

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 70-2019:

AMY LOWERY,)
)
 Charging Party,)
) **HEARING OFFICER DECISION**
 vs.) **AND NOTICE OF ISSUANCE OF**
) **ADMINISTRATIVE DECISION**
SARENS USA, INC.,)
)
 Respondent.)

* * * * *

I. INTRODUCTION

Amy Lowery alleged that her former employer, Sarens USA, Inc., discriminated against her in her employment based upon her sex and sexual orientation and retaliated against her for protected activity.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on January 29, and 30, 2019, in Missoula, Montana. Philip Hohenlohe, Attorney at Law, represented Amy Lowery. Sarens, USA, Inc., appeared through its designated representative, Rafael Boza, and was represented by Micah D. Dawson, Attorney at Law.

At hearing, Lowery, Sarah Lowery, Brian Eggert, and Boza, testified under oath. Micahel Hussey testified via Skype. The depositions of Frido DeGreef, Aaron Pezan, Sheryl Rademacher, and Mark Watson were introduced in lieu of live testimony.

Charging Party’s Exhibits (C.P. Ex.) 1; 5A; 11 through 16; and 20 through 40 were admitted. Respondent’s Exhibits (Resp. Ex.) 101 through 105; 107 through 120; 122 through 126; 128 through 132; 134 through 142; 144 through 147; and 149. Pages 17, 32, 33, 39, 49, 50, 60, 67, 69, and 70 of Respondent’s Exhibit 143 were also admitted.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did Sarens USA, Inc. discriminate against Amy Lowery on the basis of sex 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 Sarens USA, Inc. illegally discriminated against Amy Lowery on the basis of sex 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 Sarens USA, Inc. illegally discriminated against Amy Lowery on the basis of sex and/or retaliated against her for protected activity as alleged, in addition to an order to refrain such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. UNCONTESTED FACTS

1. Amy Lowery began working for Sarens USA, Inc. (Sarens) in 2014 as a Marketing Coordinator.

2. Lowery is female and identifies as a gay female. Lowery Hrg. Tr. 22:1.

IV. FINDINGS OF FACT

3. Sarens is the world's second largest crane company. Hussey Hrg. Tr. 245:10-13. Sarens acquired Rigging International, which had an office in Missoula, Montana, in approximately 2009. Sarens maintained the Missoula office after the acquisition. Lowery Hrg. Tr. 27:1-10.

4. Sarens is a well-known company in Europe, where it originated. Sarens is less well known in North America. Sarens created a marketing position that would focus on its marketing efforts in North America in an effort to raise Sarens' profile in that market. Hussey Hrg. Tr. 245:1-13. Sarens also hired a marketing professional

to work in its head office to focus on new markets, as well as support individual marketing efforts. Hussey Hrg. Tr. 245:14-246:10.

Lowery's Hiring and Job Performance

5. Sarens initially hired Lowery on a temporary basis. When the regular employee did not return from her leave of absence, Sarens hired Lowery on a full-time, permanent basis. Lowery became Sarens' Marketing Manager within approximately one year of being hired. Lowery was later promoted to Regional Marketing Manager in 2017. Lowery Hrg. Tr. 23:3-13.

6. Lowery was responsible for coordinating Sarens' marketing efforts in the United States and Canada. Lowery was also responsible for supporting Sarens' global marketing efforts. Lowery's duties included "[e]verything from website to social media to email campaigns to attending relevant industry events, trade shows." Lowery Hrg. Tr. 23:16-20. Lowery was also responsible for preparing prequalification packages and proposal packages, which were used to show the financial stability of Sarens. Lowery Hrg. Tr. 24:1-8.

7. Lowery initially reported to Sales Manager Jim Hennessy, who had hired her. When Hennessy left, Lowery then reported to Cody Meeker, who was the Sales and Marketing Manager. When Meeker left, Lowery then reported to Guus Stigter, who became the Sales and Marketing Manager. Lowery Hrg. Tr. 25:9-15. Lowery reported to Stigter at the time of her layoff.

8. Sarens is a "matrix organization, where you have one person that you report directly to formally and you have another person that you report to kind of as a functional relationship or . . . someone who is in charge from the head office perspective for the area" in which the employee works. Hussey Hrg. Tr. 242:11-18.

9. Lowery had "dotted reporting lines" to Kleopatra Kyrimi, Global Marketing Director, whose office was in Madrid, Spain. Hussey Hrg. Tr. 242:18-21. Stigter was Lowery's direct supervisor but Kyrimi served as a sort of unofficial supervisor. Lowery Hrg. Tr. 26:9-12.

10. Lowery was integral in Sarens being awarded several multi-million dollar projects. Lowery was the impetus for Sarens to attend the RICA and POWER-GEN conferences, two conferences at which Sarens had never before had a presence. Sarens generated approximately \$3 to \$5 million in revenue as a result of attending those conferences. Lowery Hrg. Tr. 32: 1-33:18.

11. Lowery received positive performance appraisals in 2016 from Stigter and Kyrimi. Lowery routinely scored at the highest level possible. C.P. Ex. 25. Lowery's 2016 performance appraisal included:

Amy is nothing short of a high asset to Sarens. Her professionalism and her consistency is admirable and helps the MarCom department accomplish projects in a timely fashion. Amy has the star quality that is required to help get Sarens' Marketing to where it should be. She is dedicated. She is kind but firm, efficient and creative, and above all, a good colleague. Working with her is a pleasure because of the professional trust that she generates around her. Sarens must strive to keep professionals like Amy around for the benefit of this historic organization.

Id. at p. 12.

12. Lowery did not receive a performance appraisal for 2017. Lowery had no indication that her performance had changed or that her continued employment with Sarens was otherwise in jeopardy. Lowery Hrg. Tr. 34:12-22.

13. Lowery was qualified for her position and was performing at a satisfactory level at all times pertinent to this matter.

Watson's Hiring by Sarens

14. In July 2016, Mark Watson became Sarens' Country Manager, based in Sarens' office in Houston, Texas. Watson was responsible for overseeing Sarens' day to day operations in the United States, including the human resources department, operations and equipment. All Sarens' managers in the United States, including Stigter, reported to Watson. Watson Hrg. Tr. 6:20-7:7; C.P. Ex. 11.

15. Watson reported directly to Mike Hussey, Sarens' Regional Director for the United States, Canada and Mexico. Hussey Hrg. Tr. 243:4-6. Hussey left Sarens in September 2018. Hussey Hrg. Tr. 241:15-19; 245:1-7.

16. Watson did not have the authority to hire or fire employees without the approval of Hussey and global Human Resources. Hussey Hrg. Tr. 252:21-253:1. However, Watson had successive supervisory authority over Lowery and controlled much of her performance as a Sarens employee.

17. In April 2017, Katherine McDonald, a female Sarens employee, filed a sexual harassment complaint against Watson. Rafael Boza, Sarens' Regional Legal Counsel, investigated the complaint. Boza interviewed Watson, who he described as either not having "a clear recollection of what he said or he just didn't remember it or, rather, he just didn't . . . I think he was just saying it the way he remembered it, and he wasn't consistent with the way [another employee who was interviewed] was remembering it . . ." Boza Depo. Tr. 21:20-24. Boza also noted that Watson "did diminish a little bit the gravity of - - of what he was saying." Boza Depo. Tr. 22:6-7.

18. Boza ultimately substantiated one of the four incidents alleged by McDonald. Boza recommended that Watson receive a written reprimand and undergo sexual harassment and gender sensitivity training. Boza also recommended that Sarens update its Sexual Harassment policy. C.P. Ex. 20.

19. Machteld Leybaert, Global Head of Sarens' Human Resources, and Hussey, determined Watson's conduct warranted only a verbal reprimand because "it was his first offense and it was not really egregious . . . or the one that was verified was not egregious . . ." Boza Hrg. Tr. 279:11-16. *See also* Watson Depo. Tr. 19:13-20:3.

20. Aaron Perzan, Contracts Manager, worked for Sarens from December 2016 until Sarens laid him off in February 2018. Perzan Depo. Tr. 4:1-4.

21. Perzan and Watson lived in the same neighborhood and their families were friendly. Watson frequently made comments to Perzan about the appearances of female employees and would ask if Perzan "would give it to her" or "give her a go." Perzan Depo. Tr. 4:13-5:4; 7:1-11. Perzan later learned from Sarens employees that Watson's nickname in the office was, "sex pest," due to his conduct toward female employees. Perzan Depo. Tr. 8:3-12.

22. When Perzan first began working more closely with Lowery on preparing proposals, Watson explained her position to Perzan and referred to her as a "dyke." Perzan Depo. Tr. 11:1-14. Watson was aware of Lowery's sexual orientation based upon conversations he had with Meeker and Hussey. Watson Hrg. Tr. 12:10-16.

Lowery's Relationship with Watson

23. On May 11, 2017, Watson offered Lowery a transfer to Sarens' office in Houston, Texas. The offer would have increased Lowery's annual salary from \$57,750 to \$67,750. C.P. Ex. 5A. Watson wanted to build a core team in Sarens'

central office, which was located in Houston. Watson Hrg. Tr. 10:18-21. Watson felt the Missoula office was vulnerable in terms of Sarens' overall goals given that it was one of the last offices previously held by Rigging International. Watson felt the costs associated with maintaining the Missoula office were too great when compared to its revenue generation. Watson Hrg. Tr. 11:1-16.

24. Lowery understood Watson was the moving party in the effort to get her to relocate to Texas. Lowery Hrg. Tr. 46:7-14; 48:19-49:2. Lowery made a counteroffer asking for a raise of \$40,000, because she did not want to work in the same office as Watson due to inappropriate and offensive comments he had made to her previously. Lowery Hrg. Tr. 47:3-18.

25. Watson traveled to Missoula approximately five times during Lowery's employment with Sarens. Watson would typically be in Missoula for a few days at a time. Lowery traveled to Houston four or five times during her time with Sarens, and she would spend three to five days there at a time. Watson Depo. Tr. 52:1-21.

26. Lowery and Watson typically spoke once or twice a week by telephone. Sometimes they would speak by telephone ten times per week depending upon what type of project they were working on together. Lowery Hrg. Tr. 53:7-20.

27. In January 2017, a retirement party was held for two Sarens employees from the Missoula office who were retiring after 30 years with the company. Watson traveled to Missoula for the party. Watson commented on a female employee's posterior and said, "her ass was big and that wasn't his type and was it mine." Lowery Hrg. Tr. 54:13-20. Watson then commented that his former company had taken out a higher insurance policy against him because of sexual harassment. Lowery Hrg. Tr. 54:4-7. Lowery interpreted Watson's comment regarding the higher insurance policy as a means of telling her that he was free to say and to do what he wanted. Lowery Hrg. Tr. 55:12-22.

28. In April 2017, Lowery spent a week working at the Houston office. Lowery observed Travis German, Sarens' Safety Director, wearing a T-shirt that read, "God Loving, Gun Owning Heterosexual." Lowery Hrg. Tr. 86:13-17. Lowery asked Aaron Perzan, Contracts Manager, if he had seen the T-shirt. Perzan responded, "Oh, yeah. He wears it every week." Lowery Hrg. Tr. 86:19-23.

29. Lowery had heard some Sarens employees in the Houston office using the terms, "fag," "faggot," and "nigger." Lowery had one Sarens employee in the Houston office ask, "What kind of gay shoes are those?" Lowery Hrg. Tr. 87:16-25.

30. Lowery found the Houston office to have a culture of discrimination based upon the language used by the employees and the conduct of Watson. Lowery Hrg. Tr. 87:16-25

31. In July 2017, Lowery was out of work on a medical leave after having had a major surgery. Watson called her at home and commented that “he’s usually just trying to get me and girls into bed and not out of bed.” Lowery was disgusted and upset by Watson’s comment. Lowery Hrg. Tr. 61:14-23.

32. Lowery reported Watson’s phone call and the comment he made to Brian Eggert, Regional IT Manager, who worked in the Missoula office. Eggert Hrg. Tr. 201:10-14. Eggert held a supervisory and managerial position in the Missoula office. Eggert Hrg. Tr. 200:1-5. As a supervisor, Eggert had the authority to act on an employee’s complaints under Sarens’ harassment policy.

33. Eggert and Watson did not get along. Eggert thought Watson had a boorish attitude and lacked respect for the people around him. Eggert Hrg. Tr. 209:15-19. When Eggert first met Watson in Houston, he observed Watson flirting with a waitress. Eggert found Watson’s behavior offensive enough that he felt compelled to apologize to the waitress. Eggert Hrg. Tr. 206:17-207:20. Eggert was also interviewed as part of Boza’s investigation into McDonald’s complaint regarding Watson’s behavior. C.P. Ex. 20.

34. During one of Watson’s trips to Missoula, Lowery met Watson at Buffalo Wild Wings after he arrived on a late night flight. Lowery felt she had to go to meet him, because he had commented that he was going to be busy when he was in town. Lowery stayed at work until 10:30 that night so she could meet him at the restaurant. Lowery Hrg. Tr. 56:14-21.

35. While at the restaurant, Watson started talking to the server, who was a young woman in her early twenties. At some point, the server mentioned that she had family in Galveston, Texas. Watson suggested she could look him up and they could go out on a boat. Lowery Hrg. Tr. 56:22-57:3.

36. Lowery was shocked that Watson, a married man in his 50's with young daughters, would attempt to pick up a woman who was so much younger than him. At one point during their time at the restaurant, the server walked away from their table and Watson commented, “Oh, wouldn’t you like to take her back to my hotel.” Lowery understood Watson to be insinuating that he was interested in having a threesome with her and the server. Lowery Hrg. Tr. 57:10-19.

37. Lowery had no interest in engaging in any kind of sexual activity with either Watson or the waitress. Lowery had no interest in having that kind of discussion with Watson. Lowery Hrg. Tr. 57:20-25.

38. Watson frequently asked Lowery when they spoke on the phone if she “was getting laid.” On one occasion, Watson asked Lowery over the phone if she was “getting any” in Missoula and commented the pool is “pretty big down” in Houston. Lowery Hrg. Tr. 58:12-59:15. Watson also inquired about whether “there were any good dyke bars in Missoula.” Lowery Hrg. Tr. 68:10-12.

The Breakbulk Conference

39. On or about October 17, 2017, Lowery traveled to Houston to represent Sarens at the Breakbulk conference. Lowery had not wanted to attend the Breakbulk conference because she did not want to be around Watson for the entirety of the conference, which was three to four days. Lowery Hrg. Tr. 63:12-24.

40. Watson made frequent comments regarding Lowery’s physical appearance, including her breasts and her posterior. At the Breakbulk conference in October 2017, Watson mentioned something to Lowery about buttoning her shirt up a little higher and said, “You know, unless that’s what you’re going for, because that’s right where my eyes are going.” Lowery Hrg. Tr. 60:20-25.

41. Lowery was offended and humiliated by Watson’s comments, which he made in front of her co-workers. Lowery Hrg. Tr. 66:19-23; 68:6-13. Watson’s comments were unwelcome and clearly intended to harass and humiliate Lowery.

42. Watson directed Lowery to walk the floor with him several times during the conference. DeGreef Depo. Tr. 7:12-17. Watson would point out women suggesting, “Oh, that woman is looking at you. She’s interested in you. Can we take her back to your hotel?” Lowery Hrg. Tr. 65:18-24. Lowery found Watson’s behavior “gross and disgusting and humiliating.” Lowery Hrg. Tr. 65:25-66:1.

43. At one point, Frido DeGreef, who was Sarens’ Fleet and Operations Manager at the time, overheard Watson asking Lowery if she “would do her,” and pointing at a passing woman. DeGreef Depo. Tr. 6:9-16. DeGreef estimated Watson asked the same or similar question two or three times and Lowery never answered the question. DeGreef Depo. Tr. 6:23-25. DeGreef described Lowery as looking amazed and trying to shrug it off. DeGreef Depo. Tr. 7:1-4.

44. Watson “catcalled” women who walked by the Sarens booth in Lowery’s presence. Lowery observed one woman walk by who had missed a belt loop on her pants. Watson yelled out to the woman that he would help her redress. The woman walked over to the Sarens booth, fixing her belt, and commented to Lowery about having to work “with this guy.” Watson asked the woman if she had a boyfriend and if she was married. The woman asked Lowery if there was a stop button for Watson, and Lowery responded they were still trying to find it. Lowery Hrg. Tr. 64:24-65:17.

45. At one point during the conference, Watson commented in front of Lowery and several of her co-workers that his “. . . type was . . . [a]nything with a pulse” and acted like he was kicking a corpse on the floor. Lowery Hrg. Tr. 64:17-23.

46. Watson repeatedly asked Lowery when she was going to move to Houston throughout the conference. Watson also informed Lowery during the conference that Stigter would no longer be her supervisor, and she would be reporting directly to him. As her direct supervisor, Watson would be in a position to discipline her under the Sarens’ matrix model. Lowery Hrg. Tr. 48:8-49:12.

47. Watson’s behavior throughout the conference shocked and upset Lowery, who interpreted his behavior as destroying “all of the good [she had] been trying to do, and the sales people.” Lowery Hrg. Tr. 65:9-12.

48. During one evening of the Breakbulk conference, Watson drove himself and Lowery to a vendor dinner. On the way to the restaurant, Watson mentioned the sexual harassment complaint filed against him earlier that year (the McDonald complaint). Watson told Lowery that he refused to accept a write up or reprimand for it. Lowery Hrg. Tr. 67:1-6. Lowery understood Watson’s comments were intended to communicate to her that he was “untouchable.” Lowery Hrg. Tr. 68:5-7.

49. After Watson and Lowery picked up the clients, who were a father and a daughter who was in her late twenties, Lowery observed Watson overtly flirt with the daughter and, at one point, Lowery observed Watson’s hand on the daughter’s upper thigh. Lowery Hrg. Tr. 67:14-20.

50. DeGreef was also upset and concerned about Watson’s conduct at the conference, particularly what he observed as Watson’s disrespectful treatment of Lowery. DeGreef contacted Alicia Thomas, Sarens’ Human Resources Manager, and reported what he had observed. DeGreef considered it “inappropriate and unprofessional behavior,” but declined to “do something with it” when asked because

he was not sure of the nature of the relationship between Watson and Lowery. DeGreef Depo. Tr. 8:7-18.

Sarens' Response to Watson's Behavior at the Breakbulk Conference

51. Thomas contacted DeGreef a few days later and informed him that another person, not Lowery, filed a complaint against Watson regarding his conduct at the Breakbulk conference, a three or four day conference that began on or about October 17, 2017. DeGreef Depo. Tr. 8:19-22.

52. Stigter called Lowery a few days after she had returned from Texas and asked her about the conference. Stigter asked if there was any inappropriate behavior at the conference. Lowery "told him exactly what happened at the conference, the catcalling, the harassment. [Lowery] also told him about Mark's behavior in the prior months, his . . . asking [her] if [she] was getting laid . . . and did we want to take that waitress home during his visits to Missoula or mine to Houston." Lowery Hrg. Tr. 70:14-23. Lowery also reported Watson's comment about his previous employer taking out a higher insurance policy on him and how she interpreted that as being a statement that his behavior was accepted "and nothing is going to change." Lowery Hrg. Tr. 70:24-71:5. Stigter responded that he understood. *Id.* at 4-5.

53. Lowery also shared her concerns about Watson's behavior with Eggert when she returned to the office. Lowery Hrg. Tr. 77:21-24.

54. Thomas called Lowery within a day of Lowery's conversation with Stigter. Thomas told Lowery she wanted to speak with her about the Breakbulk conference and any inappropriate behavior that had happened involving Watson. Lowery Hrg. Tr 71: 25-72:4. Lowery was reluctant to talk to Thomas because she understood Thomas and Watson were close friends. Lowery Hrg. Tr. 74:1-3.

55. Lowery ultimately told Thomas everything she told Stigter. Lowery also directed Thomas to talk to Kevin Largent, who was present at a conference that Lowery could not attend due to her surgery. Largent had told Lowery that Watson's behavior "was way worse" at that conference. Lowery also provided the names of other individuals who she thought would have information about Watson's behavior. Lowery Hrg. Tr. 72:14-24.

56. At no time did Thomas direct Lowery to prepare a written complaint, which is required under Sarens' harassment policy. C.P. Ex. 1; Lowery Hrg. Tr. 78: 8-14. Lowery would have put her concerns in writing if she had not been assured

that Thomas did not need anything more when she informed Lowery that she was starting an investigation. *Id.* at 16-19.

57. Sarens' harassment policy is set forth in its Employee Policies and Procedures Handbook and prohibits "unlawful harassment because of race, color, religious creed, sex, marital status, age, national origin, physical handicap, medical condition or any other protected basis . . . ". C.P. Ex. 1, p. 13. Employees who believe they have been unlawfully harassed are required to provide a written complaint to their supervisor or another Company supervisor, President or Personnel Management of the company as soon as possible after the incident. *Id.*

58. Sarens' harassment policy provides:

An employee determined by the Company to be responsible for unlawful harassment will be subject to appropriate disciplinary action, up to and including termination. Whatever action is taken against the harasser will be made known to the complaining employee and the Company will take appropriate action to remedy any loss [to the employee] resulting from harassment."

Id.

59. The policy prohibits retaliation against any employee for filing a complaint. *Id.*

60. On or about November 7, 2017, Lowery left a voice mail message for Thomas seeking information about the Watson investigation because she had not heard from Thomas for a week and a half. Ex. 27; Lowery Hrg. Tr. 73:1-7.

61. Lowery and Thomas spoke by telephone. Thomas advised Lowery that she was still investigating the allegations against Watson and assured her that Lowery would not get in trouble for reporting her concerns about Watson. Lowery told Thomas that she had been losing sleep over the thought that Watson would find out she had complained. Lowery Hrg. Tr. 73:8-22.

62. Neither Thomas nor Stigter informed Watson of Lowery's complaint regarding his conduct at the Breakbulk conference. Watson Hrg. Tr. 15:16-23. Watson was not aware that he was being investigated based upon complaints about his conduct at Breakbulk. Watson Hrg. Tr. 15:2-20.

63. On October 26, 2017, Thomas sent an email to Hussey, Leybaert and Boza, informing them of a complaint she and Boza had received regarding Watson's conduct during the Breakbulk conference. Thomas wrote:

We've been told during the conference last week, Mark and a few other's behavior at the conference was very unprofessional (flirtatious with other attendees as well as having inappropriate conversations that could be heard by other attendees). We have not received a formal complaint, but wanted to confirm if you preferred we investigate further or if we just note this in our records.

C.P. Ex. 21.

64. Leybaert responded the same day via email:

Thanks for the information. Add it in the record and go ahead with a training as it is obvious [sic] needed.

Id.

65. Hussey spoke to Thomas regarding the allegations regarding Watson prior to the October 27, 2017 email. Thomas told Hussey that Lowery was involved and had been spoken to about her concerns. Hussey Hrg. Tr. 265:19-266:3. Thomas did not disclose the specifics of Lowery's complaint. Hussey Hrg. Tr. 251:8-252:1.

66. Thomas was out of the office on vacation during the period of October 27, 2017 through November 6, 2017. *Id.* Thomas resigned her position shortly after she returned. Sheryl Rademacher, who had been Sarens' payroll administrator, then assumed Thomas' duties on or about November 17, 2017. Rademacher Depo. Tr. 5:18-23. Rademacher left her employment with Sarens in July 2018. Rademacher Depo. Tr. 6:1-4.

67. Lowery contacted Rademacher and asked her about the status of her complaint. Rademacher told Lowery she was aware of the complaint and there was a note in Watson's file, which was put there at the direction of Leybaert, Global Head of Sarens' Human Resources. Lowery Hrg. Tr. 79:25-80:10.

The Layoff

68. In 2017, Sarens was experiencing significant financial issues due to the economic downturn and lower prices in the market. Sarens was also affected by the storm that caused extensive flooding in Houston, which required Sarens to abandon their operations and set up temporary operations at another location in Houston. Hussey Hrg. Tr. 243:17-24. As a result of those financial difficulties, Sarens management determined that it needed to reduce its workforce on a global basis. Hussey Hrg. Tr. 243:25-244:6.

69. In late-November 2017, a meeting of Sarens senior management, which included Hussey and other regional directors, as well as the CEO, CFO, and global human resources director, was held in Belgium to determine what cuts needed to be made. Prior to this meeting, Lowery had not been included in the list of employees to be laid off. Hussey Hrg. Tr. 243:17-244:10.

70. Stigter, Watson and Kyrimi were not involved in the discussions regarding which employees would be laid off. Hussey Hrg. Tr. 247:1-248:13. Watson was consulted as to which operations could be reduced without adversely affecting Sarens' ability to continue its operations. However, none of Hussey's discussions with Watson included Lowery; nor did Watson ever suggest Lowery should be included in the reduction in force. Hussey Hrg. Tr. 247:1-5.

71. Hussey determined that Sarens could make short-term reductions in marketing while Sarens maintained its core operations, which essentially includes those operations that bring money into the organization. Hussey Hrg. Tr. 247:12-21.

72. Advanced notice of who would be included in the layoff was never provided to Watson, Kyrimi or Stigter. Hussey Hrg. Tr. 247:14- 248:4.

73. Ultimately, only Leybaert and Hussey were involved in deciding which Sarens employees would be laid off. Hussey Hrg. Tr. 244:21-23.

74. Hussey was aware Lowery had taken part in an investigation regarding Watson's behavior at the Breakbulk conference. However, Lowery's role in the investigation had no part in Sarens' decision to terminate her employment; nor did her gender or sexual orientation. Hussey Hrg. Tr. 251:8-252:1.

75. Hussey and Leybaert informed Watson who would be laid off during a conference call on November 21, 2017. Watson learned of the impending layoff, or head count reduction under Sarens' parlance. Watson was told that Lowery, Eggert and Steven Koski, an engineer in the Missoula office, would be laid off. Watson Depo. Tr. 16:13-17:2; Rademacher Depo. Tr. 8:12-18.

76. Watson followed up after the conference call with an email to Leybaert stating, "As discussed agree plan is as follows . . ." and a description of how the layoffs would proceed. C.P. Ex. 14. Watson concluded the email with, "Trusting this reflects our discussion and agreement." *Id.*

77. Watson volunteered to travel to the Missoula office to personally deliver the layoff notices rather than letting the news be communicated by telephone. Watson Depo. Tr. 17:6-18.

78. Before Watson traveled to Missoula, he contacted Rademacher on or about November 21, 2017 and directed her to prepare the layoff paperwork. Rademacher Depo. Tr. 8:5-9; 26:21-23. Watson initially told Rademacher that only Eggert would be laid off. Later that same day, Watson told Rademacher that four employees would be laid off, including Lowery. Rademacher Depo. Tr. 27:16-28:5.

79. A day or two after asking Rademacher to prepare the layoff paperwork, Watson met Rademacher in her office to review the paperwork. Rademacher Depo. Tr. 26:21-27:5. As Watson reviewed Lowery's layoff paperwork, he smiled and made a comment referring to Lowery as a "fucking pussing-loving [sic] bitch." Rademacher Depo. Tr. 9:11-17. Rademacher understood Watson was referring to Lowery due to her being the only female being laid off and due to Lowery's sexual orientation, which Rademacher was aware of. Rademacher Depo. Tr. 9:18-10:3.

80. Rademacher reviewed Lowery's personnel file when she prepared the layoff paperwork. Rademacher noted that there was no mention of Lowery's complaint regarding Watson in her file. Rademacher Depo. Tr. 35:6-10.

81. Rademacher contacted Hussey before Watson traveled to Missoula. Rademacher questioned whether Watson was the best choice given the nature of Lowery's complaint. Rademacher Hrg. Tr. 37:19-22. Rademacher did not report the comment made by Watson. Rademacher Hrg. Tr. 45:19-47:14. Hussey directed another long-term Sarens employee in the Missoula office to join Watson during the layoff meetings. Hussey Hrg. Tr. 251:1-7/.

82. Watson traveled to the Missoula office twice in November 2017. Lowery observed that his behavior had changed during this first visit. Watson did not come to her office or ask her out for drinks. Watson did not ask Lowery about her sex life. Lowery assumed based upon his subdued conduct that Watson had learned of her complaint. Lowery Hrg. Tr. 89:5-13.

83. During Watson's first visit to the Missoula office, Watson called a facility meeting and announced that Thomas had resigned. Watson did not offer any information as to whom employees should contact if they had human resources issues. Lowery Hrg. Tr. 89:19-24.

84. On November 28, 2017, Watson called Lowery into the conference room at approximately 9:00 a.m. Lowery Hrg. Tr. 90:21-25. Watson told Lowery, "I'm letting you go." Lowery Hrg. Tr. 92:1-4. Watson gave Lowery a letter that indicated the reason for her termination was a reduction in force. Lowery became upset and started crying. C.P. Ex. 32; Lowery Hrg. Tr. 90:21-91:20.

85. Also terminated that day were Eggert and Koski. Lowery Hrg. Tr. 92:16-18.

86. Lowery called Kyrimi within an hour or two of talking with Watson and informed her that she had been laid off. Kyrimi indicated to Lowery that she was not aware that Lowery was going to be laid off. Lowery Hrg. Tr. 94:11-95:7.

87. Lowery also called Stigter after meeting with Watson. Stigter denied knowing she was going to be laid off. Lowery told Stigter that Watson had let her go and that she was allowed to work for two more days to complete the transition. Lowery had no further contact with Stigter after this conversation. Lowery Hrg. Tr. 95:22-96:11.

88. Hussey later terminated Watson in December 2017 due to Sarens' poor financial performance and the "lack of satisfaction with the work environment from many of our employees." Hussey Hrg. Tr. 248:21-25. Employees had complained of Watson's coarse demeanor in the office, as well as his being dismissive of others' ideas and the tone he used with some employees. Hussey Hrg. Tr. 248:20-250:11.

89. Sarens laid off more employees in the North American region during the weeks following Lowery's layoff in November 2017. Hussey Hrg. Tr. 11-14.

90. Watson's conduct toward Lowery, which included inappropriate comments and inquiries regarding her personal life, was based upon her sex. Watson's behavior caused Lowery to be more anxious and less happy in her employment at Sarens. Lowery initially enjoyed her employment with Sarens, but that enjoyment was diminished by Watson's offensive and harassing behavior. Lowery Hrg. Tr. 69:5-14. At the end of her employment, Lowery no longer wanted to go to work. Lowery Hrg. Tr. 70:1-4.

91. Watson's comments were unwelcome and in no way initiated by or encouraged by Lowery. Lowery was shocked and embarrassed and felt weakened by Watson's comments, which were regularly offensive and harassing. Lowery Hrg. Tr. 56:3-11.

92. Lowery experienced shame, anxiety, and weakened as a result of Watson's behavior. Lowery's had trouble sleeping as a result of his conduct, including the termination. Lowery is more cautious, reserved and withdrawn. Lowery has had to borrow money from her parents and take money out of her 401(k) due to the financial difficulties she has experienced as a result of her termination from Sarens. Lowery Hrg. Tr. 115:10-119:20.

93. Watson's conduct caused Lowery harm, including lost sleep, humiliation, emotional distress, diminished enjoyment of social relationships, and diminished enjoyment of social events. Lowery has suffered and continues to suffer emotional distress as a result of Watson's offensive and harassing behavior.

94. Sarens' decision to lay off Lowery was not related to or a result of Watson's behavior toward Lowery. Lowery's layoff was not based on her sex or sexual orientation or in retaliation of her having complained of Watson's behavior.

95. Sarens' sexual harassment policy and its application of that policy to Watson after the McDonald complaint was not sufficient to prevent and to correct Watson's harassing behavior.

96. Lowery reasonably failed to complain about Watson's behavior prior to October 2017, despite Sarens' harassment policy, due to Watson's comment that he had refused a reprimand that resulted from the McDonald complaint and his continued offensive behavior toward her. A reasonable person in Lowery's position would understand that comment to mean that availing oneself of Sarens' harassment policy would stop Watson's behavior.

V. DISCUSSION¹

Lowery alleges Sarens discriminated against her because of her sex and sexual orientation by subjecting her to a hostile work environment that was created by Watson's discriminatory behavior. Lowery further alleges her layoff in November 2017 was discriminatory and in retaliation for her having complained about Watson's behavior just a few weeks earlier.

A. Witness Credibility

Lowery and Watson provided conflicting testimony regarding Watson's conduct toward her during her employment at Sarens. Lowery testified Watson subjected her to repeated offensive comments and sexual propositions since he began working for Sarens in July 2016. Watson denied engaging in any of the conduct alleged by Lowery and denied treating her differently due to her sex and/or sexual orientation. Therefore, a credibility determination is required.

Lowery's overall demeanor was deliberate, calm and consistent. Lowery testified in detail about each of the incidents involving Watson and how his comments and conduct caused her distress. Lowery was able to provide a fairly exact time line as to when each incident occurred and testified in detail as to the circumstances surrounding each event. Additionally, Lowery's testimony was consistent with other witness' testimony about Watson's behavior toward women and, specifically, his conduct at the Breakbulk conference.

Perzan, who knows Watson personally and professionally, testified at his deposition that he had observed Watson comment on the appearance of female employees and question whether Perzan would "would give it to her" or "give her a go." Perzan Depo. Tr. 4:13-5:4; 7:1-11. Perzan testified Watson referred to Lowery as a "dyke" when explaining who she was as a Sarens employee. Perzan also testified that other Sarens employees referred to Watson as "sex pest" due to his offensive behavior. Perzan Depo. Tr. 8:3-12.

DeGreef's deposition testimony also corroborated much of what has been alleged by Lowery. DeGreef testified he observed Watson pointing at a passing woman and asking Lowery if she "would do her." DeGreef Depo. Tr. 6:9-16. DeGreef testified Lowery never answered the question and described her as looking

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

amazed and as though she was trying to shrug off the question. DeGreef Depo. Tr. 7:1-4. DeGreef also described a situation in which he observed Watson harassing a female vendor about her appearance and commenting on how well dressed she was, which DeGreef described as interfering with his ability to conduct business with the vendor. DeGreef Depo. Tr. 9:14-10:2.

The parties each referenced the McDonald complaint, which was investigated and substantiated to some degree by Boza. McDonald did not testify in this proceeding. What was presented was hearsay testimony about the allegations made, and the report prepared by Boza, which was a summary of his investigation and his conclusions. The Hearing Officer is not relying upon the McDonald complaint to determine whether it is more likely than not that Watson acted in a similar manner with Lowery. However, Boza's observations of Watson's responses is relevant and is probative as to how Watson may recall or interpret his behavior vis-a-vis Lowery. Further, the McDonald complaint is relevant as to Sarens' attempt to invoke the *Ellerth/Faragher* defense, which is discussed in greater detail below.

Lowery's detailed and direct testimony is considered more credible than Watson's denials. While testimony regarding one's conduct and behavior is inherently self-serving, Watson's repeated denials in the face of detailed questions regarding his conduct renders his testimony significantly less credible than Lowery's certain and more convincing testimony. It is therefore determined that each of the incidents pointed to by Lowery in her testimony regarding Watson's discriminatory behavior toward her occurred as set forth in the Findings of Fact.

B. Lowery's Claim of Discrimination Because of her Sexual Orientation

Lowery alleges Watson's discriminatory conduct was also based upon sexual orientation. The MHRA provides that it is a basic personal right to be:

. . . free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to:

(a) the right to obtain and hold employment without discrimination

Mont. Code Ann. §49-1-102(1)(a)

Sexual orientation is not explicitly enumerated in the classes protected by the MHRA. Neither party pointed to a case in which the Montana Supreme Court declared sexual orientation to be a protected class under the MHRA. Turning to federal law, the federal district court has considered the fact that a split exists amongst the circuits as to whether discrimination on the basis of sexual orientation is inherently sex-based discrimination and therefore prohibited under Title VII of the Civil Rights Act of 1964. *See Somers v. Dig. Realty Trust Inc.*, 2018 U.S. Dist. LEXIS 132068, 2018 WL 3730469 (N.D. Cal. Aug. 6, 2018) (Noting the Second and Seventh Circuits have found discrimination based upon sexual orientation is sex-based discrimination, where as the Eleventh Circuit has held otherwise.). The *Somers* court explained:

The circuit courts that have found sexual orientation discrimination cognizable reason that it "is motivated, at least in part, by sex and is thus a subset of sex discrimination" because "sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018). Further, "looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex." *Id.* at 112-13. Notably, in 2015, the Equal Employment Opportunity Commission—charged with enforcing Title VII—also took the position that sexual orientation "is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Foxx*, 2015 EEO PUB LEXIS 1905, 2015 WL 4397641, at *4-5 (EEOC Jul. 16, 2015).

Somers, 2018 U.S. Dist. LEXIS 132068, **21-22.

The Ninth Circuit has not yet weighed in on this issue. However, the *Somers* court ultimately concluded that a Plaintiff alleging he or she had been treated differently due to his or her sexual orientation invokes the protections of Title VII against sex-based discrimination. The court found particularly persuasive the reasoning set forth in *Zarda*:

To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the

people to whom he or she is attracted. Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.

Somers, 2018 U.S. Dist. LEXIS 132068, *23, quoting *Zarda*, 883 F.3d at 113.

While the general trend suggests sexual orientation is inherently a sex-based consideration thereby invoking the protections of Title VII and presumably the MHRA, it is not necessary to reach that particular issue in this matter. Lowery has shown that Watson's discriminatory conduct toward her was because of her sex, and he created a hostile work environment for Lowery as a result, which is discussed in further detail below.

C. Lowery'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, Lowery 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). “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; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *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 or 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.*

This case is a direct evidence case. Direct evidence "speaks directly to the issue, requiring no support by other evidence," proving the fact in question without either inference or presumption. E.g., *Black's Law Dictionary*, p. 413 (5th Ed. 1979); *see also, Laudert v. Richland County Sheriff's Department*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. Direct evidence of discrimination establishes a violation unless the respondent proffers substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert, supra*. Once the prima facie case is established, the employer must prove, by a preponderance of evidence, "that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief." Admin. R. Mont. 24.9.610(5).

Not only did Lowery's credible testimony establish a prima facie case, but her testimony regarding Watson's conduct at the Breakbulk conference was corroborated by the testimony of Perzan and DeGreef. As such, the substantial and credible evidence of record establishes Lowery was subjected to unwelcome sexually harassing behavior by Watson that was sufficiently severe or pervasive as to affect Lowery's working conditions. Further, the substantial and credible evidence of record establishes Watson's conduct toward Lowery was because of her sex. The unwelcome comments included Watson questioning if Lowery was getting laid whenever he spoke with her; suggesting a female server was suitable for a threesome; commenting not only on Lowery's physical appearance but that of other women in Lowery's presence; and questioning whether Lowery "would do her" while pointing at women during what should have been a professional achievement for Lowery.

A reasonable woman in Lowery's position would have found Watson's conduct sufficiently severe and pervasive as to alter the terms and conditions of her employment. *See Nichols*, 256 F.3d at 872. Further, Lowery's credible and detailed

testimony establishes she subjectively found the environment abusive and terms and conditions of her employment altered as a result of Watson's conduct. *See Harris*, 510 U.S. at 21-22. Lowery complained of Watson's behavior to Stigter and Thomas after she was contacted by each of them after they received complaints about Watson's conduct at the conference. Lowery had the right to expect that Watson, as a member of Sarens management, would treat her with respect and not subject her to unrelenting and unwanted sexually harassing behavior.

Sarens argues that Watson cannot be found to be Lowery's supervisor because she offered no evidence that he had the power to take any tangible employment against her. Sarens' argument is not persuasive and is contrary to established law. *See Faragher*, 524 U.S. at 808 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."). "Some courts . . . have found that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or discipline the victim. *See Vance v. Ball State Univ.*, 570 U.S. 421, 430-31 (2013). "Other courts have substantially followed the more open-ended approach advocated by the EEOC's Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another's daily work. *See, e.g., Mack v. Otis Elevator Co.*, 326 F.3d 116, 126-127 (CA2 2003); *Whitten v. Fred's, Inc.*, 601 F.3d 231, 245-247 (CA4 2010); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), 1999 WL 33305874, *3." *Id.* at 431. In *Vance*, the Court adopted the first definition of supervisor set forth above in that a supervisor includes those employees who have the ability to take tangible employment actions.

Watson had the apparent authority to offer a position to Lowery that would have required her to relocate to Houston and offered her a significant pay increase, as well as relocation costs being borne in a large part by Sarens. Further, Watson apparently believed he was Lowery's supervisor when he informed her during the Breakbulk conference that she would no longer be reporting to Stigter, and she would be reporting to him. While Watson may not have had the actual authority to lay off or to discharge Lowery, that decision was made by Hussey and Leybaert, it is determined that Watson held supervisory authority over Lowery. Watson abused that authority by creating a hostile work environment through his discriminatory conduct that was based upon Lowery's sex. As the Montana Supreme Court has explicitly 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, 204, citing *Meritor*, 477 U.S. at 64.

1. *Sarens' Defense*

Because Lowery has established a prima facie case of a hostile work environment created by Watson's unwanted and discriminatory conduct, it must now show, by a preponderance of evidence, "that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief." Admin. R. Mont. 24.9.610(5).

Sarens argues Lowery has failed to show the harassment perpetrated by Watson was severe and pervasive. Sarens notes Lowery has not argued she was ever touched inappropriately or regularly called derogatory terms. Sarens argues the incidents pointed to by Lowery in which Watson acted inappropriately toward her and/or made discriminatory comments to or about her do not rise to the level of those cases in which much more egregious conduct was found not to be severe and pervasive. *See, e.g., Kortan v. California Youth Authority*, 217 F.3d 1104, 1111 (9th Cir. 2000) (supervisor referred to female employees as "castrating bitches," "Madonnas," or "Regina" in front of the plaintiff on several occasions and directly called the plaintiff a "Medea." The court, nonetheless ruled that the comments, while rude and disrespectful, were insufficient to support a claim for harassment); *Brooks v. City of San Mateo*, 229 F.3d 917, (9th Cir. 2000) (finding not actionable harassment for co-worker to force his hand underneath plaintiff's sweater and bra to fondle her breast); *Swenson v. Potter*, 271 F.3d 1184, 1195-96 (9th Cir. 2001) (finding that plaintiff's 16 encounters with her co-worker, including the times he told plaintiff that he thought she was beautiful, that he dreamt about her at night, that he watched her "ass moving," and physically grabbing her to kiss her did not amount to a hostile work environment); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F.Supp.2d 970, 992 (C.D.Cal.2000) (concluding that fifteen to twenty different comments in reference to sex or gender over an eighteen-month period failed to constitute an objectively abusive workplace).

Sarens' argument is not persuasive. Lowery's testimony establishes Watson regularly subjected her to inquiry and/or commentary about her sex life and her physical appearance. While Watson's office may have been located more than one thousand miles away from Lowery, the evidence shows he subjected Lowery to offensive and discriminatory comments and behavior during the majority of his interactions with her through their weekly phone calls and regular meetings. Watson's conduct clearly affected Lowery's desire to work with him and negatively impacted her overall happiness in her employment at Sarens. While Lowery may not have complained prior to October 2017, the fact remains Watson's discriminatory conduct affected Lowery in both her employment and her personal life. Therefore,

Sarens' argument that Lowery has not shown that Watson's discriminatory conduct was severe or pervasive fails.

Sarens argues Lowery failed to show Watson's conduct was unwelcome. Conduct is "unwelcome" where it is "uninvited and offensive." *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998). Sarens points to the court's reasoning in *EEOC v. Prospect Airport Servs.*, 621 F.3d 991, 998 (9th Cir. 2010) in support of its argument. In that case, the court considered the concept of welcomeness noting the concept is inherently subjective but there is an objective aspect in whether the victim communicates the conduct is unwelcomed. *Id.* at 998. The court noted, "Sometimes the past conduct of the individuals and the surrounding circumstances may suggest that conduct claimed to be unwelcome was merely part of a continuing course of conduct that had been welcomed warmly until some promotion was denied or employment was terminated. That is a credibility issue." *Id.*

Sarens is correct there is no evidence showing Lowery told Watson that she did not welcome his comments about her appearance or suggestions as to whom she should approach for an illicit tryst. Lowery never responded positively to Watson's offensive behavior or otherwise encouraged his conduct. This should have been sufficient to put Watson on notice that his behavior was unwelcome. This is particularly true given that she never initiated the discriminatory discourse or otherwise treated Watson in the same coarse and boorish manner. Further, others observed that Lowery was not receptive to Watson's conduct and appeared to be uncomfortable with his comments and suggestions. Given Watson's denial that the incidents occurred as alleged by Lowery, the Hearing Officer is left only with Lowery's testimony regarding her interactions with Watson. Lowery testified she avoided him when possible, and she was often shocked and upset at his behavior. While that would be sufficient, the Hearing Officer also has the testimony of DeGreef who described Lowery as looking amazed at Watson's behavior at the Breakbulk conference and her looking like she was trying to shrug it off. Not one witness testified Lowery looked to be enjoying Watson's behavior or was encouraging his behavior. The overwhelming evidence of record shows Watson's conduct toward Lowery was unwelcome and unwanted.

Lowery has successfully established a prima facie case of hostile work environment through direct evidence. Sarens has failed to show that unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief. *See Admin. R. Mont. 24.9.610(5)*. Therefore,

Lowery prevails on her claim that Watson’s discriminatory conduct was based on her sex and resulted in a hostile work environment.

D. Lowery’s Termination

1. *Lowery’s Claim that her Termination was Discriminatory*

Lowery contends that her layoff in November 2017 was related to Watson’s harassment of her. Lowery argues Watson played a “major role in [her] termination, and did so because he was angry that she had reported the harassment.” *Lowery Brief*, p. 14. Sarens argues Watson played no role in the decision and was merely the means by which the layoff was communicated to Lowery. Sarens notes that only Hussey and Leybaert were involved in the ultimate decision as to who would be laid off during that period.

A charging party establishes a prima facie case with evidence sufficient to convince a reasonable fact finder that all of the elements of the prima facie case exist. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In terms of the decision to include Lowery in the list of employees laid off in November 2019, there is no direct evidence pointing to a discriminatory intent. Lowery may establish a prima facie case based on circumstantial evidence by showing: (1) she is a member of a protected class; (2) she was qualified for her position and performing her job satisfactorily; (3) she experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. *Hawn v. Exec. Jet Mgmt.*, 615 F.3d 1151 (9th Cir. 2010)(internal citation omitted).

“[A] plaintiff may establish a prima facie case of discrimination by showing ‘through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of discrimination.’ *Merrick* at 1146 (internal citations omitted). Ultimately, Lowery must show that her protected trait (i.e., sex) actually motivated Sarens to lay her off in November 2017. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). The fact of the plaintiff’s protected class must have “actually played a role in [the employer’s decisionmaking] process and had a determinative influence on the outcome.” *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000) (internal citation omitted). In determining whether a prima facie case has been established, the overriding inquiry is whether the evidence is sufficient to support an inference of discrimination. *See Texas Dept. of*

Community Affairs v. Burdine, 450 U.S. 248, 252, 101 S. Ct. 1089, 1093-1095, 67 L. Ed. 2d 207, 215-217 (1981)

If Lowery satisfies this burden, Sarens must then articulate a legitimate, nondiscriminatory reason for the challenged action. Finally, if the employer satisfies this burden, the employee must show that the "reason is pretextual '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.'" *Chuang*, 225 F.3d at 1123-24 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

When the alleged harasser is the decisionmaker for the tangible employment action, this gives rise to an inference that the harasser's action was taken because of the plaintiff's sex. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998). When the harasser is not the decisionmaker, however, the plaintiff may not benefit from the inference of causation that would arise from their common identity. *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999). In this situation, the plaintiff must establish the requisite causal link by showing that the decisionmaker, without having independently evaluated the plaintiff's situation, acted in accordance with the harasser's wishes in taking the tangible employment action against the plaintiff. *Llampallas*, 163 F.3d at 1249 (11th Cir. 1998). Although temporal proximity between the tangible employment action and the harassment may be sufficient to establish a prima facie case, *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000), such an inference may be negated by un rebutted evidence showing the tangible employment action was based on grounds independent of the alleged harassment. *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1312 (9th Cir. 2002)(noting that "causation can be inferred from timing alone" and collecting cases).

Ultimately, the question is whether it is more likely than not that the employer's conduct was motivated solely by intentional discrimination. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). In other words, does the preponderance of the evidence tend to support the conclusion that the action resulted from a discriminatory motive? *Laudert.*, 2000 MT at ¶ 38. See also *Sischo-Nownejad v. Merced Cmty. College Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991).

Lowery is a member of a protected class based upon her sex. Lowery was clearly qualified for the position she held at the time of her layoff based upon her most recent performance appraisal and the total lack of evidence offered showing any

performance issues. Lowery obviously suffered an adverse employment action when Sarens terminated her employment.

Lowery offered no evidence showing she was treated less favorably in the layoff than similarly situated individuals outside of her protected class. Instead, Lowery argues that, because Watson subjected her to sexual harassment and because he was involved in the decision to terminate her, there is an inference that his discriminatory animus motivated his decisions. *See Llampallas*, 163 F.3d at 1247. Lowery contends she need prove no more because she “may establish her entire case simply by showing that she was sexually harassed by a fellow employee, and that the harasser took a tangible employment action against her.” *Id.*

“[W]hen a plaintiff proves that she was subjected to a hostile environment, the next and potentially final step in the typical Title VII case is to ascertain whether she suffered a tangible employment action related to that hostile environment.” *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 960 (9th Cir. 2004). Therefore, the final issue is whether Sarens’ decision to lay off Lowery resulted from a discriminatory motive. *See Elvig*, 375 F.3d at 959 (quoting *Nichols*, 256 F.3d at 855).

As noted above, the Hearing Officer has found Watson had supervisory authority over Lowery. While not her direct supervisor, Sarens uses a matrix management model where there are direct line reports and dotted line reports. Lowery’s direct line report went to Kyrimi, who was the Group Marketing Manager, and Stigter, who was the Sales Manager. Hussey Hrg. Tr. 242:2-21. However, Watson was the Country Manager responsible for overseeing the day-to-day operations of Sarens’ North America business. Watson Depo. Tr. 6:22-8:7. In that role, Watson exercised supervisory authority over both Lowery and the individuals to whom she reported. Further, Watson assumed actual supervisory control, or at least informed Lowery that he had, in October 2017.

However, despite his supervisory status, the evidence shows Watson was not a decisionmaker in her layoff. Hussey testified Watson was consulted at the start of the layoff process regarding what groups or functions could potentially be cut without adversely affecting Sarens’ daily operations and its potential for growth in the North American market. Hussey Hrg. Tr. 247:1-21. Hussey denied receiving any direct recommendations from Watson as to whom would be subject to layoff and testified it was he and Leybaert who made the final decision regarding who would be laid off. Hussey Hrg. Tr. 243:17-244:24. Hussey denied that Watson, Stigter or Kyrimi were involved in the decision to lay off Lowery or that anyone of them had prior notice of Lowery’s inclusion in the November 2017 layoff. Hussey Hrg. Tr. 247:7-248:4.

Hussey testified the ultimate decision as to who would be included in the November 2017 layoff was strictly his and Leybaert's decision.

Lowery's prima facie case of discriminatory termination fails. There is no evidence of record showing Watson had a role in deciding who and who would not be included in the November 2017 layoff. There is no evidence showing Hussey and Leybaert relied on any specific recommendation by Watson that Lowery be laid off. Finally, there is no evidence showing that Lowery was laid off due to her sex and/or sexual orientation or that the layoff was related to the hostile work environment created by Watson. Therefore, while Lowery has successfully established a prima facie case of hostile work environment that was not successfully rebutted by Sarens, her claim of discriminatory termination fails.

Even if Lowery was successful in establishing a prima facie case of discriminatory termination, Sarens has produced sufficient evidence showing her termination was as a result of a layoff that resulted from an economic downturn exacerbated by the damage wrought by the storms that flooded Houston in 2017 and damaged Sarens' Houston facility. Sarens has offered a legitimate, nondiscriminatory reason for Lowery's layoff. Lowery must now demonstrate that the proffered reason or reasons were pretext for intentional discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 356, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000).

Lowery may rely on the evidence used to establish her prima facie case, but she is also free to offer additional evidence. *Lyons v. England*, 307 F.3d 1092, 1112-13 (9th Cir. 2002); *Chuang*, 225 F.3d at 1127. "[T]he ultimate fact of intentional discrimination" may be inferred without additional proof once the plaintiff has made out his prima facie case if the fact finder believes the employer's proffered nondiscriminatory reasons lack credibility. *Lyons*, 307 F.3d at 1112-13 (quoting *Reeves*, 530 U.S. at 147); *see also Chuang*, 225 F.3d at 1127.

Lowery may rely on circumstantial evidence or direct evidence or both in establishing Sarens' nondiscriminatory explanation is a pretext for discrimination. *Chuang*, 225 F.3d at 1127. Typically, circumstantial evidence offered by a plaintiff to prove pretext will take one of two forms. *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003), as amended (Jan. 6, 2004). The plaintiff may "make an affirmative case that the employer is biased." *Coghlan*, 413 F.3d at 1095; *Stegall*, 350 F.3d at 1066 (describing the first option as "persuading the court that a discriminatory reason more likely motivated the employer"). Or, the plaintiff may "make [her] case negatively, by

showing that the employer's proffered explanation for the adverse action is 'unworthy of credence.'" *Coghlan*, 413 F.3d at 1095.

Lowery has not offered direct evidence showing the explanation offered by Sarens as to why she was included in the November 2017 layoff is unworthy of credence. Lowery, instead, argues pretext can be established due to Watson's sexual harassment of her and her refusal to accede to his sexually aggressive and harassing behavior. Specifically, Lowery points to Watson's comments to Rademacher after retrieving Lowery's layoff paperwork before he traveled to Missoula to deliver the news. Lowery contends this is enough to show that a discriminatory reason more likely than not motivated Sarens' decision to lay her off. However, there is no evidence showing that either Hussey or Leybaert were specifically aware of her issues with Watson. Hussey testified he was aware that Lowery had discussed issues she had with Watson at the Breakbulk conference, but he was not aware of the specifics of her complaints. Hussey Hrg. Tr. 251:11-16. Hussey denied Watson had any say in whether Lowery was laid off. Hussey Hrg. Tr. 247:1-11.

Lowery notes the confusion of Watson as to whether Kyrimi offered her name for the list of employees to be laid off. See Watson Depo. Tr. 36:9-37:7. Hussey contradicted that and denied that neither Kyrimi nor Stigter were involved in the layoff process. Hussey Hrg. Tr. 247:25-248:13. Watson conceded in his testimony that he did not "know how it went down in specifics . . . The decision for the reduction in head count came from the corporate office." Watson Depo. Tr. 37:1-7. Clearly, Watson was not involved directly in the layoff process, and he had no direct knowledge of how the layoff decisions were made. Those decisions were made by Hussey and Leybaert, and there has been no showing that either knew anything more that Lowery and others had complained about Watson's behavior at the Breakbulk conference. Even if Lowery was able to establish a prima facie case of discriminatory termination, she cannot show that Sarens' proffered reasons were pretext for a discriminatory intent. Therefore, Lowery has failed to show that her discharge was for discriminatory reasons.

2. *Lowery's Claim of Retaliation*

Lowery also contends her lay off was in retaliation for her having complained about Watson's behavior in October 2017. Retaliation under Montana law can be found where a person is subjected to discharge 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 are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link exists between the protected activity and the employer's action. See *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶17, 326 Mont. 491, 111 P.3d 202; see also *Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. See generally *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). A retaliation claim is a separate action from the original discrimination suit. See *Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989).

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

Lowery clearly engaged in protected activity when she spoke with Thomas regarding her concerns about Watson's behavior as her supervisor during the Breakbulk conference. See Admin. R. Mont. 24.9.603(1) ("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."). Lowery also complained about Watson's behavior to Eggert, who was a member of management whose office was in Missoula and Stigter, who was a member of Sarens' regional management team, within days of the Breakbulk conference.

Further, Sarens took an adverse employment action against Lowery when it laid her off in November 2017, which was just a few short weeks after her complaint. See Admin. R. Mont. 24.9.603 (2). Lowery has successfully established the first two elements of her prima facie retaliation case.

Lowery argues she suffered an adverse employment action when she was "effectively denied a promotion" because she declined Watson's offer to relocate to

Houston that would have afforded her a significant salary increase. "[T]he adverse action concept has a broader meaning" in retaliation cases than it does in discrimination cases. *Baird v. Gotbaum*, 662 F.3d 1246, 1249, 398 U.S. App. D.C. 290 (D.C. Cir. 2011) (internal quotation marks omitted). "[A]ctions giving rise to [retaliation] claims are 'not limited to discriminatory actions that affect the terms and conditions of employment,' but reach any harm that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)). Clearly, a reasonable worker would be dissuaded from engaging in protected activity under circumstances such as in this case where the complaining employee is laid off within a few short weeks after voicing his or her concerns about a supervisor's discriminatory conduct. However, a refusal to accept what appears to have been a promotion was a decision made by Lowery and not one made by Sarens. In extending such an offer, Sarens made no move to negatively alter her working conditions, her rate of pay, or any other aspect of her employment that could remotely be considered a tangible employment action. Lowery's refusal of Watson's offer cannot constitute an adverse employment action under the MHRA. It is unclear as to why Lowery was not offered a transfer to the Houston office in lieu of a layoff given that Watson's initial offer of a transfer occurred only weeks prior to Lowery's layoff.

Lowery is now required to establish the third element of a prima facie retaliation claim, which requires her to show a causal link between the protected activity and the adverse employment action. In order to establish this causal link, the evidence must show the employer's adverse employment action was based in part on its knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). Lowery must show "by a preponderance of the evidence that engaging in the protected activity was one of the reasons for [her] firing and that but for such activity [she] would not have been fired." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (citations omitted)

Proof of a causal connection between a protected activity and a material adverse action can also be established with evidence of a close proximity in time between the protected activity and the adverse action, different and more favorable treatment of persons who did not engage in protected activity, departures from established rules or procedures, proof that the respondent intended to take adverse action because of the protected activity or other proof that the adverse action was motivated in whole or in part by the protected activity. Mont. Admin. R. 24.9.610(2)(b).

There has been no evidence offered showing Sarens treated individuals who did not engage in protected activity differently or more favorably than it treated Lowery. There has been no evidence offered showing Hussey and Leybaert made the decision to lay off Lowery due to her protected activity. Given that Watson had no decision making role in the layoff process, and he was ultimately discharged within 30 days of Lowery's layoff, it is more likely than not that her protected activity played no part in the decision to lay her off.

However, Lowery may establish the requisite causal link merely by showing temporal proximity between her protected activity and her layoff on November 28, 2017. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (Causation "may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision"); *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.") (internal quotations omitted).

The Supreme Court has clarified that for a plaintiff to establish causation in prima facie case of retaliation only on the basis of "temporal proximity between an employer's knowledge of protected activity and an adverse employment action, . . . the temporal proximity must be very close." *Clark Cnty. Sch. Dist.*, 532 U.S. at 273 (citing cases from circuit courts holding that a three-month or four-month time lapse is insufficient to infer causation). "[I]n order to support an inference of retaliatory motive, the termination must have occurred 'fairly soon after the employee's protected expression.'" *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000). A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation. *See Id.* (finding that a one-year interval between the protected expression and the employee's termination, standing alone, is too long to raise an inference of discrimination); *see also Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398-99 (7th Cir. 1999) (four months too long); *Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998) (eight months), cert. denied, 528 U.S. 988, 120 S. Ct. 450, 145 L. Ed. 2d 367 (1999); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998) (five months); *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997) (four months).

In this case, the amount of time between the protected activity and the adverse employment action is not a matter of months, but, rather, a matter of weeks.

Thomas contacted Lowery in early- to mid-October 2017 about Watson's behavior at the Breakbulk conference. Lowery reported her concerns about Watson to both Eggert and Stigert during that same period. Lowery was laid off on November 28, 2017. A period of three to six weeks between the protected activity and the adverse employment action is sufficiently short so as to establish a causal link between the protected activity and adverse employment action. Further, Hussey, who was a decisionmaker in the layoff process, had knowledge of Lowery's complaint, albeit not the specifics of her complaint. Therefore, Lowery has established her prima facie case of retaliation.

As noted above, Sarens legitimate, nondiscriminatory reason for Lowery's layoff rebuts Lowery's prima facie of retaliation. *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.) Lowery is now left with the ultimate burden of showing a retaliatory reason motivated the employer or that its reason was not the true reasons for its action or that the reason offered is pretext for retaliation. *Crockett*, 234 Mont. at 95 (citations omitted). "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Heiat*, 275 Mont. 322, 328, 912 p.2d 787, 791 (quoting *St. Mary's Honor Center*, 509 U.S. at 515). *See also Vortex Fishing Sys., Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶15, 38 p.3d 836, ¶15. "To establish pretext, [Lowery] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the] proffered legitimate reasons for its actions that a reasonable [fact finder] could rationally find them unworthy of credence'." *Mageno v. Penske Truck Leasing, Inc.*, 213 f.3d 642 (9th Cir. 2000)(quoting *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (1999)).

In the interest of brevity, the discussion above shows Lowery cannot establish that Sarens' proffered reasons for her layoff was false or pretext for discrimination. There has been no showing that retaliation was the real reason for the challenged conduct. The evidence shows Watson's role in the layoff process was limited to identifying what functions could be reduced without adversely impacting Sarens' daily operations. Hussey denied that Watson ever offered Lowery's name for possible layoff or that Watson was even consulted as to which individuals should be laid off. While Hussey clearly had knowledge that Lowery had complained about Watson's behavior, there is no evidence showing that Hussey and Leybaert based their decision to lay Lowery off on anything other than the financial condition of Sarens at that time. This is evidenced by the fact that others were laid off during this

period and there is no apparent connection between Lowery's protected activity and those individuals being laid off. Lowery has not shown Sarens' reasons for her layoff were unworthy of credence.

Lowery argues Sarens' decision to cut its marketing department in the face of depressed economic conditions was unreasonable and evidence of its intent to retaliate against her for protected activity. The Hearing Officer is not in the position to second-guess the business decisions made by Sarens management. The Hearing Officer can only decide whether the decision to lay off Lowery violated the protections of the MHRA. "Courts only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless." *Villiarimo*, 281 F.3d at 1063 (internal quotation marks omitted); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000) ("That Quaker made unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age."); *Green v. Maricopa County Cmty. Coll. Sch. Dist.*, 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003) ("The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered. We do not sit as a superpersonnel department that reexamines an entity's business decision and reviews the propriety of the decision.") (internal quotation marks omitted).

The hearing officer is not persuaded that Sarens' decision to lay off Lowery was in retaliation for her protected activity of complaining about Watson's discriminatory behavior. While Hussey clearly had knowledge of her complaint and the adverse employment action occurred a short time after her protected activity, Lowery has failed to show that but for her protected activity she would not have been laid off in November 2017. Therefore, Lowery's retaliation claim fails.

E. Sarens' Ellerth/Faragher Defense

Sarens argues it is entitled to the affirmative defense outlined by the Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. at 807-08 and *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998). In *Faragher*, the Supreme Court held that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Accord Ellerth*, 524 U.S. at 765 (stating same). 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 ©. Geoffrey Weirich ed., 3d ed. 2002 supp.).

Id.

The substantial and credible evidence of record shows that Sarens' decision to lay off Lowery and other employees in November 2017 was unrelated to the hostile work environment created by Watson and to Lowery's complaint regarding Watson's behavior in October 2017. As noted above, Sarens may still invoke the *Ellerth/Faragher* defense to avoid liability for Watson's discriminatory conduct.

Sarens argues it has an harassment policy that requires investigation of all complaints of harassment. Sarens points to its discipline of Watson as a result of the McDonald complaint and its efforts to investigate complaints regarding Watson's

behavior at the Breakbulk conference. Sarens argues Lowery knew or should have known about its harassment policy and she failed to avail herself of any of the preventative or corrective opportunities allowed for under that policy.

Sarens' harassment policy prohibits "unlawful harassment because of race, color, religious creed, sex, marital status, age, national origin, physical handicap, medical condition or any other protected basis . . . ". C.P. Ex. 1, p. 13. Employees who believe they have been unlawfully harassed are required to provide a written complaint to their supervisor or another Company supervisor, President or Personnel Management of the company as soon as possible after the incident. *Id.* The policy provides:

An employee determined by the Company to be responsible for unlawful harassment will be subject to appropriate disciplinary action, up to and including termination. Whatever action is taken against the harasser will be made known to the complaining employee and the Company will take appropriate action to remedy any loss [to the employee] resulting from harassment."

Id.

The policy prohibits retaliation against any employee for filing a complaint.

Id.

Watson's discriminatory conduct toward women was the subject of the McDonald complaint. Boza investigated McDonald's complaint and substantiated one of her four allegations. Boza recommended Watson receive a written reprimand and be required to undergo sexual harassment training. Boza further recommended Sarens update its harassment policy. C.P. Ex. 20. Leybaert and Hussey decided only a verbal warning was necessary. However, Watson refused to accept even a verbal warning. Sarens did not update its harassment policy, and Watson was not required to attend any sexual harassment training until a company-wide training was held in December 2017.

Watson's brazen disregard of Sarens' harassment policy even after he was put on notice that his behavior violated Sarens' harassment policy is troubling. Watson clearly felt no compunction in engaging in discriminatory conduct toward Lowery even after he supposedly received a verbal reprimand from Leybaert and Hussey. Its questionable that Watson received any kind of reprimand given his behavior. Further, his comment to Lowery that he had been the subject of a harassment

complaint but he refused to accept the warning would tend to suggest that he not only failed to take the matter seriously but he felt no pressure to correct his behavior. Given those circumstances, Lowery's failure to avail herself of the remedies available under Sarens' harassment policy was not unreasonable. Lowery had no reasonable basis for believing that complaining about Watson's behavior to Sarens' management would change or correct his behavior.

Further, given the conduct of Sarens' management following the receipt of Lowery's complaint, it appears Lowery's concerns that nothing would be done was warranted. Not one member of management asked Lowery to prepare a written statement of her concerns although that was required under Sarens' harassment policy. Eggert personally observed Watson's boorish conduct and did nothing to report it. Thomas was clearly aware that employees had concerns about Watson's behavior, and she did nothing about it. Rademacher, who claimed to be so shocked at Watson's comments regarding Lowery prior to Lowery's layoff, chose not to report that comment to Hussey although she had the opportunity and the duty to do so. Clearly, while Sarens has a harassment policy in place, the individuals responsible for enforcing that policy chose not to act to ensure that its employees were free of workplace harassment.

The substantial and credible evidence of record shows Sarens failed to exercise reasonable care to correct and to prevent Watson's harassing behavior despite having actual and constructive notice of Watson's discriminatory conduct as a result of the McDonald complaint. Further, given the testimony of Perzan, DeGreef and Rademacher, it would appear that Watson felt no pressure to change his behavior in the workplace despite a verbal reprimand having been issued. Although Sarens' harassment policy is fairly comprehensive, Lowery's failure to report her concerns regarding Watson's behavior prior to October 2018 was not unreasonable given that Watson received no real or effective discipline as a result of the McDonald complaint. Therefore, Sarens cannot avoid liability for Watson's sexually harassing behavior toward Lowery through the invocation of the *Ellerth/Faragher* defense.

Sarens did not offer the "mixed motive" defense addressed by the Montana Supreme Court in *Laudert v. Richland County Sheriff's Dep't.* (2000), 301 Mont. 114, 7 P.3d 386 in which it considered the analyses set forth in *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, 287 Mont. 196, 953 P.2d 703 and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989). In *Laudert*, the court found a "mixed motive" analysis applies when the charging party produces direct evidence that an unlawful consideration played a motivating role in the employer's decision and the parties do not agree on the reason for the challenged action. *Id.* at 122. In this case, as noted above, Lowery

cannot show that Sarens would not have laid her off without any consideration of her having complained regarding Watson's conduct toward her. The evidence shows Sarens would have made the same decision to lay her off regardless of Watson's behavior or Lowery's complaints regarding Watson's behavior.

F. Damages

1. *Emotional Distress Damages*

Lowery has not shown she was terminated from employment because of her sex or in retaliation for protected activity, and, therefore, is not reasonably due damages related to lost earnings because there is no causal connection between the discrimination and loss of earnings. However, Lowery did suffer emotional distress damages and is due compensation as a result. With regard to Lowery's past and ongoing emotional damages, the Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Lowery as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages).

The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See Vainio*, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted). However, because of the broad remunerative purpose of the civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions. *Id.* Medical evidence is not required to establish emotional distress damages, and such damages may be established by testimony of inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991)(“No evidence of economic loss or medical evidence of medical or physical symptoms stemming from the humiliation need not be submitted.”).

Lowery has provided sufficient evidence concerning the impact that the discrimination had on her life. While at Sarens, Lowery was unhappy in a position she had previously found rewarding due to the discriminatory conduct of Watson. Among other things, Lowery experienced and continues to experience difficulties, sleeping, feelings of powerlessness, anxiety, and depression as a result of the sexual

harassment. Lowery has been unable to participate in regular, formal therapy due to her economic circumstances. Lowery's sister testified about the change in Lowery's personality and how uncomfortable Lowery felt around Watson and his treatment of her. Lowery Hrg. Tr. 193:15-22.

The Hearing Officer must focus on evidence of the qualitative harm suffered by Lowery, and not simply on the severity or pervasiveness of the conduct constituting the harassment. *See, e.g., Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 513-14 (9th Cir. 2000) (focusing on evidence of harm suffered by plaintiff, e.g., anxiety, rashes, etc.); *see also Peyton v. DiMario*, 351 U.S. App. D.C. 118, 287 F.3d 1121, 1128 (D.C. Cir. 2002) ("To the extent that the egregiousness of GPO's conduct was considered, it was merely as a proxy to assess the distress inflicted upon Peyton."). "The severity or pervasiveness of the conduct is relevant insofar as it provides probative evidence from which a jury may infer the nature and degree of emotional injury suffered, but direct evidence of the injury is still the primary proof." *Velez v. Roche*, 335 F. Supp. 2d 1022, 1038 (N.D. Cal. 2004)

Lowery seeks \$100,000.00 in emotional distress damages. Lowery points to the ruling in *Groven v. Havre Aerie Eagles #166*, Case No. 1877-2010 (Sept. 28, 2011)(order after remand) in support of the amount requested. In *Groven*, the Charging Party worked for the Respondent for approximately five years. She was subjected to repeated groping by the General Manager for several years. Charging Party complained to members of the Board and nothing was done. The Hearing Officer ultimately awarded \$100,000.00 to compensate her for the emotional distress she suffered as a result of the sexual harassment and termination, which was found to be related to the discrimination.

In *Stover v. The Bum Steer and Jay Wilson*, Case No. 481-2013 & 480-2013 (March 28, 2014), the Hearing Officer awarded \$100,000.00 to Stover, who had suffered several months of sexual harassment that escalated to a physical attack.

In *Benjamin v. Anderson*, 2005 MT 123, the Supreme Court affirmed the Hearing Officer's award of \$75,000.00 to Benjamin for emotional distress damages. In *Benjamin*, the Hearing Officer found Benjamin had developed psychological problems after she lost her job due to the employer's failure to address her sexual assault by the manager of the business and continuing discriminatory conduct against Benjamin. *Id.* at ¶69.

Lowery seeks \$100,000.00 in emotional distress damages. The amount sought is based, in part, on a finding that Lowery's termination was a consequence of the

sexual harassment and that in itself caused great emotional distress, which is not a conclusion of the Hearing Officer. Further, the cases noted above included not only verbal sexual harassment in the work place but offensive physical contact by the supervisor against his subordinate, which did not occur in this case. Therefore, the Hearing Officer finds that, based on the stated effect Watson's continued sexual harassment had on Lowery, it is reasonable to award \$50,000.00 in damages for Lowery's emotional distress.

2. *Affirmative Relief*

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

VI. CONCLUSIONS OF LAW

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

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

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

4. Amy Lowery proved that Sarens USA, Inc. violated the Montana Human Rights Act when it discriminated against her illegally because of sex. Mont. Code Ann. §§ 49-2-303(1).

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

6. Amy Lowery is owed damages for emotional distress in the amount of \$50,000.00.

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

VII. ORDER

1. Judgment is granted in favor of Amy Lowery against Sarens USA, Inc. for discriminating against her on the basis of sex in violation of the Montana Human Rights Act.

2. Sarens USA, Inc. must pay Lowery the sum of \$50,000.00 for emotional distress within 30 days of the date of this decision.

3. Sarens USA, Inc. must consult with an attorney, who may be its in-house attorney, to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for its board members, managers, and supervisors to prevent and timely remedy sexual discrimination on the job. Under the policies, Sarens USA, Inc. employees will receive information on how to report complaints of discrimination. The policies must be approved by the Montana Human Rights Bureau. In addition, Sarens USA, Inc. shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 20th day of September, 2019.

/s/ CAROLINE A. HOLIEN

Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Amy Lowery, Charging Party and her attorney, Philip Hohenlohe: and Sarens USA, Inc., Respondent, and its attorneys, Micah Dawson and Amanda Marvin:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(C) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

**Human Rights Commission
c/o Annah Howard
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728**

You must serve **ALSO** your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.