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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1002-2020:

CHERYL HYLAND, Charging Party, vs. RDJ ENTERPRISES, INC., d/b/a DOC AND EDDY'S, Respondent.	**HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Cheryl Hyland filed a charge of gender discrimination and retaliation against RDJ Enterprises, Inc. d/b/a Doc & Eddy's, on July 5, 2019. Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter on July 6, 2020, in Glendive, Montana. Attorney Veronica Procter represented the Charging Party, and Attorney Geoff Cunningham represented the Respondent.

At hearing, Cheryl Hyland, Laura Fuhrman, FNP, Tess Marburger, M.D., Deborah D. Robart, LCPC, and Rick Jensen testified under oath. Charging Party's Exhibits 1-3 were admitted into evidence.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings.

II. ISSUES

1. Did Doc & Eddy's discriminate and/or retaliate against Hyland on the basis of sex in violation of the Montana Human Rights Act, Title 49, Chapter 2, Montana Code Annotated?

2. If Doc & Eddy's did illegally discriminate and/or retaliate against Hyland 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 Doc & Eddy's did illegally discriminate and/or retaliate against Hyland 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. FINDINGS OF FACT

1. Rick Jensen (Jensen) operates RDJ Enterprises, Inc. d/b/a Doc & Eddy's ("Doc & Eddy's"), a casino located in Glendive, Montana, and owns the building where the casino is located. There is also a real estate office, a barber, and a manicurist in the same location. Jensen is the sole shareholder of the corporation.

2. Charging Party Cheryl Denise Hyland (Hyland) began working at Doc & Eddy's in 2014 as a cashier and floor runner. Her duties included cleaning, serving alcoholic beverages, and opening and closing the casino.

3. In or around August, 2018, Doc & Eddy's was experiencing issues with its lender, Bank of Baker. In order to resolve issues with the bank, Jensen borrowed from Lyle Christensen (Christensen). The money was given to Jensen, and Jensen made payments on the loan to Christensen.

4. On September 12, 2018, Doc & Eddy's of Glendive, LLC (the "LLC"), submitted paperwork to the State of Montana Secretary of State listing Rick and Lyle Christensen as the only two members.

5. Jensen and Christensen reached an agreement that, once the Montana Gaming Commission approved Christensen, the assets of the casino would be transferred to the LLC, and the two would be partners in business. In return for becoming partners, Christensen would forgive the loan. As of the date of the hearing in this matter, however, neither the assets, ownership, nor management of the casino had been transferred from RDJ Enterprises (i.e., Doc & Eddy's) to the LLC, and the LLC had no role in the casino operations.

6. Notice was placed in a local newspaper by the Gaming Commission of the intent to transfer Doc & Eddy's alcoholic beverage license to the LLC, with Jensen and Christensen as owners.

7. Christensen was involved in the daily operations of Doc and Eddy's after he loaned money in August 2018. He started making changes to the casino's operations, such as that the employees could not give away free beers unless it was a certain brand, and checks would no longer be accepted as payment.

8. Christensen took over for a sick employee and started working shifts at Doc & Eddy's. After he started working shifts, his name was on the employee computer system and his phone was on the list to call in case there was an emergency. Christensen had not worked any shifts for Doc & Eddy's prior to loaning money in August, 2018.

9. Christensen eventually complained that the work was hurting his feet, and so he hired another employee, Amanda, without prior consultation from Jensen. The hiring was not challenged by Jensen. When Amanda was hired, Jensen announced he would be in charge of her training and her work. Christensen never, however, had any direct supervisory authority over Hyland.

10. Lyle had a key to Doc & Eddy's, a combination to the safe, and access to computers. He also had access to the reader board to update people's names for points, etc., at the casino.

11. Christensen was in Doc & Eddy's computer system as an employee at the time of Hyland's assault.

12. Jensen had relayed dismay to Hyland that he had to deal with Christensen because of all the changes being made at Doc & Eddy's by Christensen.

13. On December 28, 2018, Christensen came into Doc & Eddy's and was arguing with himself, which Hyland had seen him do before. Shortly thereafter, he won on the machine and he called Hyland over.

14. When Hyland came over to Christensen, he pulled her down on his lap and said he wanted to give her a kiss. Hyland attempted to get up, but Christensen pulled her back down again. Hyland started crying, and she went into the back of the casino and called Jensen.

15. Jensen was in bed, but told Hyland he would get up and come down to the casino. Jensen told Hyland she could also use a button under the bar to call police if necessary.

16. When Hyland returned back to the front area of the casino, Christensen was leaving. Hyland called her husband, who stayed with her until she closed that night.

17. Hyland again called Jensen to say Christensen had left, and so Jensen ultimately never returned to the casino that night following Hyland's calls.

18. When Doc & Eddy's opened the following morning, Hyland and her husband were there and told Jensen they wished to press charges against Christensen for his actions toward Hyland. The Hylands called the police, to which Jensen did not object, and the police came.

19. Although the exact operational status of the casino cameras is unclear, the cameras were recording and police were able to recover the video of the incident between Christensen and Hyland. The video confirmed an assault against Hyland. Jensen never reviewed the video of the incident.

20. As a result of Hyland's complaint and the video evidence recovered from the casino, Christensen was arrested and charges were filed. Christensen bonded out not long after his arrest, but was legally prohibited from being around Hyland.

21. Jensen informed Christensen he was no longer allowed to enter the casino. Christensen did not enter the casino again prior to Hyland's resignation.

22. As a result of the incident, Christensen eventually pled nolo contendere to some form of misdemeanor assault.

23. Hyland had been warned by a co-worker three times to be careful if she decided to press charges against Christensen because of concerns about a past criminal record. Jensen had also warned Hyland to be careful with regard to Christensen. Because of both these warnings and also rumors Hyland heard, she was still concerned about her safety after Christensen was charged.

24. Prior to the December 28, 2018, incident, Hyland had complained to Jensen that Christensen talked to himself, stared at her, and made her uncomfortable. Jensen relayed that Christensen may have issues, but blamed those issues on an acrimonious divorce.

25. After the events surrounding the assault, Jensen made a statement to Hyland to the effect that "he doesn't get mad he gets even" with respect to another employee that wronged him. Jensen claimed this statement was intended to relate to

a prior employee accused of stealing from his business whom he helped to rehabilitate rather than retaliate against. Regardless of the statement's intended meaning, Hyland interpreted it as a threat.

26. Although Jensen considered Hyland a good employee and had few issues with her, an incident involving possibly allowing a family member to acquire points accumulated by another casino patron occurred shortly before the assault. When Jensen confronted Hyland, it was the first time he observed her shaking and twitching in the entire time she had worked for him.

27. Hyland became hypervigilant regarding her safety and concerns about Christensen as a threat following the assault. Jensen observed that Hyland was scared of both himself and Christensen, and believed Hyland had justification to be afraid of Christensen.

28. On January 5, 2019, the Saturday following the assault, Hyland was looking out the casino door because she was scared Christensen may return to Doc & Eddy's. At some point, Jensen walked over to Hyland and told her what he considered to be a comical anecdote regarding a friend in college who was raped and ostensibly liked it so much she left her boyfriend for the rapist. The story cause great upset to Hyland.

29. On January 7, 2019, the Tuesday following the assault, Hyland called the casino, but the phones were turned off. In her state of hypervigilance, Hyland was upset and concerned the phones were intentionally disabled as a threat and attempt to isolate employees at the casino.

30. As a result of her concerns, Hyland went with her husband to Doc & Eddy's the following morning, January 8, 2019, to give notice of her intent to quit. Although Hyland's husband attempted to pick up her check, Jensen stated Hyland needed to come inside personally to do paperwork. Hyland's husband threatened to call law enforcement and left, and Jensen followed him outside with a paycheck while yelling at them.

31. Hyland subsequently reported Jensen to the Montana Gambling Commission for what she asserted was a practice of keeping two sets of "books" for the casino.

32. Hyland went to Job Service and started looking for new employment the following Monday. In subsequent job interviews, Hyland would cry when asked her about employment. Hyland was fearful to work anywhere Jensen or Christensen might patronize.

33. Hyland searched for work from April to September 2019, when she got a job working at a hotel breakfast area. She felt safe there because she could mostly work in the kitchen, did not know people there, and knew neither Jensen nor Christensen was likely to patronize a hotel in the town in which they lived. As of the date of the hearing, however, Hyland had been laid off since March 17, 2020, due to the COVID-19 pandemic. She intended to return when needed.

34. At the hotel, Hyland worked 13 to 15 hours a week at $10.00 per hour with infrequent tips.

35. While working at Doc & Eddy's, Hyland averaged 36 to 38 hours per week at $9.00 per hour with $40-$60 in tips on weekends.

36. Hyland supports her husband because he is disabled.

37. Laura Fuhrman, FNP (Fuhrman), was qualified as an expert at hearing. She is a family nurse practitioner who works at Prairie County Hosp District in Terry, Montana. She went to Miles Community College and obtained an associate's degree in nursing. She subsequently obtained her bachelor's degree in nursing from Kaplan University (online). She then attended Vanderbilt University to obtain a master's degree and become a FNP. Fuhrman currently works in Glendive, Montana, in the ER Department and also in Sidney, Montana.

38. Fuhrman first treated Hyland after the assault on January 14, 2019. Hyland presented complaining of anxiety since the workplace assault. Hyland reported she was forced to quit her job, had legal issues pending, and was having trouble coping with everything. Fuhrman did not have reports of these types of issues prior to 2019.

39. Regarding Hyland's physical manifestations of stress and anxiety, she was experiencing poor sleep, concentration issues, and would become shaky and scared. The symptoms were affecting Hyland's everyday life, and Fuhrman was concerned about her mental health and ability to care for herself and manage day to day activities. Fuhrman diagnosed Hyland with anxiety and insomnia and prescribed a benzodiazepine. Fuhrman also suggested Hyland see a counselor.

40. Fuhrman continued to treat Hyland for similar symptoms, and Hyland continued to bring up her workplace assault as a trigger for her symptoms. Fuhrman did not have any concerns about drug-seeking behavior or malingering.

41. Tess Marburger, MD (Marburger), was qualified as an expert at hearing. She is a neurologist at St. Alexis in Williston, North Dakota. Marburger attended undergraduate and medical school at the University of Michigan, completed a medical internship at the University of Illinois-Chicago, and completed her neurology residency training at Duke University Hospital. Marburger is Board Certified in Psychiatry and Neurology, and has been with St. Alexis since 2015.

42. Marburger opined that Hyland has a history of myoclonus (i.e., involuntary muscle jerks). The initial triggering event of the myoclonus was an electrocution in 2008. Hyland was knocked unconscious at the time and suffered a brain injury. Hyland experienced tremors and jerks triggered by physical or emotional stress and which manifested in the shaking of her arms and head. The more activity she would do, the more all over twitching would increase. Some events were more subdued, such as mild symptoms Hyland experienced when engaging in activities like washing dishes.

43. Marburger first treated Hyland after the assault on April 29, 2019. Hyland reported to Marburger that a sexual assault at her workplace caused the current severe onset of symptoms: anxiety, stress and worsening of her involuntary muscle movements.

44. Marburger noted there was a striking difference in the severity of Hyland's symptoms at the time she saw Hyland. It was Marburger's professional opinion that a sexual assault would be a source of psychological stressors, which could worse symptoms of myoclonus; any trauma or stressors can exacerbate the symptoms of myoclonus.

45. Marburger recommended counseling and therapy as course of treatment, and believed medications could only be somewhat helpful. Reducing stressful triggers would reduce symptoms.

46. Marburger continued to treat Hyland, and advised her to continue with medication (a benzodiazepine) and counseling. It was Marburger's professional opinion that Hyland would require future treatment, but not necessarily that of a specialist such as herself.

47. Deborah D. Robart, LCPC, (Robart) was qualified as an expert at hearing. Robart has been a Licensed Clinical Professional Counselor since 1995 and is a Member of American Counseling Association. Since 2016, she has been in private practice in Glendive, Montana. She owns Hope Counseling and Consulting, PLLC. She also participates in the local adult treatment court and the DUI Court. Robart has a bachelor's degree in criminal justice and sociology from Montana State

University in Bozeman, Montana. She also has a master's degree in community mental health from Chadron State College in Chadron, Nebraska, and has taken multiple graduate level courses. Robart specializes in the areas of child and family, trauma, compulsive gambling, and Native American and multicultural therapy, and has practiced in not only Montana, but also Washington, South Dakota, and Nebraska.

48. Robart previously was a child and family service therapist in Nebraska, worked for the tribe Omaha Nation, Suquamish Tribe in Washington, was Director of Disaster Mental Health for the Red Cross and Department of Health and Human Services in King and Kitsap Counties in Washington, worked with the Tulalip Tribe, and owned her own private practice in Washington. Robart moved to Montana when her husband, who was in the military, retired.

49. Robart has been certified and trained in Eye Movement Desensitization and Reprocessing (EMDR) since 1995. EMDR can assist in dealing with trauma and mental health. Her current practice includes half adults and half children, of which approximately 75% are trauma victims.

50. Hyland began treating with Robart on May 1, 2019. Hyland reported she needed treatment because she was sexually assaulted at work. Due to her unemployment at the time, money was also a major problem in her household. Hyland indicated she was having trouble functioning in her daily activities of life.

51. During the first appointment, Hyland explained to Robart that she was scared about having reported the assault and of both Jensen and Christensen. Hyland was particularly concerned about Christensen's violent criminal history and possible mental health issues.

52. Robart initially diagnosed Hyland with Acute Post-Traumatic Stress Disorder (PTSD) based on her behavior, the fact that she was not sleeping, her hypervigilance, and constant crying regarding the subject matters of both the assault and employment in general. In Robart's professional opinion, any prior traumas she experienced had resolved by the time of their visit.

53. Robart continued treating Hyland on a weekly basis for issues related to the assault, job loss, finances, and extreme fear of both Jensen and Christensen. In or about September, 2017, Robart reduced her visits to once every two weeks until approximately May of 2020, when the stress of the present action increased. EMDR was used initially, then stopped due to seizure-like side effects, then re-initiated later in the therapy.

54. Robart opined that, although Hyland's symptoms were real, she conflated many different issues into her fear of Jensen and Christensen, which effectively made them larger-than-life to her.

55. Robart continues to see Hyland. Although Robart's diagnosis of Hyland is still PTSD, it has changed from acute to chronic, meaning lasting more than one year. Robart did not believe Hyland could live in a heightened state of fear for so long and maintain her well-being. In Robart's professional opinion, Hyland will require future treatment with a reasonable degree of reasonable certainty, for 6-9 months at a rate of $175, once a week.

56. Doc & Eddy's did not present any expert testimony contradicting the opinion of Hyland's providers.

57. Hyland continues to be fearful of Christensen in particular. She had seen him around town and believed he glared and pointed at her, and also believed he had driven by her home several times in an attempt to intimidate her. For a short period of time, Christensen had actually moved into a residence that was within two blocks of Hyland's home.

58. As a result of the assault, Hyland feels as though she lost her security.

59. Due to her unemployment, Hyland had to begin using the Food Bank and eggs from her chickens. Hyland never had to go to the food bank before leaving her employment at Doc & Eddy's.

60. Hyland and her husband enjoy metal detecting as a hobby, but Hyland now feels she can no longer metal detect in places that Jensen or Christensen may drive by.

61. Hyland frequently observes both Jensen's and Christensen's cars at the Doc & Eddy's location, which she must drive by when going elsewhere, and it causes her increased anxiety.

62. At hearing, Hyland's presentation was not entirely consistent with either her own testimony or that of her medical providers. While Robart was present and testifying in particular (Robart was the only medical provider to testify in-person), Hyland presented significant signs of crying and involuntary twitching. These behaviors subsided significantly outside the presence of Robart, and were essentially non-existent during Hyland's own testimony.

63. Hyland testified she was terrified to be anywhere other than her house and that it was the only place it felt safe. Hyland presented at the hearing as severely sunburned, however, which was at odds with her testimony. Although Hyland attempted to offer explanations for how she had gone to a lake recently with her family, the explanation did not match with Hyland's testimony.

IV. DISCUSSION[1]

A. Hostile Work Environment

What Hyland terms a "harassment" claim is, based on the elements set forth by counsel, a claim for hostile work environment, and will be addressed here as such. 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). 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. *See, e.g., Crockett v. City of Billings*, 234 Mont. 87, 92, 761 P.2d 813, 816 (1988).

A hostile work environment due to sexual harassment is a violation of the MHRA. *See Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶¶ 17-19, 332 Mont. 293, 138 P.3d 419 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62 (1986)). To establish a prima facie case, the charging party must demonstrate:

(1) that the party is a member of a protected class;
(2) that the party was subjected to offensive conduct that amounted to actual discrimination because of sex;
(3) that the conduct was unwelcome; and
(4) that the sexual harassment was so severe or pervasive to alter the conditions of employment and create an abusive working environment.

Jones v. All Star Painting Inc., 2018 MT 70, ¶ 18, 391 Mont. 120, 415 P.3d 986 (citing *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶¶ 15-19, 322 Mont. 434, 97 P.3d 546). Hyland, as the charging party has the burden of persuasion. Mont. Code Ann. § 26-1-402.

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

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

In this case, a significant issue is that much of the harassment complained of came from Christensen, not Jensen, the actual employer. For purposes of discrimination claims, an "employer" is defined as "an employer of one or more persons or an agent of the employer. . . ." Mont. Code Ann. § 49-2-101(11). An employer may be held liable for the sexual harassment of its employee by third parties where the employer, its agents, or its supervisory employees know or should have known of the conduct and ratify or acquiesce in the conduct by failing to take immediate and appropriate corrective action. *Puskas v. Pine Hills Youth Corr. Facility*, 2013 MT 223, ¶ 33, 371 Mont. 259, 307 P.3d 298 (citing *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2001); 29 C.F.R. 1604.11 (applying the knows or should have known standard, and adopted in Montana pursuant to Admin R. Mont. 24.9.1407)).

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

There was sufficient evidence presented at hearing for the Hearing Officer to conclude that, regardless of whether payments made from Jensen to Christensen were characterized as wages or repayment of loan amounts, Christensen was an employee

of Doc & Eddy's and therefore a co-worker of Hyland for purposes of the MHRA. No evidence was presented, however, that Christensen was an actual owner of Doc & Eddy's or a supervisor of Hyland. As of the date of the hearing in this matter, neither the assets, ownership, nor management of the casino had been transferred from RDJ Enterprises (i.e., Doc & Eddy's) to the LLC, and the LLC had no role in the casino operations. As an "owner," Christensen was only a member of the newly-created LLC, which is not the employer at issue in this matter. In addition to being an employee of Doc & Eddy's, Christensen was a creditor. Thus, while Hyland may show she was harassed by Christensen, doing so gives rise to additional affirmative defenses since he was only a co-worker.

1. Hyland Cannot Establish Her Prima Facie Case

Hyland has shown she is a member of a protected class based on sex. This factor satisfies the first element of her hostile work environment claim.

As to Christensen, Hyland has also shown she was subjected to offensive conduct that amounted to actual discrimination because of sex. His assault on Hyland in the form of unwanted sexual advances and touching was in no way disputed by Doc & Eddy's. It does not matter if Christensen ultimately pled nolo contedere to a lesser offense than he was initially charged with, as it does not change the nature or extent of the ultimate harm. *See Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995). In her post-hearing briefing, however, Hyland does not allege Jensen contributed to a hostile work environment. Therefore, Hyland has shown second element of a hostile work environment claim, but only as to the actions of Christensen.

Hyland has similarly shown that Christensen's conduct was unwelcome. She did not initiate the exchange with Christensen, and immediately withdrew when he assaulted her. She contacted Jensen immediately afterward to express her fear at Christensen's unwanted behavior, and contacted law enforcement in order to press charges against Christensen. She has therefore shown the third element of a hostile work environment claim.

With regard to the fourth element of a prima facie case—whether the sexual harassment was so severe or pervasive as to alter the condition of employment and create an abusive working environment—Hyland herself admits Christensen's behavior was isolated to a single event on a single day. Case law has held that, where a sexual assault was of sufficient severity, a single incident can be enough to create a hostile work environment. *See Tomka; Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949, 959-60 (4th Cir.1997) (involving a claim not directly under Title VII but applying the same legal principles; rape by college football players in a dorm room

was sufficiently severe that the student did not need to return to school in order to have experienced a hostile environment); *see also King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (citations omitted; although a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident). Mere physical assault alone, however, is not per se enough for a single incident to create a hostile environment. *See Beaver v. DNRC*, 2003 MT 287, ¶ 41, 318 Mont. 35, 78 P.3d 857.

In *Beaver v. DNRC*, *supra*, the Montana Supreme Court recognized that a single incident may be sufficient to create a hostile work environment. However, "the appropriate standard requires review of all of the facts and circumstances surrounding the incident of sexual assault. . . ." *Beaver*, ¶ 47. The circumstances must show that the environment was sufficiently severe or pervasive to alter the conditions of a charging party's work environment. *Id*. ". . . [I]n order for a sexually objectionable environment to be actionable under Title VII, it must be both objectively and subjectively offensive." *Beaver*, ¶ 48 (citing *Harris*, 510 U.S. at 21-22). The Montana Supreme Court concluded that, where the employer had taken immediate action to protect victim and to prevent further misconduct by harasser, and where the victim never saw the harasser at work again and there was no other evidence of sexual misconduct, the victim had failed to show a hostile working environment. *Beaver*, ¶ 49.

Here, there is no allegation that Jensen knew Christensen was engaging in the assault or somehow condoned the behavior. To the contrary, while Jensen's remedial actions could possibly have been more significant, he supported Hyland's contact of law enforcement, cooperated with the investigation, and informed Christensen he could no longer enter the casino. Hyland never encountered Christensen at the casino again after Jensen's actions. While it is admitted that Hyland's reaction to the situation was severe, when viewing the situation both subjectively and objectively, Hyland did not present a picture of a pervasively hostile environment as required under the law.

Hyland had been working at Doc & Eddy's since 2014, and did not allege any other instances of sexual harassment or other factors lending to a hostile working environment. She expressed prior discomfort to Jensen regarding Christensen, but those concerns went to issues such as how he talked to himself and possible signs of mental illness, not sexual harassment. The Hearing Officer therefore cannot find that, under the totality of the circumstances, harassment within Hyland's work environment was so severe or pervasive to alter the conditions of employment and create an abusive working environment. Additionally, as stated, while Jensen's own comments post-assault may have been inappropriate, Hyland does not allege these

statements contributed to a hostile working environment, only that they were evidence of retaliatory conduct. Hyland has therefore failed to establish the fourth element of her prima facie case.

2. Even if Hyland Could Establish Her Prima Facie Case, Her Claims are Sufficiently Rebutted

Even assuming, *arguendo*, that Hyland was able to establish the fourth element of her prima facie case, Doc & Eddy's has nonetheless managed to sufficiently rebut her claims. Notwithstanding its additional affirmative defenses regarding Christensen, Doc & Eddy's has shown it did not ratify or acquiesces in the conduct and that it took corrective action.

In a hostile work environment claim, the employer's liability attaches only after it negligently responds, or fails to respond, to the condition created by the third party. *See Puskas*, ¶ 34. An employer response is required "upon gaining awareness that an employee is being sexually harassed." *Id.*, ¶ 35 (citation omitted). An employer who acts promptly and reasonably will not be held liable for the actions of a third party, but the reasonableness of the remedy depends on the employer's ability of the employer to stop the harassment. *Id.*, ¶ 35 (citing *Ellison v. Brady,* 924 F.2d 872, 882 (9th Cir. 1991)). The Montana Supreme Court has held that "'culpable acts of continuing discrimination in the work place primarily [take] the form of the employer's failure to seriously and adequately investigate and discipline [the harasser] following the assault and the employer's subsequent failure to protect [the victim] on the job.'" *Stringer-Altmaier*, ¶ 27 (quoting *Benjamin v. Anderson*, 2005 MT 123, ¶ 54, 327 Mont. 173, 112 P.3d 1039) (emphasis added in *Stringer-Altmaier*). An employer cannot avoid liability for its employees' harassment when "it utterly fails to take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F. 3d 965, 978 (7th Cir. 2004). These factors are essentially identical to the affirmative defenses available with regard to co-worker harassment (i.e., where, as here, the harassment is not directly from the employer), with exception of a defense as to whether the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *See Vance*, 570 U.S. at 423-24 (citations omitted).

Hyland argues that Doc & Eddy's, through Jensen, neither seriously or adequately investigated and disciplined Christensen following the assault, nor did it protect Hyland on the job. Hyland points to Jensen's failure to come to the casino on the night of the incident, and the fact she was the one who called law enforcement. It is unclear how Jensen's presence would have changed matters on the night of the assault when Christensen had already left the casino. It is furthermore unclear what else Jensen could have done to assist with criminal charges against

Christensen since he was not a witness and had already let authorities take evidence from the casino. As already stated herein, Doc & Eddy's actually did take immediate action to stop the harassment. Jensen encouraged Hyland to press charges against Christensen and participated in the law enforcement investigation. Jensen also took actions to prevent Christensen from returning to the casino so long as Hyland was employed there. While there is an argument it could have taken additional corrective actions against Christensen, this argument must be taken in the context that Hyland resigned within approximately ten days of the incident. In fact, Hyland quit her employment before Christensen's ultimate criminal role in the incident had even been determined, and without making any additional corrective requests of the employer. Although Christensen did eventually return to the casino afterward, it was after Hyland had already ended her employment, making any supposition as to what might have happened had Hyland stayed purely speculative.[2]

In light of the foregoing, Hyland's claim would be barred as a result of the corrective actions taken by Doc & Eddy's following the incident. Whether these actions were sufficient in the long-run to put a complete end to the harassment was rendered moot by Hyland's own resignation only approximately ten days after the incident with Christensen.

B. Retaliation

Hyland also brings a claim for retaliation. Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. *See* Admin. R. Mont. 24.9.603(2). The elements of a prima facie retaliation case under the MHRA 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*, ¶ 71; Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the

[2] The Hearing Officer does recognize that Hyland asserts she was forced to quit her employment in connection with her retaliation claim, but that assertion does not change the analysis of Hyland's hostile work environment claim.

adverse employment action. *See generally Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). A retaliation claim is a separate action from the original discrimination suit. *See Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989).

Circumstantial evidence can provide the basis for making out a prima facie case of retaliation. In this case, the parties dispute the meaning of Jensen's statements regarding being careful what Hyland said about Christensen, "I don't get mad, I get even," and also the intent of the rape anecdote. The parties also dispute whether those statements were made because of Hyland's protected activity, and also whether any adverse action was taken against Hyland. As such, this is a circumstantial evidence case. Where the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610(3), (4); *Rolison*, ¶ 16; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 868 (9th Cir. 1996).

Only the second element of Hyland's prima facie case is significantly disputed by the parties. As such, the Hearing Officer will address that issue last in this analysis.

The first element Hyland must prove for a prima facie case for retaliation is whether she engaged in protected activity. "Protected activity" means the exercise of rights under the act or code and may include:

> (a) aiding or encouraging others in the exercise of rights under the act or code;
> (b) opposing any act or practice made unlawful by the act or code; and
> (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code.

Admin. R. Mont. 24.9.603(1). Hyland complained to Jensen about Christensen's behavior when he assaulted and sexually harassed her. This alone is enough to show that she engaged in protected activity.

The third element of a prima facie retaliation claim is causal relationship. In order to establish the causal link between the protected conduct and the illegal

employment action, the evidence must show the employer's adverse employment action was based in part on knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (Causation "may be inferred from . . . the proximity in time between the protected action and the allegedly retaliatory employment decision"). Hyland has also shown that statements made by Jensen regarding being careful, getting even, and the rape anecdote were causally linked to her protected activity. Had she not made the claim against Christensen, Jensen would not have made the statements. Hyland has therefore satisfied the third element of her claim. The question, however, is whether those statements amounted to an adverse employment action.

Going back to the second element of the retaliation claim, this element concerns whether Doc & Eddy's took adverse employment action against Hyland. Significant adverse acts are those which "would dissuade a reasonable person from engaging in a protected activity," and include:

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

Admin. R. Mont. 24.9.603(2)(a)-(b). Here, Hyland's claims of retaliation only go to the actions taken and statements made by Jensen.

Hyland does not assert she was terminated, but rather asserts she was forced to quit as a result of Jensen's actions and statements. Hyland specifically asserts that, between the time of the assault and her resignation, Jensen directed threatening comments at her regarding Christensen, including telling her to "be careful" with what she said about Christensen and stating something to the effect that he did not get mad, he got even with people. Based on the testimony and evidence presented at hearing, the Hearing Officer determines these statements were not intended as threatening toward Hyland, and a reasonable person would not have interpreted them as such. If anything, the statements appear to show that Jensen, too, was concerned about Christensen and his behavior, and was expressing that concern. Regardless, though, there is no evidence the statements amounted to a threat to

Hyland's job or any other type of adverse employment action because she had pursued (and continued to pursue) a claim against Christensen.

With regard to the rape anecdote made by Jensen, the intentions are less clear. The statement was, at a minimum, highly inappropriate, and Hyland was understandably upset by what Jensen claimed was a joke. Hyland failed to present any evidence, however, showing the isolated statement amounted to a retaliatory act. She did not show where this—or any other action or statement made by Jensen—was intended to intimidate her or threaten violence. She also did not show where Jensen's statements amounted to termination, a demotion, a suspension, a reduction in pay, a reduction in hours, an undesirable work schedule, or a denial of any benefits normally afforded Hyland. Instead, Hyland simply asserts she was forced to quit solely because of Jensen's statements.

Without more to show an adverse action was taken against her, the Hearing Officer fails to see where evidence of Jensen's statements alone satisfy the second element of Hyland's prima facie case. Hyland may well have had justifiable reasons for leaving her employment with Doc & Eddy's and was clearly suffering emotional trauma as a result of Christensen's assault, but as she has presented her case, her departure was not forced and was not the result of an actionable adverse action by the employer.

Because Hyland failed to prove her prima facie case, no further analysis is required.

V. CONCLUSIONS OF LAW

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

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

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

4. Hyland has failed to prove that Doc & Eddy's violated the Montana Human Rights Act. Mont. Code Ann. §§ 49-2-301, -303(1).

5. For purposes of Mont. Code Ann. § 49-2-505(8), Doc & Eddy's is the prevailing party.

VI. ORDER

Judgment is granted in favor of Doc & Eddy's and against Hyland.

DATED: this 29th day of January, 2021.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Cheryl Hyland, Charging Party, and her attorney, Veronica Procter; and Respondent RDJ Enterprises, Inc., d/b/a/ Doc & Eddy's, and its attorney, Geoff Cunningham:

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

Hyland.HOD.cvp