

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

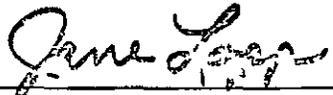
DEBBIE MEHRING,)
Charging Party,) HRC No 9209005301
v) and 9201005135
ANNIE S BURGERS & BURRITOS OF)
BUTTE, INC d/b/a JW'S BAR-B-Q,) NOTICE OF CONSIDERATION
Respondent) OF EXCEPTIONS TO HEARING
DEBBIE MEHRING,) EXAMINER'S PROPOSED ORDER
Charging Party,)
v)
JOHN WAYNE PENLEY d/b/a)
JW'S BAR-B Q AND S AND R COMPANY) Respondent
Respondent)

TO Kevin Vainio, Attorney for Charging Party
Thomas M Welsch, Attorney for Respondent

On November 8, 1995, the hearing examiner issued Findings of Fact, Conclusions of Law and Proposed Order in this case. On November 30, 1995, Respondent filed an Exception to and Request for Modification of Proposed Order. No transcript was filed with Exception. Charging Party filed a Response on December 7, 1995. No further Briefs have been filed. No oral argument has been requested.

The Human Rights Commission will consider the Exception and the Proposed Order at its regular meeting on February 19 and 20, 1996. The Commission will meet in Kalispell, MT. The Commission will notify you of the specific time and place set for consideration of the exceptions.

DATED January 4, 1996


Jane Lopp, Chair

CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Commission certifies that a true copy of the foregoing NOTICE OF CONSIDERATION OF EXCEPTIONS TO HEARING EXAMINER'S PROPOSED ORDER was served on the following persons by U S Mail, postage prepaid, on this 4th day of January, 1996

Kevin Vainio
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Melanie Moore
Human Rights Commission

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Debbie Mehring,)	
Charging Party,)	HRC NO #9201005135
)	#9209005301
v)	
)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW AND FINAL ORDER
Annie's Burger & Burritos)	
of Butte, Inc dba JW'S BBQ,)	
John W Penley dba JW S BBQ,)	
and S & R Company,)	
Respondents)	

In January 1992, Debbie Mehring filed a charge with the Montana Human Rights Commission and against John Wayne Penley, dba JW's BBQ, and S & R Company. The complaint alleged that respondents had subjected her to sexual harassment and discharged her because she had objected to the hostile work environment. Charging party filed an additional charge of discrimination with the Commission in May 1992, alleging that Annie's Burgers & Burritos of Butte, Inc, also subjected her to sexual harassment when she worked at the restaurant known as JW's BBQ, and was responsible for her unlawful discharge from employment. Charging party alleged that respondents violated her rights under §49-2-303(1) and §49-2-301, MCA.

The case was certified for hearing in March 1995. By agreement of the parties, the hearing commenced on August 1, 1995, at the Council of Commissioners Room in the Butte/Silver Bow County Courthouse in Butte, Montana. It was resumed and completed on September 14, 1995 at the offices of Poor, Roth and Robinson, 1341 Harrison Avenue, Butte, Montana.

Hearing Examiner Tim Kelly presided. Charging party was represented by attorney Kevin Vainio of Butte, Montana. Respondents Annie's Burgers & Burritos of Butte, Inc, and S & R Company were represented by attorney Thomas Welsh also of

Butte, Montana Respondent John W Penley appeared on his own behalf and represented himself

The parties waived opening statements in the case Closing arguments were timely filed in writing with the Commission by October 27, 1995 John Wayne Penlev did not file a closing argument The record of the hearing on this matter was closed on October 27, 1995 A proposed order was issued in favor of Charging Party on November 8, 1995 On November 30, 1995, Respondent filed Exception to, and Request for Modification of Proposed Order No transcript was requested Oral argument was waived by both parties

The Montana Human Rights Commission considered Respondents Exceptions on February 19, 1996, at Kalispell, Montana All Commission members were present, and indicated they had reviewed the record, consisting of the Complaint, the Proposed Order and the Briefs of both parties on the Exceptions

Upon its review of the Findings of Fact, Conclusions of Law and Proposed Order as entered by the hearing examiner, and upon full consideration of the exceptions, the Montana Human Rights Commission now overrules the Exceptions of the respondent and adopts the Findings of Fact, Conclusions of Law, and Proposed Order of the Hearing Examiner as its Final Order, as follows

RULINGS ON EXCEPTIONS

Respondent Annie's Burgers and Burritos has filed no exceptions to the proposed Findings of Fact or Conclusions of Law, concluding that respondent discriminated against charging party by permitting her to be repeatedly sexually harassed in the workplace and awarding damages to charging party Respondent challenges only the portion of the proposed Order which requires that the respondent's corporate officers and directors attend not less than three hours of training and instruction on the subject of how to prevent sexual harassment in the workplace In support of the Exceptions, Respondents filed a supplemental Affidavit of James Adamo, reciting the ages of corporate directors Stanley Short and Braunda Short (78 and 74 years, respectively), declaring that they were mere shareholders," and concluding that 'due to the infirmities of old age, requiring that Stanley Short and Braunda Short attend three hours of training and instruction on the

Human Rights Commission directing that respondent to refrain from engaging in such discriminatory conduct as required by §49-2-506(1), MCA?

III

FINDINGS OF FACT

1 The charging party is Debbie Mehring. In October and November 1991, she was a resident of Butte, Montana.

2 Respondent Annie's Burgers and Burritos of Butte, Inc., (hereafter also "Annie's Burgers and Burritos" or "Annie's") is a Montana corporation. Its shareholders are James Adamo, Stanley Short, Braunda Short, Rex Short, Jennifer Short and Lilli Short. Adamo holds 51% of the stock in the company. The officers and directors are Stanley Short, Braunda Short (Secretary/Treasurer), Rex Short (Vice-President) and James Adamo (President).

3 On October 15, 1991, Annie's Burgers and Burritos received a certificate of Registration of Assumed Business Name from the Montana Secretary of State. The certificate permitted the company to do business under the assumed name "JW's Bar B-Que" (a/k/a JW's BBQ).

4 JW's BBQ opened for business in November 1991. It closed less than a year later, in the summer of 1992. At the time of the hearing, Annie's Burgers and Burritos was not a going concern.

5 Respondent S & R Company is an Arizona partnership. The partners are the Stanley Short Revocable Trust and REXCON Pizza Co., an Arizona corporation.

6 S & R Company owns and leases real estate in Georgia and Arizona. It has conducted business at 4221 North Winfield Road in Scottsdale, Arizona.

7 Silver Bow Pizza, Inc., (hereafter also "Silver Bow Pizza"), is a corporation owned by Stanley Short, Braunda Short and Rex Short. Silver Bow Pizza operated a pizza restaurant in Butte, Montana, during 1991 and 1992. James Adamo managed the Silver Bow restaurant in Butte. Adamo held no ownership interest in Silver Bow Pizza. Adamo had previously been as an employee of S & R Company.

8 During the period of 1991 and 1992 when JW's BBQ was open for business, its payroll was done at offices at 4221 North Winfield Road, Scottsdale, Arizona. JW's

BBQ paid a monthly fee of \$250 for the payroll service. The fee went for the cost of payroll processing and accounting services.

9 Payroll for Silver Bow Pizza was done in the same manner and at the same office as the payroll done for JW's BBQ. Monthly payroll checks for Silver Bow and JW's BBQ were delivered in a single package by UPS to James Adamo. In the package there were separate envelopes containing the payroll checks for each restaurant.

10 An employee of the Stanley Short Revocable Trust performed the administrative services preparing monthly payrolls for JW's BBQ and Silver Bow Pizza.

11 Respondent John Wayne Penley (hereafter also "Penley") is presently a resident of Cascade County, Montana. In October and November 1991, Penley was manager of a restaurant known as JW's BBQ in Butte, Montana.

12 Penley's term as manager of JW's BBQ was subject to the terms and conditions set forth in the written "Employment Agreement", dated October 16, 1991, between Annie's Burgers and Burritos and Penley.

13 As provided in the Employment Agreement, Penley was paid \$2000 per month to manage the restaurant, plus 50% of the net profits of the establishment after a loan made by Silver Bow Pizza to Annie's Burgers and Burritos was paid in full.

14 The Employment Agreement further provided that Penley would report directly to James Adamo or to persons designated by Adamo and that Penley was required to train a management assistant designated by Annie's Burgers and Burritos. Penley had full authority to hire and fire employees of JW's BBQ except for the management assistant designated by Annie's Burgers and Burritos.

15 James Adamo placed Paul McCauley in the position of management assistant at JW's BBQ. McCauley was advised by Adamo, Stanley Short and Braunda Short to learn all aspects of the business. McCauley had previously worked for several years at Silver Bow Pizza.

16 The Employment Agreement between Penley and Annie's Burgers and Burritos terminated in the event of Penley's death or disability or for good causes set forth in the agreement. In the event of a termination, Penley would be entitled to accrued salary and benefits and to a severance benefit equal to 1/2 of the profits, if any, that had at such time of severance been paid on the note to Silver Bow Pizza Parlor Inc. "

17 Annie s Burgers and Burritos borrowed certain sums, not exceeding \$25,000, from Silver Bow Pizza to acquire restaurant equipment, signage, a food inventory and initial operating capital for JW's BBQ Silver Bow Pizza also rented to Annie s Burgers and Burritos the premises and equipment used for the operation of JW's BBQ

18 The loan made by Silver Bow Pizza to Annie s Burgers and Burritos regarding JW's BBQ was not paid in full during the term that Penley was employed to manage JW s BBQ

19 Penley told Debbie Mehring that JW's BBQ was 'his place' Charging party understood him to mean that he was one of the owners Other employees, including Julie Ronchetto and Paul McCauley, were aware that James Adamo and the Short family held ownership interests in the restaurant

20 S & R Company provided no income to and received no income from the operation of JW's BBQ S & R Company had no employees working at JW's BBQ, had no control over the operation of that restaurant, and had no interest in JW's BBQ as a shareholder or creditor

21 Debbie Mehring was employed at JW's BBQ for approximately three weeks, from October 28 or 29, 1991 through on or about November 20 or November 22, 1991 She was paid at the rate of \$4 25 per hour and worked 25-30 hours per week She earned an additional \$100 120 per week in tips

22 John Wayne Penley hired charging party as a waitress after an interview at the restaurant before JW's BBQ opened In the interview, Penley asked Mehring if she was married and had children and if she had a boyfriend Penley did not ask if she had any experience working in a restaurant Mehring advised him that she did not have experience He told her that she could have a job as a waitress, that he only hired 'good looking" people, and that she must really need the work Mehring started two or three days later, helping prepare the restaurant for opening

23 When Penley interviewed Julie Ronchetto for a waitress position, he asked her the same personal questions that he had asked Mehring Penley did not ask Ronchetto her work experience Ronchetto had substantial experience working as a waitress

24 Charging party worked one weekend and one week on the night shift At the request of Penley, she then switched to the day shift The transfer was made because the

restaurant was short on day time help Mehring continued to work day shifts during the remainder of her employment at JW's BBQ

25 While managing JW's BBQ, John Wayne Penley had a practice of making lewd comments to a number of the waitresses, including the charging party The remarks Penley made to the charging party included statements asking her to have a 'purely sexual relationship' with him, asking her to give him a penis massage , and telling her that he could satisfy her Remarks that charging party overheard Penlev making to others included statements that a young girl "never had a unit the size of my unit' and that one of the waitresses should have a tatoo of come dripping off her lip"

26 Penley also had a practice of brushing against waitresses in an inappropriate manner Charging party testified that she was touched by Penley a number of times, that on one occasion he thrust himself against her from behind, and on another occasion he lifted up his apron when making the penis massage" remark

27 While charging party was employed at JW s BBQ, Penley was having an intimate personal relationship with one of the waitresses, Rochelle Vaille Vaille and charging party were friends and Penley would often speak to Mehring about his relationship with Vaille Charging party acknowledged that she acted in the role of an intermediary in the Penley Vaille relationship

28 On occasions while he was managing the restaurant, Penlev would make remarks to charging party about how Vaille enjoyed anal sex, how she screamed when having sexual relations, and how she liked to 'swallow

29 Charging party testified that the lewd remarks and sexual conduct of Penley at the workplace made her feel dirty and guilty, as though she had done "something wrong " She told Penley to stop

30 The sexual conduct of Penley at JW s BBQ was unwelcome and offensive to Debbie Mehring and would have been to a reasonable woman in the same employment circumstances

31 Julie Ronchetto also observed Penley making inappropriate sexual comments to other waitresses, although none were directed at her The comments by Penley that Ronchetto overheard at JW's BBQ included sexually suggestive remarks Ronchetto observed Penley touch the rear ends of waitresses as he followed them up the stairs at

the restaurant Ronchetto described Penley as "not like any other employer I had ever worked for"

32 Paul McCauley observed Penley making improper remarks to waitresses at JW's BBQ. McCauley was also aware that some of the waitresses, including the charging party, were concerned about Penley's conduct. He recalled that Mehring confided to him that she was afraid of Penley and what he might do. McCauley described one occasion when Mehring asked him to accompany her to her car to avoid being alone with Penley.

33 At JW's BBQ, John Wayne Penley's sexual comments and other conduct of a sexual nature were directed exclusively at women.

34 Paul McCauley did not report to Adamo any of the concerns of the waitresses about Penley's conduct. McCauley had no instructions from Adamo or from the Shorts about what responsibilities in the event that an employee was subjected to sexual harassment at work.

35 Annie's Burgers and Burritos had no employment policy prohibiting employment discrimination at JW's BBQ and had no specific policy prohibiting sexual harassment. Annie's Burgers and Burritos had no grievance procedure available to its employees and no method for advising of the occurrence of improper conduct in the workplace, including sexual misconduct by John Wayne Penley.

36 On or about November 21, 1991, the relationship between Penley and Vaile came to an end. At that time, Penley was extremely distraught when he came to work. He asked employees who was with Vaile the prior night. According to charging party he also demanded to talk with her in the back room, then demanded to know if she was still friends with Vaile. When Mehring advised him that she was, Penley told her she was fired.

37 After advising charging party her employment was terminated, Penley called Paul McCauley with Mehring present. Mehring talked with McCauley on the phone. McCauley advised that the termination was "for the best".

38 McCauley testified that he concurred in the decision to fire Mehring because charging party had been the subject of complaints from customers, including reports that she had been loud and rude and had used foul language in the presence of patrons.

39 Debbie Mehring had difficulty finding other employment after her discharge from JW's BBQ. She applied for work at several restaurants and taverns. She worked at El Taco restaurant for a short period before being fired for insubordination. Later she worked at Perkins Restaurant, but again was fired for insubordination. At the time of the hearing, she was going to school and was not employed.

40 The experience of working at JW's BBQ caused the charging party a great deal of stress. Her firing aggravated the stress because of the difficulties it created for her in supporting herself and her children. The terminations at El Taco and Perkins also caused the charging party stress, although Mehring was glad she would not be working at El Taco.

41 Charging party claimed that she had certain expenses in looking for employment after she was discharged from JW's BBQ, including car repair costs, travel expenses and a clothing investment related to job applications. Charging party also testified that none of those expenses were solely attributable to looking for work. She produced no record of expenses or costs incurred in her job seeking efforts.

42 Debbie Mehring was not replaced after she was fired from JW's BBQ. Shortly after she was discharged, other employees were laid off because of a downturn in business.

43 Months after the charging party's firing, John Wayne Penley lost his job as manager of JW's BBQ. His conduct had become increasingly erratic. Paul McCauley reported the problems to James Adamo. Adamo consulted with Rex Short and Short agreed to travel to Butte to advise Penley of his termination. On the day Short arrived, Penley came to work intoxicated and belligerent. Police were called to remove him from the premises. His employment with Annie's Burgeois and Burritos ended that day.

44 According to Rex Short, Penley was fired because of his drinking, his unprofessional and boisterous manner, and his lack of responsiveness to the oversight and supervision of James Adamo.

45 By the summer of 1992, JW's BBQ had failed. The operation was shut down. Notice was posted on the door that the restaurant had closed.

46 John Wayne Penley denied that he was anything more than friendly to waitresses at the restaurant. He denied making sexual advances towards Debbie

Mehring He admitted that he did have an intimate relationship with Rochelle Vaille and that it made him distraught when it ended He also admitted to a drinking problem during the period he managed JW's BBQ

47 Penley's recollection of the events at the restaurant in October and November 1991 and his assertions that he did not engage in sexual harassing conduct toward female employees, including the charging party, were not credible in light of both the testimony of witnesses Ronchetto and McCauley corroborating key testimony of Debbie Mehring and the demeanor of Penley on the stand conveying uncertainty and ambiguity in response to critical questions concerning his behavior as a manager for respondent

48 On December 9, 1991, charging party filed a discrimination complaint with the HRC and against John Wayne Penley dba JW s Barb B-Q The December 9, 1991 complaint identified S & R Company and Annie's Burgers and Burritos as owners of JW's BBQ On January 31, 1992, Debbie Mehring filed a verified complaint against Penley and S & R Company On May 20, 1992, charging party filed a verified discrimination complaint against Annie's Burgers and Burritos dba JW's BBQ

IV OPINION

The Montana Human Rights Act prohibits the type of workplace harassment based on gender that Debbie Mehring alleged in this case §49-2-303, MCA, Harrison v. Chance, 797 P 2d 200, 204 (1990) If her employer or employers subjected her to sexual harassment, or tolerated or condoned such conduct, then they are liable for the resulting harm Vainio v Brookshire, 852 P 2d 596 (Mont 1993)

Before addressing the merits of the charging party's complaint, however, a number of threshold issues must be answered, concerning the timeliness of her complaint against

Annie s Burgers and Burritos and the contention that John Wayne Penley and S & R Company were also her employers

Annie's Burgers and Burritos asserts that Debbie Mehring failed to file her charge against the company within 180 days after the last alleged incident of discrimination, as required by §49-2-501(2), MCA In effect, the company argues that because Mehring was discharged on November 21, 1991, and did not file a verified complaint naming

Annie's Burgers and Burritos as a respondent for more than six months, the charge must be dismissed. That defense fails for several reasons:

Mehring's initial discrimination complaint did identify Annie's Burgers and Burritos as an owner although it only named John Wayne Penley dba JW's BBQ as the respondent. The charge was filed in December 1991, well within the statutory period. The later complaint, filed in May 1992, served as an amendment to the original charge for purposes of identifying Annie's Burgers and Burritos as a named respondent and meeting the verification requirement. Under the administrative regulations of the Commission, the amendment related back to the original filing date for purposes of the statute of limitations. Rules 24-9-209(2) and 24-9-210(1), ARM.

The timeliness of charging party's complaint against Annie's Burgers and Burritos also is supported by the application of §25-5-103, MCA, as well as the "misnomer rule." Under §25-5-103, MCA,

"when a complaint sets forth a cause of action against a [respondent] designated by a fictitious name and the true name is thereafter discovered and substituted by amendment, the fictitiously named [respondent] is considered a party to the action from its commencement so that the statute of limitations stops running on the date the original complaint is filed."

Sooy v. Petrolane Steel Gas, 708 P.2d 1014, 1017 (Mont. 1985). The "misnomer rule" applies to situations in which the charging party has actually served the correct party, the party he intends to name, but mistakenly used the wrong name for the respondent. In such a case, relief from the statute of limitations is provided and an amended complaint correcting the mistake in identification also relates back to the original filing. LaForest v. Texaco Inc., 585 P.2d 1318 (Mont. 1978).

Debbie Mehring specifically identified "JW's BBQ" as a respondent in her initial discrimination complaint. That is a fictitious name registered for use by Annie's Burgers and Burritos. It is irrelevant that Mehring initially identified John Wayne Penley as its owner and user. The evidence was clear that Penley was an authorized agent of Annie's Burgers and Burritos. Service upon him, and through him upon JW's BBQ, was effective as to the corporate owner.

Whether the May 1992 amendment was filed after discovering the true respondent behind the fictitious name or simply to correct the omission of Annie's

Burgers and Burritos as the party actually doing business as JW's BBQ, the amended complaint related back to the original filing date. Under both §25-5-103, MCA, and the misnomer rule, Debbie Mehring timely filed this action against Annie's Burgers and Burritos.

Charging party is less successful however in her claims that John Wayne Penley and S & R Company were her employers when she worked at JW's BBQ. Penley asserts that he was only an employee at the restaurant, one of Mehring's coworkers and not her employer. The evidence supports that analysis.

Penley was hired by the officers, directors and owners of Annie's Burgers and Burritos to manage JW's BBQ in a profitable manner. The "Employment Agreement" between Penley and the company was just that, an employment agreement. Although charging party contends that the profit sharing provisions in the agreement, the use of Penley's initials in the name chosen for the restaurant and his statements that JW's BBQ was "his place" all indicate ownership, they are insufficient to create an ownership interest where none exists.

The profit sharing provisions of the employment agreement were only a means of measuring the increase in compensation that Penley could earn as an employee if the restaurant was successful. It did not allow him a position of equity in the corporation. Other aspects of the agreement, including the termination provisions which denied him any residual rights in the establishment and provided him only with certain severance benefits, belie the notion that the employment agreement conferred any ownership interest in Penley.

Penley also made no property claim to the use of his initials in the restaurant. Penley's statements that JW's BBQ was "his place" were both ambiguous in meaning and legally incorrect. Penley had no power to make himself an owner of the restaurant simply by holding himself out to be one. John Wayne Penley was an employee at JW's BBQ and technically only an agent for charging party's actual employer, Annie's Burgers and Burritos.

In 1993, the state legislature amended the Montana Human Rights Act to expand the definition of 'employer' to include agents and coworkers who engaged in illegal discrimination. Today, personal liability can be imposed on fellow workers for the harm

caused by their discriminatory acts. One of the express reasons for the change was to reach individuals responsible for workplace harassment, separate from or in addition to their employers. Fandrich v. Capital Ford Lincoln Mercury, 901 P.2d 112 (Mont. 1995)

The events which are the subject of this case however, occurred in 1991 when the term 'employer' was more narrowly defined and did not include 'agents' of the employer. §49-2-101(8), MCA. As a result John Wayne Penley was not an employer of the charging party and cannot be held liable for a violation of her rights. The complaint filed by Mehring against Penley must therefore be dismissed.

An entirely different analysis must be done regarding charging party's claim that S & R Company was also one of her employers. To succeed in this argument, charging party acknowledges that she must pierce the corporate veil that separates Annie's Burgers and Burritos and S & R Company as two distinct legal entities. The evidence in support of such an effort is unpersuasive.

For charging party to establish that S & R Company was her employer, she carries the burden of proving that Annie's Burgers and Burritos had no functional identity apart from S & R, and that the corporate form used by Annie's Burgers and Burritos was part of a subterfuge to 'defeat a public convenience, justify a wrong or perpetrate a fraud.' Meridian Minerals Co. v. Nicor Mineral Ventures, 742 P.2d 456, 462-463 (Mont. 1987) (explaining the "alter-ego" test used in piercing the corporate veil). A variety of factors may be considered in evaluating the functional separation, or lack of it, between legal entities.

In the Meridian case, the Montana Supreme Court identified fourteen separate criteria upon which to rely. Meridian Minerals Co., 742 P.2d at 462. Other courts, including federal courts reviewing civil rights claims, have provided a shorter, more general enumeration of the relevant factors. See, for example, Frank v. U.S. West, 3 F.3d 1357 (10th Cir. 1993) (approving the "integrated enterprise test" which focuses on whether there is (1) interrelation of operations, (2) centralized control of personnel, (3) common management, and (4) common ownership or financial control)¹. Whatever the

¹ See also United Electrical Workers v. Pleasant St. Corp., 960 F.2d 1080 (1st Cir. 1992), Publicker Industries Inc. v. Roman Ceramics, 603 F.2d 1065 (3rd Cir. 1979), Bridges

approach, no single factor will answer the question it depends instead on the totality of the circumstances

In this case, the evidence was inadequate to warrant disregard of the corporate form used by Annie's Burgers and Burritos. There was no evidence that S & R Company held any controlling economic interest in Annie's. S & R held no stock, provided no financing, furnished no assets and generated no income from Annie's Burgers and Burritos. The only evidence offered concerning a common identity between the two entities was that shareholders/officers of the partners comprising S & R Company were also shareholders or officers or directors of Annie's. In Meridian, the Court expressly held that a showing of common officers or directors or shareholders was not in itself sufficient to warrant piercing the corporate veil. Meridian Minerals Co., 742 P.2d at 463.

Although charging party has underscored the fact that the payroll for Annie's Burgers and Burritos was done from the same offices in Arizona that S & R Company conducted some of its business, the evidence showed that the principal place of business for Annie's was in Butte. The evidence also showed that S & R Company and Annie's are in two distinct lines of business, the former owns and leases property while the latter operated a restaurant. There was no proof of commingling of funds or assets, no admissions that the entities were the same, and no demonstrated failure to comply with the statutory requirements governing either partnerships or corporations.

A great deal of the evidence presented by charging party on this question did not concern S & R Company but Silver Bow Pizza. Indeed, there were significant links between Annie's Burgers and Burritos and Silver Bow, including an interchange of employees, a reliance on Silver Bow's assets and financing, and suggestions of operating controls that may have gone beyond purely arms length transactions. That evidence was directed at Silver Bow Pizza which was never identified or named as a party to this case.

To the extent that charging party attempted to use Silver Bow Pizza to bridge the

v. Lastman Kodak Co., 68 FEP Cases 1587 (S.D. N.Y. 1995) (requiring such unity of interest and ownership that the separation no longer exists and failure to disregard the form would result in injustice.)

substantial gap between Annie's Burgers and Burritos and S & R Company as distinct legal entities, she was unsuccessful. The relationship between S & R Company and Silver Bow was no greater than the one between S & R Company and Annie's, i.e., some common officers and shareholders, some administrative services and no direct controlling links.

Given the evidence that Annie's Burgers and Burritos and S & R Company were separate and distinct legal entities and in the absence of proof that S & R had any employment relationship with charging party, the claim that S & R was an employer of Debbie Mehring for purposes of the Human Rights Act must be rejected. As a result, the charge filed by Debbie Mehring against S & R Company must also be dismissed.

Having dispensed with John Wayne Penley and S & R Company as respondents, there remains the central question in this case concerning whether Debbie Mehring was subjected to a sexually hostile work environment while she was employed by Annie's Burgers and Burritos as a waitress at JW's BBQ. The simple answer is yes.

To prevail on a hostile environment claim, a charging party must prove that (a) she is a member of a protected group, (b) she was subjected to sexual advances, requests for sexual favors or other sexual conduct in the workplace, (c) the sexual conduct was unwelcome to her, (d) the conduct was sufficiently severe or pervasive to alter the terms or conditions of her employment and to create an abusive environment, and (e) the employer or management level employees knew or should have known of the conduct and failed to take effective action to prevent or stop it. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-68 (1987), quoting with approval the EEOC Guidelines at 29 CFR §1604.11, Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994), EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514-1515 (9th Cir. 1989). The evidence presented at the hearing supported each element of charging party's claim.

John Wayne Penley had a practice of making lewd and offensive comments to his staff of waitresses. He also engaged in intentional, inappropriate touching of a number of female employees. He provided charging party with graphic and offensive descriptions of his sex life with one of the waitresses. Penley requested sexual favors from his staff, including a request to the charging party that she give him a penis massage. His unmannerly behavior was directed exclusively at women.

The pattern of conduct at JW's BBQ by its principal manager was sufficiently offensive and pervasive to alter the terms and conditions of employment there. For a waitress, the work environment was abusive. There was no evidence that charging party welcomed such an atmosphere.

John Wayne Penley was the authorized representative of Annie's Burgers and Burritos at the restaurant site. He was vested with complete authority over all personnel decisions involving the charging party and others, except the management assistant who was male. In those circumstances, Penley's harassment of female workers is imputed to his corporate employer. Harrison v. Chance, 797 P.2d at 204 citing Meritor Savings Bank, 477 U.S. at 64. See also, among others, Karibian v. Columbia University, 14 F.3d 773 (2d Cir. 1994) (employer liable for supervisor's harassment regardless of notice or reasonableness of complaint procedures where supervisor used position and apparent authority to further his activities), Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983).

Annie's Burgers and Burritos knew or should have known of the hostile work environment at JW's BBQ. The company breached its duty not to discriminate against charging party by installing Penley in his management position without training or instruction prohibiting harassment, by vesting in Penley plenary authority over female employees without adequate controls on its exercise, by failing to establish any grievance mechanism which would enable employees to report misconduct by the manager, and by failing to take remedial action in a timely and effective manner. Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), cert. denied 115 S.Ct. 733 (employer liable for failure to deter or remedy sexual harassment by supervising employees).

With respect to charging party's claim that she was discharged in retaliation for her complaints about sexual harassment at JW's BBQ, the evidence did not support a finding that Debbie Mehring was engaged in protected human rights activity when her employment was terminated. That is an essential element of an illegal retaliation claim under civil rights law. Moyo v. Gomez, 40 F.3d 982 (9th Cir. 1994) (claimant must show she protested or otherwise opposed unlawful employment discrimination), EEOC v. Crown Zellerbach Corp., 720 F.2d 1008 (9th Cir. 1983).

According to charging party's testimony, the discharge decision immediately followed and was related to Mehring's admission to John Wayne Penley that she was still friends with Rochelle Vaille. Penley had just learned that his personal relationship with Vaille was over. He was distraught and angry. Notwithstanding respondent's contentions that there were other valid and nondiscriminatory reasons for the firing (e.g. charging party's inexperience, customer complaints about her demeanor, slow business), the connection between Mehring and Vaille did appear to be a motivating factor in the adverse decision.

Standing alone, however, that association did not evidence any protected human rights activity by Debbie Mehring. It was undisputed that the relationship between Vaille and Penley was consensual. On occasion, Mehring acted as an intermediary between them. There was no proof of any protest by charging party regarding the violation of Vaille's rights under the Human Rights Act. In the absence of such opposition, the claim that the termination constituted illegal retaliation in violation of §49-2-301, MCA, must fail.²

Having found that Annie's Burgers and Burritos engaged in an unlawful discriminatory practice by having subjected Debbie Mehring to sexual harassment while she was employed at JW's BBQ, the Human Rights Commission is obliged to order the respondent to refrain from such conduct and may require such other affirmative relief as is necessary to prevent future violations. §49-2-506(1), MCA. The Commission will also award relief to the charging party to rectify the harm, including emotional harm, caused by the discriminatory conduct. §49-2-506(1)(b), MCA, Vainio v. Brookshire, 852 P.2d 596 (Mont. 1993) (\$20,000 award for emotional distress in sexual harassment case).

² Even if a retaliatory motive could be found from the evidence presented at the hearing, charging party would still not be entitled to back pay, reimbursement of job seeking expenses, or other monetary relief. The decision to terminate her employment at JW's BBQ would have been made in any event. At the time that charging party was fired, it was not contested that the restaurant began laying other people off because of the unprofitability of the business. Mehring's admitted lack of experience and the unexceptional quality of her work made her a certain candidate for such action.

Considering the practices of John Wayne Penley in managing JW's BBQ, including his penchant for lewd remarks, requests for sex from employees, inappropriate touching, and sexual displays a significant emotional impact from the hostile work environment at the restaurant -- mental distress, embarrassment, humiliation, anger, anxiety, etc -- was sufficiently established by the testimony of the charging party and can reasonably be inferred from the circumstances of the violation of her basic civil rights. In light of the short duration of charging party's employment, however, and the difficulty of separating the residual effects of the sexual harassment by respondent from the other stressors in the charging party's life since that period, it is found that the sum of \$4,500 is reasonable and appropriate to rectify the harm Debbie Mehring sustained as a result of the on-the-job harassment at JW's BBQ.

Finally, there was a complete absence of effort by any of the officers or directors of Annie's Burgers and Burritos to establish a policy of nondiscrimination, to prohibit sexual harassment in the workplace, to afford employees an avenue for relief in the event of workplace misconduct, or to impose limitations on the apparently unlimited personnel authority of its manager. Given that general failure, additional affirmative relief is warranted in this case in order to minimize the likelihood of future violations of the Montana Human Rights Act.

V

CONCLUSIONS OF LAW

1 Charging party timely filed her charge that respondent Annie's Burgers and Burritos of Butte, Inc. violated her rights under the Montana Human Rights Act.

2 John Wayne Penley was not an employer of the charging party during the period relevant to this complaint and the charge against Penley must be dismissed.

3 S & R Company, an Arizona partnership, was not an employer of the charging party during the period relevant to this complaint and the charge against S & R Company must be dismissed.

4 Respondent Annie's Burgers and Burritos created, maintained, tolerated and condoned a hostile work environment at JW's BBQ in Butte which discriminated against the charging party in the terms, conditions and privileges of her employment and in violation of her rights under §49-2-303, MCA.

5 As a result of the emotional harm caused to the charging party by the discriminatory and hostile work environment created and maintained by the respondent Annie's Burgers and Burritos at JW's BBQ restaurant Debbie Mehring is entitled to the sum of \$4,500 in accordance with §49-2-506(1)(b) MCA

6 Respondent Annie's Burgers and Burritos did not subject charging party to illegal retaliation for having engaged in protected human rights activities in violation of her rights under §49-2-301, MCA

7 The circumstances of the violation of the Human Rights Act by the respondent Annie's Burgers and Burritos indicate that affirmative relief, in addition to an order requiring the respondent to cease such violations, is warranted and necessary

VI

FINAL ORDER

1 Judgment in this matter is found in favor of the respondent John Wayne Penley, and against charging party, and the charge against Penley is hereby dismissed

2 Judgment in this matter is found in favor of the respondent S & R Company, an Arizona partnership, and against charging party, and the charge against S & R Company is hereby dismissed

3 Judgment is found in favor of the charging party, Debbie Mehring, and against the respondent Annie's Burgers and Burritos, in the matter of her complaint that she was subjected to an unlawful and hostile work environment while she was employed at JW's BBQ restaurant in Butte

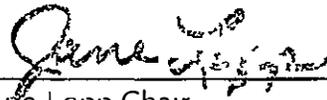
4 Judgment is found in favor of respondent Annie's Burgers and Burritos and against charging party on her complaint that respondent illegally retaliated and discharged her for having engaged in protected human rights activities

5 Respondent Annie's Burgers and Burritos is ordered to pay to the charging party the sum of \$4,500 for the emotional harm caused to her by the above described unlawful sexual harassment, with interest from the date of the final order in this case

6 Respondent Annie's Burgers and Burritos is ordered to refrain from engaging in any conduct which discriminates against its employees in violation of the Montana Human Rights Act, including conduct which creates, tolerates or condones a work environment which is hostile or abusive to workers on account of their sex

7 Respondent Annie's Burgers and Burritos is ordered to direct that each and every corporate officer and director, including James Adamo, Rex Short, Stanley Short and Braunda Short, attend not less than three hours of training and instruction on the subject of how to prevent sexual harassment in the workplace conducted by a recognized professional trainer in that subject, and certified by the trainer to the staff of the Human Rights Commission. The training is to occur within 120 days of the final order in this case. Written certification is to be delivered to the staff of the Human Rights Commission within 14 days after completion of the training.

DATED this 29th day of February, 1996



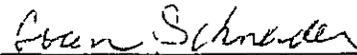
S. Jarle Lopp, Chair
Montana Human Rights Commission

Commissioners Etchart, Ogien, Stevenson and Svec concur

CERTIFICATE OF SERVICE

The undersigned employee of the Montana Human Rights Commission certifies that a true copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER was mailed to the following persons by U.S. Mail, postage prepaid on this 29th day of February, 1996

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Montana Human Rights Commission