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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NOS. 448-2019:

CHRISTY MCEACHERN,	)	
	)	
Charging Party,	)	
	)	**AMENDED HEARING OFFICER**
	)	**DECISION AND NOTICE OF**
vs.	)	**ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
TREASURE STATE ASSOCIATES, LLC,	)	
	)	
Respondent.	)	

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This amended decision is issued to protect the privacy interests of non-parties. No substantive change has been made.

I. PROCEDURAL AND PRELIMINARY MATTERS

On March 1, 2018, the Charging Party, Christy McEachern filed a Charge of Discrimination with the Montana Department of Labor and Industry's Human Rights Bureau (HRB) alleging Tom Schulke - Mountain West Farm Bureau Insurance discriminated against her on the basis of sex by creating a hostile work environment. On May 28, 2018, McEachern filed an Amended Charge of Discrimination that changed the named Respondent as Treasure State Associates (TSA) and Mountain West Farm Bureau Insurance (Mountain West). McEachern subsequently amended her Charge of Discrimination to allege that TSA retaliated against her for protected activity.

On September 27, 2018, the matter was transferred to the Office of Administrative Hearings (OAH). There was some confusion as to what entities were properly named as Respondents in this matter due to HRB having issued separate Final Investigative Reports for both TSA and Mountain West.

On December 12, 2018, McEachern filed an unopposed Motion to Amend Complaint to include the allegation that her discharge was retaliatory and discriminatory.

On December 17, 2018, the Hearing Officer issued an Order Dismissing Mountain West Farm Bureau Mutual Insurance Company as a respondent in this matter based upon the parties' stipulation that it be dismissed, with prejudice, as a party/respondent.

On January 14, 2019, Hearing Office Caroline A. Holien convened a contested case hearing in this matter. Philip A. Hohenlohe, Attorney at Law, represented McEachern. Thomas C. Bancroft, Attorney at Law, represented TSA. Thomas W. Schulke, TSA Owner, appeared as TSA designated representative.

At hearing, McEachern, Schulke, Jordan Young, Karen Johnson, Keriann Knadler, Sara Tucker, Melany King, Bruce Anfinson, Jerad J. Grove, Sean Cirullo, Delyn Porter, Sandra Bravo, Catherine Culver, Stephanie Ratchford, Cassandra Colby, Jennifer Williams, Dina Schulke, and Kelsey Langemo testified under oath.

The parties stipulated to the admission of Charging Party's Exhibits 1 through 16 and Respondent's Exhibits 101 through 116.

The parties graciouosly 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 on March 15, 2019. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did Treasure State Associates, LLC, discriminate and/or retaliate against Christy McEachern on the basis of gender in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Treasure State Associates, LLC, did illegally discriminate and/or retaliate against Christy McEachern on the basis of gender 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 Treasure State Associates, LLC, did illegally discriminate and/or retaliate against Christy McEachern on the basis of gender as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. UNCONTESTED FACTS

1. Charging Party Christina ("Christy") McEachern was employed by Respondent Treasure State Associates, LLC, (TSA), as a licensed policy analyst beginning on or about August 29, 2016.

2. TSA is a single member limited liability company owned and operated by Thomas W. Schulke.

3. Schulke was McEachern's supervisor during her employment with TSA.

4. On February 2, 2018, McEachern's employment with TSA was terminated.

5. Schulke was the primary decisionmaker regarding the termination of McEachern's employment.

IV. FINDINGS OF FACT

6. Schulke has been an appointed insurance agent of Mountain West Farm Bureau and Mountain West Farm Bureau Mutual Insurance Company's (Mountain West) for more than 23 years. Schulke Hrg. Tr. 293:14-20. Moutain West provides insurance products, which Schulke is authorized to sell pursuant to an Agents Contract between Mountain West and Schulke. Mountain West has no supervisory authority over Schulke or any TSA employee. *See Mountain West Farm Bureau Mutual Insurance Co's Opposition to Charging Party's Motion to Amend Caption* (filed 10/22/2018).

7. Schulke manages the day-to-day operations of TSA. Day-to-day operations include serving existing client accounts; addressing customer questions and concerns; and other administrative duties. Schulke Hrg. Tr. 295:18-25-296:1-3.

8. Schulke and McEachern became acquainted when McEachern worked for Tim McAlpine, another Mountain West Farm Bureau insurance agent, who at that time shared office space with Schulke. McEachern Hrg. Tr. 11:24-12:4. Schulke and

McAlpine still share an ownership interest in the building where McAlpine has his office. Schulke Hrg. Tr. 291:10-20; 297:19-23.

9. McEachern had a "strained" relationship with McAlpine, who is described as being antisocial. Schulke Hrg. Tr. 302:6-12. Schulke gave her pointers as to how to successfully work with McAlpine. McEachern Hrg. Tr. 11:24-12:4. While Schulke and McEachern were friendly when she worked for McAlpine, they were not the type of friends who "did outside stuff." McEachern Hrg. Tr. 12:1-4.

10. McEachern and Schulke frequently sent each other text messages while she worked for McAlpine. McEachern and Schulke frequently exchanged jokes and messages regarding McAlpine, as well as several personal jokes. *See* Respondent Exhibit (Resp. Ex.) 1. The last email message exchanged between McEachern and Schulke occurred on November 30, 2017. Schulke Hrg. Tr. 303:23-304:1-2.

11. Schulke was notified by his Agency Manager in 2016 that another agent in town was separating from the Mountain West, and Mountain West wanted Schulke to take over that agent's book of business. Schulke Hrg. Tr. 292:5 - 293:24.

12. For a period of time, Schulke maintained two offices after taking over the other agency's business. Schulke Hrg. Tr. 294:1-8. Schulke had three employees at that time at his original office - Cathy Culver, Stephanie Ratchford, and Karen Johnson - and faced the task of staffing the new office after several of the employees of the former agent quit. Schulke Hrg. Tr. 294:13-19; 300:9-12.

13. During this transitional period, Schulke was supported by an agent who had an agency in Dillon. The other agent ultimately left after only two months leaving Schulke as the sole agent in control of TSA. Schulke Hrg. Tr. 296:4-19; 299:21-25.

14. Culver, who has been Schulke's office manager for several years, contacted McEachern during sometime in 2016 and told her that Schulke wanted her to work for his office on the farm and ranch policies. McEachern understood she was hired, in part, because of her good attitude and "smiley" nature. McEachern Hrg. Tr. 10:20-11:6.

15. In August 2016, McEachern began working as a licensed policy analyst for Schulke and TSA. McEachern Hrg. Tr. 10:1-7. As a licensed policy analyst, McEachern was responsible for commercial construction/contractors and farm and ranch policies. McEachern's position required a lot of customer contact. McEachern

liked her job and felt she performed her job duties more than adequately. McEachern Hrg. Tr. 13:13-14:6.

16. TSA was behind on its mandatory annual reviews/audits when McEachern was hired. As a result, McEachern focused most of her attention on clearing the backlog during the initial months of her employment. McEachern frequently worked late hours and worked from home in an effort to get the office caught up on the reviews and audits. McEachern Hrg. Tr. 12:17-13:23.

17. When McEachern initially started at TSA, her working hours were 9:00 a.m. to 4:00 p.m. McEachern Hrg. Tr. 70:2-9. McEachern has two young daughters, one of whom suffers from medical issues. McEachern informed Schulke of the struggles her daughter was having, which required her to take her daughter to frequent medical appointments. McEachern understood Schulke was prepared to be lenient with her attendance because he, like her, had been a single parent. McEachern Hrg. Tr. 64:12-19; 70:2-15.

18. McEachern had approached Schulke on at least one occasion expressing concern about how her attendance might affect her employment security. Schulke assured McEachern that she had nothing to worry about. Schulke approved McEachern's leave requests and advised her that her office hours were flexible due to her daughter's health issues. McEachern Hrg. Tr. 64:6-19; 70:1-15.

19. McEachern was generally happy in her employment with TSA during the early months of her employment. McEachern got along with her co-workers and was always willing to help those who came to her with questions.

20. McEachern performed her job duties to the best of her ability and took her job duties seriously. There were no customer complaints or allegations that McEachern failed to act in a professional manner when working with clients.

21. McEachern generally liked Schulke at the beginning of her employment at TSA. However, in the summer of 2017, McEachern felt Schulke's conduct toward her started to change. McEachern felt his jokes and comments became more inappropriate and more directed at her. McEachern Hrg. Tr. 14:7-21.

22. In June 2017, McEachern and Schulke traveled together to White Sulphur Springs. Schulke, who was driving, told McEachern that the agent who had assisted him in opening the TSA office had an open marriage with his spouse and they were swingers. Schulke asked McEachern if she had ever had a threesome. McEachern

was made uncomfortable and angry by Schulke's comments and did not welcome his inquiry. McEachern Hrg. Tr. 15:1-16:2.

23. In July 2017, McEachern was preparing to leave the kitchen area of the TSA office when Schulke approached her. Schulke looked her up and down and commented on her looking tan and looking as though she had lost weight. Schulke then asked her who she was sleeping with. McEachern was uncomfortable and embarrassed at Schulke's comments. McEachern Hrg. Tr. 16:3-22l 17:5-9.

24. Schulke's comments were overheard by Sara Elizabeth Tucker, another TSA employee who also lived with McEachern. Tucker later asked McEachern about what she had heard, and McEachern told her how much the comments had upset her.

25. McEachern also told her friend, Melany King, about Schulke's comment shortly after it happened. King Hrg. Tr. 333:4-17.

26. In August 2017, McEachern and Schulke met with a husband and wife regarding a farm and ranch policy in McEachern's office. McEachern was seated at her desk and the wife was sitting across the desk in front of McEachern. The husband was seated closer to Schulke. As McEachern got up from her chair to pick up a paper from the printer, Schulke pulled her hair causing McEachern's head to be pulled back and whispered in her ear, "Bet you like that, huh?" McEachern felt her face go red and she felt shock and upset at Schulke's behavior, which she interpreted as being sexual. McEachern Hrg. Tr. 18:13-19:15.

27. McEachern confided in her friends and co-workers about the incident. McEachern was clearly upset and uncomfortable when relating the details of the incident. McEachern also told a friend who could tell she was extremely upset. See Young Hrg. Tr. 196:7-198:13; Knadler Hrg. Tr. 234:12-235:10; Tucker Hrg. Tr. 268:4-25; King Hrg. Tr. 333:4-17.

28. In August 2017, John Larson, an IT worker from the Mountain West Farm Bureau Wyoming office, was in Helena. Larson asked McEachern out to dinner. McEachern declined his invitation. McEachern talked to her TSA co-workers about the situation. McEachern Hrg. Tr. 26:2-13. Schulke found out and later came to her office. Schulke told McEachern she should go out with the IT worker and "take one for the team." Schulke suggested McEachern show the worker "a good time" and "take him out and have fun." McEachern told Schulke she was not interested. McEachern Hrg. Tr. 26:19-27:3.

29. The next day, McEachern attended the morning meeting with other TSA staff. The issue of Larson's date request was raised again in front of the entire staff. Schulke suggested McEachern "take one for the team" so the office could get better IT service. McEachern was embarrassed and upset about Schulke's comments. McEachern Hrg. Tr. 27:6-13.

30. In late summer or early fall 2017, McEachern was in her office discussing a policy with a co-worker, Jordan Young. Schulke came into her office while talking on his cell phone, and McEachern heard Schulke ask, "What are you wearing?" and then follow up with, "Oh, never mind. I'm in someone's office now." After Schulke ended his cell phone conversation, he put his phone in McEachern's face to show her a picture of a woman in a bikini from the abdomen down. Schulke indicated it was Jamie Carter, an agent who worked at the Idaho office. McEachern Hrg. Tr. 29:6-25.

31. McEachern had not asked to see the photo and felt it was inappropriate, awkward and weird. McEachern Hrg. Tr. 31:23-32:2.

32. McEachern told Young later that week how she felt uncomfortable due to Schulke's conduct. Young Hrg. Tr. 193:19-194:3.

33. McEachern later reported the incident to Culver. Culver responded by giggling and commenting that she thought Schulke and Carter had slept with each other at an agent's conference. McEachern had hoped Culver would speak with Schulke so he would change his behavior. Culver did not do anything in response to McEachern's concerns. McEachern Hrg. Tr. 55:17-58:1.

34. On October 12, 2017, McEachern, Schulke and other TSA employees met at the Windbag restaurant for a staff appreciation dinner hosted by Schulke. McEachern arrived late and sat in the last remaining spot which was between Schulke and Keriann Knadler. McEachern Hrg. Tr. 35:1-22.

35. Approximately 15 minutes after her arrival, Schulke placed his hand on McEachern's shoulder and began rubbing her back between her shoulder blades. Schulke rubbed McEachern's back off and on throughout the evening. McEachern asked Knadler to scoot over so she could move away from Schulke. McEachern tried leaning back in her chair so Schulke would not be able to rub her back. McEachern Hrg. Tr. 36:1-38:17.

36. Knadler observed Schulke rubbing McEachern's arm and back. McEachern also told Knadler at the table that Schulke kept rubbing her arm and touching her back. 231:14-232:18.

37. Young, who was sitting across the table from McEachern and Schulke, noticed McEachern "looked really uncomfortable" and kept shuffling in her chair. Young suspected something "weird" was going on due to McEachern's facial expressions. Young had noticed that Schulke had his arm draped over McEachern's back. Young Hrg. Tr. 190:9-191:8. McEachern later told Young that Schulke was rubbing her back and making her feel uncomfortable. Young Hrg. Tr. 191:22-25.

38. McEachern accompanied Schulke, Knadler, and Sean Cirullo, Schulke's son-in-law, to the Grub Stake after the dinner at the Windbag. McEachern sat on the opposite side of the table from Schulke. McEachern had one drink at the Grub Stake and left without any further incident. McEachern Hrg. Tr. 38:19-39:17.

39. When McEachern returned home that evening, she told Tucker that Schulke had "his arm on her . . . his hand on her arm and then also touched her back" while they were at the Windbag. Tucker Hrg. Tr. 267:5-8. Tucker described McEachern as being "creeped out" and "weirded out" that Schulke "felt like he could have that power to touch her when she didn't want it." *Id.* at 267:13-18.

40. Schulke engaged in other behavior that made McEachern uncomfortable. On one occasion, Schulke told McEachern a story about a mutual acquaintance in which he walked in on him bending his wife over the bed and "giving it to her." Schulke's "joke" made McEachern feel gross. McEachern Hrg. Tr. 40:1-24.

41. Schulke frequently made inappropriate or off-color jokes in the office. When Schulke made a joke that may be considered offensive, he would often comment, "There's a $10,000 deductible." The deductible comment was related to a former Farm Bureau agent who had been sued for sexual harassment and, as a result, other Farm Bureau agents were required to carry insurance to defend against such claims. McEachern Hrg. Tr. 44:2-6; Young Hrg. Tr. 199:20-25; Karen Johnson Hrg. Tr. 216:20-217:19; Knadler Hrg. Tr. 235:12-24; Tucker Hrg. Tr. 269:22-270:20.

42. In late 2016 or early 2017, Sandra Bravo, a young woman who had just recently been hired, was working in the file room and was kneeling on her knees. Schulke walked by with a client and commented that Brown did her best work on her knees. McEachern overheard the comment and went to check on Brown, who told her she thought it was embarrassing. McEachern Hrg. Tr. 47:12-48:22.

43. Schulke frequently commented on female employees' appearances and would appear to be ogling them. Young Hrg. Tr. 186:4-25; Johnson Hrg. Tr. 218:5-24; Tucker Hrg. Tr. 262:21-263:2.

44. In December 2017, McEachern attended an office Christmas party Schulke hosted at the Montana City Grill. The entire office was there, as were several insurance adjusters. Schulke introduced McEachern to the group and commented that she was alone as usual. Schulke's comment angered McEachern, who felt it was an unnecessary and embarrassing. McEachern Hrg. Tr. 43:1-14.

45. In January 2018, McEachern contacted the Montana Human Rights Bureau (HRB). McEachern decided she would file a formal report if she was able to secure employment elsewhere. McEachern Hrg. Tr. 51:16-21. McEachern did not file a Charge of Discrimination at that time. McEachern Hrg. Tr. 61:11-15.

46. McEachern felt uneasy around Schulke and tried avoiding talking to him about anything that was not work related. McEachern avoided Schulke in an effort to avoid his harassing conduct. McEachern Hrg. Tr. 54:5-10; 53:6-16.

47. McEachern felt Schulke began avoiding her because he no longer walked by and said good morning. McEachern Hrg. Tr. 53:19-25.

48. On January 5, 2018, Schulke issued McEachern a written warning regarding her attendance; vulgar language being used in the office; gossiping with co-workers; snapping at an employee regarding her pay; complaining about her benefits with other co-workers; and an issue regarding an automobile policy. Charging Party's Exhibit (C.P. Ex.) 2.

49. Prior to the January 5, 2018 warning, McEachern had not received any formal warnings regarding her attendance. McEachern had previously spoken with Schulke about concerns she had that her attendance issues could jeopardize her employment. Schulke assured her that her job was not in jeopardy as a result of her attendance issues. McEachern Hrg. Tr. 64: 1-19.

50. In approximately June 2016, Schulke implemented a computer time keeping system due to concerns he had that McEachern's time sheets were not accurate. Schulke Hrg. Tr. 311:17-22. McEachern may have made minor mistakes on her time sheets, but she never deliberately over-reported her hours. McEachern, at times, did not report hours she had worked. Once the automated time keeping

system was put in place, there were days McEachern worked more than seven hours in a day. McEachern actually averaged 7.2 hours each day. See C.P. Ex. 16.

51. McEachern was also faulted for not taking a 30-minute lunch break. McEachern was often prevented from taking a lunch due to client meetings. Schulke had previously assured her that it was not an issue. McEachern Hrg. Tr. 79:1-80:2.

52. Schulke's write up also raised an issue of McEachern "creating a disturbance" in the workplace. McEachern had not deliberately created a disturbance but she had expressed dissatisfaction with Schulke's behavior and the working conditions to her co-workers. McEachern Hrg. Tr. 71:18-72:10.

53. Other employees made loud comments using expletives in the office without repercussions. McEachern Hrg. Tr. 72:18-75:19.

54. The office was essentially split into two factions. The first faction consisted of the "customer service side," which generally included McEachern, Young, Langemo, and Knadler. The second faction consisted of "the other side" of the office, which generally included Culver, Stephanie Ratchford and Cirullo. McEachern did not get along with either Culver or Ratchford, and the three had several disagreements during McEachern's tenure at TSA. See Culver Hrg. Tr. 484:20-485:9; 486:11-487:8; Ratchford Hrg. Tr. 513:22-514:6; Tucker Hrg. Tr. 260:2-14.

55. Schulke's write up also addressed cell phone usage. TSA did not have a specific policy prohibiting the use of personal cell phones during the work day. Schulke had told McEachern she could use her phone to communicate with her children. McEachern's use of her cell phone during the work day was substantially less than that of her co-workers. McEachern Hrg. Tr. 75:4-77:22.

56. Schulke's write up also accused McEachern of failing to ensure the quality or accuracy of her work. McEachern had mistakenly added a four wheeler to a client's policy that would not cover it. Upon learning of the mistake, McEachern corrected it. McEachern Hrg. Tr. 80:3-17.

57. Other employees made mistakes, including Schulke. No other employee was disciplined for making mistakes. McEachern Hrg. Tr. 81:1-7.

58 McEachern was also criticized for having food at her desk. Other employees had food at their desks but received no discipline. McEachern Hrg. Tr. 81:8-82:2.

59. The warning also accused McEachern of being insubordinate. When McEachern asked for an example, Schulke told McEachern it was related to an incident in which she, Langemo, Knadler and Young were in Langemo's office for approximately 15 minutes having a personal discussion. Schulke called while they were in the office, and asked to speak with Langemo. Schulke told McEachern that Culver had called him and told him that they were all talking. McEachern Hrg. Tr. 77:24-78:25.

60. Earlier that day, McEachern had become angry about paid-time-off (PTO) she had accrued. McEachern did not receive holiday pay because she had not worked a 70-hour average for that pay period as required under TSA's policies. Schulke Hrg. Tr. 412:9-21; 413:14-17. McEachern was overheard in Langemo's office saying something to the effect that she "could hardly wait to find another f'ing job." *Id.*

61. Only Young and McEachern received discipline as a result of the incident in which they were discovered chatting in Langemo's office. Schulke directed Knadler to act as though she had received discipline even though she had received none. Knadler Hrg. Tr. 236:20-25.

62. Schulke's write up accused McEachern of carelessness; failing to follow instructions. Schulke could not offer any examples of such behavior when pressed by McEachern at the meeting. McEachern Hrg. Tr. 71:3-12;

63. Shortly after receiving the warning, McEachern advised Schulke that she was seeking other employment. Schulke Hrg. Tr. 413:18-25. McEachern told Schulke a day or two after he had given her the written warning that she had an interview with another local insurance agency and had been offered a full-time position that she was considering taking. Schulke Hrg. Tr. 413:21-414:2.

64. Schulke testified he had received complaints from Culver, Ratchford, and Langemo that they were unhappy working with McEachern and wanted to quit as a result. Schulke Hrg. Tr. 414:14-25. Culver had a difficult working relationship with McEachern and felt the stress associated with the tension between her and McEachern, as well as the stress of the office, was bad enough for her to start looking for another job. Culver Hrg. Tr. 490:7-491:14.

65. Both Ratchford and Langemo denied at hearing telling Schulke they intended to quit. Ratchford Hrg. Tr. 515:16-24; Langemo Hrg. Tr. 573:15-574:8. Langemo, who had worked with McEachern at McAlpine's office, also denied expressing concern about leaving McAlpine's office to work at TSA due to "drama"

created by McEachern, which is contrary to Schulke's testimony. Langemo Hrg. Tr. 572: 1-20; Schulke Hrg. Tr. 412:9-18.

66. In late 2017, Schulke engaged Jennifer Williams, who had contracted to draft an employee manual for TSA, to find ways for his office to improve customer service and streamlining. Williams Hrg. Tr. 534:17-23; Resp. Ex. 115. Williams did not identify McEachern at all in her report, despite listing other employees who she considered to be an issue. Williams Hrg. Tr. 538:1-3.

67. During the period following Schulke giving McEachern the written warning, a customer contacted the office and requested his "dec pages" be sent to AAA. McEachern spoke with a TSA commercial agent and told him what the customer was requesting. McEachern ended up talking to the customer personally. McEachern Hrg. Tr. 82:3-83:13. McEachern had spoken to Culver about issues the customer was having with his policies. McEachern understood that the general consensus was that the customer had outgrown TSA. McEachern Hrg. Tr. 84:21-85:2. McEachern sent the sheets over with the understanding that such an action was consistent with TSA policies and procedures. McEachern Hrg. Tr. 85:9-19.

68. Schulke's wife, who frequently worked at the TSA office, notified Schulke, who was out of town at the time, that McEachern had sent the "dec sheets" to AAA. Schulke became upset because AAA is a competitor and the AAA agent was the former agent from whom he assumed the business for TSA. At the time, Mountain West Farm Bureau had a lawsuit against the AAA agent for violating a noncompete agreement. Schulke Hrg. Tr. 416:4-16.

69. Schulke decided to eliminate McEachern's position and to reorganize the office to assume her duties. Schulke Hrg. Tr. 416:25-417:2.

70. On Friday, February 2, 2018, Schulke and Jerad Grove, an agent whose office is in Butte, approached McEachern. Schulke had asked Grove to join him to act as a witness. Grove Hrg. Tr. 349:1-8. Schulke asked McEachern to meet him in the filing room during her lunch break. McEachern Hrg. Tr. 87:2-16.

71. Grove was seated at the table in the filing room when Schulke gave McEachern the termination notice. McEachern Hrg. Tr. 87:10-16. The notice provided that her position was no longer needed due to an office reorganization. C.P. Ex. 7.

72. McEachern became emotional and started to cry. McEachern told Schulke that he had promised her that he would not fire her. McEachern Hrg. Tr. 87:17-23.

73. McEachern went to her office to pack up her belongings and was followed by Grove and Schulke. *Id.* at 87:17-25. Either Schulke or Grove closed the door to her office and both stood while she gathered her papers. McEachern told them to open the door, and Grove told her that they would pack up her belongings. McEachern then made a comment about karma getting Schulke and wishing he would die in the manner that his father passed away. McEachern asked to retrieve her personal files from the computer and Schulke refused. McEachern Hrg. Tr. 88:1-89:25. The police were ultimately contacted by someone at TSA. Grove Hrg. Tr. 350:2-7.

74. When law enforcement arrived, the officer sat with McEachern as she packed up her office. The officer escorted McEachern out of the office. McEachern was embarrassed and upset at the situation. McEachern Hrg. Tr. 90:9-91:14.

75. Cassandra Colby began working as a Customer Service Agent on Monday, February 5, 2018. Colby had previously been asked to apply for work at TSA by Culver. Colby was not hired for that position but her resume was kept on file. Colby Hrg. Tr. 526:8-12; 527:18-528:2.

76. McEachern's duties as a licensed policy analyst have been spread amongst remaining TSA employees. At the time of hearing, TSA was "doing more [business] with less people." McEachern's job duties have been assumed by other TSA employees. Schulke Hrg. Tr. 416:25-417:1; 420:21-421:4.

77. Beginning in January 2017, TSA had a policy manual that was developed by Williams. There have been three versions of the policy manual since its initial publication. Williams Hrg. Tr. 530:20-24. Each time there was a new edition, it was presented to the entire office. *Id.* at 530:23-531:5.

78. TSA's harassment policy, which has been included in each version of the policy manual, provides TSA has:

> "no tolerance . . . for any kind of harassment or bullying, including sexual, . . . or any other form of continued inappropriate abuse of another individual (employee or otherwise)." Disciplinary action can include corrective action, up to and including termination. TSA

> employees are required to report any allegations of harassment to the Appointed Agent, who is required to begin an investigation into the allegations.

C.P. Exs. 3, 4, 5.

79. It was reasonable for employees who had issues with Schulke's comments or conduct to report those concerns to Culver given her senior status in the office. In the alternative, an employee could have reported their concerns to the district manager. Williams Hrg. Tr. 538:24-539:10.

80. Schulke's actions toward McEachern prior to her termination were unwelcome, severe, and pervasive enough so as to substantially alter her working conditions. Schulke's comments and actions created a hostile work environment for McEachern. Schulke's conduct toward McEachern was motivated by her sex.

81. Schulke's harassment of McEachern culminated in the tangible employment actions of her receiving discipline in January 2018 and ultimately being terminated February 2, 2018.

82. Schulke's decision to discipline and to terminate McEachern was not retaliation for protected activity.

83. McEachern moved to Billings in October 2018 because she could no longer afford her home in Helena. McEachern also thought it would be easier to find employment in the Billings area. McEachern Hrg. Tr. 100:14-23.

84. McEachern had received a job offer from a State Farm agent in Billings at or near the time she moved from Helena. McEachern started working for the agent but had to leave the employment after her daughter was accepted into an outpatient program at the Mayo Clinic in Rochester, Minnesota. McEachern earned approximately $200.00 for the two days she spent working for the State Farm agent. McEachern Hrg. Tr. 99:24-100:7.

85. McEachern exercised reasonable diligence in finding employment after her termination from TSA. McEachern applied for one to three jobs each week but has been unable to find other employment. McEachern struggles with job applications when she is asked to describe the nature of her separation from her previous employment. McEachern is embarrassed that she has to note that she had been fired from TSA. McEachern Hrg. Tr. 96:7-25.

86. McEachern previously held a CNA license but it has since lapsed. The hours required for a CNA are difficult for McEachern given that she is a single mother with two young daughters. McEachern Hrg. Tr. 97:17-98:3.

87. McEachern suffered emotional distress as a result of Schulke's harassment and her termination. McEachern was uncomfortable working for her male supervisor at the State Farm office. McEachern had never before been hesitant or uncomfortable working around and for men. McEachern was ashamed and embarrassed by having tolerated Schulke's conduct and having been forced to explain to her children why she was no longer able to work at TSA and why they had to move to Billings. McEachern Hrg. Tr. 101:4-102:22.

88. McEachern is less trusting of others and is not as outgoing or as strong willed as she had been before. McEachern has been depressed, embarrassed, and regretful as a result of the sexual harassment she experienced while working at TSA. McEachern has been defeated and anxious, particularly about her financial situation and having to move to Billings. McEachern has experienced difficulty sleeping and often has nightmares about the events of the day of her termination. McEachern's social interactions have been impaired and she tends to stay home and avoid other people McEachern Hrg. Tr. 101:4-102:22.

89. McEachern's friends noticed a marked change in her behavior during the final months of her employment and thereafter. McEachern was seen as having retreated into her shell and being less "smiley." McEachern, who was generally seen as being a forceful and independent woman was seen as having become more introverted and less sure of herself. Tucker Hrg. Tr. 269:13-21; King Hrg. Tr. 334:11-335:11.

90. At the time of her termination, McEachern was earning $33,317.92 per year. McEachern was paid an average of $1,281.46 per two-week pay period. McEachern would have continued to earn at least that amount each week if she had remained in her employment at TSA. McEachern Hrg. Tr. 95:1-5.

91. Between McEachern's termination and the date of this decision, McEachern would have worked for TSA for 39.5 pay periods had she not been fired. McEachern's total lost wages for that period totals $50,617.67 ($1,281.46 x 39.5 pay periods). The interest on those lost wages is $3,083.85 calculated at a rate of 8.5%

per year[1]. McEachern is entitled to $53,251.52 in back pay, including interest on those lost wages through the date of this decision. *See Addendum A.*

92. McEachern is entitled to an award of two years of front pay in the amount of $66,635.92, the present value of which is $63,197.88, if paid in a lump sum. *See* Addendum A.

93. McEachern suffered emotional distress as a result of TSA's discriminatory actions. $25,000.00 represents a reasonable amount of compensation for the discrimination she suffered.

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

V. DISCUSSION

McEachern argues TSA discriminated against her on the basis of sex by subjecting her to a hostile work environment that resulted from Schulke's inappropriate and offensive comments and actions. Schulke denies having engaged in any behavior that would be considered inappropriate or offensive and denies treating McEachern differently due to her sex.

A. The Timeliness of McEachern's Charge of Discrimination

Schulke argues the incidents pointed to by McEachern occurred outside of the 180-day statute of limitations provided for under Mont. Code Ann. § 49-2-501(4). Both parties point to *AMTRAK v. Morgan* in support of their respective arguments regarding the timeliness of McEachern's claim. *AMTRAK,* 536 US 101. 122 S. Ct. 2061, 153 L.Ed. 2d 106 (2002). TSA contends McEachern must show that at least one individual act of discrimination occurred after September 2, 2017, which is 180 days prior to the date McEachern filed her Charge of Discrimination. TSA argues the only event that occurred within that time period was the "Windbag Event," and no such discriminatory act occurred at that time. TSA contends McEachern has failed

[1]Mont. Code Ann. § 25-9-205(1)(a) provides that interest payable on judgments is equal to the rate for bank prime loans on the day the judgment was entered, plus 3%. As of August 5, 2019, the bank prime loan interest rate was 5.25%. Therefore, the interest rate for the judgment entered in this matter is 8.25%.

to prove a discrete act of discrimination occurred during the 180-day period prior to the filing of her Charge of Discrimination.

McEachern counters that a claim of hostile work environment may encompass a series of discriminatory acts that constitute an unlawful employment practice. McEachern argues that a claim is timely so long as one act that is part of the hostile work environment claim occurred within the 180-day period.

1. *McEachern's Testimony Regarding the Windbag Event is Credible*

The parties appear to agree that the timeliness issue essentially boils down to whether Schulke acted inappropriately toward McEachern during the Windbag Event. The parties gave conflicting evidence as to what occurred that evening. As such, a credibility determination is required.

Montana Code Ann. § 26-1-302 provides:

> A witness is presumed to speak the truth. The jury or the court in the absence of a jury is the exclusive judge of a witness's credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness's testimony. The matters include but are not limited to:
>
> (1) the demeanor or manner of the witness while testifying;
> (2) the character of the witness's testimony;
> (3) bias of the witness for or against any party involved in the case;
> (4) interest of the witness in the outcome of the litigation or other motive to testify falsely;
> (5) the witness's character for truth, honesty, or integrity;
> (6) the extent of the witness's capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which the witness testifies;
> (7) inconsistent statements of the witness;
> (8) an admission of untruthfulness by the witness;
> (9) other evidence contradicting the witness's testimony.

TSA makes several arguments in support of its contention that the Windbag Event did not occur as described by McEachern. TSA points to discrepancies in McEachern's Charge of Discrimination; McEachern's deposition testimony and

McEachern's testimony at hearing. TSA notes McEachern's Charge of Discrimination and Amended Charge of Discrimination included:

> On October 12, 2017, the office had a meeting at a local restaurant. [Schulke] sat next to me, and began rubbing my shoulders and back. The more alcohol [he] drank the more [he] continued this behavior directly in front of his wife. I did not want Respondent touching me.

Both forms are signed and dated by McEachern indicating the information included in the forms was true and correct.

McEachern denied at hearing she intended to suggest Schulke's actions that evening were due to his being inebriated. McEachern Hrg. Tr 138:15-20. McEachern testified Schulke put his hand on her shoulder and moved his hand down her back and began rubbing her back in circular motions. She testified he would occasionally remove his hand and start again. McEachern attempted to lean back in the chair to prevent him from doing it again.

TSA notes there are discrepancies between McEachern's description of the Windbag Event. TSA points to McEachern's initial denial that Schulke ever tried to put his arm around her despite her deposition testimony that "[Schulke] started to put his arm around me and he was rubbing my back, and then he would kind of go up to my shoulder a little bit and down to my back. McEachern Hrg. Tr. 139:1-18.

McEachern's descriptions of the Windbag Event are not so divergent as to dismiss her testimony as not being credible. The Hearing Officer fails to see the distinction between someone putting their hand on another person's shoulder and rubbing their back; and someone starting to put their arm around another person and then rubbing their back. While the language may be different in the scenarios pointed to by TSA, the substance of the story remains the same.

TSA also faults McEachern for going out for drinks with Schulke and Cirullo despite her claims of discomfort at the Windbag. TSA argues McEachern could have left the Windbag at any time if she was as uncomfortable as she claims and certainly did not have to accompany Schulke to another bar if he had made her feel like some "sleazy guy hitting on [her] at the bar that I couldn't get away from." McEachern Hrg. Tr. 37:13-15. McEachern counters McEachern made the decision to join several of her friends from work at the Grubstake and when she found Schulke there, she made efforts not to sit next to him.

TSA notes that only a few days later McEachern spearheaded an effort to celebrate Boss' Day at the TSA office. McEachern wrote in Schulke's card that he was a "wonderful boss man," and they were "lucky to have him." Exs. 109, 110; McEachern Hrg. Tr. 141:24-142:22. TSA notes McEachern could have used a generic comment instead of writing such a positive message. Writing a message in a card is not necessarily evidence of ones feelings about the recipient, particularly in an office setting where the card is passed around and viewed by other employees, as well as your supervisor.

TSA's arguments as to the credibility of McEachern's testimony is not persuasive. An employees decision to join her boss and co-workers at a bar for drinks is not so unusual as to discredit her testimony that she was treated inappropriately earlier that evening. Further, the differences between McEachern's hearing testimony and her deposition testimony and the charging documents are not so great as to prompt the dismissal of her testimony in its entirety regarding the Windbag Event. Further, a message written in a greeting card is not an affirmative statement that the employee feels the workplace is free of discrimination.

Schulke testified he was seated next to McEachern during the Windbag Event. Schulke denied McEachern appeared to be uncomfortable or distressed and he denied giving her a back massage or putting his arm around her. Schulke Hrg. Tr. 409:8-16. Similarly, Schulke's wife, Dina, testified Schulke was sat "kitty-corner," "to the left" of her, and their son-in-law, Sean Cirullo, was seated across from Schulke. Dina Schulke Hrg. Tr. 544:1-8. Dina Schulke denied seeing her husband touch McEachern. *Id.* at 544:9-20. Dina Schulke went on to testify that her husband is not prone to public displays of affection. *Id.* at 544:21-545:11. Cirullo testified he could clearly see Schulke during the Windbag Event and denied seeing him touch McEachern. Cirullo Hrg. Tr. 362:11-363:11.

Various witnesses testified about their observations that evening at the Windbag, as well as what McEachern told them about the event shortly thereafter. Young testified she observed Schulke's arm draped over McEachern's barstool and McEachern shuffling in her chair and moving closer to Knadler, who was sitting on the other side of McEachern. Young Hrg. Tr. 190:1-13. Young described McEachern as looking "really uncomfortable" and she could tell something weird was happening based upon McEachern's facial expressions. Young Hrg. Tr. 191:1-2; 6-7. Young testified McEachern later told her that Schulke was rubbing her back and making her feel uncomfortable. Young Hrg. Tr. 191:20-23. TSA argues that Young's use of "kind of" rather than "yes" or "no" suggests an unwillingness to commit to direct testimony regarding the Windbag Event.

TSA argues that Young's testimony should be dismissed due to the hostility she held toward Schulke based upon his having terminated her employment just prior to her starting school. Young Hrg. Tr. 178:15-19. It is true that Young was disciplined on the same day as McEachern, when neither Knadler or Langemo received any such discipline, and she was discharged on the same day as McEachern. Young Hrg. Tr. 203:2-7. TSA notes Young is personal friends with McEachern and would have reason to provide testimony that was favorable to McEachern.

McEachern counters that Young's testimony only addressed what she saw and did not include things she did not have personal knowledge of. McEachern further argues that Young's use of "kind of" is akin to the use of the word "like" - it is merely a verbal filler.

Young's testimony was restrained and limited to her observations. Young was forthright when asked if she held any hard feelings toward Schulke due to the nature of her separation. Young is no longer a TSA employee and appears to have no vested interest in the outcome of McEachern's claim. TSA points to an incident where Young pretended to be a college student to gain information for McEachern regarding her former husband's child support obligations. However, McEachern raised the issue of Culver taking continuing education classes for Schulke so he could maintain his licensure. While troubling, neither event is particularly indicative of the witness' willingness to perjure themselves at hearing. Further, it seems unlikely Young would still harbor such hard feelings toward Schulke that she would be willing to commit perjury for a former co-worker she had seen four or five times since leaving her employment with TSA in January 2018. Young Hrg. Tr. 179:14-23.

Knadler was present at the Windbag Event and sat to the right of McEachern. Knadler Hrg. Tr. 231:1-12. Knadler testified that she observed Schulke rub McEachern's back once after McEachern complained to her that Schulke kept touching her. Knadler Hrg. Tr. 232:11-16. Knadler testified McEachern kept "[s]cooting her body . . . [and] getting pretty close to [her]." Knadler Hrg. Tr. 232:2-6. Knadler testified McEachern told her on the way out of the Windbag that she was "freaked out" and did not like Schulke touching her. Knadler Hrg. Tr. 232:21-25; 233:1-3.

TSA argues Knadler's testimony is not worthy of credence because she failed to report any of that information when contacted by an HRB Investigator. Knadler Hrg. Tr. 241:4-17. TSA argues Knadler's recollection should have been clearer when contacted by the HRB Investigator than it was several months later at the time of

hearing. See Knadler Hrg. Tr. 241:14-243:1. TSA contends Knadler has shown a pattern of trying to appease her friends by her refusal to identify Young as a source of office drama. Knadler Hrg. Tr. 245:20-246:22. TSA also notes Knadler's attempt to avoid agreeing with the contention that Schulke was a supportive supervisor as she had indicated in her resignation letter. Knadler Hrg. TR. 250:16-251:4.

McEachern counters that Knadler was forthright when confronted with the discrepancy in her testimony regarding what she observed at the Windbag versus what she told the HRB Investigator. See Knadler Hrg. Tr. 243:1-11. Knadler testified she was in the middle of work when contacted by HRB and she "wasn't thinking clearly." Knadler Hrg. Tr. 241:17-24. Knadler testified, "But when he called, I was in the middle of my work. I wasn't thinking clearly. All of this - - I didn't want to have to do any of this. I wanted to put that place behind me. So year, I was confused about what I had said and what I hadn't said. So then after I talked to him, they wanted us to think about whatever happened and if I thought of anything." *Id.* at 17-24.

Again, as with Jordan, Knadler is no longer a TSA employee. Knadler does not appear to have a vested interest in the outcome of this matter. Knadler was forthright when confronted with the discrepancy between what she told the HRB Investigator and her sworn testimony, and she provided a reasonable explanation for the discrepancy. Again, the issues raised by TSA do not necessarily render Knadler's testimony as completely unreliable.

TSA further argues Tucker's testimony should not be considered to be credible. Tucker previously worked for TSA from September 2016 through September 2017. Tucker Hrg. Tr. 254:4-13; 274:17-21. Tucker left her employment with TSA due to the demands of her other job that required her to be frequently absent from TSA. Tucker Hrg. Tr. 255:20-24. Tucker lived with McEachern rent free from December 2017 through 2018. Tucker Hrg. Tr. 256:7-15. Tucker testified McEachern told her about Schulke's putting his hand on her arm and touching her back. Tucker testified McEachern was "kind of weirded out that had happened and it was ind of like she felt creeped out that, again, in public he felt he could have that power to touch her when she didn't want it." Tucker estimated she spoke with McEachern about the incident within a couple of hours. Tucker Hrg. Tr. 267:11-22.

While Tucker is clearly close friends with McEachern, her testimony was clear, direct and without embellishment. Tucker demonstrated no animus toward Schulke and no evidence was offered that would call into question the voracity of her

testimony. Tucker's testimony that McEachern reported the Windbag Event within a couple of hours of it having happened makes McEachern's testimony more likely and more credible than the testimony offered by Dina Schulke and Cirullo, who both have a greater interest in Schulke achieving a favorable outcome in this matter based upon both their familial and professional relationships with Schulke.

Given the direct and detailed testimony of McEachern regarding the Windbag Event and the fact much of her testimony was corroborated by other witnesses, particularly Knadler who was in a position to observe what had occurred that evening at the Windbag, McEachern's testimony describing the Windbag Event is determined to be more credible than the denial offered by Schulke.

2. *McEachern's Hostile Work Environment Claim is Timely*

"[D]iscrete acts that fall within the statutory time period do not make timely acts that fall outside the time period." AMTRAK, 536 U.S. 112. However, "it may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Id*., quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed. 571., 97 S. Ct. 1885 (1977). Termination that fell within the limitations period cannot be used to pull in the time-barred discriminatory act. *Id.* "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'." *Id.* at 115.

However, hostile environment claims are different in that they involve repeated conduct that occurs over a period of days and months in contrast with discrete acts. *Id.* at 115. A hostile work environment "is ambient and persistent, and . . . continues to exist between overt manifestations." *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 444-45 (9th Cir. 2017) (internal citation omitted). As the Court noted in its analysis of the provisions of Title VII in *AMTRAK*:

> It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct. The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days 'after' the single unlawful practice 'occurred'. Given, therefore, that the

> incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

AMTRAK, 536 U.S. 101, 118.

There is no disagreement that the Windbag Event took place on October 12, 2017, which is within 180 days of the filing of McEachern's original Charge of Discrimination, which was filed on March 5, 2018. Therefore, McEachern's claim is timely and the entire time period of her claim will be considered as part of her charge of hostile work environment.

B. McEachern's *Prima Facie* Case of Sexual Harassment

The Montana Human Rights Act (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, McEachern 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, (1993). Whether an environment is hostile or abusive depends on all the circumstances including; the frequency of the discriminatory conduct; it's severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 271, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (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, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998),* quoting *Harris,* 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. It is not necessary that a plaintiff enumerate with precision the exact number of times that she was subjected to offensive conduct in order to demonstrate the pervasiveness required to prove a hostile working environment. Testimony that the plaintiff was subjected to numerous instances of offensive conduct can be sufficient to show that the conduct was pervasive. *Torres v. Pisano*, 116 F.3d 625, 634-635 (2nd Cir.,1997).

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

is experienced by its target." *Oncale.,* 523 U.S. at 81. The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness of frequency of the conduct. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991)(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.* The burden then shifts to the employer to 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).

1. *McEachern's Testimony Regarding Schulke's Conduct is Credible*

Schulke flatly denies that many of the incidents outlined by McEachern occurred. As noted above, it is determined that the Windbag Event occurred as described by McEachern. For similar reasons, it is determined that the other incidents pointed to by McEachern occurred as alleged.

McEachern's testimony was clear, direct and sufficiently detailed as to be considered credible. Further, Schulke conceded that several of the incidents complained of by McEachern actually happened. Schulke merely disagreed with her interpretation of events. For instance, the Bravo incident. Schulke did not deny the Bravo incident occurred as described by McEachern. He argued that he simply did not mean for his comment to be interpreted as being sexual in nature. Schulke Hrg. Tr. 391:2-12. Similarly, Schulke agreed he had told his subordinates a story about a mutual acquaintance engaging in sexual relations with his wife, which he merely thought was an amusing anecdote shared with those TSA employees who also knew him. Schulke Hrg. Tr. 378:3-379:18. Schulke also conceded having made the $10,000 deductible joke in reference to a former agent who faced sexual harassment allegations, which he just considered a warning to employees to keep their comments professional. Schulke Hrg. Tr. 380:11-381:13.
Tr. 378:3-379:18.

Still, Schulke denied other incidents pointed to by McEachern, including the White Sulphur Spring incident; the hair pulling incident; the bikini picture incident; and the break room incident. However, McEachern produced witnesses who either observed or heard the incident; or to whom McEachern reported the incident at or near the time of the incident.

For example, Young testified she heard Schulke on the phone with Jamie Carter and heard him ask what she was wearing. Young left McEachern's office after hearing the comment due to it being "uncomfortable." Young testified McEachern came to her "probably within the week" and reported Schulke had showed her a picture of a woman, presumably Carter, in a bikini shot from the chest down. Young Hrg. Tr. 193. Young also heard Schulke encourage McEachern to go on a date with Larson by saying, ". . . she didn't have to sleep with him, just show him a good time so we could get better service." *Id*. at 194:8-17. Young also confirmed McEachern had told her of the hair pulling incident "possibly two weeks" after it had occurred. Young Hrg. Tr. 197:14-22.

Similarly, Tucker testified she overheard Schulke comment on McEachern's apparent weight loss and ask who she was sleeping with in July 2017. Tucker Hrg. Tr. 266:3-16. Tucker testified she approached McEachern later that day and asked about what she had overheard Schulke say to McEachern. Tucker testified McEachern appeared embarrassed and in shock that something like that was said to her in front of her co-workers. Tucker Hrg. Tr. 266:19-267:2. Tucker also testified McEachern told her about the hair pulling incident within a couple of hours of it having occurred. Tucker Hrg. Tr. 268:6-15.

Karen Johnson also testified she overheard Schulke comment on McEachern's weight and "poking and prodding at her because she was single." Johnson Hrg. Tr. 221:25-222:9.

Knadler confirmed Schulke commented on Larson asking McEachern out for a date and Schulke encouraging her to "take one for the team so [they] would get good IT service from him." Knadler Hrg. Tr. 233:9-13. Knadler testified McEachern reported the hair pulling incident to her within two to three months after the incident had occurred and while they were both still working at TSA. Knadler Hrg. Tr. 234:12-23.

Each of the witnesses who corroborated McEachern's testimony left TSA at or near the time of McEachern's termination. For several of the incidents, the individuals were in a position to be able to hear or see the event. Further, each of the

witnesses who testified about McEachern reporting an incident to them were able to give some time frame in which the conversation occurred. While not immediate, the reporting of the various incident by McEachern to the witnesses who testified occurred close enough in time to the complained of incident as to provide credible corroboration of her testimony. Schulke has noted that many of the witnesses left TSA employment with less than positive attitudes toward him and the business itself. However, there was not sufficient evidence offered that would call into question the credibility or the accuracy of the witness' sworn testimony. Further, enough time has passed and for many of the witnesses several other jobs have been had since their separation from TSA that none of the witnesses' testimony can be dismissed as entirely lacking in credibility. Therefore, given that much of McEachern's testimony regarding the various complained of incidents have been corroborated, McEachern's testimony is considered to be more credible than Schulke's denials.

2. *McEachern's Claim of a Hostile Work Environment*

The substantial and credible evidence of record establishes Schulke engaged in a course of conduct toward McEachern and other female TSA employees that was sufficiently severe and pervasive that would cause a reasonable person in McEachern's position to find the terms and conditions of her employment having been altered as a result. *See Nichols,* 256 F.3d at 872. Further, McEachern's credible and detailed testimony establishes she subjectively found the environment abusive and the terms and conditions of her employment altered as a result of Hodges' conduct. *See Harris*, 510 U.S. at 21-22.

McEachern reached out to those closest to her and complained about Schulke's conduct, which had a cumulative effect on her causing her to be less "bubbly" and "smiley" and to dread returning to work each day. The evidence shows Schulke's conduct caused McEachern to have increased feelings of frustration, despair and insecurity. Further, 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 Montana Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 221, 797 P.2d 200, 204, citing *Meritor Savings Bank FSB v. Vinson*, (1986) 477 U.S. 57,

The overwhelming credible evidence shows Schulke, as the appointed agent for TSA and the primary decision maker for the employer, subjected McEachern to harassment on the basis of her sex, which was sufficiently severe and pervasive to alter the conditions of McEachern's employment and created an abusive working environment. McEachern has shown Schulke's comments and actions were

unwelcome and caused her distress and affected her desire to continue in her employment at TSA. McEachern has shown she was subjected to a sexually hostile working environment. As such, she has shown that TSA discriminated against her on the basis of sex. See *Meritor*, 477 U.S. 57 at 64.

3. *Schulke's Harassment Culminated in Tangible Adverse Employment Actions*

To prevail on a claim that an adverse employment decision, including discipline and termination, was for discriminatory reasons, the plaintiff must first establish a prima facie case of discrimination. As noted above, McEachern has satisfied this burden. The next issue is whether a tangible employment action occurred and whether it was related to the harassment that occurred in this case. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004)(quoting *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 855 (9th Cir. 2011)).

"A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands . . . she establishes that the employment decision itself . . . is actionable . . .". *Id.* at 753-54. There is an inference that a discriminatory animus exists when the decision maker was the one responsible for the harassment. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F. 3d 1236, 1247 (11th Cir. 1998). The harmed employee "may establish her entire case simply by showing that she was sexually harassed by a fellow employee, and that the harasser took a took a tangible employment action against her." *Id.*

A tangible employment action took place when Schulke terminated McEachern's employment. See *Stringer-Altmaier*, 2006 MT ¶26 (internal citations omitted). The write up McEachern received previously did not alter the terms and conditions of her employment in any way. Schulke was the sole appointed agent for TSA and responsible for making hiring and firing decisions. Therefore, McEachern has shown that her termination on February 2, 2018 was for discriminatory reasons.

TSA argues that it has legitimate, non-discriminatory reasons for its decision to discharge McEachern. TSA points to office morale, which reportedly improved upon her separation. TSA further points to McEachern's performance issues, which Schulke testified began to occur in the early part of her employment.

McEachern argues that any issues with her performance can be traced back to when she stopped communicating with Schulke and tried to avoid him. McEachern also points to issues with the reasons for her write-up as evidence that Schulke's reasons were merely pretext for discrimination. McEachern's argument is well taken.

McEachern spoke with Schulke at various points of her employment to discuss concerns she had that her attendance issues could affect her employment. Schulke assured her that it was not an issue. It appears McEachern reported for work and put in an average of 7.2 hours each day. It further appears that McEachern and Schulke had an informal agreement that she would have some leniency given her daughter's medical issues.

Schulke pointed to McEachern's disruptive effect on the office. Certainly, Culver and Ratchford had serious concerns about McEachern's behavior in the office. However, it appears that the office was plagued by cliques and "drama" created by employees such as Young. What undercut Schulke's argument is the fact that Williams, who was charged with observing TSA employees and noting those issues that she observed, mentioned nothing of McEachern.

There was no evidence offered showing McEachern routinely failed to perform her job duties or failed to conduct herself in a professional fashion. The one issue raised involving the "dec sheets," appears to have occurred as a result of miscommunication between Culver, McEachern and Schulke. While it would have been advisable for McEachern to have consulted with Schulke before sending the documents to the former Farm Bureau agent operating a competing insurance agency in Helena, she responded promptly to a customer's request.

Finally, the January 2018 write up is concerning. The fact that four employees were involved in the same conversation and only two employees, who were subsequently discharged, received warnings while the others were directed to pretend as though they had received discipline when they had not, suggests that Schulke's animus toward McEachern motivated his taking actions against her employment.

McEachern has shown that Schulke's reasons for terminating her employment was for discriminatory reasons. Therefore, McEachern has shown she was subjected to intentional discrimination in violation of the MHRA.

4. *Ellerth/Faragher Defense*

In the landmark *Ellerth* and *Faragher* decisions, the United States Supreme Court held that an employer can escape liability for certain Title VII claims by proving "(a) the employer exercised reasonable care to prevent and promptly correct harassment and discrimination in the workplace, and (b) the employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275,

141 L. Ed. 2d 662 (1998); *see also Ellerth*, 524 U.S. 742. This defense is only available when "no tangible employment action is taken." *Id.* In this case, Schulke's termination of McEachern's employment qualifies as a tangible employment action thereby foreclosing TSA from relying on this defense.

C. McEachern's Claim of Retaliation

It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because the individual has opposed any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter. Mont. Code Ann. § 49-2-301. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. *See* Admin. R. Mont. 24.9.603 (2).

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

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. When 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 meets its burden, the presumption of discrimination created by the prima facie case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* The charging party may succeed in this 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. *Crockett*, 234 Mont. 87, 95, 761 P.2d 813, 818, (Mont. 1988), citations omitted. At all times,

McEachern retains the burden of persuading the trier of fact that she has been the victim of retaliation. *St. Mary's Honor Center*, 509 U.S. at 507; *Heiat*, 275 Mont. 322, 328, 912 P.2d 787, 792.

"Protected activity" means the exercise of rights under the act or code and may include: (a) aiding or encouraging others in the exercise of rights under the act or code;(b) opposing any act or practice made unlawful by the act or code; and (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1).

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

McEachern argues she engaged in protected activity "by avoiding Schulke and not communicating with him because of his abusive conduct." McEachern notes that she was "implicitly expressing her opposition to [Schulke's] discriminatory practices. . . and asserting her right to be free of harassment in the workplace by avoiding situations in which she would be in danger of harassment." McEachern Opening Brief, p. 20.

Some courts have found that a person's attempt to avoid sexual harassment constitutes opposition to unlawful employment practices. In *Black v. City of County of Honolulu*, the court found the plaintiff's efforts to seek a transfer away from a harassing supervisor, in addition to the plaintiff having filed both informal and formal complaints about the supervisor's behaviors, constituted protected activity even though the "opposition of this sort [was] not as overt as verbal or physical rejection, or even rejection manifested in disobedience." *Black*, 112 F. Supp. 1041, 1049-50. The court noted that several district courts have made similar conclusions. *Fleming v. South Carolina Dep't of Corrections*, 952 F. Supp. 283 (D.S.C. 1996)(plaintiff's refusal of supervisor's request for sex constituted protected activity); *Armbruster v. Epstein*, 1996 U.S. Dist. LEXIS 7459, 1996 WL 289991, 3 (E.D. Pa.

May 31, 1996) (court denied defendant's motion to dismiss finding that protected activity includes employee's refusal of sexual advances by employer); *Burrell v. City Univ. of New York*, 894 F. Supp. 750, 761 (S.D.N.Y. 1995) (evidence supported finding that "the predominant reason for Burrell's termination was in retaliation either for filing her complaint … or for refusing to accede to Roman's sexual advances, both activities protected under Title VII"); *Boyd v. James S. Hayes Living Health Care Agency, Inc.*, 671 F. Supp. 1155, 1167 (W.D. Tenn. 1987) (plaintiff engaged in protected activity by refusing her supervisor's sexual advances); *EEOC v. Domino's Pizza*, 909 F. Supp. 1529, 1533 (M.D. Fla. 1995) (employee ordering supervisor from his office and threatening to file a report after she came onto him was protected activity); but see, *Speer v. Rand*, 1996 U.S. Dist. LEXIS 17071, 1996 WL 667108, 8 n.4 (N.D. III. Nov. 15, 1996); *Del Castillo v. Pathmark Stores*, 941 F. Supp. 437, 438-439 (S.D.N.Y. 1996).

What distinguishes the case at hand from the cases listed above is that there was an affirmative act by the plaintiff showing opposition to the unlawful employment practice. Either the plaintiff filed a formal or informal complaint or directly refused the sexual advances of a co-worker or supervisor. In some fashion, the plaintiff made clear that he or she was opposing the sexual harassment by another. In this case, McEachern made no such declaration. She merely avoided the problem. While reasonable given the circumstances, the fact remains she engaged in no affirmative behavior showing her opposition to discrimination in the workplace. "Protected activity" requires more than an implicit expression of opposition.

The one act by McEachern that could be considered protected activity was her complaining to Culver in late summer or early fall 2017 about Schulke showing her Carter's bikini picture. McEachern testified:

> I told her what happened. I told her that Tom came in my office on speaker phone and told her what he said - - asked, "What are you wearing? Wait, don't answer that." And then I said later on he showed me a picture of a girl in a bikini. She giggled and said, "Oh, ha, ha. Yeah, Pretty sure they slept together at an annual agents' meeting." And that was it.

McEachern Hrg. Tr. 56:5-11.

Given that Culver was essentially second-in-command, it was reasonable for McEachern to have gone to her with concerns about Schulke's behavior. What she told Culver could reasonably be interpreted as opposition to discriminatory conduct

by her supervisor. However, there has been no suggestion that McEachern told Culver she believed Schulke's behavior to be sexual harassment or that she wished to file a complaint about his behavior. Given the apparently chatty nature of the office, it is difficult to determine whether the concerns voiced by McEachern at that time were communicated as complaints or merely office gossip. However, for the sake of argument, given Culver's apparent authority at the office, one could find McEachern's comments to her about the Carter picture constituted protected activity. The next issue is whether a causal connection exists between the protected activity and the adverse employment action.

In order to establish the requisite causal link, the evidence must show the employer's decision to terminate was based in part on knowledge of the employee's protected activity. There is no evidence showing Schulke was aware of McEachern's complaint to Culver. Culver denied being aware of the bikini incident until recently. Culver Hrg. Tr. 493:7-10. Even if one was to presume knowledge on the part of Schulke, the temporal proximity between his gaining such knowledge and the adverse employment actions three to four months later is not sufficient evidence of causality. See *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001)(citing *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir.1992) (4-month period insufficient); *Brown v. Dep't of Public Safety*, 446 Fed. Appx. 70, 73 (9th Cir. 2011) (holding that without more, a 5-month gap between actions was insufficient to infer causation for a retaliation claim); *Fazeli v. Bank of Am., NA*, 525 Fed. Appx. 570, 571 (9th Cir. 2013) (finding that less than three months was insufficient to infer causation in light of other evidence that no causal link existed); *but c.f. Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002)(citing *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 505 (9th Cir. 1989) (finding a prima facie case of causation where plaintiffs were discharged from employment 42 and 52 days after the alleged protected activity)); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(holding that sufficient evidence existed where adverse actions occurred less than three months after the complaint was filed, two weeks after the charge was first investigated, and less than two months after the investigation ended); *see also Bagley v. Bel-Aire Mech., Inc.*, 647 Fed. Appx. 797, 800 (9th Cir. 2016) (finding that African-American employee-plaintiff made prima facie showing of but-for causation in action alleging retaliatory layoff 36 days after his discrimination complaint (citations omitted)).

In the absence of some evidence of knowledge on the part of Schulke regarding McEachern's complaint of the bikini incident and the passing of approximately four months between the complaint and the adverse employment action, McEachern has

failed to establish the requisite causation. Therefore, McEachern's claim of retaliation must fail.

D. McEachern's Damages

1. *Back Pay*

In employment discrimination, once the charging party has established that her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Berry,* 779 P.2d ***at*** 523-24. Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). To defeat this presumptive entitlement, the respondent must demonstrate by clear and convincing evidence that a lesser amount of back pay is due the charging party. ***Id.***; ***see also****, Benjamin v. Anderson*, ¶62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay at the rate of 8.25% per year is also reasonable. *Berry*, 779 P.2d ***at*** 523.

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

TSA bears the burden proving that McEachern failed to mitigate her damages. *Cromwell v. Victor Sch. Dist. No. 7,* 2006 MT 171, ¶25, 333 Mont. 1, 140 P.3d 487. To satisfy this burden, TSA must prove "that, based on undisputed facts in the record, during the time in question there was substantially equivalent jobs available, which [McEachern] could have obtained, and that [McEachern] failed to use reasonable diligence in seeking one." *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994).

TSA called vocational expert Delyn Porter as a witness on the issue of whether McEachern exercised reasonable diligence in finding work after her termination from TSA. Porter's testimony did not address the Helena job market where McEachern was living at the time of the termination and until she moved to Billings in October 2018. Porter Hrg. Tr. 462:18-24. Porter admitted not knowing if McEachern could have obtained any of the jobs he identified as being suitable for her in the Billings job market. *Id.* at 5-13. Porter identified several jobs in the Billings market for which he claimed McEachern was qualified. However, those jobs required a CNA license, which McEachern had not held for several years. Porter Hrg. Tr. 463:23-464:14. In fact, only 10% of the jobs Porter identified as being suitable for McEachern were in the insurance business. Porter Hrg. Tr. 464:15-21.

TSA has not met its burden of showing McEachern failed to mitigate her damages after Schulke terminated her employment in February 2018. Therefore, McEachern has shown she is entitled to back pay damages in the amount of $50,617.67, which represents 39.5 pay periods at $1,281.46 per pay period. This award is reasonable likely to make McEachern whole for the discrimination she experienced at TSA. McEachern is also entitled to interest on the lost wages through the date of the decision at the rate of 8.5% per annum, which amounts to $3,083.85, for a total of $53,701.52.

2. *Front Pay*

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

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

> (1) whether the employer is still in business; (2) whether there is a comparable position available for the plaintiff to assume; (3) whether an innocent employee would be displaced by reinstatement; (4) whether the parties agree that reinstatement is a viable remedy; (5) whether the degree of hostility or animosity between the parties, caused not only by the underlying offense but also by the litigation process, would

> undermine reinstatement; (6) whether reinstatement would arouse hostility in the workplace; (7) whether the plaintiff has since acquired similar work; (8) whether the plaintiff's career goals have changed since the unlawful termination; and (9) whether the plaintiff has the ability to return to work for the defendant employer, including consideration of the effect of the dismissal on the plaintiff's self-worth.

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

Reinstatement appears not to be a viable remedy in this case given the hard feelings between the parties and the apparent hostility between McEachern and Schulke. Therefore, front pay is appropriate in this case.

McEachern seeks front pay award equal to four years. "Because of the potential for windfall, [front pay's] use must be tempered." *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). OAH has historically followed the guidance of the Wrongful Discharge from Employment Act, which allows for recovery of lost wages for a maximum of four years from the date of discharge. *See* Mont. Code Ann.§ 39-2-905(1); *Billbruck v. BNSF Ry. Co.*, HRC Case No. 0031010549 (Aug. 3, 2004).

McEachern made reasonable efforts to obtain substantially equivalent work since being terminated by TSA. However, as of the date of hearing, she has been unable to find such work. McEachern worked for TSA for less than two years. McEachern seeks four years of front pay in addition to back pay. However, such a front pay award is not reasonable given the amount of time she worked for TSA. A front pay award of two years is reasonable and supported by the credible and substantial evidence of record. Awarding four years of front pay as requested by McEachern would be unduly speculative or not supported by the record. It would also result in an unjust windfall for McEachern. Therefore, McEachern is entitled to an award of $66,635.92 in front pay damages, the present value of which is $63,197.88. *See* Addendum A.

3. *Emotional Distress*

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a ***per se*** invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm,

including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Vainio*, p. 16, fn. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828. Medical evidence is not required to establish emotional distress damages, and such damages may be established by testimony or inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991). "[N]o evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted." *Id.*

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

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

The severity of the harm governs the amount of recovery. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836. From a factual standpoint, the instant case is similar to *Vainio*. In that case the Montana Supreme Court found that an emotional distress award of $20,000.00 was appropriate in a case where the plaintiff was subjected to conduct that "included, among other things, brushing his body against her buttocks, putting his hand up her skirt, grabbing her breasts, and requesting [the plaintiff] to have sex with him." *Vainio,* 258 Mont. at 280-281.

The Montana Supreme Court affirmed a district court's award of $5,000.00 in emotional distress damages in *Beaver v. Mont. Dep't of Natural Res. & Conservation*. In Beaver, the plaintiff was subjected to a single incident of sexual assault by her

supervisor outside of work prior to receiving a less desirable position. The court noted that Beaver did not have any further contact with the supervisor after the incident; the employer did not take inappropriate action against her; and her therapist reported she was unlikely to need further therapy related to the sexual assault and required no medication and was able to return to work. *Id.* at ¶88. The court found "the award of compensatory damages. . . [was] not so grossly out of proportion to Beaver's injury as to shock the conscience." *Id.* at ¶94.

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

The credible evidence at hearing demonstrated that McEachern suffered substantial emotional distress. Schulke subjected her to repeated inappropriate comments about her sex life, her appearance and her sexual activity while she attempted to earn a living for her and her family. This has had a profound effect on her mental well-being, her inter-personal relationships and her ability to work with male superiors.

McEachern has requested $75,000 in emotional distress damages, which is excessive based upon the severity of the conduct and when compared to similar cases. McEachern likens the facts of her case to the facts of *Groven v. Havre Aerie Eagles* #166, Case No. 1877-2010 (Sept. 28, 2011)(order after remand). In *Groven*, the Charging Party was subjected to repeated offensive touching by her supervisor, which continued despite her complaints.

The severity of the conduct in *Groven* is not at all similar to the issues experienced by McEachern. The facts of this case are more similar to *Vainio* in which an award of $25,000 was deemed appropriate for the emotional distress experienced by the Charging Party in that case. Therefore, based upon a consideration of the severity of the incidents experienced by McEachern and the discriminatory discharge, an award of $25,000 for emotional distress is appropriate.

4. *Affirmative Relief*

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

VI. CONCLUSIONS OF LAW

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

2. Treasure State Associates, LLC, illegally discriminated against Christy McEachern by subjecting her to a hostile work environment because of her sex.

3. Treasure State Associates, LLC, did not illegally retaliate against Christy McEachern for protected activity.

4. Christy McEachern is entitled to recover $66,635.92 in front pay, the present value of which is $63,197.88, to address the suffering she experienced as a result of the discriminatory conduct of Thomas Schulke, as the sole appointed agent for Treasure State Associates, LLC.

5. Christy McEachern is entitled to recover $50,617.67 in back pay she suffered as the discriminatory conduct of Thomas Schulke, as the sole appointed agent for Treasure State Associates, LLC, along with $3,083.85 in interest.

6. Christy McEachern is entitled to recover $25,000.00 for the emotional distress she suffered as a result of the illegal discrimination. McEachern is entitled to post judgment interest on all of these amounts.

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

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

VII. ORDER

1. Judgment is granted in favor of Christy McEachern and against Treasure State Associates, LLC, as Treasure State Associates, LLC, discriminated against McEachern in violation of the Montana Human Rights Act.

2. Within 60 days of the date of this decision, Treasure State Associates, LLC, shall pay to Christy McEachern the sum of $141,899.40. representing $116,899.40 in economic losses sustained and $25,000 in emotional distress damages.

3. The department permanently enjoins Treasure State Associates, LLC ,from discriminating against any person on the basis of sex.

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

DATED: this 8th day of August, 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: Christy McEachern, Charging Party, and her attorney, Philip Hohenlohe; and Treasure State Associates, LLC, Respondent, and its attorney, Thomas Bancroft:

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.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows, as well as by email to the indicated email addresses:

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DATED this 8th day of August, 2019.

/s/ SANDRA PAGE
Legal Secretary

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