STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 551-2019:

SHALAINE LAWSON,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
NORVAL ELECTRIC COOPERATIVE,	)	
	)	
Respondent.	)	

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I. PROCEDURAL BACKGROUND

Shalaine Lawson brought this complaint alleging NorVal Electric Cooperative (NorVal) discriminated against her on the basis of sex and retaliated against her for protected activity.

The Hearing Officer conducted a contested case hearing in this matter on February 21, and 22, 2018, and March 4, 2018. Shalaine Lawson appeared and was represented by Todd Shea, Attorney at Law. NorVal appeared through its designated representative, Craig Herbert, and was represented by Maxon Davis, Attorney at Law.

At hearing, Lawson, Herbert, Shawn Lawson, Candy Milroy, Matthew Knierim, Jennifer Durward, APRN, PMHNP-BC, Elizabeth Dyrdahl, LCPC/LAC, Ann Adair, Ph.D.,Colin Deebel, Karla Johnson, Scott St. John, Nick Dulaney, and Cory Wheeler testified under oath.

The parties stipulated to the admission of the deposition testimony of Karen Black, MEd., CRC, CCM, CDMS, and Chris Laviola, Clinical Psychologist Specialist (Exs. 70(C) and 70(D)). The parties also stipulated to the admission of the deposition testimony of Craig Herbert (Ex. 70(A)), as well as NorVal's counter-designations (Ex. 70(A)(1)), and the deposition testimony of Chris Christensen (Ex. 70(B)). The deposition testimony of Knierim (Ex. 70(E)) was initially admitted but

later withdrawn upon the completion of his testimony at hearing. A portion of the deposition testimony of Britni Lingohr was read into the record by Shea, with no counter-designation offered by NorVal.

Charging Party's Exhibits (C.P. Ex.) 1-13; 15-29; 31A, 31B, 32, 34A-35; 37A-37F; 38A (NorVal Trustee Policy No. 6); 39A-39S; 40A through 40I; 41A (with additional documents offered at hearing), 41B (with additional documents offered at hearing to replace the first three pages of the exhibit included in C.P.'s exhibit binder); 42 through 46; 47A through 47C; 48; 49A through 49D; 51 through 54; 57A through 57D; 61A through 61K; 62; 64-67; 69A, 69B; 70A through 70D; 71 through 76; 77A through 77G; 78; 79A; 79B; and 80 were admitted, as were Respondent's Exhibits (Resp. Ex.) 101 and 103 through 142.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination upon the timely filing of the final brief. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did NorVal Electric Cooperative, discriminate against Shalaine Lawson on the basis of gender and/or retaliate against her for protected activity in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If NorVal Electric Cooperative, did discriminate against Shalaine Lawson on the basis of gender and/or retaliate against her for protected activity 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 NorVal Electric Cooperative, did discriminate against Shalaine Lawson on the basis of gender and/or retaliate against her for protected activity as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. PRELIMINARY ISSUES

The parties graciously submitted briefing on three issues, each of which will be addressed in turn.

A. The effect of NorVal's counsel conducting the investigation of an employee's discrimination/retaliation complaint without those results being shared with Lawson and/or her counsel. Does attorney-client privilege prevent disclosure of those results? The admissibility of Exs. 81 and 82.

NorVal denied conducting any investigation of Lawson's complaint throughout the investigation conducted by HRB. Indeed, NorVal has contended in this proceeding and its post-hearing briefing that it had no duty to perform an investigation because Lawson's complaint did not state specifically that she was alleging Herbert sexually harassed her, which it contends is required under NorVal's harassment policy. As noted below, the Hearing Officer finds that it did have a duty to investigate Lawson's complaint because Herbert knew or should have known that Lawson was accusing him of sexual harassment. As the General Manager, Herbert was required to address that complaint under NorVal's policy. NorVal's policy does not require investigation of such a complaint. However, Montana law requires the employer to address an employee's complaint of sexual harassment. *See Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶27, 332 Mont. 293, 138 P.3d 419, ("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.").

At or near the time of hearing, there was a suggestion that NorVal's counsel investigated Lawson's complaint and found no evidence of sexual harassment. See NorVal's Findings of Fact and Conclusions of Law, FOF 24 (04/22/2019). At hearing, when pressed on the investigation's conclusions, Herbert responded, "You would have to ask Mr. Davis." Herbert conceded he had never seen a report about the investigation results.

The Hearing Officer asked the parties to submit briefs on the issue of whether attorney-client privilege prevented the disclosure of the investigation's results. NorVal argues that its counsel was retained shortly after learning it was a party to an adversarial proceeding, and NorVal has not waived the attorney-client privilege. Lawson argues that NorVal has failed to produce any evidence that would allow the Hearing Officer to find that its counsel's interview of four witnesses prior to hearing satisfied NorVal's duty to investigate Lawson's complaint.

Montana Code Ann. § 26-1-803 provides:

> (1) An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment.
>
> (2) A client cannot, except voluntarily, be examined as to any communication made by the client to the client's attorney or the advice given to the client by the attorney in the course of the attorney's professional employment.

The attorney-client privilege has eight essential elements: "1) where legal advice of any kind is sought; 2) from a legal adviser in his capacity as such; 3) the communications relating to that purpose; 4) made in confidence; 5) by the client; 6) are at his instance permanently protected; 7) from disclosure by himself or by the legal adviser; 8) unless the protection be waived." *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 fn. 2 (9th Cir. 1992).

A similar issue was addressed by the court in *Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (Cal. N.D. 2005). The court considered the admissibility of investigative reports prepared by an attorney engaged by the employer and the employer's human resources department. The court found the attorney's report would ordinarily be subject to both work product and attorney-client privilege. The court found the attorney's report was covered by attorney-client privilege because it was prepared by an attorney at the direction of the employer's attorney with the intent of providing the employer with legal advice regarding the merits of the plaintiff's claim. *Id.* at 534. The court noted:

> "If Defendants assert as an affirmative defense the adequacy of their pre-litigation investigation into [the plaintiff's] claims of discrimination, then they waive the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation. Where a party puts the adequacy of its pre-litigation investigation at issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privileged."

Id. at 535.

The court ultimately concluded that the attorney's legal analysis of the employer's investigation did not fall within the scope of the employer's waiver. The court noted that its "pre-litigation investigation is relevant to their affirmative defense, but the attorney's intra-litigation analysis of that investigation is not." *Id.* (internal citation omitted).

The Hearing Officer is not convinced that NorVal's trial counsel conducted an investigation of Lawson's complaint. It is more probable that the investigation conducted by NorVal's counsel was an "intra-litigation analysis" rather than a "pre-litigation analysis." The Hearing Officer bases this on the following: NorVal engaged him after the filing of Lawson's HRB complaint and for the apparent purpose of defending NorVal at the contested case hearing; counsel's apparent failure to interview Lawson, presumably because she was represented by counsel; and the failure to produce any documentary evidence showing that an investigation regarding Lawson's complaint to get to the truth of the matter rather than to mount a defense to that complaint. It is therefore determined for the purposes of this decision that no such investigation took place. Alternatively, if such an investigation did take place, that investigation was for the purposes of preparing for hearing and not to satisfy the duty of the employer to promptly investigate an employee's complaint of sexual harassment. Therefore, Charging Party's Proposed Exhibits 81 and 82 are excluded from the record.

B. The admissibility of the medical records of Chris Laviola.

NorVal contends Laviola's records are not admissible because Laviola is a psychologist and not a medical doctor and any records prepared by Laviola are not medical records. NorVal further contends Lawson failed to lay the proper foundation for the admission of those records. NorVal offered no legal foundation for its arguments.

Medical records generally constitute hearsay. However, there are exceptions to the prohibition against the admissibility of hearsay evidence. Rule 803(4), M.R.Evid. provides:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Rule 803(6), M.R.Evid. further provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness . . . The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id.

NorVal cited no rule, statute, or case that defined a psychologist's records as not constituting medical records, as that term is used in the Montana Rules of Evidence cited above. Laviola authenticated the documents and confirmed the documents were true and accurate copies of her records and reports in this case. Laviola further confirmed the notes included in the documents were notes she routinely took during the course of her practice. NorVal's objection to the admission of Laviola's medical records prepared in her course of treatment of Lawson is overruled. Charging Party's Exhibit 41C is hereby admitted.

C. Whether the Hearing Officer has the authority to award costs in a contested case proceeding under the Montana Human Rights Act.

Lawson contends the Hearing Officer has the authority to award costs related to Lawson prosecuting her claim at the contested case proceedings. Those costs include the cost associated with obtaining transcripts; engaging expert witnesses for hearing; and ongoing costs associated with the hearing.

The Hearing Officer directed counsel to consider Mont. Code Ann. § 49-2-505(8), which provides:

> The prevailing party in a hearing under this section ***may bring an action in district court for attorney fees and costs***. The court in its discretion may allow the prevailing party reasonable attorney fees and costs. An

action under this section must comply with the Montana Rules of Civil Procedure.

Id. (emphasis added).

Lawson argues the Hearing Officer is authorized to award such costs under Rule 54(d), M.R.Civ.P., which provides:

> **(d) Costs; Attorney Fees.**
> (1) Costs Other than Attorney Fees. Unless a Montana statute, these rules, or a court order provides otherwise, costs -- other than attorney fees -- should be allowed to the prevailing party. But costs against the State of Montana, its officers, its agencies, and its political subdivisions may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.
> (2) Attorney Fees.
> (A) Claim to Be by Motion. A claim for attorney fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

Id.

The hearing officer has only those powers that are specifically delegated by statute or rule. *Auto Parts of Bozeman v. Employment Relations Div.*, 2001 MT 72, ¶38, 305 Mont. 40, 23 P.3d 193.

Montana Code Ann. § 49-2-506 provides:

> (1) If the hearings officer finds that a party against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the department shall order the party to refrain from engaging in the discriminatory conduct. The order may:
> (a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found;
> (b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against;
> (C) require a report on the manner of compliance.

(2) Except as provided in 49-2-510, the order may not require the payment of punitive damages.
(3) Whenever an order or conciliation agreement requires inspection by the department for a period of time to determine if the respondent is complying with that order or agreement, the period of time may not be more than 1 year.

Id.

The Hearing Officer lacks the authority to order any remedy beyond that which is enumerated in Mont. Code Ann. § 49-2-506. The remedy for a prevailing party regarding costs and attorney fees lies with the District Court and not with this Hearing Officer. Therefore, the Hearing Officer cannot address Lawson's request for costs and attorney fees and will not be accepting any evidence regarding the same.

IV. FINDINGS OF FACT

1. NorVal Electric Cooperative, Inc. (NorVal) is a Montana electric cooperative with its principal place of business in Glasgow, Montana.

2. NorVal distributes electric energy to its member-owners over a 10,000 square mile area in Valley, Daniels, Roosevelt and McCone counties in northeast Montana.

3. NorVal has 21 employees, which includes office staff and an outside line crew.

4. NorVal is governed by an eight-member Board of Directors (Board), who are elected by the members of the cooperative.

5. Craig Herbert has been NorVal's General Manger since 2009. Herbert reports directly to the NorVal's Board. Herbert is the Board's agent in overseeing NorVal's daily operations.

6. Shalaine Lawson was born and raised in Malta, Montana. Lawson received her bachelor's degree in accounting in 2002 from the University of Montana.

7. Lawson moved to Glasgow in 2004 and worked as an accountant for a local accounting firm. Lawson later obtained her Certified Public Accountant (CPA) license while working at the firm.

8. Lawson began working for NorVal in December 2010. Lawson successfully completed a six-month probationary period. Lawson reported to Office Manager and Chief Financial Officer Scott St. John. Lawson's annual salary was approximately $45,000.00.

9. St. John and Lawson had a difficult working relationship. However, St. John never issued any discipline to Lawson while he was her supervisor; nor did he ever indicate to Herbert that Lawson should not receive a pay increase.

10. In 2015, St. John resigned from NorVal so he could pursue farming on a full-time basis. St. John's resignation was not due to his difficult working relationship with Lawson.

11. Lawson and another NorVal employee applied for the Office Manager and Chief Financial Officer position. Herbert and Nick Dulaney, NorVal's Line Crew Supervisor, interviewed both candidates. Lawson was ultimately hired for the position when the other employee declined to move from Opheim, Montana to Glasgow.

12. Lawson's promotion took effect January 4, 2015. Lawson's hourly wage increased from $33.31 to $36.32.

13. Lawson received multiple raises while working at NorVal, the most recent being a 2% raise in September 2017. Lawson's hourly wage at the time of her medical leave of absence was $40.66. Lawson's annual salary was $84,567.00. Ex. 57A.

14. Herbert has the authority to allow or deny employees pay increases based upon his assessment of the employee's job performance. In September 2017, Herbert awarded several employees, including Lawson, the 2% pay increase, which he considered to be a "token" raise. Herbert denied two employees this raise due to concerns he had regarding their performance.

15. Lawson understood her performance was acceptable throughout the majority of her employment at NorVal. Lawson never received a poor performance evaluation and had been assured by Chris Christensen, a member of NorVal's governing board, that she was doing a good job as late as October 2017. Lawson understood the Board, St. John, and Herbert were satisfied with her job performance.

16. Dulaney and Lawson had a difficult working relationship at times. The two often squabbled about work related issues. As a result, in July 2017, Herbert

issued a memo to both Lawson and Dulaney stating, you "each do a good job in your respective areas" . . . [but] you must treat each other professionally and courteously . . ." Ex. 1.

17. Despite these squabbles, Dulaney and his wife had Lawson prepare their income tax returns for several years prior to December 2017. Lawson acted as a tax preparer for several NorVal employees prior to December 2017.

18. Dulaney felt Lawson did a good job, and she went out of her way to assist his crew. Dulaney felt Lawson had the best interest of NorVal at heart and she tried to perform her job duties to the best of her ability.

19. Lawson and Herbert generally had a positive working relationship during the early years of her employment at NorVal. Lawson frequently shared personal information about herself and her family with Herbert.

20. In May 2017, Lawson stopped sharing personal information with Herbert because he began making inappropriate comments and suggestions to Lawson that were sexual in nature. Lawson felt uncomfortable with Herbert's comments.

21. In May 2017, Lawson and Herbert drove together to Wolf Point, Montana to review work done by Electrotest. Lawson had begun wearing false eyelashes the previous month, and Herbert asked her why during the ride. Lawson told Herbert that she felt better with the false eyelashes, and Herbert commented, "when women go and try to improve their looks, it's because they're looking to have an affair."

22. Lawson felt the comment was inappropriate and felt Herbert was trying to see if she was interested in having an affair.

23. Lawson stopped wearing false eyelashes at work as a result of Herbert's comment.

24. In June 2017, Cory Wheeler, who is a CPA with Smith, Lange, and Halley located in Sidney, Montana, reported to NorVal's office to perform field work for his upcoming audit.

25. Wheeler's audit revealed that the biggest issue facing NorVal was the method by which they calculated reports. Wheeler worked with Lawson and Herbert to correct several entries. Wheeler did not find any of the financial statements were

materially misstated to the point that he would be required to issue a qualified audit letter to NorVal. Wheeler ultimately provided an unqualified audit letter to NorVal later in the summer of 2017.

26. Wheeler's audit letter included, "[W]e are very pleased with the assistance we received while conducting your audit. We find your accounting staff to be open-minded and eager to do the best job that they can for the cooperative." Ex. 79B.

27. In June 2017, Lawson approached Herbert about attending a Cooperative Finance Corporation (CFC) conference. CFC is NorVal's banking institution. Herbert and Lawson were alone in his office when she approached him. Herbert asked Lawson if she had ever "fooled around" with Eric Anderson, CFC's Regional Vice President. Lawson was shocked at the question and asked if there was a reason he was asking. Herbert denied there was a specific reason but commented that she was naive and, "Eric is that way, I just wanted to know." Herbert has never asked another NorVal employee about their relationship with Anderson.

28. Lawson felt uncomfortable with Herbert's question, and, as a result, she did not attend the CFC conference.

29. In mid-June 2017, Lawson traveled to Bozeman, Montana with her son, who was attending a football camp. Lawson had a massage while in Bozeman, which she told Herbert about when she returned to the office.

30. Lawson was in Herbert's office later that same day when he inquired about whether her husband gave her massages. Herbert told Lawson, "I just wanted you to know that given the opportunity, I give a really good massage, and if we're ever given an opportunity, I would like to get you relaxed." Lawson did not respond to Herbert's offer, and she left his office. Lawson felt "degraded, dirty and really uncomfortable" as a result of Herbert's unwanted and unwelcome offer.

31. During this same period, Lawson was in Herbert's office to discuss NorVal's pending annual audit. Lawson commented her back was hurting. Herbert directed Lawson to turn around and cross her arms. Herbert shut his office door and approached Lawson from behind. Herbert then embraced Lawson from behind and picked her up thereby popping her back. Lawson felt Herbert was smelling her hair while he popped her back. Lawson did not say anything, but she felt Herbert's actions were inappropriate.

32. Several days after the back popping incident, Lawson was in Herbert's office after having not spoken to him for several days. Herbert asked Lawson for a hug at the end of their meeting, indicating it would be, "just for friends." Herbert then gave Lawson a hug, which she felt was inappropriate.

33. In the summer of 2017, Herbert inquired about the health of Lawson's sex life. Lawson was alone in her office when Herbert entered her office and made the inquiry. Lawson felt disgusted by the question and wondered why Herbert felt it was appropriate for him to ask her those types of questions. Herbert has never asked another NorVal employee about their sex life.

34. In mid-July 2017, Lawson was at the copy machine when Herbert approached her. Lawson was wearing knee length shorts. Herbert asked Lawson if she had been gaining weight, and, when she said no, he commented, "you are filling out your pants nicely."

35. Lawson felt bad as a result of Herbert's comment and suspected Herbert was interested in pursuing a sexual relationship with her. Lawson threw away the shorts she was wearing as a result.

36. Herbert's comments affected Lawson's feelings of self worth. Lawson stopped showering as often and stopped wearing nice clothes in an effort to "ward him off" because she did not want Herbert seeing her in that light. Herbert's comments and inquiries were unwanted and unwelcome by Lawson.

37. In August 2017, NorVal was in the process of doing power shutoffs and the term "turn off" was used during the conversation in the office. Lawson went to Herbert's office later that same day and he asked her, "are there things that turn you off?" Lawson immediately left Herbert's office. Herbert used the term "turn off" as a sexual reference several times that day in Lawson's presence.

38. Lawson began talking to her husband, Shawn Lawson, about Herbert's conduct toward her and its effect. Lawson contacted attorneys that do legal work for his employer and used "them as a sounding board, more or less to see what . . . what her recourse was . . .how maybe to proceed."

39. On September 19, 2017, Shawn Lawson sent various attorneys in the area emails referring to the "potential sexual harassment" claim of his wife. Ex. 26.

40. Shawn Lawson passed on the advice he received to Lawson. Lawson understood her options included finding a new job or filing a complaint regarding Herbert's conduct. Shawn Lawson encouraged his wife to continuing working for NorVal and hope the situation improved.

41. During the Board's September 2017 meeting, Herbert asked the Board if anyone had room for Lawson to ride with them to a meeting in Great Falls, Montana. Director Kurt Breigenzer commented that he did not have room in his room, which prompted the other directors to laugh. Director Lee Risa commented that he thought they had addressed that problem.

42. Risa had previously accused Herbert and Lawson of having an affair after her promotion to office manager. Lawson learned of Risa's accusation through Herbert. Lawson was upset at the accusation of her having an affair with Herbert. Lawson was further upset that it was never investigated and she never had an opportunity to respond to the accusation.

43. On October 3, 2017, Lawson, Herbert and other NorVal employees attended a multiple day conference hosted by the Montana Electric Cooperatives' Association (MECA) in Great Falls.

44. Herbert and Lawson had agreed prior to the MECA conference to meet at some point during the conference to discuss work related matters.

45. During the morning of October 4, 2017, Lawson attended a meeting at the conference. Herbert stood approximately 15 feet down an empty hallway and waited for Lawson to come out of the meeting. Herbert asked to speak with Lawson. When Lawson approached Herbert, he asked if they could have their meeting in his hotel room. Lawson refused and Herbert told her that he had a key made for her. Herbert suggested she go up to his room, and he would do the same a short time later so as not to raise suspicions. Lawson again refused and became visibly upset due to the inappropriateness of Herbert's suggestion. Herbert has never asked another NorVal employee to meet with him in a hotel room.

46. Lawson texted Herbert later that day and asked if they could meet by the pool, which they did. Lawson and Herbert's meeting concluded without incident.

47. Lawson and Herbert were back in the office following the MECA conference on October 6, 2017. During their discussion regarding various work related topics, Lawson felt Herbert was being very degrading and belittling. Lawson

told Herbert that she had documented his having requested her to come to his hotel room, and she left the office.

48. Lawson made the comment about documenting the hotel room request because she felt she needed to tell him that she had to report it or find another job. Lawson suspected Herbert may fire her, but she felt it necessary to tell him that he needed to stop his behavior. Lawson considered this exchange as her having filed a complaint of sexual harassment with her employer.

49. Herbert informed Director Chris Christensen that Lawson was upset with him shortly after Herbert had asked Lawson to meet with him in his hotel room.

50. Herbert knew or should have known at that point that Lawson was wanting to file a sexual harassment complaint based upon his knowledge of NorVal's harassment policy and his role as General Manager. Herbert was in the peculiar position to understand the import of Lawson's comments regarding the invitation to his hotel room given he was the one who extended the offer and had gone so far to as to suggest the two meet surreptitiously in his room.

51. Herbert "verbally" informed the Board of Lawson's complaint. However, he never provided the Board with a written copy of her complaint thereby denying Lawson access to the remedies available to her under NorVal's harassment policy.

52. NorVal's Harassment Policy (Employee Policy No. 17) provides that "no person shall be discriminated against in employment because of sex, race, color, religion, national origin, handicap or age." Ex. 37C.

53. NorVal's Harassment Policy further provides:

> In accordance with this policy, any act of discrimination, including harassment on the basis of sex, is strictly prohibited and any person in violation of this policy is subject to corrective and disciplinary actions, including termination of employment.
>
> 1. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct, including the use of profane language, of a sexual nature constitute sexual harassment when:
>
> a. Submission to such conduct is made either explicitly or implicitly a term or condition of employment,

b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual,

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive working environment.

2. Any employee who believes that he or she has been subjected to any form of discrimination, prohibited by the Cooperative policy, including sexual harassment from another employee or a member of the board, is strongly urged to immediately file a written, documented complaint with their immediate supervisor, or if the immediate supervisor is involved the employee should report to the General Manager so that management may address the situation and individuals involved. All incidents of harassment should be reported.

3. Any deliberate or repeated unsolicited comments, gestures, or physical contact, which is unwelcome, constitutes harassment and will not be tolerated, and will result in disciplinary action or termination by the Cooperative, considers any report of a violation a serious offense and any reported incident will be taken seriously. Any employee who knowingly files a false statement may be subject to immediate dismissal.

Ex. 37C.

54. There is no provision in NorVal's policy as to an employee's recourse if the harasser is the General Manager or a member of the board.

55. On October 9, 2017, Lawson requested a meeting with Herbert with a board member present. Lawson did not feel comfortable talking with Herbert alone because he appeared to be angry and she just "wanted it addressed so that we could move on and move forward."

56. A Board member came to the office and spoke with Herbert and left without speaking to Lawson[1]. Herbert then informed Lawson that the Board would not meet with her. Herbert then told Lawson that they needed to work it out or she needed to go. Lawson requested written direction as to whom she should report her

[1]The record was not clear as to which Board member was in the office that morning.

complaints, and Herbert told her that she was only to speak to him. When Lawson questioned that directive, Herbert repeated she was only to speak to him. Herbert accused Lawson of threatening him when she told him that she had documented his inviting her to his hotel room, which he took as being a threat that she was going to file a sexual harassment complaint.

57. On October 10, 2017, Herbert went to Lawson's office where she asked how she was supposed to report her sexual harassment complaint. Herbert advised Lawson that the Cooperative's attorney, Matthew Knierim, was drafting something for her to review.

58. At approximately 4:30 that afternoon, Herbert placed an envelope with Lawson's name on it on her desk. Lawson opened the envelope after Herbert left her office and discovered it was a written reprimand noting that it was being issued by Herbert and the subject was, "Employee Behavior." Ex. 3.

59. Knierim assisted Herbert in preparing the reprimand. Knierim had no knowledge of Lawson's complaint at the time he assisted Herbert. There had been no discussions about terminating Lawson's employment prior to the issuance of October 10, 2017 reprimand, which Herbert initiated four days after Lawson first made it known she considered his behavior toward her to constitute sexual harassment.

60. The reprimand began, "In light of your recent behavior and comments, I am concerned that you do not understand the 'chain of command' at Norval." The reprimand accused Lawson of creating a toxic work environment and challenging Herbert's authority. The reprimand also accused Lawson of inappropriately criticizing the Board for its approach to tax issues; as well as attacking Dulaney for issues she had regarding his performance. The second paragraph of the memo included, "This is not acceptable and if it occurs again, you will be terminated immediately for cause." Ex. 3.

61. The reprimand concluded, "You asked for your chain of command and [sic] believe this memo answers that question. If you think I am being unreasonable, let me know your reasoning and I will address it." *Id.*

62. Later that same day, Herbert sent Lawson a text message asking her to call him that night. Herbert wrote, "I don't want any attitude from either one of us. I think we owe each other one last civil talk before this gets too far out of hand." Ex. 4.

63. Lawson called Herbert that evening. Herbert began the conversation by offering Lawson a severance package if she would leave immediately. Lawson declined and said she had done nothing wrong. Lawson told Herbert she merely wanted the sexual harassment to stop and she did not want either her family or Herbert's family to suffer any embarrassment. Lawson's husband overheard his wife's part of the conversation, including her refusal of the severance package.

64. Herbert, as NorVal's General Manager, has never offered a severance package to a departing employee other than as a result of a reduction-in-force.

65. Herbert lacked the authority to extend such an offer without the approval of the Board. Herbert had neither requested permission from the Board to extend a severance offer to Lawson; nor did he inform the Board that he was doing so.

66. Lawson reported for work the next day. Instead of meeting in his office, Herbert asked Lawson to accompany him for a car ride so they could speak privately. Lawson agreed on the condition they not discuss her sexual harassment complaint.

67. Herbert told Lawson that the offer of a severance package still stands shortly after they got into the car. Lawson stopped Herbert when he began talking about the sexual harassment complaint. When he brought it up a second time, Lawson asked him to turn the car around and return to the office. Lawson felt Herbert was trying to discourage her from pursuing her sexual harassment complaint.

68. Herbert and Lawson met in his office later that day. Immediately upon entering his office, Herbert told Lawson that he did not want to sleep with her.

69. Herbert then showed Lawson a picture of a woman on his work computer. Herbert told Lawson that he and the woman had traveled together for work for several months. Herbert mentioned that he and the woman had hung out quite often and would be in the same hotel room, laying on the same bed, watching television and it was not a "big deal."

70. From October 13, 2017 through October 16, 2017, Lawson was on vacation. When she returned to the office, Lawson again asked Herbert to whom she should report her sexual harassment complaint, which visibly angered Herbert.

71. On October 23, 2017, Herbert informed Lawson that she would no longer be taking the Board minutes, which had been her responsibility, and that a

subordinate of hers would be assuming that role. When asked why, Herbert told Lawson that he was the boss and he did not have to give her a reason.

72. After speaking with Herbert, Lawson decided to take her complaint to Knierim, NorVal's attorney. Lawson tried to give Knierim the October 10th reprimand, as well as her written response. Knierim directed Lawson to leave his office. Lawson tried to tell Knierim that Herbert had been sexually harassing her and had asked her to his hotel room. Knierim told her that she could not report to anyone but Herbert and again directed her to leave his office. Knierim refused to accept either the reprimand or Lawson's written response.

73. Lawson contacted the Montana Human Rights Bureau (HRB) after leaving Knierim's office. After being given an appointment for November 2, 2017, Lawson returned to the office. Lawson asked that a third party be present when she was to speak with Herbert. Herbert directed Lawson later that day to report to him when she left the office and when she returned.

74. Herbert never before required Lawson or any other NorVal employee to report whenever she left or arrived at the office.

75. Unbeknownst to Lawson, Herbert had been maintaining a timeline of events regarding his interactions with Lawson. Herbert testified at hearing that he had been maintaining a timeline on all employees throughout the employees' employment to protect himself[2].

76. Herbert's October 27, 2017 entry in Lawson's timeline noted that Lawson wanted to talk to the Board and "that will not happen." This entry also noted that Lawson had told Herbert she would be filing a complaint with the Montana Department of Labor and Industry (DLI) and the Equal Employment Opportunity Commission (EEOC). Ex. 31A, p.23.

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[2]NorVal provided one timeline to HRB (Ex. 31A), which is different from the timeline produced during the course of discovery (Ex. 32A). It is unclear if Herbert maintained the timeline as he testified, or he prepared it, or at least embellished it, in anticipation of litigation.

77. On November 2, 2017, Lawson spoke with an HRB investigator and learned it would take 180 days for any investigation to conclude. Lawson ultimately filed her Charge of Discrimination on November 24, 2017. Ex. 34A[3].

78. Lawson did not report for work the next day. Lawson wrote in an email sent to Herbert on November 3, 2017:

> I will not be in today. The extreme stress and anxiety caused by your continued harassment and retaliation and threats has caused me physical and psychological distress. I am unable to sleep, eat, and have become physically ill. I will be seeking medical attention. I will deliver a form I want filled out with work comp tomorrow. I will inform you when I'm able to return to work.

Ex. 8.

79. Lawson traveled to Glasgow, Montana to meet with Elizabeth Drydahl, LCPA, LAC. Drydahl determined that Lawson required hospitalization. Lawson did not want to be hospitalized in Glasgow, so Drydahl contacted Shawn Lawson and informed him that he needed to come to Glasgow to transport his wife to the emergency room in Havre, Montana.

80. Lawson saw Dr. Parham that same day at the Havre emergency room. Dr. Parham noted in his notes that his clinical impression was that Lawson had "Depression with suicidal ideation." Ex. 41D. Lawson was then referred to Jennifer Durward, APRN, PMHNP-BC, who met with Lawson later that same day.

81. Durward is an adult psychiatric nurse practitioner, who has a master's degree in psychiatric nurse practice. She is board certified and has been practicing since 2011. Durward has the competency to diagnose mental heath illnesses in adults, make other medical assessments, and prescribe medication.

82. On November 3, 2017, Lawson saw Durward, who had been called in due to Lawson's suicide ideation. Durward was on call when Lawson presented at the Havre Emergency Room. Lawson reported to Durward that she had been sexually harassed by her boss and he would not stop despite her having confronted him. Lawson also reported that her boss continued to retaliate against her after she complained.

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[3]Lawson filed an Amended Charge of Discrimination on February 27, 2018, that included retaliation allegations. *See* Ex. 34B.

83. Durward observed that Lawson was displaying neurovegetative signs of not sleeping well and having excessive worry. Durward included in her notes that Lawson had reported that she was not taking care of herself for the past six months, meaning she had stopped getting her hair done and she had stopped wearing makeup.

84. Durward issued multiple letters prohibiting Lawson from returning to work until she was provided the results of the investigation of her sexual harassment complaint beginning November 3, 2017 and continuing through May 1, 2018. Exs. 40A-40H.

85. Durward's November 17, 2017 report included "stress reaction" and "sexual harassment on the job," amongst other things, in the assessment and plan section. Durward also noted "sexual harassment on the job" in the diagnosis section of the report. Exs. 40D, 40E, 40F.

86. Shawn Lawson forwarded Lawson's medical records from her hospitalization to Herbert to be included in her workers' compensation claim.

87. Herbert contacted Shawn Lawson the day he received the records. Herbert presented him with two options for Lawson to continue to receive pay during her absence. Shawn Lawson assumed Herbert was trying to dissuade his wife from filing a workers' compensation claim.

88. Herbert's assistant filed a workers' compensation claim noting that the cause of Lawson's injury was "unknown." Ex. 47A.

89. Lawson subsequently amended the workers' compensation claim to reflect that the source of her injury was sexual harassment and retaliation by Herbert. Lawson wrote:

> On 11/3/17, I sought medical help due to continued retaliation and threats at NorVal. I was sexually harassed by general manager Craig Herbert for several months. I attempted to report to someone other than Mr. Herbert and was told I could only report to him. I tried to report to the cooperative attorney Matthew Knierimm and was told to leave his office. I continued to be depressed, anxious, and had suicidal thoughts which led me to seek medical help on 11/3/17.

Ex. 8.

90. On November 10, 2017, a workers' compensation representative interviewed Lawson in relation to her complaint. The interview was recorded[4]. The information Lawson provided during that interview was consistent with the information she testified to at hearing.

91. Lawson's workers' compensation claim was ultimately denied.

92. Lawson sought a no contact order against Herbert from the Glasgow Police Department in early November 2017. Lawson was concerned for her and her family's safety due to Herbert's apparent anger at her accusations.

93. On November 10, 2017, Lawson received a letter from Herbert dated November 6, 2017 that informed her that she was banned from NorVal's property and a meeting would be held on November 21 to discuss her employment status with NorVal. Ex. 9. Herbert also revoked Lawson's access to her work email and suspended her NorVal credit card.

94. Lawson received a letter from Knierim that same day, which was dated November 7, 2017. Knierim's letter informed Lawson that she would be terminated effective immediately if she pursued a no contact order. Ex. 10. Lawson sent an email to Knierim that same day informing him that she would not be pursuing an order of protection. Ex. 11. Given Knierim's testimony that Herbert had not yet informed him of Lawson's sexual harassment complaint at the time Knierim prepared this letter, Herbert's request he prepare such a letter could only have been intended to harass Lawson and to retaliate against her for opposing his behavior.

95. Lawson sent Knierim a series of emails that included the medical notes of Durward and Dr. Parham and her request for an extended leave of absence. Lawson also informed Knierim that she had filed a complaint with HRB. Exs. 15-21. In one email, Lawson wrote:

> Also, I wanted to let you know that given that NorVal did not investigate my sexual harassment or retaliation complaint, I contacted the Montana HRB and filed a complaint. I understand that the HRB will send a copy of the complaint to NorVal directly.

Ex. 71.

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[4]The interview recording was played at the start of hearing. The evidentiary value of the recording will be addressed in the discussion section.

96. After receiving no response from Knierim, Lawson forwarded her emails to Knierim to Herbert. Lawson wanted to ensure her leave of absence was extended. She also requested the meeting scheduled for November 21, 2017 was postponed.

97. On November 21, 2017, Lawson received a letter from Herbert that included:

> Matt Knierim forwarded both emails that you had sent him while he was absent from his office. As your employer, all work-related issues will be run through me and not Mr. Knierim. The only reason Mr. Knierim responded to you was that you told me earlier you were seeking an order of protection against the Cooperative and you were not willing to communicate with me at that time. You later changed your mind and again, I am your direct supervisor and you need to communicate with me directly on all matters of employment.
>
> As far as the meeting that was scheduled to be held on November 21, 2017, NorVal is fine with postponing until a future date that both parties can agree on. Your paid sick leave benefit will be exhausted on December 13, 2017.
>
> All of your previous complaints lodged with NorVal have been investigated.
>
> The earlier severance package that the Cooperative offered, was refused by you on October 11, 2017, is no longer available.
>
> NorVal wants our facility keys, credit card, cell phone, and iPad immediately returned to the Cooperative while you are on this extended sick leave.
>
> Again, if you have any questions, please contact me.

Ex. 17.

98. Lawson responded that same day with an email to Herbert. Lawson noted she had never heard of another NorVal employee being directed to return the items listed in Herbert's letter during a leave of absence, but she would comply with Herbert's directive. Lawson also inquired as to whom conducted the investigation and requested the results. Ex. 18.

99. Herbert did not reply to Lawson's email.

100. Herbert withdrew the severance offer due to Lawson's filing of an HRB complaint. The NorVal board supported this decision and intended to use the money to fight Lawson's complaint.

101. On December 8, 2017, Lawson received a letter from Herbert that included:

> Your paid sick leave will expire at the close of business on December 13. As of December 14th, you will be placed on unpaid leave; all salary and benefits will stop at that point. You have the option of paying NorVal for your medical, dental and eye insurance, or I can have NRECA send you the paperwork for COBRA insurance coverage.
>
> You may certainly remain on unpaid leave through the close of business on December 15th. The extent to which you may remain on unpaid leave status thereafter is a matter lodged to the discretion of NorVal. If you have any information which you believe that NOrVal should consider in that regard, you will need to provide it to me. If it is your intention to return to work after December 15th, you will need to report to [sic] directly to me at 8 AM on December 18th before you resume any duties at NorVal.

Ex. 73.

102. Following her receipt of the letter, Lawson contacted Karla Johnson at NorVal and asked for a copy of NorVal's employee policy relating to employee leaves of absence. Johnson informed Herbert of Lawson's request. Herbert then sent an email to Lawson that included, "You were informed all requests for information dealing with NorVal had to come through me. This is still is still [sic] the requirement." Ex. 19.

103. NorVal never provided Lawson with a copy of the policy. NorVal did not provide any updates to Lawson that informed her that it had kept her benefits active contrary to the December 8, 2017 letter.

104. On December 13, 2017, Lawson sent an email to Herbert requesting that her leave of absence be extended. Lawson's email included a medical note from Durward. In response, Herbert wrote:

> As far as your leave status at NorVal, my understanding is that Ms. Durward is not a physician. Your characterizing her as a [sic] one is misleading. If you want NorVal to consider extending your unpaid leave status beyond next week, the note which you have forwarded from Ms. Durward is not a sufficient basis on its own for NorVal to do so. If you have information from a physician which explains the nature of your illness and supports a need that you remain off work, I suggest that you provide that information to NorVal.

Ex. 20.

105. Herbert's December 13, 2017 email was the first indication that NorVal was not accepting of medical notes from Durward, despite having received three previous medical notes from Durward.

106. Lawson replied to Herbert's email the next day. Lawson outlined Durward's qualifications. Ex. 20. Herbert did not respond to Lawson's email.

107. On January 2, 2018, Lawson received a paycheck from NorVal, which paid out all of her accrued vacation and sick leave as of December 29, 2017. Ex. 69A-B.

108. NorVal's policy provides that it will pay out all accrued vacation and sick leave upon the ending of an individual's employment. *See* Ex. 42, p. 3.

109. On January 3, 2018, Lawson sent an email to Herbert asking why her benefits had been paid out. Lawson again requested the results of NorVal's investigation of her sexual harassment complaint.

110. Herbert responded the next day via email that included:

> As far as your employment status, you are still listed as an employee with NorVal on unpaid leave. How long this will last is up to the attorneys or if you accept employment elsewhere then you will no longer be a NorVal employee.

Ex. 21.

111. On January 12, 2018, Lawson sent Herbert an email requesting that he forward an attached medical note from Durward to the Board and send confirmation

that he had done so. Lawson again requested the results of the investigation of her sexual harassment complaint. Lawson received no response from Herbert. Ex. 77F.

112. On January 25, 2018, Lawson sent a letter to NorVal Board of Directors President Ron Reddig informing him that she had not yet received the investigation results and requested information regarding her employment status. Ex. 22.

113. Lawson also sought permission to seek interim employment while on unpaid leave due to the tenor of Herbert's January 4, 2018 email. See Ex. 21.

114. NorVal did not respond to Lawson's January 25, 2018, letter.

115. On January 31, 2018, Lawson sent an email to Herbert with another medical leave note from Durward requesting that her leave of absence be extended. Lawson again requested the results of the investigation of her sexual harassment complaint. Ex. 74.

116. On February 5, 2018, Herbert sent the following email to Lawson:

> You filed a Charge of Discrimination with the Montana Human Rights Division in November 2017. The charge alleges that you were the victim of sexual harassment and retaliation by me at NorVal Electric Cooperative. Through our attorney, NorVal has filed an Answer to that charge. In that Answer NorVal has specifically denied your allegation of sexual harassment and retaliation; we also provided documentation of serious deficiencies in your job performance that had arisen before you came up with the idea that you could best deal with those deficiencies by alleging sexual harassment and retaliation.
>
> You have retained your own attorney in this matter. Any further communications about your allegation of sexual harassment and retaliation - including, but not limited to anything to do with any investigation of your allegations - needs to henceforth be between your attorney and NorVal's attorney.
>
> The only communication directly from you to which I will respond from this point forward is one from you advising as to a date when you intend to return to work at NorVal. If you chose [sic] to send such a communication to me, it will be taken by NorVal as an acknowledgment (1) that those deficiencies were both real and serious and (2) that you

> are committed 100 percent to the principle that your work here at NorVal, including your relationships with not just me but with all of your co-workers, will be free of the problems which I had previously brought to your attention.

Ex. 24.

117. Following Herbert's February 5, 2018, email, Lawson learned that Herbert had reported to the Glasgow Police Department on November 7, 2017 that he was in the process of terminating Lawson and he was waiting for her to make the first move. Ex. 30.

118. Lawson also learned that St. John had returned as a temporary replacement the day after she was suspended on November 6, 2017. Lawson also discovered that NorVal had advertised her position in January 2018.

119. St. John had resumed working for NorVal on or about November 7, 2017. St. John discovered two million dollars worth of unprocessed work orders. Herbert was aware of the backlog as they were included in the monthly reports. St. John determined at least a third of the work orders were unprocessed due to a lack of documentation. St. John ultimately cleared the backlog.

120. St. John also discovered several insurance claims that had not been submitted by Lawson. St. John got them processed and they were approved by the insurance company.

121. St. John has never been asked to conduct an investigation into Herbert's allegations that Lawson was engaged in fraudulent activity while employed at NorVal. St. John was never made aware that Herbert was seeking an outside auditor to review Lawson's work.

122. Similarly, Wheeler has never been engaged by NorVal to prepare a report on any errors or fraudulent activity on the part of Lawson.

123. Herbert directed NorVal employees to cease contact with Lawson after she was suspended. Lawson's contact with NorVal employees was never harassing or intimidating.

124. Herbert advised NorVal employees that Lawson was being investigated for possible fraud. Herbert failed to advise those same employees that he had no

direct or credible evidence of fraudulent behavior on the part of Lawson. Herbert also failed to inform those employees that he never actually requested either St. John or Wheeler to conduct any investigation into Lawson's conduct. Herbert's comments suggesting Lawson was guilty of fraudulent conduct could only have been intended to harm Lawson's reputation in retaliation for her having complained of his behavior.

125. On February 27, 2018, Lawson filed an amended Charge of Discrimination with HRB, which set forth various allegations of retaliation. HRB sent the amended Charge of Discrimination to NorVal's counsel on February 27, 2018. Ex. 49E.

126. In February 2018, NorVal's trial counsel interviewed four NorVal employees, including Dulaney.

127. On April 11, 2018, NorVal's counsel sent a letter to Lawson's counsel advising that NorVal required a statement from a "qualified physician." The letter went on to provide, "Ms. Durward is not a physician and even if she were, none of the communications which have been passed along from her address what Policy No. 12 calls for." Ex. 42.

128. Included with the April 11, 2018 letter was a copy of NorVal's Policy No. 12, which is entitled, "Employee Compensation and Benefits." The policy reads:

> After any absence of more than two (2) days, the Cooperative reserves the right to request a statement acceptable to the Cooperative from a qualified physician stating the employee is unable to perform his regular duties.

Ex. 42, p. 2.

129. Lawson attempted to obtain appointments with psychiatrists in the area, but she could not get an appointment for several months. Lawson ultimately sought medical attention from Dr. Chris Laviola, Ph.D., in an effort to comply with the directive of NorVal's counsel.

130. Dr. Laviola is currently the Clinical Director of Innercept, a residential treatment facility for young adults and adolescents in Idaho. Dr. Laviola received his doctorate in psychology from Pepperdine University. Dr. Laviola is licensed in both Montana and Idaho.

131. Dr. Laviola was previously a staff psychologist at North Montana Hospital in Havre for more than four years.

132. On May 18, 2018, Dr. Laviola met with Lawson for approximately 45 minutes. Dr. Laviola observed Lawson seemed depressed and was at high risk of suicidal ideation. Dr. Laviola determined that the increased stressors related to Lawson's complaint of sexual harassment was exacerbating her issues.

133. Dr. Laviola recommended Lawson remain off work until she received the results of the investigation of her sexual harassment complaint. Ex. 44. Lawson provided Dr. Laviola's written recommendation to NorVal, but she received no response.

134. Candy Milroy is a CPA, who lives in Glendive, Montana. Milroy and Lawson worked together in 2006. Milroy kept in contact with Lawson when she began her employment at NorVal.

135. Milroy stayed with Lawson when she traveled to Glasgow to perform audits in the summer of 2017. Lawson told Milroy that Herbert had been making inappropriate sexual comments. Lawson later told Milroy about the MECA conference and Herbert's invitation to his hotel room.

136. Milroy observed that Lawson had complained about how stressful the workplace was due to Herbert's conduct. Milroy observed Lawson had lost a good deal of weight during that period, and she was concerned about Lawson's mental health.

137. Durward continued to provide treatment to Lawson after November 2017. Durward has observed that Lawson has become isolated due to the small size of Glasgow. Durward further observed that Lawson's self esteem has been negatively affected by the rumors in the community that she had engaged in fraudulent behavior at NorVal. Durward also noted that Lawson feared the stigma that would attach as a result of her having complained of Herbert's conduct.

138. Lawson has been compliant in Durward's medical treatment, which includes medication and continued therapy for at least two years.

139. Herbert subjected Lawson to harassing behavior that was based upon her sex. Herbert's offensive conduct was unwelcome and unwanted by Lawson.

140. Lawson suffered from depression and anxiety as a result of Herbert's conduct. Lawson had difficulty sleeping and felt degraded and demeaned due to Herbert's behavior.

141. Herbert, as an agent of NorVal, knew as early as October 6, 2017 that Lawson considered his conduct to constitute sexual harassment. Herbert failed to properly notify the Board and its legal counsel of Lawson's complaint.

142. NorVal, through Herbert, retaliated against Lawson for protesting Herbert's conduct beginning with the October 10, 2017, reprimanded issued by Herbert and continuing thereafter.

143. Herbert made it impossible for Lawson to fully mitigate her damages due to the threats included in his January 3, 2018 email.

144. Lawson's final annual salary was $84,567.00. Lawson was paid $7,047.30 on a monthly basis. Lawson would have continued to earn at least that amount each week if she had been allowed to return to work for NorVal.

145. Lawson was eligible for benefits as a NorVal employee that had a monthly value of $1,184.91. *See* Ex. 57C. Lawson is entitled to a monthly total of $8,662.21 ($7,047.30 + $1,184.91).

146. Lawson is entitled to a backpay award of $192,384.89. Lawson is entitled to $13,635.51 in interest on that amount for a total of $206,020.39[5]. *See* Addendum A.

147. Lawson is entitled to an award of four years of front pay in the amount of $415,786.08, which represents her monthly pay of $8,662.21 for a period of 48 months. The present value of this award, if paid in a lump sum, is $378,215.59.

148. Lawson suffered emotional distress as a result of NorVal's discriminatory and retaliatory actions. Lawson will require therapy and medical treatment going forward. An award of $50,000 represents a reasonable amount of compensation for the discrimination she suffered.

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[5]Mont. Code Ann. § 25-9-205(1)(a) provides that interest payable on judgments is equal to the rate for bank prime loans on the day the judgment was entered, plus 3%. As of August 5, 2019, the bank prime loan interest rate was 5.00%. Therefore, the interest rate for the judgment entered in this matter is 8.00%.

149. Imposition of affirmative relief, which requires NorVal to ensure that its employees and the members of the Board are throughly trained with respect to prohibitions against retaliating against those who have engaged in protected activity and appropriate methods of dealing with such situations, is appropriate.

V. DISCUSSION[6]

Lawson alleges NorVal discriminated against her because of her sex due to the hostile work environment created by Herbert. Lawson further alleges NorVal retaliated against her when she complained of Herbert's conduct.

A. *Lawson's Prima Facie Case of 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) and 49-3-201. Sexual harassment is considered a form of sex discrimination, and a hostile work environment is one form of illegal sexual harassment. *Beaver v. D.N.R.C.*, ¶29, 2003 MT 287, 318 Mont. 35, 78 P. 3d 857; *Stringer-Altmaier v. Haffner*, ¶20, 2006 MT 129, 138 P.3d 419.

The anti-discrimination provisions of the 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. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

To establish a claim of a hostile work environment, Lawson must show (1) she was subjected to verbal or physical conduct of a harassing nature; (2) that it was unwelcome; and (3) that the harassment permeated the work environment to the point that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Stringer-Altmaier* at ¶22; *Nichols v. Azteca Restaurant Ent., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001).

A charging party establishes a prima facie case of sexual harassment with proof that she was subject to "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

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[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.

"Harassment need not be severe and pervasive to impose liability; ***one or the other will do***." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted). A hostile work environment exists when the work place is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the condition of the victim's employment and create an abusive working environment. *Faragher v. Boca Raton*, 524 U.S. 775, 786, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). Whether an environment is hostile or abusive depends on all the circumstances including; the frequency of the discriminatory conduct; it's severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 271, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001); *Harris*, 510 U.S. *at* 23; *see also Faragher*, 524 U.S. at 787-88.

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, 118 S. Ct. 998, 140 L. Ed. 2d 201 *(1998),* quoting *Harris,* 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. It is not necessary that a plaintiff enumerate with precision the exact number of times that she was subjected to offensive conduct in order to demonstrate the pervasiveness required to prove a hostile working environment. Testimony that the plaintiff was subjected to numerous instances of offensive conduct can be sufficient to show that the conduct was pervasive. *Torres v. Pisano*, 116 F.3d 625, 634-635 (2nd Cir.1997).

While simple teasing, offhand comments, and isolated incidents (unless extremely serious) are not sufficient to create an actionable claim under Title VII . . . the harassment need not be so severe as to cause diagnosed psychological injury. *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154, 1161-62 (2017)(internal quotations and citations omitted). It is enough if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position. *Id.* at 1162 (internal quotation and citation omitted). The assessment of whether an environment is objectively hostile "requires careful consideration of the social context in which the particular behavior occurs and

is experienced by its target." *Oncale,* 523 U.S. at 81. The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness of frequency of the conduct. *Ellison,* 924 F.2d at 878(citations omitted). "Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance." *Id.*

NorVal generally denies Lawson's allegations that Herbert subjected her to unwelcome and unwanted comments that were of a sexual nature. NorVal notes Lawson did not report anything to the Board until October 2017, when it alleges she was undeniably aware that Herbert had grave concerns about her performance. NorVal further notes Lawson did not complain of Herbert's behavior to her co-workers despite her apparent willingness to share the intimate details of her life with Herbert and her co-workers.

Lawson points to several admissions by Herbert that he made the comments complained of by Lawson, including commenting on her using false eyelashes in an apparent effort to have an affair; offering to give her a massage and help her relax; questioning the health of Lawson's sex life; asking if she was having an affair with Eric Anderson, Regional CFC Vice President; commenting that she was "filling out her pants nicely;" reporting to her that a Board member had made a comment suggesting she and Herbert had an affair; using the phrase "turn off" in sexual terms when speaking with her in August 2017; and asking her to his hotel room during the MECA conference in October 2017. Lawson also points to Herbert's admission that he cracked her back in the office and asked her for a hug "just for friends."

The credibility of the witnesses in this matter is critical to determining whether certain events happened, whether certain words were used, whether discrimination occurred and what remedies, if any should be imposed. While Herbert admitted making many of the comments pointed to by Lawson, he argued Lawson misinterpreted them. Herbert denied being interested sexually in Lawson and denied that he was attempting to establish a romantic relationship with her.

Herbert's testimony was not persuasive. For instance, Herbert admitted asking Lawson about the health of her sex life but only because he had recently learned about the female anatomy due to a family member's illness. Lacking in Herbert's self serving testimony was why a female subordinate would want her supervisor to inquire about her sex life regardless of the supervisor's knowledge of the female anatomy. Another example of Herbert's perplexing logic was offered when he admitted

commenting on Lawson's appearance in a pair of shorts. Herbert testified he commented on Lawson's apparent weight gain as a compliment because Lawson's clothes were hanging on her after she had earlier complained she had trouble maintaining her weight. Again, Herbert did not explain why a female subordinate would appreciate her male supervisor commenting on her weight and then commenting on how well she was filling out her shorts. Another example of Herbert's perplexing logic was the invitation to his hotel room he extended to Lawson at the MECA conference. Herbert testified he and Lawson had previously agreed to meet to discuss work related issues during the conference, and he offered his hotel room to avoid a scene if she were to become emotional. The two were able to meet near the pool without a scene occurring, so it makes little sense that a meeting in his room would have come to a different result. Herbert also did not address Lawson's testimony that he had told her he made an extra key for her so she could come up to his room separately and not bring any attention to the fact that she was meeting him in his hotel room.

Herbert's purported timeline also lessens the credibility of his testimony. Herbert testified he begins a timeline on every employee at or near the employee's time of hire to "protect himself." While that may be the case, Herbert offered no credible explanation as to the discrepancies between the two timelines NorVal produced during discovery and for hearing. One timeline, which was provided to HRB, had information concerning Lawson's complaint and Herbert's subsequent actions toward Lawson removed. The second timeline, which was not provided to HRB but was produced during the course of discovery, included much more detail, including comments about his car ride with Lawson in which he wrote, "I tried to bring up the letter [Shalaine] sent me the night of October 10, 2017, and [Shalaine] said she did not want to talk about [it] at all." See Ex. 31B, p. 10. Herbert professed to have no idea why that sentence was not included in the timeline provided to HRB when pressed at hearing.

Also detrimental to Herbert's credibility was his testimony that he told the Board members individually and Knierim, NorVal's counsel, about Lawson's sexual harassment complaint. Board Member Chris Christensen denied that was the case although he conceded Herbert may have mentioned it during an executive session of the Board. Christensen testified Herbert never presented a written copy of Lawson's complaint; nor did he ever request the Board investigate Lawson's complaint. Similarly, Knierim testified he assisted in preparing the October 10, 2017 reprimand without having any knowledge of Lawson's complaint and he later prepared the November 7, 2017 letter still not having any knowledge of her complaint. Herbert's testimony was directly contradicted by two witnesses who had nothing to gain by

providing false testimony that contradicted the testimony of NorVal's General Manager.

Finally, and most detrimental to Herbert's credibility, was his repeated response, "On the advice of counsel," when pressed as to why he engaged in certain conduct after Lawson made clear she considered his conduct toward her to constitute sexual harassment on October 6, 2017 and several times thereafter. Herbert was also combative and defensive throughout much of the hearing.

Lawson's testimony was supported by the recorded interview she underwent as part of her workers' compensation claim. Lawson's testimony at hearing was consistent with the information she provided during the interview. Further, Lawson's husband provided corroborating testimony as to what Lawson complained of at or near the time she filed her complaint with Herbert in October 2017. Lawson's testimony was also corroborated by her medical providers, as well as Milroy, none of whom have an apparent reason to lie on behalf of Lawson.

Lawson's testimony was clear, detailed and specific as to each of the incidents in which Herbert treated her in a discriminatory and/or retaliatory manner. In contrast, Herbert's testimony was evasive, self serving, and conflicted with the testimony of several of the witnesses. As such, Herbert's testimony regarding his acts of discrimination, as well as his acts of retaliation, which will be addressed elsewhere in this decision, is deemed less credible than Lawson's testimony.

The substantial and credible evidence of record establishes Herbert regularly subjected Lawson to unwelcome comments of a sexual nature that was pervasive in nature. A reasonable person in Lawson's position would have found Herbert's conduct objectively offensive. Being regularly subjected to inquiries about your sex life, comments on your appearance and suggestions that one meet her supervisor in his hotel room at a professional conference would cause a reasonable person in Lawson's position to find Herbert's conduct severe enough and pervasive enough as to change the conditions of the employment. Lawson's credible testimony also establishes she subjectively found Herbert's conduct offensive. Lawson testified she felt dirty, degraded, and disgusting as a result of Herbert's conduct. Lawson clearly had a severe emotional response to Herbert's conduct that culminated in her hospitalization and seeking mental health treatment. Lawson has established her prima facie case of discrimination based upon her sex.

1. NorVal's Defense

The Montana Supreme Court has recognized, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s] on the basis of sex" and violates the MHRA. *Harrison v. Chance* (1990), 244 Mont. 215, 221, 797 P.2d 200, 200, citing *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 64 (1986). An employer is vicariously liable for a supervisor's sexual harassment, whether it falls under the category of quid pro quo or hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). However, certain affirmative defenses are available to employers under these circumstances.

In *Ellerth* and *Faragher*, the Supreme Court provided a framework for assessing an employer's liability where the plaintiff can show she was subjected to a hostile environment. This framework was summarized by the Ninth Circuit Court of Appeals in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959-60 (2004):

> Within this framework, there are two, alternative theories under which a plaintiff may establish an employer's vicarious liability for sexual harassment. First, an employer is vicariously liable for a hostile environment that "culminates in a tangible employment action." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. Second, when no "tangible employment action" has been taken, an employer may raise "an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." The affirmative defense has two prongs: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Whether the employer has a stated anti-harassment policy is relevant to the first element of the defense. And an employee's failure to use a complaint procedure provided by the employer "will normally suffice to satisfy the employer's burden under the second element of the defense."
>
> *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 877 (9th Cir. 2001) (quoting *Ellerth*, 524 U.S. at 765). Moreover, even if a tangible employment action occurred, an employer may still assert the affirmative defense if the tangible employment action "was unrelated to

> any harassment or complaint thereof." *Nichols*, 256 F.3d at 877; *see also* B. Lindemann & P. Grossman, Employment Discrimination Law 609 & nn.160-63 (C). Geoffrey Weirich ed., 3d ed. 2002 supp.).

Id.

Neither party has argued that Lawson was discharged despite her last day of paid leave being December 14, 2017. Lawson has not argued she was constructively discharged. In fact, Lawson argues she has been in a type of employment limbo in which she cannot obtain alternative employment without jeopardizing her NorVal employment. In its last communications with Lawson, NorVal informed her that she was still considered a NorVal employee on unpaid leave. How long that status continued would be "up to the attorneys or if [she] accept[ed] employment elsewhere, then [she would] no longer be a NorVal employee." *See* Ex. 21 (*Letter from Herbert to Lawson*, 01/04/2018). NorVal did pay out Lawson's accrued benefits, which under NorVal's policy, occurs only upon the termination of an individual's employment. *See* Ex. 69A-B; Ex. 42, p. 3. It would appear NorVal terminated Lawson on January 2, 2018, when she received the payout. Again, neither party contends there has been a separation from employment. Therefore, the appropriate analysis is that which is required when no tangible employment action has occurred. Ultimately, the result is the same regardless of whether a tangible employment action has taken place.

NorVal argues its adoption and dissemination of an anti-harassment policy is sufficient to establish it exercised reasonable care to prevent sexual harassment in the workplace. *See Hardage v. CBS Broad. Inc.*,427 F.3d 1177, 1185 (9th Cir. 2005), citing *Ellerth*, 524 U.S. 765. However, an employer cannot be found to have exercised reasonable care to prevent a supervisor's harassing conduct when its harassment policy contains no provision that would assure an employee can bypass his or her supervisor when the complaint alleges it is the supervisor who is the harasser. *See Faragher*, 524 U.S. at 808. Simply having a policy is insufficient; the implementation of the policy must be considered. *See Clark v. UPS*, 400 F.3d 341, 349 (6th Cir. 2005)("Prong one of the affirmative defense requires an inquiry that looks behind the fact of a policy to determine whether the policy was effective in practice in reasonably preventing and correcting any harassing behavior."). As the court noted in *Alatorre v. Marbus*, 106 F. Supp. 3d 1141, 1552, "An effective policy should at least: (1) require supervisors to report instances of sexual harassment; (2) permit both formal and informal complaints; (3) provide a mechanism for bypassing a harassing supervisor; and (4) provide for training regarding the policy." *Id.*, citing *Clark*, 400 3d. at 349.

The wisdom of *Faragher* and its progeny is highlighted in a case such as this. Herbert was and continues to be NorVal's General Manager. He, in effect, acts as an agent for NorVal in overseeing its daily operations. All NorVal employees report to Herbert and are accountable to him in his role as General Manager. In that same vein, all NorVal employees are subject to Herbert's whim and caprice. Herbert's control was made painfully clear when Lawson told him that she considered his conduct toward her harassing and she wished to file a complaint. Herbert blocked Lawson from going to the Board, which was the only conceivable next step for an employee in Lawson's position. Herbert repeatedly directed Lawson to report only to him and to deal only with him when she made it obvious she was unhappy with his behavior and considered it to be affecting her employment conditions. While NorVal does have a harassment policy, the mere existence of that policy is insufficient to show NorVal exercised reasonable care to prevent workplace sexual harassment.

Further, the evidence of record shows Lawson reasonably attempted to take advantage of what little corrective opportunities were available to her under NorVal's policy. Lawson went to Herbert on October 6, 2017 and put him on notice that she considered his behavior to constitute sexual harassment. NorVal argues this communication did not provide NorVal notice of sexually harassing conduct because Lawson's notice was not "reasonably calculated to end the harassment." *See Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001). NorVal contends Lawson's notice contained no allegation of "sexual advances, requests for sexual favors, and other verbal or physical conduct, including the use of profane language, of a sexual nature" as required under NorVal's policy.

NorVal's argument is unavailing. Herbert, an agent of NorVal and who held a fiduciary duty to the Board, was on notice that Lawson considered his conduct harassing. Herbert clearly understood the import of Lawson's complaint given he felt it necessary to mention it in an executive session of NorVal's Board of Directors. Further, Herbert's timeline would suggest he knew or at the very least suspected that Lawson was going to file a sexual harassment complaint. Beyond Herbert's demonstrated understanding of the existence of and the nature of Lawson's complaint, Lawson's notice was sufficiently detailed and offered in a highly emotional manner. Herbert knew or should have known Lawson was protesting his harassment. Despite this apparent knowledge and understanding of Lawson's complaint and his fiduciary duty to the Board, Herbert chose to block Lawson from availing herself of any recourse available under NorVal's harassment policy. Lawson should not be faulted for failing to notify the employer of her complaint. The fault lies with Herbert, who deliberately blocked Lawson from any recourse that may have been available. Lawson could only complain to Herbert under NorVal's policy and

according to Herbert's directives, which rendered NorVal's harassment policy meaningless and any effort by Lawson to report her concerns futile.

Herbert's deliberate effort to prevent Lawson's complaint from being addressed by the employer and to block an investigation into that complaint by the employer is sufficient to give rise to a finding of discrimination based upon sex. In *Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶27, 332 Mont. 293, 138 P.3d 419, the Montana Supreme Court noted 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*).

NorVal initially denied investigating Lawson's complaint. At hearing, it became apparent that NorVal's trial counsel conducted some type of investigation. It would appear that the investigation conducted, given the timing, the limited number of people interviewed, and absolutely no interview of Lawson, was an investigation conducted for the purposes of an intra-litigation analysis rather than a pre-litigation analysis, as discussed above. This is particularly true given the lack of any formal report documenting the results of that investigation.

As a result of its failure to have a comprehensive harassment policy providing for an alternative means of reporting when the subject of the complaint is the supervisor and Herbert's patter of obstructive conduct rendering what policy it did have in place meaningless, NorVal is foreclosed from availing itself of the *Faragher/Ellerth* affirmative defense.

Lawson has shown NorVal discriminated against her on the basis of her sex based upon Herbert's sexual harassment which was sufficiently severe and pervasive so as to alter Lawson's working conditions and its failure to investigate Lawson's complaint.

B. *Lawson's 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). Administrative Rule of Montana 24.9.603(3) provides:

> When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity.

Id.

A charging party may rely upon specific and substantial circumstantial evidence when establishing the prima facie retaliation case. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Place, Inc. v Costa*, 539 U.S. 90, 100 (2003)(citations omitted). A retaliation claim is established if the employer's conduct "might have dissuaded a reasonable worker form making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405(citations omitted).

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 plaintiff alleges a prima facie case, the employer must present a legitimate nondiscriminatory reason for its alleged action. Once the employer presents a legitimate nondiscriminatory reason, the plaintiff must produce evidence establishing his or her prima facie case, as well as evidence raising an inference that the employer's proffered reason is pretextual. Admin. R. Mont. 24.9.610(3); *Rolison v. Bozeman Deaconess Health Servs*., 2005 MT 95, ¶16, 326 Mont. 491, 111 P.3d 202; *see also Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 868 (9th Cir. 1996).

1. Lawson 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). It is undisputed that Lawson complained to Herbert, who was not only her supervisor, but also the General Manager of NorVal and an agent of its Board, that she considered his conduct toward her sexual harassment. Herbert, and by extension, NorVal knew or should have known that Lawson was protesting activity that violated the MHRA, as well as its own harassment policy. Lawson has satisfied the first element of her prima facie retaliation claim.

2. Lawson Suffered an Adverse Employment Action

The second element of the retaliation claim concerns whether NorVal took an adverse employment action against Lawson. A "significant adverse act are those that would dissuade a reasonable person from engaging in a protected activity" and includes:

> (a) violence or threats of violence, malicious damage to property, coercion, intimidation, harassment, the filing of a factually or legally baseless civil action or criminal complaint, or other interference with the person or property of an individual;
> (b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;

Admin. R. Mont. 24.9.603(2)(a),(b).

Lawson alleges she suffered a constellation of retaliatory acts as a result of her protesting Herbert's harassing conduct. Lawson points to various incidents, which include:

> 1. Mr. Herbert's untrue letter to Shalaine that "all of [Shalaine's] complaints were investigated."
> 2. NorVal's ignoring Shalaine's 6 written requests for the investigation results.
> 3. NorVal's false pleading that Shalaine "failed to appear" for the 11/21/17 meeting.

4. NorVal's conditional "offer" to return to work, but without any investigation results while she was on recommended medical leave (without pay) awaiting the results of NorVal's alleged investigation of her claims
5. Shalaine's acknowledged inability to bypass Mr. Herbert with her complaint against him.
6. Norval's order to Shalaine to "immediately" to [sic] return all NorVal property, but other NorVal employees similarly situated were never required to do so.
7. NorVal's placing Shalaine on suspension and not allowing her on its property following her complaint.
8. Mr. Herbert's severance offer made 1 day after Shalaine asked him who she can direct her complaint to other than him, and his revocation of the offer 2 days after he was notified of her HRB claim.
9. Mr. Herbert's failure to respond to Shalaine's 12/14/17 email listing Ms. Durward's credentials.
10. NorVal's advertising a full-time replacement for Shalaine as early as 1/4/2018.
11. Mr. Herbert's 1/4/18 email wherein he made no offer to provide the investigation results but advised Shalaine that her employment with NorVal would be terminated if she "accept[ed] any employment elsewhere." This was tantamount to trying to make Shalaine resign from NorVal.
12. The Board's failure to respond to Shalaine's 1/25/18 letter to the Board wherein she requested among many other things, basic information about her employment status, whether her benefits would be continuing, and permission to seek interim employment while on unpaid leave.
13. NorVal's multiple violations of its written policies and its ongoing pattern of antagonism towards Shalaine.
14. NorVal's clear relevant factual misrepresentations provided to the Human Rights Commission in September 2018.
15. Mr. Herbert's sharing his irrelevant timeline information with employees to malign Shalaine.
16. Denying Shalaine access to NorVal property.
17. Threatening Shalaine with termination of employment if she followed through with her no-contact order.
18. Failing to fill out Workers' Compensation claim accurately.
19. Mr. Herbert - the accused harasser-telling NorVal employees in an employee meeting after Shalaine when out on leave that he could make

Shalaine clean toilets upon her return to work so long as NorVal paid Shalaine her same salary[7].
20. After Shalaine went out on leave, Mr. Herbert went through Shalaine's emails and made phone calls to malign Shalaine.
21. Reckless accusations of fraud and repeatedly claiming that Shalaine was incompetent.
22. NorVal treated Shalaine differently than other NorVal employees who went out on leave.
23. NorVal ignored virtually every medical note submitted by Shalaine requesting NorVal's investigation results.
24. NorVal's ignoring Shalaine's multiple medical records provided to NorVal noting suicidal ideation due to the uninvestigated harassment and retaliation claims.
25. NorVal's treating Shalaine as a non-person.

Lawson Opening Brief, p. 35.

Other incidents that occurred, which Lawson alleges were retaliatory, include the October 10, 2017 reprimand (Ex. 3); the removal of her responsibility to take Board minutes and assigning that duty to her subordinate; and Herbert's order that she check in and out with him despite never before requiring that of Lawson or any other NorVal employee.

The U.S. Supreme Court has held that the antiretaliation provision of Title VII "protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *White*, 548 U.S. at 67. The Court noted the "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id*. at 68 (internal quotations and citations omitted). Material adversity is the measure as it separates "significant from trivial harms." *Id.* Further, the reaction of the reasonable employee is the standard to avoid the difficulty of determining "a plaintiff's unusual subjective feelings." *Id.* at 68-69.

The Court noted that "context matters" when determining the significance of an act of retaliation. *Id.* "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships

[7]Dulaney testified he observed Herbert make this or a similar comment several times at employee meetings.

which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id*. quoting *Oncale, supra*, at 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201. The Montana Supreme Court has held that "a significant adverse act" under Admin. R. Mont. 24.9.603(1) must "adversely affect [the] employment in [a] material way." *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶27, 390 Mont. 161, 415 P.3d 976.

The Ninth Circuit has recognized that retaliatory harassment, if sufficiently severe, may constitute "adverse employment action" for purposes of a retaliation claim. *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000). Such harassment is actionable only if it is "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Id*. (citation omitted). Although not every insult or harassing comment constitutes a hostile work environment, repeated derogatory or humiliating statements may do so. *Id.*

Several of the incidents pointed to by Lawson as being retaliatory do not constitute adverse employment actions. For instance, **NorVal's conduct before the Human Rights Commission** did not materially affect her employment. *See* Nos. 3, 4 of the above list. Similarly, NorVal's failure to file Lawson's workers' compensation claim according to her specifications did not affect her employment. *Id*. at No. 5. Herbert's offer of a severance and subsequent revocation of that offer had no real effect on Lawson's employment. *Id.* at 4, 8. Herbert's email telling her that she would be terminated if she were to work for another employer similarly had no effect on Lawson's employment. *Id*. at 11, 17. The conduct described was clearly petty and malicious but does not constitute adverse employment actions.

However, many of the incidents pointed to by Lawson do constitute adverse employment actions. Herbert's efforts to malign and to defame Lawson after she complained of his conduct had a direct effect on her ability to return to her position after her medical leave of absence. *Id.* at Nos. 15, 19, 20, 21 and 25. Lawson is a professional for whom her reputation is a valuable commodity. No professional can or should tolerate an individual's effort to diminish his or her reputation based upon fabrications and exaggerations. Calling into question Lawson's ability to ethically and effectively perform her job duties had a material and adverse effect on Lawson's employment and her potential future employment in that region of Montana.

Herbert treatment of Lawson was different than his treatment of other NorVal employees. For instance, suspending Lawson and then directing her to return all NorVal property before barring her from NorVal's facility shortly after the start of her medical leave of absence was clearly intended to make it impossible for Lawson to

return to work or to perform any work for NorVal from home. *Id*. at 6, 7, and 16. St. John was not subject to similar treatment when he chose to resign and there was no evidence showing any other NorVal employee was subjected to similar treatment. Such treatment had a material adverse impact upon Lawson performing work for NorVal or being able to return to NorVal at the end of her leave of absence.

Much was made at hearing of NorVal's repeated refusal to provide Lawson with the results of its investigation of her sexual harassment complaint. On the face of it, it would appear those refusals would have no effect on an individual's employment. However, in this case, context does matter. Lawson had filed a complaint with her employer accusing her supervisor of sexually harassing her during the course of her employment. Herbert blocked Lawson from availing herself of whatever recourse should have been available to her under NorVal's harassment policy. Herbert's obstruction basically made it impossible for Lawson to be able to continue in her employment with NorVal, thereby having a material and adverse impact on Lawson's employment with NorVal. *Id*. at 1, 2, and 5.

Similarly, Herbert's concerted effort to make it difficult for Lawson to continue on her medical leave of absence had an materially adverse impact on Lawson's employment. Herbert's conduct made it nearly impossible for Lawson to comply with NorVal's leave of absence policy, which seemed to change whenever Lawson took an affirmative step to complain of Herbert's conduct. Herbert's conduct created roadblocks for Lawson that were not forced upon other NorVal employees seeking to take a leave of absence. Herbert's approach toward Lawson's leave of absence made it impossible for Lawson to return to work, which clearly had a material and adverse impact on her employment with NorVal. *Id.* at 9, 12, 22 through 24.

Additionally, the October 10, 2017 reprimand and the reassigning of Lawson's note taking duties had a material adverse impact on Lawson's employment. The reprimand basically accused Lawson of not being able to do her job in a satisfactory manner. Similarly, the reassignment of the note taking duties communicated not only to Lawson, but also to her co-workers and the Board, that Lawson was not in a favored position. Given Herbert's concerted effort to defame Lawson both personally and professionally following her complaint, Herbert was clearly intent on communicating to all those around Lawson that she was, at the very least, a poor employee. Further, the treatment of Lawson in regards to things such as reporting in and out, was obviously intended to demean her and to punish her for daring to complain of Herbert's behavior.

Lawson has shown she suffered several adverse employment actions after filing her sexual harassment complaint with the employer. Therefore, the final issue is whether Lawson can establish a causal relationship between her protected activity and the adverse employment actions.

3. Lawson has Shown the Requisite Causal Relationship

In order to establish the causal link between the protected activity and the illegal, adverse employment action, 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").

Herbert's retaliatory conduct toward Lawson began almost immediately upon her giving him notice that she regarded his conduct to be sexual harassment. It took Herbert no more than 24 hours to begin a course of conduct that was clearly intended to punish Lawson and to dissuade her from pursuing her complaint. Herbert not only harassed and embarrassed Lawson, but he purposefully frustrated and prevented her from returning to work. Lawson has shown a close temporal proximity between her protected activity and the adverse employment action. Lawson further showed that several of the retaliatory incidents occurred after Herbert and the NorVal Board had actual or constructive notice of her HRB complaint, which was initially filed on November 24, 2017 and subsequently amended on February 27, 2018. *See* Admin. R. Mont. 24.9.603(3); *see also* Exs. 34A, 34B. Therefore, Lawson has established the requisite causal connection between her protected activity and the adverse employment actions that resulted from that protected activity. As such, Lawson has established each and every element of her prima facie case of retaliation.

4. NorVal has not Rebutted Lawson's Prima Facie Case of Retaliation

NorVal may rebut Lawson's prima facie case 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.

NorVal argues Lawson has failed to show it breached any duty not to retaliate. NorVal responds to one of the retaliatory incidents pointed to by Lawson, namely bringing St. John back in her absence and advertising her position, and argues it was necessary due to her apparent unwillingness to return to her position. NorVal clearly had a legitimate, non discriminatory reason to arrange for St. John to perform Lawson's duties during her absence. Further, NorVal is correct that it was not retaliatory to allow Lawson to continue on her medical leave of absence.

However, NorVal has not produced sufficient evidence showing the other conduct found to be retaliatory was for legitimate, non discriminatory reasons. No defense has been offered regarding Herbert's repeated efforts to thwart Lawson's efforts to file her complaint and to have it fully investigated; Herbert's repeated efforts to frustrate Lawson's efforts to comply with NorVal's leave policy in terms of what medical notes it would or would not accept; or Herbert's repeated attempts to malign and to defame Lawson's professional reputation among her co-workers and her peers. NorVal has not produced substantial and credible evidence to rebut Lawson's prima facie retaliation case.

5. **Lawson has Shown NorVal's Proferred Reasons were Pretext for Retaliation**

Even assuming NorVal had met its burden, there is sufficient evidence in the record to show that its explanations were merely pretext for retaliation. Pretext can be established in two ways: either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. at 256. Circumstantial evidence, also referred to as indirect evidence, may be used to show the employer's proffered legitimate business reason "is unworthy of credence because it is internally inconsistent or otherwise not believable." *Chuang v. Univ. of Cal. Davis, Bd. of Trs*., 225 F.3d 1115, 1127 (9th Cir. 2000) (quotation marks omitted). Direct evidence may also be used to show the employer was more likely motivated by retaliation than the employer's proffered reasons. *See Id.*

Lawson may attempt to establish she was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, *supra*, 450 U.S. at 256. Although the presumption of discrimination "drop[ped] out of the picture" once NorVal met its burden, *St. Mary's Honor Center*, supra, 509 U.S. at 511, the Hearing Officer may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," *Burdine*, supra, at 255, n. 10.A plaintiff may show pretext either by "directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. (quoting Burdine, 450 U.S. at 256) (internal quotation marks omitted). When "the plaintiff proffers only circumstantial evidence that the employer's motives were different from its stated motives," courts require " 'specific' and 'substantial' evidence of pretext to survive summary judgment." *Stegall v. Citadell Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003).

As noted above, the inconsistencies of the various explanations offered by Herbert and by NorVal throughout the HRB investigation and at hearing is substantial circumstantial evidence that the reasons proffered are pretext for retaliation. For example, Herbert testified he told Knierim about Lawson's complaint prior to Knierim preparing the October 10, 2017 letter on behalf of NorVal. Knierim denied that was the case. Herbert testified he provided the Board with a copy of Lawson's HRB complaint. Board Member Chris Christensen denied that to be the case. Herbert later testified he believed Christensen was mistaken.

Herbert testified he called for a fraud investigation due to concerns he had about potentially fraudulent conduct on the part of Lawson. Both Wheeler and St. John denied being aware of Herbert's supposed concerns or ever being asked to investigate the concerns voiced by Herbert at hearing. NorVal contended Lawson intimidated NorVal employees into testifying for her; no witnesses supported that contention. Herbert, in fact, admitted his timeline was incorrect regarding alleged intimidation and contrary testimony offered by NorVal employees. Herbert testified Lawson refused to provide NorVal with her passwords. Herbert later corrected his testimony to reflect that he only just informed Lawson of the missing passwords at the time of hearing.

The timelines NorVal produced are the biggest source of concern for the Hearing Officer. As noted above, there are various inconsistencies in these timelines . Collin Deeble, a Field Service Manager with Montana Tech Services, testified as to whether the timeline could have been modified prior to its supposed creation.

Deeble testified the metadata does not necessarily show when a document was modified, and he was unable to verify when the entries were actually created or modified. Given the inconsistences in Herbert's testimony, as well as the discrepancies between the two timelines, *see* Exs. 31A & 31B, the Hearing Officer is left with the inescapable conclusion that Herbert's testimony was manufactured.

Further, NorVal has not provided sufficient evidence to rebut the presumption created by Admin. R. Mont. 24.9.603(3), which allows for a disputable presumption when a respondent or an agent of the respondent has actual or constructive knowledge that proceedings are or have been pending with the department. Lawson filed her first HRB complaint on November 24, 2017. HRB mailed the Charge of Discrimination directly to NorVal at its PO Box in Glasgow. It is inconceivable Herbert did not receive word that the complaint had been filed.

Further, several of the retaliatory actions NorVal took against Lawson occurred within days and weeks of Lawson filing her HRB complaint. The Hearing Officer does not believe Herbert did not have actual notice, or at the very least constructive notice, of the complaint given how he refused to remove himself from NorVal's internal complaint process and took every opportunity to punish Lawson regarding her leave of absence and other issues related to her employment following her initial complaint to him on October 6, 2017.

The inconsistences in Herbert's testimony alone is enough to establish the reasons proffered by NorVal for its actions against Lawson after she attempted to complain to the employer about Herbert's behavior and the filing of her initial HRB complaint was pretext for retaliation. However, the presumption created by Admin. R. Mont. 24.9.603(3) has not been disputed by NorVal. Therefore, Lawson has succeeded in establishing a prima facie case that has not been rebutted by NorVal.

C. *Lawson's Damages*

1. Back Pay

In employment discrimination, once the charging party has established that her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Berry*, 779 P.2d at 523-24. Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). To defeat this presumptive entitlement, the respondent must demonstrate by clear and

convincing evidence that a lesser amount of back pay is due the charging party. *Id.; see also, Benjamin v. Anderson,* ¶62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay at the rate of 8.25% per year is also reasonable. *Berry*, 779 P.2d at 523.

The Charging Party has an affirmative duty to mitigate lost wages by "us[ing] reasonable diligence" to locate "substantially equivalent" employment, *see Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982), and a failure to mitigate damages can reduce or completely cancel out a back pay award. *See* 42 U.S.C. § 2000e-5(g) ("interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable"); *e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence). There is no offset for unemployment insurance benefits received against wage loss recovery resulting from illegal discrimination. *Vortex Fishing Sys. Inc. v. Foss*, ¶ 28, 2001 MT 312, 308 Mont. 3, 38 P.3d 836. *See also Kauffman v. Sidereal Corp.*, 695 F.2d 343, 347 (9th Cir. 1982), *quoting Nat'l Labor Rel'ns Bd. v. Gullett Gin Co.*, 340 U.S. 361 (1951).

NorVal bears the burden of proving Lawson failed to mitigate her damages. *Cromwell v. Victor Sch. Dist. No. 7*, 2006 MT 171, ¶25, 333 Mont. 1, 140 P.3d 487. NorVal must show "that, based on undisputed facts in the record, during the time in question there was substantially equivalent jobs available, which [Lawson] could have obtained, and that [Lawson] failed to use reasonable diligence in seeking one." *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994). The reasonableness of mitigation efforts depends upon the particular circumstances of the plaintiff/claimant. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 684-85 (9th Cir. 1997).

NorVal did not address Lawson's efforts to mitigate her damages. Given Lawson's apparent interest in continuing in her employment as a CPA, which is a difficult proposition in that area of Montana, and NorVal's threats against her if she did obtain other employment, Lawson has been faced with an impossible task in trying to find suitable employment that would provide similar wages and/or benefits to that which is offered by NorVal.

NorVal has not met its burden of showing Lawson failed to mitigate her damages. Lawson's final annual salary was $84,567.00. Lawson's monthly wages were $7,0477.30 and her benefits were valued at $1,184.91. Lawson has shown she is entitled to back pay damages in the amount of $192,384.89. *See* Addendum A. This award is reasonable likely to make Lawson whole for the discrimination she experienced at NorVal. Lawson is also entitled to $13,635.51 in interest on the lost

wages through the date of the decision at the rate of 8.00% per annum, for a total of $206,020.39. *Id*.

2. Front Pay

Front pay compensates the Charging Party for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the plaintiff could return to her former position. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001). Future damages need only be reasonably certain and not absolutely certain, and of necessity are the subject of some degree of conjecture and speculation. *Kerr v. Gibson Products Co. of Bozeman, Inc.*, 226 Mont. 69, 74, 733 P.2d 1292, 1295.

The courts have considered the following factors when determining if reinstatement is feasible:

> (1) whether the employer is still in business; (2) whether there is a comparable position available for the plaintiff to assume; (3) whether an innocent employee would be displaced by reinstatement; (4) whether the parties agree that reinstatement is a viable remedy; (5) whether the degree of hostility or animosity between the parties, caused not only by the underlying offense but also by the litigation process, would undermine reinstatement; (6) whether reinstatement would arouse hostility in the workplace; (7) whether the plaintiff has since acquired similar work; (8) whether the plaintiff's career goals have changed since the unlawful termination; and (9) whether the plaintiff has the ability to return to work for the defendant employer, including consideration of the effect of the dismissal on the plaintiff's self-worth.

Webner v. Titan Distrib., 101 F. Supp. 2d 1215, 1236 (N.D. Iowa 2000) (citations omitted); aff'd on other grounds, 267 F.3d 828 (8th Cir. 2001).

Reinstatement appears not to be a viable remedy in this case given the hard feelings between the parties and the apparent hostility between Lawson and Herbert. Further, given the malicious nature of Herbert's attack on Lawson since she filed her complaint, it would clearly adversely affect Lawson's feelings of self worth. Therefore, front pay is appropriate in this case.

"Because of the potential for windfall, [front pay's] use must be tempered." *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). OAH has historically

followed the guidance of the Wrongful Discharge from Employment Act, which allows for recovery of lost wages for a maximum of four years from the date of discharge. *See* Mont. Code Ann.§ 39-2-905(1); *Billbruck v. BNSF Ry. Co.*, HRC Case No. 0031010549 (Aug. 3, 2004).

As noted above, Herbert and NorVal made it impossible for Lawson to seek and to obtain substantially equivalent work given its threat that she would no longer be deemed a NorVal employee if she were to begin working for another employer. Herbert made it equally impossible for Lawson to return to work for NorVal given his baseless allegations that she had engaged in fraudulent conduct, which he made to Lawson's co-workers and workers whom she previously supervised. Herbert's attempts to undermine Lawson's professional reputation by making defamatory statements about her work makes it highly unlikely that she will ever be able to find work substantially similar to her work at NorVal.

Lawson worked for NorVal for seven years prior to her going on medical leave. Awarding four years of front pay not unreasonable given the years of service and the slim probability of Lawson finding work that offered the same or similar wages and benefits she was enjoying at NorVal when she went on her medical leave of absence. Further, such an award would not be unduly speculative or not supported by the record. Such an award would not result in an Lawson enjoying an unjust windfall. Therefore, Lawson is entitled to an award of $415,786.08, the present value being $378,215.59, if paid in a lump sum.

3. Emotional Distress

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994); *Vainio*, p. 16, fn. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828. Medical evidence is not required to establish emotional distress damages, and such damages may be established by testimony or inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991). "[N]o evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted." *Id*.

Vortex Fishing Syst. at ¶33, succinctly explains emotional distress awards:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. 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. *Bolden v. Southeastern Penn.Transp. Auth*. (3d Cir.1994), 21 F.3d 29, 34; *see also Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden*, in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (quoting *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. Johnson v. Hale (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman*, 107 F.3d at 385.

The severity of the harm governs the amount of recovery. *Vortex Fishing Systems,* 2001 at ¶ 33. From a factual standpoint, the instant case is similar to *Vainio*. In that case the Montana Supreme Court found that an emotional distress award of $20,000.00 was appropriate in a case where the plaintiff was subjected to conduct that "included, among other things, brushing his body against her buttocks, putting his hand up her skirt, grabbing her breasts, and requesting [the plaintiff] to have sex with him." *Vainio*, 258 Mont. at 280-281.

The Montana Supreme Court affirmed a district court's award of $5,000.00 in emotional distress damages in *Beaver v. Mont. Dep't of Natural Res. & Conservation*. In Beaver, the plaintiff was subjected to a single incident of sexual assault by her supervisor outside of work prior to receiving a less desirable position. The court noted that Beaver did not have any further contact with the supervisor after the incident; the employer did not take inappropriate action against her; and her therapist reported she was unlikely to need further therapy related to the sexual assault and required no medication and was able to return to work. Id. at ¶88. The court found "the award of compensatory damages. . . [was] not so grossly out of proportion to Beaver's injury as to shock the conscience." *Id*. at ¶94.

An award of $10,000.00 in emotional distress damages was affirmed by the district court in *Anderson v. Martin*, 1997 Mont. Dist. LEXIS 567, ** 9-11 (Second Judicial District Court of Montana, Silver Bow County). In Anderson, the plaintiff showed she was subjected to unwanted kissing and other unwanted physical touching despite her protests. *Id.* The Montana Supreme Court affirmed an award of $75,000.00 for emotional distress damages in a case where the plaintiff proved that her manager subjected her to unwanted sexual advances in the workplace and attempted to assault her when giving her a ride home from a Christmas party. *Benjamin v. Anderson*, 2005 MT 123, ¶¶ 68-70, 327 Mont. 173, 112 P.3d 1039.

The credible evidence at hearing demonstrated that Lawson suffered substantial emotional distress as a result of Herbert's discriminatory and retliatory conduct. Herbert subjected her to repeated inappropriate comments about her sex life, her appearance and her sexual activity while she attempted to earn a living for her and her family. This has had a profound effect on her mental well-being, her inter-personal relationships and her ability to work with male superiors. Further, Herbert has made a concerted effort to discredit and defame Lawson amongst her co-workers and peers; and the evidence suggests Herbert was less than forthright through HRB's investigation.

After considering the severity of the incidents experienced by Lawson and Herbert's conduct after she attempted to file a complaint with her employer and filed her HRB complaints, an award of $50,000.00 for emotional distress is appropriate.

4. Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the Respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of any further violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1). This relief should include injunctive relief against Respondent and appropriate training be provided to both NorVal employees and the NorVal Board of Directors to ensure that no further acts of sexual harassment occur.

VI. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1).

2. NorVal Electric Cooperative illegally discriminated against Shalaine Lawson by subjecting her to a hostile work environment because of her sex.

3. NorVal Electric Cooperative illegally retaliated against Shalaine Lawson for protected activity.

4. Shalaine Lawson is entitled to recover $192,384.89 in back pay she suffered as the discriminatory conduct of Craig Herbert, as the General Manager of NorVal Electric Cooperative, along with $13,635.51 in interest, for a total of $206,020.39.

5. Shalaine Lawson is entitled to recover $415,786.08 in front pay, the present value of which is $378,215.59, to address the suffering she experienced as a result of the discriminatory conduct of Craig Herbert in his role as General Manager of NorVal Electric Cooperative.

6. Shalaine Lawson is entitled to recover $50,000.00 for the emotional distress she suffered as a result of the illegal discrimination and retaliation. Lawson is entitled to post judgment interest on all of these amounts.

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

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

VII. ORDER

1. Judgment is granted in favor of Shalaine Lawson and against NorVal Electric Cooperative. NorVal Electric Cooperative discriminated against Shalaine Lawson in violation of the Montana Human Rights Act.

2. Within 90 days of the date of this decision, NorVal Electric Cooperative, shall pay to Shalaine Lawson the sum of $671.806.47, representing $206,020.39 in backpay; $415,786.08 in front pay[8], and $50,000.00 in emotional distress damages.

[8]As noted above, the present value of the front pay award is $378,215.59.

3. The department permanently enjoins NorVal Electric Cooperative, from discriminating against any person on the basis of sex.

4. NorVal Electric Cooperative must consult with an attorney with expertise in human rights law to ensure that its harassment policies and procedures are sufficient to identify, investigate and resolve employee complaints of discrimination. This review should also include training for its employees to prevent and timely remedy disability discrimination. Under the policies, the employees of NorVal Electric Cooperative, as well as its Board of Directors, shall receive information on how to report complaints of discrimination and how those complaints should be treated by NorVal Electric Cooperative management. The plan and policies must be approved by the Montana Human Rights Bureau. In addition, NorVal Electric Cooperative shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 22nd day of October, 2019.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Shalaine Lawson, Charging Party, and her attorney, Todd Shea; and NorVal Electric Cooperative, Respondent, and its attorney, Maxon Davis:

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. Please contact Charles Fisher Court Reporting in Bozeman for a copy of the transcript.

LAWSON.HOD.CHP

Addendum A

Backpay		
Start Date:		12/15/2017
End Date:		10/22/2019
Monthly Wages:	$	7,477.30
Monthly Benefits:	$	1,184.91
Monthly Total:	$	8,662.21
Total Backpay Award:	$	192,384.89
Interest Rate:		8.00% (H.15 + 3%)
Interest Alone:	$	13,635.51
Total with Interest:	**$**	**206,020.39**

Front Pay	
Total Front Pay Award:	$415,786.08
Years:	4
Periods Per Year:	12
Periodic Payment:	($8,662.21)
Discount Rate:	2.37%
Periodic Rate:	0.198%
Present Value (Lump Sum):	**$ 378,215.59**

Discount Approx. = 10-yr. Treasury 1-yr. Avg.

Backpay Calculation

Pay Date	Wages + Benefits	Interest
Sunday, December 31, 2017	$ 4,331.11	$ 626.53
Wednesday, January 31, 2018	$ 8,662.21	$ 1,194.20
Wednesday, February 28, 2018	$ 8,662.21	$ 1,141.04
Saturday, March 31, 2018	$ 8,662.21	$ 1,082.18
Monday, April 30, 2018	$ 8,662.21	$ 1,025.23
Thursday, May 31, 2018	$ 8,662.21	$ 966.37
Saturday, June 30, 2018	$ 8,662.21	$ 909.41
Tuesday, July 31, 2018	$ 8,662.21	$ 850.56
Friday, August 31, 2018	$ 8,662.21	$ 791.70
Sunday, September 30, 2018	$ 8,662.21	$ 734.75
Wednesday, October 31, 2018	$ 8,662.21	$ 675.89
Friday, November 30, 2018	$ 8,662.21	$ 618.93
Monday, December 31, 2018	$ 8,662.21	$ 560.08
Thursday, January 31, 2019	$ 8,662.21	$ 501.22
Thursday, February 28, 2019	$ 8,662.21	$ 448.06
Sunday, March 31, 2019	$ 8,662.21	$ 389.21
Tuesday, April 30, 2019	$ 8,662.21	$ 332.25
Friday, May 31, 2019	$ 8,662.21	$ 273.39
Sunday, June 30, 2019	$ 8,662.21	$ 216.44
Wednesday, July 31, 2019	$ 8,662.21	$ 157.58
Saturday, August 31, 2019	$ 8,662.21	$ 98.73
Monday, September 30, 2019	$ 8,662.21	$ 41.77
Tuesday, October 22, 2019	$ 6,147.37	$ -
	$ 192,384.89	$ 13,635.51