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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 827-2017

JERRY JAMES BRIGHT,	)
	)
Charging Party,	)
	) HEARING OFFICER DECISION
vs.	) AND NOTICE OF ISSUANCE
	) OF ADMINISTRATIVE DECISION
KB ENTERPRISES, LLC, D/B/A SNAPP ITZ,	)
	)
Respondent.	)

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I. PROCEDURAL AND PRELIMINARY MATTERS

Jerry Bright brought this complaint alleging that his employer, KB Enterprises, LLC, d/b/a Snapp Itz (KB), discriminated against him on the basis of his race and national origin when it failed to take action to stop his supervisor from using racial slurs toward him at work. Bright further alleged that he was forced to quit his employment as a result of the hostile work environment.

Hearing Officer David A. Scrimm convened a contested case hearing in this matter on April 20-21, 2017. J. Ben Everett, attorney at law, represented Bright. Matthew J. Sack, attorney at law, represented KB.

At hearing, Bright, Josh Blaz, Kevin Beck, Travis Scholler, Misty Franklin, and Dave Gustafson testified under oath. Debbie Fortner, Gustafson's wife, was subpoenaed to testify and was contacted by the Hearing Officer at the hearing. She stated she would be there in 15 minutes, but failed to appear to testify. Charging Party's Exhibits 1and 3 and Respondent's Exhibit 1 (middle paragraph) and Exhibit 2 were admitted into evidence. Respondent's Exhibit 3 was refused and the parties were given the opportunity to argue whether it should be admitted in their post-hearing briefs. It was not argued and remains not admitted. Respondent's Exhibit 4 was not offered. The parties also filed the depositions of Jerry Bright, Misty Franklin,

David Gustafson, David Ritchie, Travis Scholler and the 30(b)(6) deposition of KB Enterprises.

With respect to the objections to the designation of KB's 30(b)(6) deposition the Hearing Officer overrules KB's objection to p. 24, l. 20; p. 31, l. 12; p. 44, l. 9; p. 54, ll. 2, 16, 25 and p. 57, l. 20. The Hearing Officer sustains KB's objection to p. 42, l. 11 and p. 53, l. 17, but not lines 23-25.

Prior to hearing, the Hearing Officer issued an order denying KB's motion to quash the subpoena of Stephanie Clement; denying Bright's motion to allow the telephone testimony of Lloyd Shelton and granting Bright's motion to allow Clement to testify by telephone. The order informed the parties that the order may be further explained in this decision. However, since Clement was not called as a witness, issues involving her testimony are moot. At hearing, Lloyd Shelton was not called to testify so any issue with his testimony is also moot. William Sanders was subpoenaed to testify but did not appear.

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 on June 9, 2017. 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:

A complete statement of the issues is contained in the Final Prehearing Order issued by this tribunal on April 20, 2017.

III. FINDINGS OF FACT:

1. Jerry Bright is a 54-year-old African American male who worked as a fabricator for KB Enterprises (KB) from January 28, 2015 through April 29, 2016.

2. For purposes of the Montana Human Rights Act, Bright is a member of a protected class.

3. KB has less than 15 employees. KB's shop which had at least five saws in regular use could be very loud. Employees frequently wore ear protection or ear buds and listened to a radio playing very loudly.

4. Kevin Beck is the owner of KB.

5. At the time Bright resigned from KB on April 29, 2016, he was earning $14.50 an hour and receiving no benefits.

6. Bright was an excellent employee and an asset to KB.

7. General Manager David Gustafson supervised Bright and all other KB employees. Gustafson left his employment with KB in late June 2016.

8. Gustafson had a condescending and demeaning attitude toward anyone who reported to him, including Bright as "second in command." Gustafson was not a good manager of people. He was even condescending toward Beck. Beck did not know how to perform all of the steps in the fabrication of the products his company sold. This put Gustafson in a position of power over Beck ("had him over a barrel") . Accordingly, Beck would be less likely to address Gustafson's' discriminatory conduct out of fear that he would leave his employment putting Beck and KB in a bind. It wasn't until Bright filed his human rights complaint that Gustafson left his employment with KB.

9. Gustafson intentionally did not want to teach Bright all the 'tricks of the trade' because he feared losing his job to Bright. As a result, Bright did not fully grasp his fabrication job duties, adding to the difficulties between himself and Gustafson.

10. On occasions in March, June, and November 2015, and mid-April 2016, Gustafson called or referred to Bright as a "nigger."

11. In March 2015, the employees went on break to smoke. Bright briefly overheard Gustafson say, "I don't know why Kevin hires niggers and spics anyway." After the break, Bright asked Gustafson to come over to the spin saw work area because he needed some guidance. When they reached the spin saw, Gustafson looked at what Bright had been working on and stated, "I don't know why Kevin hires niggers and spics anyway." Toward the end of the day Bright discussed what happened with Misty Franklin.[1] Beck met with Gustafson about his use of the "N-word" and told him "you know I've told you about this before."

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[1] On cross-examination, Bright testified that he could only speculate that Franklin and Blaz had overheard Gustafson's initial slur when the employees were on break. He did not contradict himself or disavow his testimony regarding what he told Franklin later on that day.

12. In June 2015, Gustafson told Bright "I don't know why Kevin [Beck] hires fucking niggers anyway. I told you a thousand times how to do this and I don't know why you are not getting this." Bright was angry about Gustafson's slurs, but decided not to escalate the situation so he clocked out and then called Beck to report what had happened. He told Beck that Gustafson was using that "nigger crap again." When Beck returned to the premises two or three days later, he held a meeting with Bright and Gustafson to discuss their working relationship. Brights said, "the nigger stuff was getting to him." Gustafson stated Bright asked too many questions. Beck did not address Bright's concerns about Gustafson's racial slurs.

13. On November 30, 2015, some employees felt that Bright and others who had worked over the weekend had left the shop in a mess. Bright thought some of the material could still be used. A meeting was called in the assembly room to discuss the matter. Gustafson and Bright went to the block saw area where Gustafson showed Bright what was trash. Bright stated, "I didn't know that," to which Gustafson responded, "What you nigger stupid or what?" Bright said, "What do you mean?" Gustafson replied, "This is bullshit." Bright was upset that Gustafson had again used the "N-word" toward him and he felt singled out over the trash issue. Bright got in Gustafson's face and physically threatened Gustafson by saying he was going to, "break his fucking neck." The police were called and Bright was asked to leave the premises.

14. Later that same day, Franklin called Bright asking him to bring in a statement describing his version of the day's events when he returned to work. Bright returned to the facility that evening and gave Misty Franklin a statement/complaint regarding what had happened and noted, in part, that Gustafson pushed him "over the top with using the (N) word." Ex. 1.

15. Some time shortly after the November 30 incident, Beck screamed at Debbie Fortner, Gustafson's girlfriend and perhaps common law wife, "Your husband is going to get me sued."

16. When Beck met with Bright and Gustafson after the November 30, 2015 incident, Bright told Beck that he did not appreciate Gustafson using the word "nigger" toward him. Beck told Gustafson that he had warned him about his language before. Beck told Gustafson he was not treating his employees right. Beck also expressed concern that he might get sued over Gustafson's racist conduct.

17. On April 29, 2016, Bright was spinning material when Gustafson came over to check measurements, which he had not done before. There was an issue with

the measurement and Gustafson said, "I've talked to you a thousand times. I don't know why Kevin hired you niggers anyway." Bright became very upset and went into the assembly area to cool off. Gustafson followed him asking, "Are you going back tofucking work?" Gustafson threw a piece of foam and said, "This is bullshit." Bright clocked out and went home to avoid any further confrontation with Gustafson.

18. Gustafson admitted to using the "N-word" at work in 2012 when communicating with William Sanders, a former African-American employee of KB. Gustafson had also been accused of being a racist by Beck's father, Dave Beck, while he was the owner of the company. Beck and his father, Dave Beck, told Gustafson, "You have to watch it or we'll get sued."

19. Although Bright used the term "nigga," it was used as a term of endearment and not as a slur. He and another African-American employee, Lloyd Shelton, would greet each other, "What's up my nigga." Gustafson's conduct in using the term "nigger" in a degrading sense was unwelcome to Bright. Bright complained of this racist conduct to Beck.

20. Blaz also witnessed Gustafson use the "N-word" toward Bright at work.

21. Bright had a temper and short fuse at work.

22. Incidents occurred in December of 2015 and January of 2016 when Bright got angry and lost his temper with his co-workers. Bright called Scholler, a Caucasian, the "N-word."

23. Franklin could not recall anything about the March 2015 incident and was unaware of the June 2015 incident until shortly before Bright quit working for KB. She did not see the initial events leading up to the November 30, 2015 altercation between Gustafson and Bright, nor did she see what occurred when Gustafson and Bright went to the block saw area. Franklin investigated the incident and, other than Bright, no other employee reported hearing Gustafson using the "N-word."

24. Scholler took Bright's job when Bright left KB and became second-in-command.

25. Bright filed his Human Rights Complaint on May 3, 2016.

26. Bright was offered his job back two weeks after he resigned from KB. At that time, Gustafson was still employed at KB and Bright wanted nothing to do with him. Two weeks later, which would still be in May, Beck again offered Bright a job with KB. Travis Scholler was okay with Bright returning. Gustafson left his employment with KB at the end of June. Bright had, by this time, started back working at BSW, Inc. (BSW).

27. Beck gave Bright a good recommendation to BSW on Bright's behalf.

28. At the time of his resignation from KB's employment, Bright earned $14.50 per hour. Bright currently works at Walmart in Fort Collins, CO, and earns $11.70 per hour.

29. At the time of Bright's employment with KB, it had no company policy regarding discrimination. KB had a poster on the wall from some government agency. That poster or a facsimile of it was not introduced into the evidentiary record. Other than the poster, KB had no policy about discrimination that was disseminated to the employees. Bright complained of discrimination and Beck did nothing to address it because he believes it never happened.

30. Beck testified that under KB's nonexistent anti-discrimination 'policy" consequences could include termination if KB's investigation determined discrimination had occurred.

31. Bright and Beck had meetings about Bright's anger issues and confrontations he had with other employees.

32. Bright was hurt by being called "nigger" by Gustafson. It was a painful and dark experience for him, because KB failed to do anything to stop Gustafson's racial slurs. This degrading belittlement made Bright angry and affected his personal relationships, including those with his co-workers.

33. KB admitted that it never conducted an investigation into Gustafson's alleged use of the "N-word." Beck was aware of Gustafson's racist conduct toward Bright, but did not take reasonable steps to protect Bright on the job.

34. KB's racial harassment of Bright, by and through its employee and Bright's supervisor, Gustafson, created an intimidating, hostile, and offensive working environment sufficiently severe so as to alter the conditions of Bright's employment.

35. It was also reasonable for Bright to decline an offer of re-employment by KB due to the working conditions created by Gustafson's offensive conduct. First, because Gustafson was still working for KB, and it was unlikely the racial slurs would have discontinued. The legitimacy of the later offer is in question because, although Bright was told Gustafson was gone, he was not terminated until the end of June well after the time of the second offer.

36. KB's discriminatory actions have caused Bright harm, including lost past and future wages, humiliation and emotional distress for which he is entitled to damages.

37. Claimant's Exhibit 3 was admitted into evidence and shows Bright's earnings for 2016 from KB, BSW, Inc., and Wal-Mart. There are approximately 35 weeks between April 29, 2016 and January 1, 2017. Based on $14.50 per hour x 40 hours per week x 35 weeks, Bright would have earned an additional $20,300.00 for 2016 had he continued working for KB. Instead, and as evidenced by Exhibit 3, he earned $7,725.87 at BSW, Inc. and $4,520.43 at Wal-Mart, which amounts to a difference of $8,053.70 he would have earned for 2016 had his employment with KB continued.

38. Bright also suffered a $2.80 per hour wage loss from January 1, 2017 through the date of this decision. When Bright resigned from KB he earned $14.50 per hour and is currently working for Walmart in Fort Collins, CO and earns $11.70 per hour. There are approximately 40 weeks between January 1, 2017 and the date of this decision, October 10, 2017. Based on the $2.80 per hour wage loss between these dates x 40 hours per week x 40 weeks, Bright has suffered wage loss of $4,480.00.

39. Based on the following figures, Bright is entitled to a total of $12,533.70 in back pay through today's date plus interest.

40. Bright is also awarded one year of front pay in the amount of $5,824.00.

41. Bright suffered emotional distress as a result of Gustafson's discriminatory conduct and Beck's failure to do anything about it. $20,000.00 represents a reasonable amount of compensation for the discrimination he suffered.

42. Imposition of affirmative relief, which requires KB to ensure that its owner(s), supervisors and workers are throughly trained with respect to prohibitions

against racial discrimination and appropriate methods of dealing with such discrimination are appropriate.

IV. OPINION[2]

A. Bright's Testimony is More Credible than the Evidence Offered by KB

The credibility of the witnesses in this matter is critical to determining whether certain events happened, whether certain words were used, whether discrimination occurred and what remedies, if any should be assessed. The four events Bright described where Gustafson used the ""N-word"" are credible. Bright's testimony about him leaving work on two occasions after Gustafson used racial slurs toward him is unrebutted. As such, these acts lend credibility to the motivations for his departure. Further, Gustafson conceded having used the ""N-word"" before and was thought of by others as a racist and that his language could and did lead to a lawsuit. The fact that no one other than Bright heard the words uttered does not lend credibility to the idea that the events that Bright described did not occur. Most of the other employees were not in a position to hear what Gustafson might have said. They were working in other parts of the facility where, given the loud nature of the work and the wearing of ear protection, it is unlikely anyone but two people talking directly with one another in the same space could hear each other.

Beck's insistence that none of these events ever occurred is also not credible because he was not present when any of the incidents occurred. One reason that Beck gave for his assertion that Gustafson did not use the ""N-word"" was that Bright would have beat Gustafson up if he had used that term. If Beck believed that such an altercation was proof of Gustafson using the ""N-word"" toward Bright, he had no better evidence that the events of November 30 where Bright in response to Gustafson's use of the ""N-word"" resulted in Bright threatening to "break his fucking neck." Beck's credibility is further damaged by the fact that much of his testimony in response to questions about whether he had any meetings with Gustafson and or Bright about Bright's allegations was marked with, "I can't recall," "not exactly sure" and "not that I'm aware of."

The credibility of Beck's testimony is further undermined by Gustafson's testimony and to some extent Blaz' testimony. For the most part, the Hearing Officer has disregarded most of Blaz' testimony because of his lying about who was in

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

several pictures taken at a gas station where he and his girlfriend had apparently taken a KB vehicle and not returned it. His initial testimony about Gustafson was more credible than his testimony about Kevin Beck. Further, Gustafson's testimony about meetings where the "N-word" was discussed support Bright's version of events.

B. KB Discriminated Against Bright By Permitting A Racially Hostile Work Environment to Exist.

Montana law prohibits employment discrimination based on race. Mont. Code Ann. §49-2-303(1). The anti-discrimination provisions of the Montana Human Rights Act 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).

A charging party establishes a prima facie case of a hostile working environment with proof that he was subject to "conduct which a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." McGinest v. GTE Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004); see also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The abusive work environment must be both subjectively and objectively hostile. McGinest, supra, 360 F.3d at 1113. "Harassment need not be severe and pervasive to impose liability; <u>one or the other will do</u>." Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted).

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). 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; see also Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998). 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). The objective severity of a charging party's claim of a hostile working environment must be assessed from the perspective of a reasonable person belonging to the racial group of the charging party. McGinest, supra at 1114. See also, Ellison, supra at 879.

An employer incurs vicarious liability for its employees' unlawful conduct when it fails to take reasonable steps to protect an employee from a discriminatory hostile working environment created by an employee.. Altmaier v. Haffner, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. Snell v. Montana-Dakota Utilities Co., 198 Mont. 56, 643 P.2d 841 (1982). 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).

To the extent Bright participated in the hostile conduct with his use of the term "nigga" or "nigger," Bright can still show that the complained of conduct was unwelcome with evidence that, at some point, he made clear to his co-workers and to his superiors that such conduct was unwelcome and the conduct continued thereafter. See, e.g., Erps v. W. Va. Human Rights Comm'n, 224 W. Va. 126, 138, 680 S.E.2d 371, 383 (2009). Bright's testimony convincingly demonstrates that Gustafson's conduct in repeatedly employing the "N-word" was subjectively perceived as hostile. Bright's complaints to Beck clearly demonstrate he perceived Gustafson's conduct as hostile. Bright's written statement about the events of November 30, 2015 also demonstrate that Gustafson's use of the "N-word" was unwelcome and created a hostile work environment. Bright not only complained to Beck, but confronted Gustafson to try to stop the conduct. Gustafson's conduct clearly upset Bright.

The conduct was also objectively offensive. "[I]t is beyond question that the use of the word 'nigger' is highly offensive and demeaning , evoking a history of racial violence, brutality and subordination." McGinest, 360 F. 3d at 1116. Regardless of whether Bright may have used racial slurs himself, the use of the "N-word" by Gustafson directed toward Bright is without question under the circumstances of this case objectively offensive.

Bright testified it felt hurtful to be called the "N-word" by Gustafson, and that it was a painful and dark experience for him because KB failed to do anything to stop Gustafson's racial slurs. Bright testified that this degrading belittlement made him angry and affected his personal relationships, including those with his co-workers. These slurs were designed to humiliate Bright. Under either circumstance, the "N-word" was implemented clearly and unequivocally to discriminate against Bright because of his race.

The discriminatory conduct here was severe in that Bright had to endure his supervisor's use of the "N-word." In addition, given the number of times that the

word was used demonstrates that the offensive conduct was both sufficiently severe and pervasive enough under the circumstances of this case so as to create a hostile working environment.[3] Bright's testimony about the number of incidents in which Gustafson used the "N-word" confirms that the conduct was pervasive. Even if, however, the use of the "N-word" was not pervasive, its use amounts to the type of severe conduct that in and of itself constitutes discriminatory conduct. The only basis for its use by Gustafson was to single out and to humiliate Bright because of his race. These were not errant slips of the tongue, but were designed first and foremost to discriminate against Bright because of his race. The discriminatory conduct was also severe because Bright came to understand that Beck was not going to address the issue with Gustafson in a manner that would make it stop. Bright has, therefore, proven preponderantly that he was subjected to a hostile working environment.

The question that remains, then, is whether KB took reasonable steps to correct the problem. In light of Bright's complaints to Beck, and the failure to do anything to stop–or even investigate–the conduct, the answer is "no." There is no evidence that Gustafson was disciplined, admonished not to engage in patently discriminatory conduct, or even talked to about use of racial slurs toward Bright.

Because Bright has proven a hostile working environment existed, and because Beck did nothing about it, Bright has proven that KB discriminated against him on the basis of race.

C. Bright Was Constructively Discharged on the Basis of Race by KB.

Bright seeks lost wages on the grounds that he was constructively discharged. The Montana Code defines constructive discharge as: ". . . the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment." Mont. Code Ann. § 39-2-903(1). The Montana Supreme Court has

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[3] The fact that only Blaz testified to hearing Gustafson use the "N-word" while other co-workers did not, is given little weight because of the circumstances surrounding the timing and location of Gustafson's slurs within the KB manufacturing facility. The facility has at least five saws which were frequently in simultaneous operation, employees often wore hearing protection or were listening to music with earbuds. A radio was also being played loud enough to be heard throughout the facility. Additionally, Franklin and Beck, if he was present at the facility, worked in offices away from the manufacturing area.

held that the occurrence of a constructive discharge is "usually a question of fact determined by the totality of the circumstances." Bellanger v. American Music Co., 2004 MT 392, ¶ 14, 325 Mont. 221, 104 P.3d 1075 (citations omitted). The determination cannot be based solely on the employee's subjective judgment that working conditions are intolerable. Jarvenpaa v. Glacier Elec. Coop., 271 Mont. 477, 898 P.2d 690, 692 (1995).

Constructive discharge cannot be automatically concluded whenever employment discrimination is followed by the victim's resignation. See Snell v. Mont.-Dakota Utils. Co., 198 Mont. 56, 65, 643 P.2d 841 (1982) (citations omitted). The determination of whether constructive discharge has occurred depends on the totality of circumstances, and must be supported by more than an employee's subjective judgment that working conditions are intolerable. Id. (Citations omitted). "'It is a matter of degree, a question of fact . . . whether by encouraging, participating in or allowing a known pervasive pattern of discrimination, against an employee or a class of employees, the employer has rendered working conditions so oppressive that resignation is the only reasonable alternative.'" Id. (quoting Nolan v. Cleland, 482 F.Supp. 668, 672 (N.D.Cal.1979)).

The Ninth Circuit has determined:

> A plaintiff alleging a constructive discharge must show some "aggravating factors, such as a "continuous pattern of discriminatory treatment." Satterwhite, 744 F.2d at 1382 (emphasis added) (quoting Clark v. Marsh, 214 U.S. App. D.C. 350, 665 F.2d 1168, 1174 (D.C.Cir.1981)). We have upheld factual findings of constructive discharge when the plaintiff was subjected to incidents of differential treatment over a period of months or years. See Wakefield v. NLRB, 779 F.2d 1437, 1439 (9th Cir.1986); Satterwhite, 744 F.2d at 1383; see also Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887-89 (3d Cir.1984); Real v. Continental Group, Inc., 627 F. Supp. 434, 443-44 (N.D.Cal.1986). Similarly, in Nolan, we held that a showing of four incidents of differential treatment over a period of two years was sufficient to create a genuine issue of fact for trial. Nolan, 686 F.2d at 813-14.

Watson v. Nationwide Insurance Co., 823 F.2d 360, 361 (9th Cir. 1987).

Bright has shown that he was subjected to repeated racial slurs by Gustafson. Under the totality of the circumstances, Bright has provided sufficient evidence showing that his work environment was so intolerable that voluntary termination was

the only reasonable alternative. It was reasonable for Bright to leave his employment because after at least four incidents of his supervisor using racial slurs toward him and in light of the fact that Beck did little or nothing to address Gustafson's outrageous conduct, he had little or no expectation that the racial slurs would stop if he continued working and just kept complaining.

D. Damages

The department may order any reasonable measure to rectify any harm Bright suffered as a result of illegal retaliation. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. See, e.g., P. W. Berry v. Freese, 239 Mont. 183, 779 P.2d 521, 523, (1989); see also Dolan v. School District No. 10, 195 Mont. 340, 636 P.2d 825, 830 (1981) (accord, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)). To be compensable, however, the damage must be causally related to making the victim whole. In other words, the damage must flow from the discriminatory conduct. Mont. Code Ann. §§ 49-2-506(1)(b); Berry, supra. See also, Village of Freeport Park Commission v. New York Division of Human Rights, 41 A.D. 2d 740, 341 N.Y.S. 2d 218 (App. 1973)(loss of earnings which did not flow from the discriminatory act is not compensable as it does not flow from the discrimination). Damages include emotional distress endured as a result of unlawful discrimination. Vortex Fishing Systems v. Loss, 2001 MT 312, ¶33, 308 Mont. 8, 38 P.3d 836.

With respect to employment discrimination, once the charging party has established that his damages flow from the illegal conduct, then there is a presumptive entitlement to an award of back pay. Berry, 779 P.2d at 523-24. 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, 2005 MT 123, ¶62, 327 Mont. 173, 112 P.3d 1039.

Here, Bright was constructively discharged as the result of an intolerable work environment. KB disputed whether Bright was constructively discharged but, as discussed above, its arguments failed. It also sought to limit any payment of back pay to Bright because Beck offered Bright two opportunities to return to employment at KB. The initial offer was made in early May while Gustafson was still working for KB making Bright's decision to decline the offer more than reasonable. The second offer, made two weeks later in May, was purportedly after Gustafson had been discharged and with Scholler in charge, however, Gustafson was not fired until the end of June. Bright's refusal of the second offer was also reasonable, especially since

he resumed working for BSW again and did not want to leave them in the lurch. KB did not prove by clear and convincing evidence that Bright is due a lesser amount in back pay.

Bright is also entitled to compensatory damages for humiliation and emotional distress which he suffered on the job as a result of the illegal discrimination. The value of this distress can be established by testimony or inferred from the circumstances. Vortex Fishing Systems v. Foss, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836.

Bright unquestionably suffered emotional distress from the illegal discrimination he suffered. Regardless of whether Bright may have used racial slurs himself, he was subjected to highly derogatory racial slurs on the job by Gustafson. Bright was so upset that he complained to Beck and confronted Gustafson about the use of the "N-word." Contrary to the respondent's argument, the evidence of the method of discrimination, coupled with Bright's testimony about his anguish, plainly establishes his emotional distress.

In Johnson v. Hale 13 F.3d 1351 (9th Cir. 1994), two African-American men responded to an advertisement to rent an apartment. When they met with the landlord's wife to see the apartment, she told them "that her husband would not allow her to rent to 'Negro men.' Id. The district court awarded the plaintiffs $125.00 each. The court of appeals set aside the district court order and awarded $3,500.00 to each man, noting that "sum would appear to be the minimum that finds support in recent cases . . ." Id. at 1354. Unlike the case at bar, the Johnson plaintiffs were not subjected to essentially public humiliation as was Bright–which then went uninvestigated and ignored by KB. Only one statement was made to the Johnson plaintiffs, unlike the repeated conduct that Bright endured.

In Herron v. Blackwell, 908 F.2d 864, 872 (11th Cir. 1990), the Court of Appeals upheld an emotional distress award of $40,000.00 against a property owner who refused to sell his home to a black couple because of their race. The plaintiffs were anguished over, among other things, the fact that someone would deny them the ability to purchase a home for which they were financially qualified, their disappointment that their race would be a factor after thirty years of fighting for equal justice, and the invasion of privacy caused by the publicity. Id. at 873.

In Wazoua v. Ames Construction Inc., Case No. 240-2010, the charging party endured being called "nigger" and "jungle bunny" by his co-workers and having such comments broadcast over the radio to the entire work crew. In that case the hearing

officer found that the employer did nothing to curtail the racial slurs and awarded emotional distress damages of $30,000.00.

Here, Bright was understandably upset over the racial slurs that he endured. His supervisor's language was directed at him specifically because of his race (i.e., he was singled out for discriminatory treatment because of his race). Bright's humiliation, anger and angst at being subjected to the ridicule of being called the "N-word" by his work supervisor, and the fact that his employer did nothing to help him justifies awarding emotional distress damages of $20,000.00.

E. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). KB's failure to curtail its employee's racially discriminatory conduct toward Bright was inexcusable. Affirmative relief in the form of both injunctive relief and training to ensure that the conduct does not reoccur in the future is necessary to rectify the harm in this case.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. KB violated the Montana Human Rights Act by permitting its employees to racially discriminate against Bright while taking no effective action to stop such discrimination.

3. Bright is owed compensatory damages in the amount of $18,357.70 as described in Findings of Fact 37-40.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), KB must pay Bright the sum of $20,000.00 as damages for emotional distress.

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

6. For purposes of attorneys' fees, the Charging Party is the prevailing party. Mont. Code Ann. § 49-2-505(8).

VI. ORDER

1. Judgment is found in favor of Bright and against KB Enterprises, LLC, d/b/a Snapp Itz, for discriminating against Bright in violation of the Montana Human Rights Act.

2. KB Enterprises, LLC, d/b/a Snapp Itz, is enjoined from discriminating against any employee on the basis of race or national origin.

3. KB Enterprises, LLC, d/b/a Snapp Itz, must pay Bright the sum of $18,357.70 in compensatory damages and $20,000.00 for emotional distress.

4. KB Enterprises, LLC, d/b/a Snapp Itz, must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for its owner(s) and supervisors to prevent and timely remedy racial discrimination on job sites in Montana. Under the policies, KB's employees will receive information on how to report complaints of discrimination. The policies must be approved by the Montana Human Rights Bureau. In addition, KB shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 10th day of October, 2017.

/s/ DAVID A. SCRIMM
David A. Scrimm, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Jerry James Bright, and his attorney, J. Ben Everett, Everett Law, PLLC; and Respondent KB Enterprises, LLC, d/b/a Snap Itz, and its attorney, Matthew I. Sack, Sack Law, PLLC:

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)

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.

Bright.HOD.dsp