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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1249-2017:

TRISTEN FLAGEN,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
MISSION VALLEY AQUATIC	)	
CENTER,	)	
	)	
Respondent.	)	

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I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Tristen Flagen (Flagen) has alleged that her employer, Mission Valley Aquatics (MVA), a non-profit, charitable Montana corporation, discriminated against her in her employment based upon sex and race. MVA requested summary judgment prior to trial, and summary judgment was granted as to the race discrimination claim.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter as to the sex discrimination claim on January 10, 11 and 12, 2018, in Polson, Montana. Attorneys Alicia P. Arant and Carey Schmidt, represented Flagen and Attorneys Barbara E. Bell and Antonia P. Marra represented Mission Valley Aquatics.

At hearing, Flagen, Abigail Eyre (Eyre), Ashley Mercer (Mercer), Megan Pope (Pope), Taryn Dupuis (Dupuis), Joslyn Shackleford (Shackleford), Glynda Brown (Dr. Brown), Janelle Pruitt (Pruitt), Randy Folker (Folker), Ali Bronsdon (Bronsdon), Zacharie "Zax" Martin (Martin), and Jeff Smith (Smith) testified under oath.

Charging Party's Exhibits 1/A, 4/D, 10/J, 11/K, 12/L - 104, 21-U, 22/V, 25/Y, 26/Z were admitted into evidence. Respondent's Exhibits 101 and 105 were admitted.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings. Simultaneous to the briefing, Flagen filed a M. R. Civ. P. 37(c) motion related to alleged discovery abuses. Oral argument was taken following a full briefing on the motion. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following hearing officer decision is rendered, including a ruling on Flagen's Rule 37(c) motion.

II. ISSUES

1. Did MVA discriminate against Flagen on the basis of sex and/or retaliate against her in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If MVA did illegally discriminate and/or retaliate against Flagen as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If MVA did illegally discriminate and/or retaliate against Flagen as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

4. Should Flagen's Rule 37(c) motion be granted and, if so, what sanctions are appropriate?

III. FINDINGS OF FACT

1. Flagen resides in Ronan, Montana. She is gay, female, Native American, and an enrolled member of the Fort Peck Assiniboine and Sioux Tribe.

2. Flagen's claims of discrimination involve allegations of sexual harassment by MVA employees Martin and Folker, as well as allegations of retaliation for reporting the alleged behavior by Martin to Bronsdon and Folker. Flagen alleges that sexual harassment incidents primarily took place on the pool deck, in the life guard break room, and the family changing room.

3. MVA is a public benefit corporation. It owns and operates an aquatic center in Polson, Montana.

4. As MVA's Aquatics Director, Bronsdon was the top management employee during Flagen's tenure of employment. She had the ability to hire, fire, promote, demote, and change wage rates during her employment.

5. Smith became the Aquatics Director for MVA in 2014, and has remained in that position since.

6. Flagen initially applied to work at MVA part-time. She applied because she was a swimmer and had experience lifeguarding since high school, though she had no certification as such.

7. MVA hired Flagen as a lifeguard in the spring of 2013. Flagen was among MVA's inaugural staff, and worked for the pool from the day it opened to the public. Flagen took the necessary classes at MVA to qualify her to be a lifeguard before MVA opened its doors in May, 2013.

8. Flagen was employed as a lifeguard and, later in her employment, as a swim instructor from 2013 through February 23, 2016. Following the summer of 2015, after ceasing other employment which she previously concurrently held, Flagen worked more consistently, approximately 30 hours per week.

9. From the beginning of Flagen's employment through late-2014, MVA was managed by Aquatics Director, Ali Brondon; Assistant Director/Pool Operator/Head Swim Coach, Mark Johnston; Program Manager, Dana Johnston (collectively, the Johnstons); and Aquatic Supervisor, Jeff Smith.

10. The Johnstons' employment relationship with MVA ended in the fall of 2014. Their presence at and departure from the pool affected MVA's leadership structure and workplace culture.

11. After the Johnstons' departure, Bronsdon and Smith assumed coaching, programming, and other managerial duties while MVA recruited the Johnstons' replacement(s).

12. Bronsdon taught Martin how to lifeguard in the winter of 2015 and then hired him as a lifeguard.

13. MVA hired and employed Folker pursuant to a contract, dated June 8, 2015, in the dual position of "Head Swim Coach" and "Lifeguard Supervisor," which Folker testified was executed by Board Member, Hu Beaver. In keeping with MVA's

internal disorganization, the contract entered into evidence and the job descriptions in it did not appear to completely match the positions, and may not have represented the actual, final agreement of the parties. (Exhibit 21/U.)

14. Between June and July of 2015, Folker spent five weeks as an employee at MVA in an orientation capacity. Folker and Bronsdon had been negotiating an employment agreement prior to his arrival. Folker's focus was on coaching, but he agreed to also function in a lifeguard supervisory role to supplement his income.

15. MVA held a staff meeting upon Folker's arrival and introduced him as the new head coach and lifeguard supervisor.

16. Folker subjectively believed he functioned in a supervisory role. The lifeguards Folker supervised believed Folker supervised them.

17. Folker made recommendations regarding employees, including Flagen, upon which MVA relied to promote, discipline, and terminate her.

18. During Folker's 2015 summer orientation, he made inquiries and comments to Flagen about her sexuality that made her uncomfortable. Folker told Flagen that she "intrigued" him, asked her why she was not married, and inquired about tattoos located on her lower back, rib cage, and lower right side.

19. Folker asked Flagen whether it would be "scandalous" if he asked her out and whether people would talk. Flagen told Folker that people would talk if they dated, and that she did not want to date him.

20. Folker also sarcastically asked Flagen to take him to Homesteaders, a rodeo event in Flagen's hometown. Flagen did not go to Homesteaders that year out of fear she would run into Folker.

21. Just before Folker went back to Hawaii in preparation for his permanent move to Montana, he asked Flagen whether she would miss him while he was gone. She told him she would not.

22. Flagen did not report Folker's conduct to another supervisor because she did not want to stir anything up, as MVA was excited to have a new head coach with Folker's qualifications. Flagen believed that she handled the situation.

23. Bronsdon rarely made unilateral employment decisions regarding the staff. Folker testified that "as a confidante of Ali, she asked opinions of me," particularly in the context of Flagen's employment. (Hr. Tr. 450:18-451:25.) Bronsdon confirmed that she relied heavily upon managements' opinions and recommendations in making employment decisions.

24. Pursuant to a joint decision with Bronsdon and Smith, Folker delivered promotions to both Flagen and Martin as head lifeguards in a meeting in or around August, 2015.

25. Following his return from Hawaii, Folker became less interested in Flagen after she continued to show disinterest in him.

26. After Martin raised the topic with Folker and Folker discussed the same with Bronsdon, Folker promoted Martin to assistant swim coach.

27. It undisputed that neither Flagen nor anyone else was informed of or considered for the open assistant swim coach position. Martin simply got the position after he took the initiative to inquire about doing it. Flagen's interest was not piqued, however, until she observed that Martin was doing something she was not. Although Flagen had worked at MVA longer than Martin, she did not have any certifications necessary to work in the assistant swim coach position.

28. Although Flagen was a competent and generally reliable employee, she was not a self-starter, and rarely acted on her own initiative to take on more work or responsibilities at MVA.

29. Initially, Flagen and Martin had an amicable work relationship. Martin's father was suffering from the same health condition her mother had died from, and they connected over that shared experience. The two also connected over their appreciation for marijuana.

30. Flagen's relationship with Martin deteriorated when he threw her swimsuit in the dumpster behind the Aquatic Center, which he had previously done with another lifeguard's swimsuit. She confronted Martin in front of other lifeguards, and he apologized.

31. Martin's discussions with Flagen regarding his family shifted from his father's illness to his sexual dissatisfaction with his girlfriend. Flagen let him talk about his problems and advised him to talk to his girlfriend. Martin also told Flagen

about other women he was having sex with, and his anecdotes about pursuing other women transitioned into comments and inquiries aimed at Flagen. Flagen testified that Martin's first sexual comment toward her was something to the effect that, "If you ever want to be with a man, I'll be your guinea pig." (Hrg. Tr. 57:12-15.)

32. As Martin's behavior escalated, he began sending Flagen numerous, unsolicited sexually explicit images and videos of himself via Snapchat, including pictures of his penis and videos of himself masturbating. Martin sent enough of these messages to Flagen that it became routine.

33. Martin would tell Flagen about his erection and how he would tuck it away and then proceed to the family bathroom to masturbate. At one point, Martin was doing this a few times per week.

34. Martin's conduct escalated to the point where, in or around December, 2015, Flagen and Martin were storing items used for "Family Fun Night" in a closet, and Martin told Flagen to come into the bathroom because he had to show her something. Flagen froze as she walked in and saw Martin masturbating and ejaculating in front of her.

35. Later in December, 2015, Martin walked in on Flagen while she was showering and asked her to have sex with him. He tried other times thereafter, but Flagen locked the door.

36. In mid-January, 2016, Martin approached Flagen in the lifeguard room with his pants down and told her to touch his penis. With a window in the room that looked out onto the pool deck and the likely presence of others who could possibly see into the room, Flagen testified that her "first reaction was to turn around and look at the window and go, 'What the hell?'" (Hrg. Tr. 71:5-7.)

37. Flagen had never encountered anything like Martin's behavior before and it made her deeply uncomfortable. Although Flagen told Martin to stop, it only slowed his conduct for a brief time and never caused it to cease.

38. Flagen was hesitant to raise issues about Martin at MVA, because she knew he was a favored employee, did not want to stir up any problems at work, and believed she could handle the situation on her own.

39. Martin knew his conduct was unwelcome. Flagen told Martin "no," that she was not interested in him, that she had a girlfriend, and that she liked girls.

40. Martin was not credible and his blanket denial of events, which was itself inconsistent with his prior deposition testimony, was without merit. Furthermore, the testimony of Dupuis established that Martin had, in fact, sent sexually suggestive pictures to Flagen via Snapchat, as she was present when Flagen received one.

41. Martin subjected Flagen to unwanted sexual conduct that a reasonable woman in Flagen's situation would have found abusive.

42. To the extent Flagen did attempt to raise issues about Martin with Folker, instead of asking Flagen what she meant–or making any inquiry at all–Folker felt challenged and got angry. Folker himself testified that he may have told Flagen he would protect Martin no matter what depending on the context, and that he absolutely would have protected Martin from losing hours.

43. Flagen felt shut down by Folker's response to her complaint regarding Martin.

44. In or around January, 2016, Flagen attempted to report Martin's inappropriate conduct to Bronsdon. Flagen entered Bronsdon's office, told her she had something serious to discuss, and that she was having a problem with Martin. Bronsdon responded to the effect that Martin was her "main man" and that she wished Flagen and Martin could just get along.

45. Bronsdon's testimony recalled the day Flagen came into her office and specifically complained about Martin's conduct: ". . .Tristen came in and said, Zax [(i.e., Martin)] is so -- or I asked her to come in. I don't know. I mean, I know she came in on that day and talked about Zax and how he was being annoying, or being - you know, they were having a bad day together as coworkers." (Hrg. Tr. 630:13-18.)

46. Without making any inquiry into the nature or substance of the conflict, Bronsdon rhetorically asked Flagen if she needed to talk to Martin, and then proceeded to walk onto the pool deck where Martin was washing windows so both she and Flagen could talk to Martin together.

47. Flagen did not wish to talk to Martin, but followed Bronsdon onto the pool deck because she felt she had to. Bronsdon spoke with Martin about being nice to Flagen, to which Martin smirked and said, "Sorry." Flagen walked away, feeling as though she was going "crazy." (Hrg. Tr. 73:1-4.)

48. Although the exact time when it occurred is uncertain, Bronsdon and Folker decided that Flagen and Martin needed to be spoken with in order to resolve their conflict. The solution was to have Folker give a motivational, team-building speech based on Maslow's Hierarchy.

49. Bronsdon asked Flagen to attend a meeting for Flagen and Martin. Flagen was shaken by the request, and informed Bronsdon she did not wish to attend. Bronsdon insisted Flagen attend, but assured Flagen that she would be there with her.

50. Based on Folker's credible recollection, the meeting occurred in or around November, 2015. (Hr. Tr. 434-36:23-23.) On the day of the meeting, Flagen entered the lifeguard room to find two chairs positioned side-by-side in the center of the room. One chair was for Flagen, the other was for Martin. Folker was seated above them on the counter top beside a whiteboard where he had diagramed a pyramid and labeled it "Maslow's Hierarchy of Laws."

51. Bronsdon stood in the doorway initially, but later left. Flagen remained beside Martin and beneath Folker. Flagen understood Folker's use of Maslow's Hierarchy to instruct that people with more responsibilities have more needs. Folker explained that as a swim coach with a family, Martin carried stress and was due more leniency. He pointed out that Flagen was "just a lifeguard." During the meeting, Folker praised Martin, but not Flagen.

52. No one talked during the meeting except Folker. Neither Folker nor Bronsdon referenced, discussed, questioned, or otherwise acknowledged the conflict between Flagen and Martin.

53. Bronsdon noted that both Flagen and Martin seemed very uncomfortable during the meeting. They did not want to talk to each other and had to be encouraged to respond even with simple "yes" and "no" answers. When questioned why he did not ask why tension existed between Martin and Flagen, Folker responded, "I already knew. I didn't need to ask." (Hr. Tr. 526:19-25.)

54. The effect of the meeting was to silence Flagen. Dr. Brown testified that the nature of that meeting "would have the most chilling affect you could imagine on a person with any kind of conflict," but particularly a conflict based in sexual harassment. (Hrg. Tr. 311: 7-12.) Flagen testified that she "never felt so powerless and small in [her] whole life . . . [t]hey got me down that day." (Hrg. Tr. 77:10-14.)

55. Dr. Brown offered expert testimony in which she stated that, in forty years of human resources management experience, she had never encountered such an inappropriate and counter-productive method of workplace conflict-resolution as the meeting with Folker, Flagen, and Martin. (Hrg. Tr. 310:18-311:7-20.)

56. Bronsdon expressed her desire to Flagen that everyone–specifically Flagen and Martin–would just get along. She conceded that there were times Flagen came into her office and told her "something about something, and it wasn't always important." (Hrg. Tr. 627:13-17.) Based on what Flagen had told her, Bronsdon knew Flagen was having problems with Martin.

57. Flagen asserted that she had used the word "inappropriate" with Bronsdon and Folker, but both individuals credibly testified that, had they heard the word, it would have raised greater concerns for them. This was particularly true with Folker, who's own sister had been molested by a swim coach.

58. Flagen's failure to directly tell anyone about Martin's inappropriate conduct was bolstered by Flagen's failure to tell either her partner or any co-workers or friends about Martin's harassment. or, for the most part, her electronic communications with him (Dupuis excepted).

59. Bronsdon described Flagen as a ubiquitous complainer. Without specificity or context, Bronsdon indicated that Flagen thought every person who worked at MVA was annoying except one.

60. Management knew there was great conflict between Flagen and Martin. Bronsdon, Smith, and Folker were all aware of the tension between Flagen and Martin. At one point, Bronsdon scheduled Flagen and Martin on separate shifts as a result of the tension, but made no meaningful inquiry as to its underlying cause.

61. In spite of it being unlikely she used the word "inappropriate," Flagen made reasonable efforts to lodge a complaint of sexual harassment on the day she told Bronsdon that she was having problems with Martin. Bronsdon's reaction effectively and permanently stopped Flagen from elaborating or otherwise sharing sensitive and humiliating details about the problem she faced, and caused Flagen to make no additional attempts at reporting sexual harassment to MVA.

62. MVA management made no attempt to understand the underlying cause of the conflict between Flagen and Martin. In his testimony, Smith twice referred to the conflict between as a "sibling rivalry"; Bronsdon compared Flagen and Martin to

"brother and sister"; and both Bronsdon and Folker used the term "juvenile" to describe Flagen's complaints regarding Martin. (Hrg. Tr. 527:25; 528:6-10; 546-547; 553:4; 685: 14-17; 696:20; 718:3; 809:2-21; 825:22-25.)

63. Flagen wanted to become a Certified Pool Operator (CPO) because she believed the certification might increase her earnings potential elsewhere. A new hotel was opening up next to MVA, and Flagen knew they would need a CPO. The CPO certification was not needed for Flagen's work at MVA.

64. Flagen had been researching CPO courses, which occurred infrequently and typically out of town, and discovered one was scheduled in Kalispell on February 22-23, 2016. On February 12, 2016, Flagen put a request into Orbital Shift, MVA's online scheduling software, to take February 22nd and 23rd off to attend the CPO course.

65. Bronsdon saw Flagen's request, texted Flagen to ask why she wanted the time off, and indicated that with another employee on suspension, it would be difficult to find someone to cover the days.

66. Flagen registered and personally paid for the CPO class later that day.

67. Bronsdon ultimately informed Flagen that she could not have the time off because of all of the scheduled events for those days.

68. Bronsdon attempted to find out about setting up the class at a different time so that MVA could pay for Flagen to take the class while still being paid her usual hourly rate of pay while attending the class. Bronsdon also found out that Flagen could obtain a refund if she would ask for it in writing.

69. Ultimately, on the Thursday before the class, which was to be held the next Monday, Flagen told Bronsdon that she had not applied for the refund and did not know whether she would attend the class or come to work. Bronsdon told Flagen that she was not giving her the time off, and that if she attended the class, her time would not be excused. Flagen's response was that she would "face the consequences." (Hrg. Tr. 670:13-21.)

70. Flagen ultimately attended the CPO certification training on February 22-23, 2016, and missed work at MVA without calling in.

71. In response, Bronsdon spoke with Smith–who both parties agree knew virtually nothing of Flagen's prior complaints about Martin–after Flagen failed to show for the second day, and both decided that some type of reprimand was appropriate. Bronsdon decided to suspend Flagen for a week and took her off the schedule as a reprimand.

72. Flagen was not scheduled to work on February 24, 2016, the day after she completed the CPO course, but on the evening of February 24th, Bronsdon called Flagen, engaged in small talk, and then asked Flagen whether she intended to work the 6:00 am shift for which she was scheduled the following morning. Flagen said she did, but Bronsdon then informed Flagen that she was no longer scheduled to work, and that she should not come in for her morning shift. Flagen misinterpreted Bronsdon's statement, became belligerent, and asked whether Bronsdon really intended to do "this" (*i.e.*, terminate Flagen) over the phone, and then hung up.

73. Flagen later contacted Bronsdon via e-mail asking for a termination letter.

74. Rather than disavow Flagen of her mistaken impression that she had been terminated and not suspended, Bronsdon ran with it in order to avoid further confrontation. Bronsdon investigated and found a scenario under which Flagen's absence could result in her termination–namely, that she missed three shifts in two days (two lifeguarding shifts and one swim class), which was considered a voluntary quit in the employee handbook. Thus, although it had originally been the intention of Bronsdon to suspend Flagen's employment, Bronsdon changed the Employee Conduct Form from suspension, to state that Flagen had voluntarily quit her employment by violating the employee handbook as to missing shifts and failing to contact her employer.

75. Bronsdon discussed Flagen's behavior on the phone call with Smith, who had no knowledge of any alleged sexual harassment, and he agreed that Flagen had been insubordinate and suspension was appropriate, as was treating Flagen's behavior as a voluntary quit under the handbook policy.

76. Bronsdon responded to Flagen's e-mail late in the evening on February 24, 2016, by sending a blank email with two attachments: page six of MVA's Employee Handbook and an employee conduct form that listed the date of the incident as February 22-23, 2016, and the time of the incident as 5:30 a.m. - 3:00 p.m. and 1:30 p.m. - 2:30 p.m.

77. The employee conduct form stated that Flagen had not shown up to work for either two lifeguarding shifts or to teach a swim lesson for which she was the lead teacher. It went on to state that a no-call, no-show to three facility-wide shift commitments was defined in employee handbook as a voluntary quit. (Exh. 12/L.)

78. Flagen disagreed that she had voluntarily quit her job. Therefore, she showed up at 5:40 am on February 25, 2016, to work her 6:00 am shift. Further exemplifying Bronsdon's desire to avoid direct conflict, when both she and Flagen were in the parking lot together the following morning, Bronsdon did not open her window, get out of her vehicle, or in any way speak with Flagen.

79. Flagen discovered MVA had definitively terminated her employment the night of February 24, 2016, when she found that they had removed her personal belongings from her storage cubby, dumped them into a grocery sack, and left it on the lobby desk. MVA had also blocked Flagen's access to Orbital Shift to prevent her from clocking in.

80. During Flagen's tenure, MVA employees did not feel comfortable bringing complaints to management. They did not trust management to take their concerns seriously and feared retaliation.

81. MVA provided no training on its anti-discrimination policy after early-2013, nor did it provide any anti-discrimination/sexual harassment training at all.

82. MVA's anti-discrimination policy was undermined by its management's general disregard for maintaining, updating, and distributing a uniform employee handbook.

83. Despite making changes to its policies on an unknown basis, MVA provided no refresher training to its staff. Instead of providing updated versions of the employee handbook to staff following modification, MVA told staff to read new versions and sign off on them.

84. Flagen was afraid to go to work for fear she would be sexually harassed.

85. Flagen was not able to sleep due to the harassment she suffered at MVA.

86. Flagen felt powerless and small because MVA sided with her harasser and did not take her complaints about Martin seriously.

87. The harassment Flagen experienced has caused her social anxiety, including embarrassment at what people will think of her.

88. Flagen suffers from depression as a result of the harassment at MVA.

89. Flagen was diagnosed with PTSD by her mental health therapist, Eyre. Eyre was qualified as an expert in clinical social work and has extensive experience and training in assessing the credibility of sexual assault victims. Eyre's diagnosis was based on Flagen's reports of nightmares, panic attacks, flashbacks, and intrusive thoughts. She determined these symptoms impaired Flagen's ability to function normally on a daily basis.

90. At the time of hearing, Flagen had been treated for PTSD for over a year due to the sexual abuse she suffered at MVA.

91. Eyre opined that Flagen experiences impairment in her functioning after enduring trauma from Martin. The trauma Flagen endured consisted of waking nightmares and full-body memories of trauma suffered at MVA. The panic attacks Flagen experienced caused her to have the inability to breathe and talk. She exhibited symptoms of stress and embarrassment which inhibited her ability to enjoy intimate relationships with her partner and her children.

92. Eyre determined that there were no other causes contributing to Flagen's PTSD other than the sexual harassment she experienced at MVA.

93. MVA offered no expert testimony contrary to Eyre's opinions that Flagen suffered PTSD caused solely by the sexual harassment Flagen endured in her employment with MVA.

94. The undisputed expert testimony established that Flagen's response of freezing in the face of assault and harassment is a common biological reaction to trauma.

95. MVA's response (or lack thereof) to Flagen's reports of problems with Martin stemming from his sexual harassment contributed to her mental health condition.

96. Flagen's treatment for her PTSD costs $90.00 per session. Prior to the hearing, she treated 3-4 times per month for 12 months. Flagen will require additional treatment for 9-12 months at least once per week.

97. Flagen's partner for 7 years noted significant changes in Flagen as a result of the sexual harassment she endured at MVA. It has adversely affected Flagen's ability to go out in public and enjoy things. In addition, Flagen's PTSD has affected her ability to care for her children. Being in public with the children causes her anxiety.

98. Flagen occasionally missed work at subsequent jobs due to anxiety caused by her PTSD.

99. MVA's discriminatory actions caused Flagen harm, including social stigmatization, fear, lost sleep, nausea, humiliation, emotional distress, PTSD, diminished enjoyment of social relationships, and diminished enjoyment of social events. Flagen suffers emotional distress as a result of the discrimination she endured at MVA.

100. MVA's counsel failed to produce Orbital Shift records in response to Flagen's discovery requests directed at their disclosure.

101. MVA's counsel failed to disclose Orbital Shift records to either opposing counsel or this tribunal prior to hearing, in spite of knowledge of their existence and an intent to rely on those records and introduce them into evidence.

IV. DISCUSSION[1]

A. Discovery Abuses and Sanctions

During the pendency of the case, Flagen submitted discovery to MVA, which included her Request for Production No. 12 (RFP 12). RFP 12 required, among other things, the production of all of MVA's scheduling documents. Respondent objected to that request, but produced some responsive documents. It did not, however, produce any documentation from the Orbital Shift scheduling software. Documentation from Orbital Shift would have shown the specific dates and times that both Martin, Flagen and other MVA employees worked. While Flagen herself was familiar with the operation of Orbital Shift from an employee perspective, it was apparent at hearing that neither she nor her counsel were aware that Orbital Shift also

[1] Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

kept detailed work history records. Hence, they did not move to compel additional data from Orbital Shift.

Although MVA did not produce any documentation from Orbital Shift in response to RFP 12, it attempted to introduce the withheld Orbital Shift scheduling documentation at hearing through Smith's testimony. Flagen objected on the basis MVA's failure to previously disclose the documents in either MVA's final pre-trial disclosures or in response to Flagen's discovery requests. Upon questioning by the Hearing Officer, it came to light that MVA's counsel had done virtually nothing to make inquiry with management about what documents might be available in response to RFP 12. It also came to light that MVA's counsel became aware of the Orbital Shift records the week before the hearing and in time to include them in its final disclosures (or supplement accordingly), but took no efforts to disclose or otherwise inform Flagen's counsel of their existence. Instead, they waited until Smith's testimony–one of the last witnesses called on the third and final day of the hearing–to attempt to introduce the Orbital Shift records. The purpose of introducing the records was to bolster an impossibility defense and show that Martin and Flagen were rarely, if ever, scheduled to work shifts at the same time. Although Flagen never testified that the only time she was at the pool was while she worked or that she was only harassed while on the clock, Flagen's counsel was unprepared to confront this defense. Had they been aware of the Orbital Shift records, it would have changed the nature of their questions and strategy with several witnesses who had already testified and been excused.

Failure by a party to disclose relevant evidence requested in discovery requires a sanction. Mont. R. Civ. P. 37(c). Failure to disclose information mandates the offending party "is not allowed to use that information or witness to supply evidence . . . at a hearing, unless the failure was substantially justified or is harmless." M. R. Civ. P. 37(c). Because of the foregoing issues and the requirement that MVA not be allowed to benefit from its failure to disclose the Orbital Shift information, the Hearing Officer excluded the Orbital Shift documents as a sanction, but still allowed Smith to testify as to his personal knowledge of when Flagen or Martin may have worked. Upon further reflection, however, even if Smith's knowledge did not come directly from Orbital Shift, it was still potentially "fruit of the poisonous tree," and the Hearing Officer is of the opinion that Smith's testimony regarding scheduling should have been excluded as a whole.

Subsequent to the hearing, Flagen moved for additional Rule 37(c) sanctions in the form of default judgment against MVA. In addition to the Orbital Shift records, Flagen also took issue with MVA having asserted a privacy interest with regard to

Folker's personnel file when, during his testimony, he testified that he did not care if his personnel file was made public. Contrary to Flagen's assertions, MVA took the correct position in protecting the privacy interests of its employees and of protecting itself against claims should it release such files. MVA, not Folker as a former employee, was the client of MVA's counsel. MVA's counsel was in no better position–and had no particular duty–than was Flagen's counsel to seek either Folker's or any other party's release of otherwise-confidential information. Similarly, Flagen's counsel also took issue with what was produced in regard to Martin's background check, but the Hearing Officer finds that to the extent this information was untimely, it was not an intentional act on behalf of MVA, was not particularly relevant to the proceedings at hand, and was therefore harmless.

With regard to Rule 37, in addition to the mandatory sanction of preventing withheld information from becoming part of the record, a court may impose other appropriate sanctions, including those listed at Rule 37(b)(2)(A). Those include (i) directing matters be embraced or facts designated as established for purposes of the action; (ii) prohibiting a party from supporting or opposing designated claims or defenses, or introducing designated matters into evidence; (iii) striking pleadings; (iv) staying proceedings; (v) dismissing an action; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey an order. M. R. Civ. P. 37(b)(2)(A)(i)-(vii).

In the context of a spoilation case, the Montana Supreme Court recently addressed the burden of "a party seeking the extreme sanction of precluding or truncating litigation on the merits. . . ." *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court* ("MSU"), 2018 MT 220, ¶ 25, 392 Mont. 458, 426 P.3d 541 (citations omitted). Montana does not have a case directly addressing the burden of a party seeking dismissal in a failure to produce case. *See*, *e.g.*, *McKenzie v. Scheeler*, 285 Mont. 500, 513-14, 949 P.2d 1168, 1176 (1997) (merely leaving appropriate sanctions to a court's discretion); *see also Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc .*, 2005 MT 254, ¶ 14, 329 Mont. 38, 122 P.3d 431 (when reviewing sanctions for appropriateness, the Montana Supreme Court looks at "whether the consequence inflicted via the sanction: (1) relates to the extent and nature of the actual discovery abuse; (2) relates to the extent of the prejudice to the opposing party which resulted from the discovery abuse; and (3) is consistent with the consequences expressly warned of by the District Court, if a warning was actually issued.") (citations omitted). Although spoilation is somewhat different than a failure to produce, the burden set forth in the *MSU* case is still informative. Essentially, the moving party has the burden of showing that: (1) the item not produced was subject to a duty to produce; (2) the other party intentionally, knowingly, or negligently

breached the duty; and (3) the failure to produce was sufficiently prejudicial to outweigh the overarching policy of M. R. Civ. P. 1 for resolution of disputed claims on the merits. *C.f. MSU*, ¶ 25.

Here, as discussed above, the Orbital Shift records were subject to production, and through both negligence (in discovery) and intentional acts (just prior to and at hearing), were not produced. The Hearing Officer does not believe, however, that the failure to produce these records was sufficiently prejudicial to outweigh the overarching policy of M. R. Civ. P. 1 for resolution of disputed claims on the merits. The Orbital Shift records went to a specific, narrow issue, and Flagen herself knew when she was scheduled. Had the record been clearly inculpatory, the Hearing Officer believes more significant sanctions would be warranted. As it is, however, MVA primarily harmed itself by failing to disclose potentially exculpatory records. Therefore, a more appropriate sanction in this case goes toward "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." M. R. Civ. P. 37(b)(2)(A)(ii). To that end, the Hearing Officer concludes that, as a sanction for its conduct, MVA should be precluded from supporting its defense of impossibility relating to the scheduling of both Flagen and Martin, and should be precluded from using evidence related thereto. M. R. Civ. P. 37(c), (b)(2)(A)(ii). For purposes of the this decision, then, the Hearing Officer will disregard MVA's arguments and related evidence that Martin could not have sexually harassed Flagen because of when they were scheduled to work.

B. Discrimination

Flagen has alleged sexual harassment that created a hostile or offensive work environment, as well as harassment that involves the conditioning of concrete employment benefits on sexual favors (*i.e.*, quid pro quo). Flagen has also alleged retaliation in relation to both being passed over for promotion and her termination.

1. Hostile Work Environment

The MHRA prohibits discrimination in the terms and conditions of employment on the basis of sex. Mont. Code Ann. § 49-2-303(1)(a). The anti-discrimination provisions of the Montana Human Rights Act (MHRA) closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *See, e.g., Crockett v. City of Billings*, 234 Mont. 87, 92, 761 P.2d 813, 816 (1988).

A hostile work environment due to sexual harassment is a violation of the MHRA. *See Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶¶ 17-19, 332 Mont. 293, 138 P.3d 419 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62(1986)). To establish a *prima facie* case, the charging party must demonstrate: (1) that the party is a member of a protected class; (2) that the party was subjected to offensive conduct that amounted to actual discrimination because of sex; (3) that the conduct was unwelcome; and (4) that the sexual harassment was so severe or pervasive to alter the conditions of employment and create an abusive working environment. *Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 18, 391 Mont. 120, 415 P.3d 986 (citing *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶¶ 15-19, 322 Mont. 434, 97 P.3d 546). Flagen, as the charging party has the burden of persuasion. Mont. Code Ann. § 26-1-402.

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *See Stringer-Altmaier*, ¶ 21 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. *at* 23. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113-14 (9th Cir. 2004) (citations omitted).

Furthermore, an employer may be held liable for the sexual harassment of its employee by third parties where the employer, its agents, or its supervisory employees, knows *or should have known* of the conduct and ratifies or acquiesces in the conduct by failing to take immediate and appropriate corrective action. *Puskas v. Pine Hills Youth Corr. Facility*, 2013 MT 223, ¶ 33, 371 Mont. 259, 307 P.3d 298 (citing *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2001); 29 C.F.R. 1604.11 (applying the knows or should have known standard, and adopted in Montana pursuant to Admin R. Mont. 24.9.1407)).

An issue in this case is that Flagen sued MVA for the acts of both Folker and Martin. MVA alleges that neither Folker nor Martin were supervisors, while Flagen disputes this assertion with regard to Folker. This leads to a potentially convoluted application of law in order to determine whether MVA was aware of the situation in a way that created potential liability. Setting aside for a moment whether a hostile work environment did, in fact, exist, and in order to simplify the foregoing, Flagen must essentially prove one of the following possibilities:

1) Folker sexually harassed Flagen, and MVA was therefore aware of the harassment by nature of Folker's role as a supervisor; and/or

2) Folker was a supervisor and Flagen either directly informed him of Martin's sexual harassment or he should have known of it, and MVA was therefore aware of the harassment by nature of Folker's role as a supervisor; and/or

3) Regardless of Folker's or Martin's status as supervisors, either Bronsdon or Smith–who were undisputedly supervisors–were either directly informed of Folker and/or Martin's sexual harassment of Flagen or should have known of it.

See Puskas, ¶ 33.

With regard to Folker's status as a supervisor, in *Vance v. Ball State Univ.*, the United States Supreme Court addressed the issue of who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment. The Supreme Court held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. . . ." *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). As the Court stated, in harassment cases, an employer's liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a supervisor, however, if the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Id*. at 423-24 (citations omitted).

Even if an employer concentrates all decision making authority in a few individuals, doing so does not isolate itself from liability. *See id*. at 446-47. Where an employer confines decision making power to a small number of individuals, it requires that they rely on input from other workers who actually interact with the affected employee when making decisions. *Id*. (citations omitted). A perfect example of this occurred between Bronsdon and Folker. Folker testified that, as a confidante of Bronsdon, she asked opinions of him, particularly in the context of Flagen's employment. Thus, although Folker did not have the power to do something such as fire Flagen, Bronsdon asked for his input. "Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment

actions to the employees on whose recommendations it relies." *Id*. (citations omitted). Under these circumstances, the Hearing Officer concludes that Folker was Flagen's supervisor.

a. Flagen Has Not Established a Prima Facie Hostile Work Environment Case With Regard to Folker

Although Folker was Flagen's supervisor for purposes of her sexual harassment claim, Flagen failed to meet her burden to show that Folker's actions created a hostile work environment. Flagen testified that Folker made inquiries and comments toward Flagen which made her feel uncomfortable. Although Folker did not completely recall all of the incidents raised by Flagen, the Hearing Officer found Flagen's testimony credible that Folker told Flagen she intrigued him, asked why she was not married, inquired about her tattoos, asked whether it would be scandalous if he asked her out and whether people would talk, asked whether she would miss him while he was in Hawaii, and jokingly (on its face) asked Flagen if she was going to take him out to the local Homesteader's rodeo event. Folker was, by his own account, an awkward individual who had difficulty reading others' emotions and reactions. Flagen herself testified, however, that when she did not show interest in Folker, he simply became disinterested himself. The only evidence of an abusive working environment presented by Flagen related to Folker's temper, which was a general issue, unrelated to Flagen specifically, and not pervasive. Under the totality of the circumstances, then, Flagen has failed to present evidence that the sexual harassment was so severe or pervasive to alter the conditions of her employment and create an abusive working environment. *See Jones*,¶ 18 (citations omitted); *see also Stringer-Altmaier*, ¶ 21 (citations omitted).

b. Flagen Has Established a Prima Facie Hostile Work Environment Claim With Regard to Martin

With regard to Martin, there is an initial issue as to whether the harassment actually occurred. As pointed out by MVA, Flagen's accusations concerning Martin are a "she said, he said" situation. Flagen's memory was spotty, though so was Martin's. Flagen sent texts to a friend saying she was going to "fuck over" people at MVA on January 12, 2016, after arguing with Folker and yelling at Bronsdon about a co-worker's termination. Some of the events Flagen described as occurring at the pool were also unlikely based on diagrams and descriptions presented at hearing, such as events Flagen said occurred in the lifeguard room which had both a mirror and a large window facing the pool. Flagen also did not tell her partner or any friends about any sexual harassment by Martin at the time she was still employed. And, although

Flagen was friends with Bronsdon and informed her of many intimate facts during her employment, she did not tell Bronsdon about the harassment (*see* discussion below). These inconsistencies created overall doubt as to the credibility of any of Flagen's testimony, as did her possible retributive motivations following her termination. However, several facts weigh heavily in favor of Flagen's version of events.

The testimony of Taryn Dupuis established that Martin had, in fact, sent sexually suggestive pictures to Flagen via Snapchat. Dupuis had no obvious motivation for lying about this fact. Thus, Martin's denial with regard to the nature of his communications with Flagen was flatly rebutted. Furthermore, Martin's own testimony was not believable and incredibly evasive. Martin had previously asserted Flagen was harassing him, then changed his story and ultimately denied all of the activity. With regard to Snapchat, Martin gave an entirely implausible explanation as to how he ostensibly deleted his account in 2015, and gave an equally implausible explanation as to why he had deleted his Tumbler account prior to being deposed. He also claimed to have absolutely no opinion of Flagen, even as he sat accused of sexually harassing her. Flagen's therapist, Eyre, also offered testimony regarding her treatment of Flagen for Martin's sexual harassment which lent credence to Flagen's version of events. She offered insight into Flagen's suffering, and based on the sheer length and depth of Flagen's treatment related to Martin's harassment, it seems unlikely that Flagen would have consistently maintained such treatment had she solely been using the treatment as a means to and ends in furtherance of her claim. Given all of these factors, it is more-likely-than-not that Flagen's version of events was accurate insofar as the nature and type of Martin's sexual harassment of her.

The Hearing Officer also concludes, however, that Flagen did not directly inform a supervisor, whether it be Bronsdon, Smith, or Folker, about Martin's behavior. Flagen asserted that she had used the word "inappropriate" with Bronsdon and Folker, but both individuals credibly testified that, had they heard the word, "red flags" would have gone off for them. This was particularly true with Folker, who testified regarding molestation of his own sister by a swim coach and how he would not have overlooked hearing the word. Adding further credence to Flagen's failure to directly tell anyone about Martin's harassment was that she told neither her partner nor any co-workers or friends about Martin's harassment. or, for the most part, her electronic communications with him. Flagen's counsel point to statements made during Bronsdon's testimony wherein it appeared she may have started to say that Flagen told her Martin was being "inappropriate," but the Hearing Officer believes Bronsdon's apparent stumble had more to do with the focus of the hearing and the language being used by counsel than it did her recollection of events.

Whether Flagen directly informed Bronsdon, Smith, or Folker about Martin's sexual harassment is not dispositive. As the Montana Supreme Court has stated, the question is not only whether an employer knew of harassment, but also whether it should have known. *See* Puskas, ¶ 33; *see also* 29 C.F.R. 1604.11. "This theory of liability is grounded not in the harassing act itself . . . but rather in the employer's 'negligence and ratification' of the harassment through its failure to take appropriate and reasonable responsive action." *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006) (quoting *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005)). The duty to discover harassment includes a duty to investigate complaints. *See Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) ("The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified"). Notice of sexual harassment may be imputed onto an employer where the employer's actions effectively discouraged reporting of harassment. *See Disstasio v. Perkin Elmer Corp.*, 157 F.3d 55, 59 (2d Cir. 1997); *see also Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 301 (5th Cir. 2001) ("once it becomes objectively obvious that the employer has no real intention of stopping the harassment, the harassed employee is not obliged to go through the wasted motion of reporting the harassment"). In this case, Flagen went to both Bronsdon and Folker to speak with them about Martin. In neither situation was she allowed to speak. In the case of Bronsdon specifically, she was quickly rebuffed, given no opportunity to explain her issues, and effectively told Martin was a good employee and friend of Bronsdon. Flagen has therefore shown that MVA management *should have known* of the harassment, but, through its own negligence, ratification of the situation, refusal to hear complaints, and lack of a clear management structure, it chose to ignore the situation and forego any type of investigation.

With regard to the hostile working environment, based on Flagen's testimony, the conditions created by Martin were severe. Some actions were minor but still contributed to a hostile working environment, such as Martin throwing Flagen's swimsuit away. The other behaviors described by Flagen were, however, beyond the pale. Martin sent Flagen numerous, unsolicited sexually explicit images and videos of himself via Snapchat, including pictures of his penis and videos of himself masturbating. Martin sent enough of these messages to Flagen that it became routine. Up to a few times a week, Martin would tell Flagen about his erection (and at times attempt to show her the same), and would then proceed to the family bathroom to masturbate. Martin's conduct escalated to the point where, in or around December, 2015, Flagen and Martin were storing items used for "Family Fun Night" in a closet, and Martin told Flagen to come into the bathroom because he had to show her something. Flagen froze as she walked in and saw Martin masturbating and

ejaculating in front of her. Later that month, Martin walked in on Flagen while she was showering and asked her to have sex with him. He tried other times thereafter, but Flagen locked the door. In mid-January, 2016, Martin approached Flagen in the lifeguard room with his pants down and told her to touch his penis. These actions clearly meet both the second and fourth elements of a hostile work environment based on sex discrimination–the acts were offensive and amounted to actual discrimination because of sex, and the sexual harassment was so severe and pervasive that it altered the conditions of Flagen's employment and created an abusive working environment. *See Jones*, ¶ 18. Also, under the totality of the circumstances, it was objectively frequent, severe, and humiliating. *See Harris*, 510 U.S. at 23; *Stringer-Altmaier*, ¶ 21.

Flagen has also proven the third element of a hostile work environment claim, namely that the conduct was unwelcome, and would have been to any reasonable person in Flagen's situation. Martin knew his conduct was unwelcome, as Flagen told Martin "no" and that she was not interested in him, had a girlfriend, and liked girls. Martin's behavior made Flagen deeply uncomfortable. She had never encountered anything like that before, and found Martin's behavior troubling. When she eventually told Martin to stop, his conduct slowed for a time, but never ceased. Flagen remained professional and cordial toward Martin at work throughout this time, however, because she did not want to cause workplace issues and believed she could handle the situation. Nonetheless, Martin's conduct was objectively interfering with her ability to work, as evidenced by the issues she was having with Martin in the workplace. *See Harris*, 510 U.S. at 23; *Stringer-Altmaier*, ¶ 21.

Based on the foregoing, Flagen has successfully made a prima facie hostile work environment claim.

c. MVA Has Not Established a Defense to Flagen's Hostile Work Environment Claim

Having proven the elements of a prima facie hostile work environment claim and having also shown that MVA management should have known of the conduct, the burden turns to MVA to show that it did not ratify or acquiesces in the conduct by failing to take immediate and appropriate corrective action. *See Puskas*, ¶ 33. Once a plaintiff establishes the initial elements of a sexual harassment claim or a hostile work environment claim, the employer's liability attaches only after it negligently responds, or fails to respond, to the condition created by the third party." *Puskas*, ¶ 34. An employer response is required "upon gaining awareness that an employee is being sexually harassed." *Id.*, ¶ 35 (citing *Freitag*, 468 F.3d at 528). An employer who acts promptly and reasonably will not be held liable for the actions of a third

party, but the reasonableness of the remedy depends on the employer's ability of the employer to stop the harassment. *Id.*, ¶ 35 (citing *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991)). The Montana Supreme Court has held that "'culpable acts of continuing discrimination in the work place primarily [take] the form of the employer's failure to seriously and adequately investigate and discipline [the harasser] following the assault and the employer's subsequent failure to protect [the victim] on the job.'" *Stringer-Altmaier*, ¶ 27 (quoting *Benjamin v. Anderson*, 2005 MT 123, ¶ 54, 327 Mont. 173, 112 P.3d 1039) (emphasis added in *Stringer-Altmaier*). An employer cannot avoid liability for its employees' harassment when "it utterly fails to take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F. 3d 965, 978 (7th Cir. 2004).

Here, MVA's management was aware of conflict between Flagen and Martin which should have prompted further investigation. Instead, however, there was a superficial attempt to resolve the situation with absolutely no investigation into the underlying cause. As discussed, to the extent that Flagen did attempt to further explain the situation to Bronsdon, she was immediately rebuffed. The only attempt at resolving issues between Flagen and Martin–of which both Bronsdon and Folker were aware–was a meeting wherein the two were placed side-by-side together in a small, enclosed room and given a motivational lecture by Folker about Maslow's hierarchy of needs wherein Martin's behavior was reinforced. As Dr. Brown testified, in her forty years of human resources management experience, she has never encountered such an inappropriate and counter-productive method of workplace conflict-resolution. MVA's response–or lack thereof–illustrates a classic situation in which the employer has failed to seriously and adequately investigate the situation and to protect victims of harassment on the job. *See Stringer-Altmaier*, ¶ 27. There simply was no investigation, and MVA's response was one of negligence and ratification of the harassment through its total failure to take appropriate and reasonable responsive action. *See Freitag*, 468 F.3d at 538. MVA has therefore failed to establish any valid defense to Flagen's hostile work environment claim.

2. Quid Pro Quo

Flagen has also alleged "quid pro quo" sexual harassment, which amounts to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. *See Williams v. Joe Lowther Ins. Agency, Inc.*, 2008 MT 46, ¶ 22, 341 Mont. 394, 177 P.3d 1018 (quoting and adopting 29 C.F.R. § 1604.11(a)) Quid pro quo sexual harassment occurs when: (1) the conduct is made on the basis of sex; (2) submission to such conduct is made either explicitly or implicitly a term or

condition of an individual's employment; and (3) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. *Williams*, ¶ 22. A quid pro quo sexual discrimination claim is properly considered as a "job detriment claim," where tangible job benefits are conditioned on acquiescence to requests for sexual favors or other conduct of a sexual nature. *Id*. at ¶ 23 (citations omitted). Here, Flagen's claims only apply to Folker, as there is no allegation Martin had any ability to control Flagen's employment.

Folker made inquiries and comments toward Flagen which she said made her feel uncomfortable. Although Folker did not completely recall all of the incidents raised by Flagen, the Hearing Officer found Flagen's testimony credible that Folker told Flagen she intrigued him, asked why she was not married, inquired about her tattoos, asked whether it would be scandalous if he asked her out and whether people would talk, asked whether she would miss him while he was in Hawaii, and jokingly (on its face) asked Flagen if she was going to take him out to the local Homesteader's rodeo event. Folker was, by his own account, an awkward individual who had difficulty reading others' emotions and reactions. While none of these statements were outright sexual, but they were all made on the basis of sex, and–although Flagen did not say as much to Folker–were unwelcome. This satisfies the first element of a quid pro claim.

Where Flagen's quid pro quo claim fails is with regard to both the second and third elements. As discussed below with regard to retaliation, although Flagen has asserted that she was passed over for promotion, this assertion was not borne out by the evidence. While Folker did effectively promote Martin to assistant swim coach, it was a result of both Martin's enthusiasm and inquiry about possibly doing the job (no one denied that Martin was a reliable, enthusiastic, hard-working employee). No one else, including Flagen, was considered for the job, but it was also not a job that existed prior to Martin's inquiry. Martin wanted more responsibility in his job, and Flagen did not express interest in coaching until after-the-fact. Furthermore, she did not have or work toward any certifications that would have allowed her to perform the job more than Martin. Giving Martin the job as MVA did may have been unprofessional, but Flagen failed to present any evidence that Martin got the job over Flagen because of Flagen's failure to reciprocate Folker's interest. Simply put, there was no submission to any conduct that was made either explicitly or implicitly a term or condition Flagen's employment, and submission to or rejection of such conduct by Flagen was not used as the basis for employment decisions affecting her. *See Williams*, ¶ 22.

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3. Retaliation

a. Flagen Has Shown a Prima Facie Case of Retaliation

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. *See* Admin. R. Mont. 24.9.603 (2). The elements of a prima facie retaliation case under Title VII are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link exists between the protected activity and the employer's action. *See Rolison v. Bozeman Deaconess Health Servs*., 2005 MT 95,¶17, 326 Mont. 491, 111 P.3d 202; *see also Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. *See generally Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). A retaliation claim is a separate action from the original discrimination suit. *See Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989).

Circumstantial evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610(3), (4); *see also Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 868 (9th Cir. 1996).

i. Protected Activity

The first element is whether Flagen engaged in protected activity. "Protected activity" means the exercise of rights under the act or code and may include: (a) aiding or encouraging others in the exercise of rights under the act or code; (b) opposing any act or practice made unlawful by the act or code; and (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1). Because the Hearing Officer has concluded that Flagen very generally complained about Martin but did not overtly state that he was being "inappropriate" or discriminatory, there is no direct evidence that Flagen engaged in a

protected activity when she complained about Martin's conduct in the workplace. However, the Hearing Officer has also concluded that, in any instance wherein Flagen attempted to complain in a manner that may have brought Martin's conduct to light, she was stymied by a combination of MVA management's immediate defense of Martin and, with Bronsdon in particular, a desire to avoid confrontation. At a minimum, then, evidence shows that MVA management was aware of issues between Flagen and Martin and even took steps to address them, yet at the same time also took measures to actively avoid hearing Flagen's complaints and to avoid conducting further investigation. Therefore, Flagen has satisfied the first element of her prima facie retaliation claim.

ii. Adverse Employment Action

The second element of the retaliation claim concerns whether MVA took an adverse employment action against Flagen. Flagen cites to three incidences of adverse employment action: (1) when she was overlooked for hiring as a assistant swim team coach; (2) the November, 2015, meeting between Folker, Martin, and Flagen; and (3) when she was placed on suspension and/or terminated. Of these three things, both the November meeting and Flagen's termination were adverse employment actions.

With regard to overlooking Flagen as an assistant swim team coach, this was not an adverse employment action. By all accounts, Flagen was not a "self starter" and took little initiative to go beyond what was specifically asked of her in her employment. As discussed above, Martin got the position–which did not exist prior to that point–on his own volition because he took the initiative to ask Folker about it. Flagen did not inquire about the assistant swim team coach position until learning that Martin had been placed into it. Also, contrary to Flagen's assertions, she was not more qualified for the position than Martin, as she did not possess any of the required certifications. While it is true that the position was not advertised, this was a function of MVA's dysfunctional, inexperienced management structure, and the failure to advertise or otherwise offer up its availability was not in any way directed at Flagen as an adverse employment action.

With regard to both the November meeting and Flagen's termination, these were adverse employment actions that "would dissuade a reasonable person from engaging in a protected activity." Admin. R. Mont. 24.9.603(2). Flagen was placed into the November meeting because she complained about Martin. Without making any specific inquiry into her complaints, Flagen was effectively told by both Bronsdon and Folker that Martin was a great employee, was protected, and that she had better

get along with him or suffer consequences. This was clearly an adverse employment action that would have dissuaded anyone from making further complaints.

Flagen's termination, which came not long after the meeting, was also clearly an adverse employment action. Flagen has therefore satisfied the second element of her prima facie retaliation claim.

iii. Causal Relationship

The third element of a prima facie retaliation claim is a causal relationship. In order to establish the causal link between the protected conduct and the illegal employment action as required by the prima facie case, the evidence must show the employer's adverse employment action was based in part on knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(Causation "may be inferred from . . . the proximity in time between the protected action and the allegedly retaliatory employment decision").

In terms of Flagen's employment, the actions taken by MVA have a degree of temporal proximity to Flagen's protected activity. She complained about Martin, engaged in the meeting with Folker and Martin, and was terminated at some point thereafter on February 23, 2016. While it appears that the meeting took place in November of 2015 rather than February of 2016 as Flagen believed, there is nonetheless a close enough proximity that, on its face, the termination appears to be temporally related to Flagen's protected activity of attempting to complain to Bronsdon about Martin's harassing behavior.

With regard to the Folker meeting, the causal connection between Flagen's protected activity and the adverse employment action is well-established. Flagen made an effort to lodge a complaint with Bronsdon about Martin, but Bronsdon's reaction was to stop her from elaborating and immediately come to Martin's defense in a way that made it clear nothing Flagen had to say would be well taken. The meeting was specifically held because of Flagen's complaint, and was an attempt to quell that complaint. Flagen has therefore satisfied the third element of her prima facie retaliation claim with respect to both her firing and the meeting.

b. MVA Has Not Fully Rebutted Flagen's Prima Facie Case of Retaliation

If the plaintiff makes out a prima facie case, the employer can rebut it by producing evidence of a legitimate, nondiscriminatory explanation for its actions. *See St. Mary's Honor Ctr.*, 509 U.S. 502, 506-07 (1993) (once a prima facie case is established, the burden of production shifts to employer to articulate a nondiscriminatory reason for adverse employment action, causing the presumption created by the prima facie case to fall away.) A plaintiff who establishes a prima facie case of retaliation bears the "ultimate burden of persuading the court that [she] has been the victim of intentional [retaliation]." *Burdine*, 450 U.S. at 256. In order to carry this burden, a plaintiff must establish "both that the [employer's] reason was false and that [retaliation] was the real reason for the challenged conduct." *St. Mary's Honor Ctr,* 509 U.S. at 515.

i. Flagen's Termination

MVA has clearly established through Bronsdon's testimony that there were legitimate, nondiscriminatory reasons for Flagen's termination. On February 12, 2016, Flagen asked for time off on February 22-23, 2016, which was less than two weeks away. Bronsdon noted that Flagen's absence would place Bronsdon in the difficult position of having to cover for Flagen's shift. Flagen wanted the time off to attend a CPO class, which she did not need for her position at MVA. (The CPO certification would have, however, potentially enabled Flagen to obtain work maintaining the pool at the new hotel opening next to MVA's facilities.) Bronsdon declined to allow time off because of all of the scheduled events for those days. When Flagen informed Bronsdon that she had already signed up for the class and paid the several hundred dollar fee, Bronsdon personally inquired about setting up the class at a different time when more MVA employees could participate, they could be paid for their time taking the class, and MVA itself could pay for the class. Bronsdon also found out that Flagen could obtain a refund if she asked for it in writing. On February 18, 2016, Flagen told Bronsdon she had not applied for the refund and did not know whether she would attend the class or come to work. Bronsdon then stated something to the effect that, if Flagen attended the class, it would be going against what Bronsdon told her, she was not giving Flagen those days off, and her absence would not be excused. Flagen's response was that she would face the consequences.

Flagen ultimately attended the CPO certification training and missed work at MVA without calling in to confirm her absence. In response, Bronsdon spoke with Smith–who both parties agree knew virtually nothing of Flagen's prior complaints

about Martin–after Flagen failed to show for the second day, and both decided that some type of reprimand was appropriate. Bronsdon decided to suspend Flagen for a week and took her off the schedule as a reprimand. When Flagen eventually spoke with Bronsdon, Bronsdon told her not to come in for her morning shift. Flagen misinterpreted Bronsdon's statement, and asked whether Bronsdon really intended to do "this" (i.e., terminate Flagen) over the phone, and then hung up. Flagen later contacted Bronsdon asking for a termination letter. Rather than disavow Flagen of her mistaken impression, Bronsdon ran with it in order to avoid further confrontation. She investigated and found a scenario under which Flagen's absence could result in her termination–namely, that she missed three shifts in two days (two lifeguarding shifts and one swim class), which was considered a voluntary quit in the employee handbook. Further exemplifying Bronsdon's desire to avoid direct conflict, when both she and Flagen were in the parking lot together the following morning, Bronsdon refused to open her window, get out of her vehicle, or in any way speak with Flagen.

The parties have made much ado of whether Flagen had, in fact, missed three "shifts" and whether, as a result, she voluntarily quit. The Hearing Officer finds this issue a red herring, at least for purposes of retaliation. Bronsdon did not intend to terminate Flagen for any protected activity; she simply did not correct Flagen's mistaken impression that not being scheduled for the day after she missed work meant termination and not suspension. To the extent that Bronsdon intended to reprimand Flagen, there is no dispute that this situation arose entirely because of Flagen's unexcused absence to take the CPO class, which warranted the suspension and was not in any way retaliatory as a result of Flagen engaging in protected activity. Whether or not Flagen missed three shifts, and whether or not her termination may have amounted to a wrongful discharge as a result, is both irrelevant and outside the jurisdiction of this tribunal. For purposes of the present matter, however, MVA has shown that Bronsdon's inexperience at handling management and employee issues, and not discriminatory reasons, led to Flagen's termination.

ii. The Folker Meeting

In light of what management should have known and the type of inquiry that was incumbent upon them, MVA has not produced any substantial, credible evidence showing there were legitimate, nondiscriminatory reasons for the Folker meeting. Although there is a dispute as to whether the meeting occurred after Flagen made her time-off request for the CPO class in February, 2016, or if it occurred closer to November, 2015, the Hearing Officer concludes that it was a retaliatory act regardless of exactly when it occurred.

It must be granted that, on its face, the Folker meeting was directed at assisting Flagen and Martin to get along. However, MVA management's overt refusal to delve into the "why" of the situation also made the meeting into an intentional ratification of ongoing behavior. Bronsdon was completely dismissive about hearing Flagen's complaints when she came to her. Indeed, the very nature of the meeting was illustrative of the degree to which Bronsdon and Folker both knew Flagen and Martin were not getting along and yet intentionally chose not to inquire as to why. Although the Hearing Officer finds Flagen's description of the meeting as a "cage match" to be extreme, it was nonetheless highly ill-conceived given the situation. Flagen was placed in a demeaning, threatening situation because of her complaint to Bronsdon. In the meantime, the meeting reinforced Martin's behavior and served to quash any further attempts by Flagen to raise concerns with MVA management or otherwise "rock to the boat" with Martin. It was a clear message from MVA that Flagen was not permitted to raise her concerns with management, and that the status quo would continue. To reiterate Dr. Brown's testimony, the situation was a completely inappropriate and counter-productive method of workplace conflict-resolution. To the extent MVA had nondiscriminatory reasons for the meeting, none of those reasons were legitimate given the complete absence of any kind of investigation into the situation. *Cf. St. Mary's Honor Ctr.*, 509 U.S. at 506-07.

C. Damages and Affirmative Relief

Flagen has not proven she was terminated from employment because of her sex, and therefore is not reasonably due damages related to lost earnings because there is no causal connection between the discrimination and loss of earnings. However, Flagen did suffer emotional distress damages and is due compensation as a result. With regard to Flagen's past and ongoing emotional damages, the Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Flagen as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages). The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See Vainio*, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted). However, because of the broad remunerative

purpose of the civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions. *Id*.

Flagen has provided sufficient evidence concerning the impact that the discrimination had on her life. While at MVA, Flagen was afraid to go to work for fear she would be sexually harassed. Among other things, she experienced and experiences difficulties sleeping, feelings of powerlessness, nausea, and both social anxiety and depression as a result of the sexual harassment. Flagen was diagnosed with PTSD by Eyre given her history of nightmares, panic attacks, flashbacks, and intrusive thoughts about the sexual harassment, which impaired Flagen's ability to function normally on a daily basis and adversely affected her ability to care for her children. At the time of hearing, Flagen had been treated for PTSD for approximately a year due to the sexual abuse she suffered at MVA, and was expected to continue with therapy for another year at $90.00 per session. There were no other causes contributing to Flagen's PTSD other than the sexual harassment she experienced at MVA.

Based on the figures provided by Flagen and her therapist, she was expected to incur approximately two years of therapy to treat her emotional distress. The Hearing officer believes that it is reasonable to award the cost of 104 therapy sessions (*i.e.*, weekly for two years) at $90.00 each, or $9,360.00. In addition, based on the emotional distress caused by MVA, Flagen should receive additional compensation for that distress. Flagen has demanded $200,000.00, although she provides no underlying rationale for the number. Furthermore, the $200,000.00 figure is based on a finding that Flagen's termination was a consequence of the sexual harassment and that in itself caused great emotional distress, which is not a conclusion of the Hearing Officer. The Hearing Officer therefore finds that, based on a combination of MVA's role in the harassment being passive and the cost of therapy, it is reasonable to award an additional $50,000.00 in damages for Flagen's emotional distress, for a total of $59,360.00.

The law requires affirmative relief enjoining further discriminatory acts and may further prescribe any appropriate conditions on MVA's future conduct relevant to the type of discrimination found. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring MVA's management to consult with HRB to identify appropriate training to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

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V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

2. Flagen is a member of a protected class within the meaning of the Montana Human Rights Act (Mont. Cod Ann. §49-2-303) and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e et seq.), on the basis of sex.

3. The MHRA prohibits discrimination in employment based upon sex. Mont. Code Ann. § 49-2-303(1)(a).

4. Flagen proved that MVA violated the Montana Human Rights Act when it discriminated against her illegally because of sex and retaliated against her for engaging in protected activity. Mont. Code Ann. §§ 49-2-301, -303(1).

5. The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

6. Flagen is owed compensatory damages in the amount of 9,360.00.

7. Flagen is owed damages for emotional distress in the amount of $50,000.00.

8. Flagen's M. R. Civ. P. 37(c) motion is granted, but not as to sanctions sought. Because of MVA's failure to disclose Orbital Shift records, it is precluded from supporting its defense of impossibility relating to the scheduling of both Flagen and Martin, and is precluded from using evidence related thereto. M. R. Civ. P. 37(c), (b)(2)(A)(ii).

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

VI. ORDER

1. Flagen's M. R. Civ. P. 37(c) motion is granted, with the remedy that MVA's arguments and related evidence that Martin could not have sexually harassed Flagen because of when they were scheduled to work are disregarded.

2. Judgment is granted in favor of Flagen against MVA for discriminating against Flagen in violation of the Montana Human Rights Act.

3. MVA must pay Flagen the sum of $9,360.00 in compensatory damages and $50,000.00 for emotional distress.

4. MVA must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for its board members, managers, and supervisors to prevent and timely remedy sexual discrimination on the job. Under the policies, MVA's employees will receive information on how to report complaints of discrimination. The policies must be approved by the Montana Human Rights Bureau. In addition, MVA shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 7th day of February, 2019.

/s/ CHAD R. VANISKO
Chad R. Vanisko, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Tristen Flagen, Charging Party, and her attorney, Carey Schmidt; and Mission Valley Aquatics, Respondent, and its attorneys, Antonia P. Marra and Barbara Bell:

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) and (4).

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 ONE DIGITAL COPY, with:

Human Rights Commission
c/o Annah Howard
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 ONE DIGITAL COPY 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 original transcript is in the contested case file.

Flagen.HOD.cvp