Montana Supreme Court cited Justice O'Connor's concurrence, in which she "attempted to identify with more precision what evidence would constitute 'direct evidence' of discrimination by describing what was not direct evidence." Her description involved "stray remarks in the workplace," "statements by nondecisionmakers ***[sic]***," or "statements by decisionmakers unrelated to the decisional process." *Price Waterhouse*, 490 U.S. ***at*** 277, 109 S.Ct. ***at*** 1804-05.

Laudert also identified the direct evidence presented in that case in support of the claim of discrimination.

> As in *Price Waterhouse*, the hearing examiner found that Laudert submitted evidence of statements made by a decision-maker and related

[7] Criminal defendant attacked presumption of regularity attached to two prior criminal convictions, with his own affidavit and testimony detailing the irregularity (failure to advise of his right to counsel before accepting his guilty pleas). However, the criminal defendant's affidavit and testimony regarding the irregularity also included false testimony that the same Justice of the Peace made the same constitutional error in both cases, and that he was as sure of the irregularity about which he testified as he was that there was only one JP in both cases. Sworn testimony that there were two different JPs on the two cases, and they were so dissimilar that they could not be mistaken for one another, left the defendant's testimony without credibility and his direct evidence did not overcome the presumption of regularity.

> to the decisional process being challenged which reflected an unlawful discriminatory attitude. The parties do not contest this finding. This finding was supported by the following facts. Deputy Glaeske, one of the four panelists who evaluated Laudert's interview, expressed his doubts regarding whether Laudert was physically capable of performing the job due to his disability, prior to Laudert's interview. Laudert brought up Glaeske's doubts during his interview. Despite having provided a full medical release, a discussion of Laudert's physical condition, medical history, and medication needs followed. The interviewers asked if Laudert could do the job and if Laudert could take a blow to the stomach. Laudert asked if his medical releases were in his job application file and provided another copy after the interview. Laudert estimated that 10 minutes of the 20- to 30-minute interview were spent discussing his physical condition.
>
> *Laudert at* ¶29.

In the present case, for a period of years, Stover and Lynn had a consensual arrangement to have sexual intercourse whenever they both agreed upon it. When Stover began refusing some of Lynn's suggestions that they engage in consensual intercourse, the "rules" of their arrangement did not change – if and only if they both agreed upon it, they had intercourse. Indeed, Stover admitted that after 2013, she still continued to agree to sex with Lynn and then engage in that sex, some of the times that he suggested it. Thus her assertions that had she told Lynn in 2013 that the "neighbors with benefits" arrangement was over were not credible, and were contradicted by her own admissions under oath. Even if she had proved she made that statement at that time, Lynn would have had no reason to give it credence, because Stover continued thereafter to agree to and to have sex with Lynn some of the times that he suggested it.

The end of her "neighbors with benefits" arrangement with Lynn, can only be dated as September 21, 2015, the date upon she delivered her letter (Exhibit 1) to Lynn. Until he received that letter, Lynn had no reason to stop suggesting sexual intercourse between them to Stover. Thus, his continued suggestions, even though she was refusing most of them, could not have been hostile actions against Stover before Stover told him, for the first time, that she now considered such suggestions sexual harassment. She told him that for the first time when she delivered to him the September 21, 2015, letter. The response to maintenance needs on the premises may have been poor, but Lynn was out of state most of the last months of Stover's second tenancy, and Stover (and Miller) actually got a small "break" on rent because they

were present and responding to some maintenance needs. Again, the evidence that such poor response happened could not be considered sexual harassment or retaliation until Lynn had notice that Stover now considered actions that had previously been an acceptable part of their relationship to be sexual harassment.

Indeed, there were only two possible hostile actions that could support her sex harassment and retaliation claims: (1) the September 7, 2015, alleged demand for monthly sex in return for a waiver of interest on any late fee for late rent payments (*quid pro quo* sex discrimination) and (2) the 30-Day Notice to Terminate Tenancy delivered to Stover on September 23, 2015.

More likely than not, the first time Stover told Lynn that she felt he was harassing her was in her September 21, 2015 letter. She had recently been turning him down whenever he approached her about sexual intercourse. In September, he was home all month, and his number of suggestions increased, but only in her letter did she say to him "I have been informed that your sexual advances towards me are considered sexual harassment even though at one point our friendship included those interactions." *Cf.* Finding 21 [emphasis added]. This was an admission that until she was "informed" (date and circumstances unknown), Stover had not considered Lynn's conduct to be sexual harassment, instead considering it part of their friendship. Since it had been an acceptable part of their friendship, Lynn had no reason to change his conduct until Stover told him the prior arrangement was over and backed it up by no longer agreeing sometimes to engage in sex with him.

In Stover's statement to the sheriff's office, she stated that "I wrote Jeffrey Lynn a letter [the September 21, 2015, letter] . . . and upon receiving it he began to retaliate." Ex. 3, p. 3, last paragraph [emphasis added]. This was an admission that Stover did not consider any of Lynn's actions before he received the letter to have been retaliatory.

Stover's level of functioning after her head injury may have been compromised. But even if she did not intend to admit that Lynn neither discriminated nor retaliated against her before her September 21, 2015, letter, she did not prove any illegal discrimination or retaliation before that letter.

Stover did not prove that Lynn suggested sex for waiver of interest on late fees, and thus there is insufficient evidence of any quid pro quo arrangement whereby

Stover got cheaper rent, or better repairs or other favors, in return for her sexual favors.

Stover did not prove that Lynn's manner of seeking her agreement to engage in sexual intercourse ever changed. She did not prove that more likely than not, at some point (whether before or after her letter) his behavior appreciably worsened.

The alleged attempt to force entry through the screen door of the rental trailer was not proved. As the landlord, Lynn had no reason to damage his own property. A screen door would not have withstood a determined effort on his part to open it.

Thus, Lynn's crude and uncouth efforts to restart their sexual escapades were consistent with how he had enticed her to join him in such activities before, over a course of years. Therefore, her case still stands or falls upon whether the notice of termination of her lease and/or the one-word text message, established illegal discrimination or retaliation.

After he received her letter stating that she had decided to move, Lynn gave Stover a notice of termination. After she moved out, he sent his nasty one-word text message to Stover. These were the only proven actions that could possibly support the charges of illegal discrimination and retaliation after he was on notice that Stover felt harassed. Before receipt of the September 21, 2015, letter, the evidence is not persuasive that Lynn engaged in any behavior toward Stover that he knew or reasonably should have known was or could have been perceived by her as sexual harassment or retaliation. Before the letter, he was simply acting upon his understanding that his "friendship" with Stover still included sexual intercourse when they both agreed to it.

Lynn's notice of termination of Stover's lease, after she notified him that she intended to move out, was not proved to be either a discriminatory or a retaliatory act. Lynn and Stover had a lease without a written agreement. As a result, the rental was, by law, month to month. Mont. Code Ann. §70-24-201(2)(e). Either party to an unwritten month to month lease could give a 30-day notice of termination of that lease. Mont. Code Ann. §70-24-441(2) and (3). There was no requirement of a violation of the terms of the lease before such a notice of termination could be given. *Id.* Stover had not given Lynn a valid notice of termination of her lease. She gave notice that she intended to leave the premises, but did not state that she would be

out by a certain date, or that within 30 days after her notice she would leave. Lynn prepared a valid notice of termination of Stover's lease, requiring her to vacate the premises within 30 days after service of the notice of termination of her lease. While his snide comment when he tossed the notice through the open passenger-side window of Stover's car was hostile, the notice itself established an end date for Stover's occupancy, which was something the landlord had a right to do, and a solid business reason to do – he needed to know when the premises would be available.

Lynn's hostile delivery of the notice immediately followed Stover's hostile act of rolling up her window to avoid any interaction with him. Lynn certainly could have been angry with Stover when he delivered that notice of termination, just as she was angry with him. Instead of talking to her and asking about when she proposed to vacate the premises, he was resorting to a legal remedy available to him to set a date by which she had to vacate the premises. Instead of talking with him, she rolled up her window. If they had talked, perhaps they could have worked out a mutually agreeable date for her to vacate the premises, perhaps not. Clearly, since Stover called the Sheriff when Lynn approached her, she was not interested in talking with him. By September 23, 2015, neither party was inclined to converse with the other. Stover had not proved that Lynn's displeasure with her was discriminatory or retaliatory animus. There was insufficient evidence that his anger about the invalid notice of termination of the lease that she gave him was related to her refusal to grant him continued sexual favors. The fact that he was angry when he delivered the termination notice, or that he became angry when she rolled up her car window, did not establish that he gave her that notice out of illegal retaliatory animus.

Finally, one derogatory epithet, even one as crude and unacceptable as "cunt," does not by itself establish illegal retaliation. Both Lynn and Stover exhibited the willingness to be rude and crude in their communications. The erstwhile lovers now disliked each other, but Lynn's isolated act of sending that derogatory epithet to Stover did not establish illegal discrimination or illegal retaliation.

III. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. §49-2-512(1)

2. Respondent Jeffrey Lynn was not proved to have illegally discriminated in housing because of sex or to have illegally retaliated against Charging Party Samantha J. Stover. Mont. Code Ann. §§49-2-305(1)(b) and 301.

3. Stover's complaint must be dismissed. Mont. Code Ann. §§49-2-504(7)(b).

4. For purposes of Mont. Code Ann. §49-2-505(8), Jeffrey Lynn is the prevailing party.

IV. Order

Judgment is hereby entered in favor of Jeffrey Lynn and Samantha J. Stover's complaint is dismissed.

Dated: January 18, 2017.

/s/ DAVD SCRIMM
David Scrimm, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: J. Ben Everett, attorney for Samantha J. Stover; and Peter Carroll, attorney for Jeffrey Lynn:

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 appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard, (406) 444-4356 immediately to arrange for transcription of the record.

Stover.HOD.dsp