BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013567:

SHANNON C. WELLS,	) Case No. 503-2010
	)
Charging Party,	)
	)
vs.	)HEARINGS OFFICER DECISION
	)AND NOTICE OF ISSUANCE OF
A TECHBUILDER CORPORATION,	)ADMINISTRATIVE DECISION
a Montana Corporation,	)
	)
Respondent.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Shannon Wells brought this complaint alleging that her employer, A TechBuilder Corporation (A Tech), discriminated against her on the basis of sex when its majority shareholder, Rick Downs, subjected her to a hostile working environment and discriminated against her on the basis of sex by discharging her from employment and replaced her with a male worker. On February 16, 2010, Wells moved to dismiss that portion of her complaint which alleged disparate treatment, leaving only the hostile working environment claim to be litigated at the hearing.

Hearings Officer Gregory L. Hanchett convened a contested case hearing in this matter on March 16 and 17, 2010 in Malta, Montana. Kim Christopherson, attorney at law, represented Wells. Eric Nord, attorney at law, represented A Tech.

At hearing, Wells, Anne Boothe, Sharon Wombold, Mike Traynor, Phil Hotchkiss, Charles J. (Joe) Humbert, Dave Stoltenberg, Ryan Kovachs and Rick Downs testified under oath. Charging Party's Exhibits 1 through 17 and Respondent's Exhibit's 101, 103, 105, 108 and 109 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 Hearings Bureau on June 18, 2010. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES:

1. Did A Tech discriminate against Wells on the basis of sex by creating a hostile working environment?

2. If A Tech discriminated against Wells, what measure of damages is appropriate to rectify the harm?

III. FINDINGS OF FACT

1. Wells, being female, is part of a protected class.

2. A Tech is a Montana corporation engaged in the building of "Ready To Move" (RTM) homes.

3. In 2008, A Tech was an upstart home builder employing a unique methodology of Canadian home building. A Tech's president and CEO is Rick Downs. A Tech is controlled by a board of directors. At various times, Anne Boothe, Joe Humbert , Dave Stoltenberg and Sharon Wombold have served on the board. In addition, Downs, Boothe and Wombold own or owned shares of stock in A Tech. Downs is the majority share holder in A Tech.

4. It took some time for A Tech to develop the capital necessary to start marketing and selling homes. Downs collaborated with such entities as the Montana Business Incubator (MBI), a Montana non-profit corporation that provides capital to upstart corporations in order to enhance the economy in Montana. MBI provided A Tech capital in exchange for founder's shares of stock in A Tech. As of the time of this hearing, MBI still holds these founder's shares. Stoltenberg met Downs through his participation in MBI. Its was through this connection that Stoltenberg became a member of the Board.

5. In 2007, A Tech contracted with Humbert Construction to complete the refurbishing of a commercial property located in Malta where A Tech was going to set up its business. At the time Humbert Construction was hired, it had two employees, Joe Humbert and Phil Hotchkiss. By January, 2008, A Tech decided to hire Humbert and Hotchkiss as employees. Shortly thereafter, Downs decided that

Humbert would be a good addition to the board of directors. Humbert was added to the board of directors.

6. By February, 2008, A Tech had sufficient capital to begin hiring additional workers. It began to advertise for employees. At about the same time, the housing market in the United States began to decline.

7. Wells responded to the advertisement for employees and applied for the position. Wells had some construction experience, having worked with her husband in a roofing business for some years prior to applying at A Tech. She also had been around construction for much of her life, having been raised in a family that had a construction business.

8. Downs interviewed Wells without anyone else being present. They discussed her experience. They also discussed the fact that the job would provide opportunities to do several facets of building. Wells told Downs, however, that she did not want to do roofing because she did not believe that she could physically handle the work.

9. After showing Wells the physical plant, Downs offered Wells a job, promising to pay her $12.00 dollars per hour. Wells was not permitted to start immediately, however, because the business was not yet up and going. The primary reason for the delay was the fact that Downs, who is a Canadian citizen, had not yet obtained the appropriate visa to enable him to engage in business in the United States.

10. Approximately two months later, Wells received a letter of intent to hire indicating it was from Joe Humbert. In fact, Downs created the letter. Downs had Humbert sign off on the letter because Downs still could not directly engage in the hiring process because of his immigration status.

11. On her first day of work, Downs introduced Wells to employees around the plant, including Joe Humbert. Downs told Wells that, even though there was a board of directors, Downs was in control of everything and made all of the decisions.

12. Downs started Wells out at $11.00 per hour. She eventually did get a raise, but she had to ask for it. Downs directly supervised Wells. Initially, Wells undertook several different tasks, including framing.

13. On June 18,2008, employee John Biddix became upset while on the job at the A Tech construction headquarters. Biddix had frequently made racist and sexist remarks about employees. At the time Biddix became upset, Wells and fellow employees Mike Traynor and Paul Hotchkiss were present. Biddix began harassing Wells, calling her a "dude." He kept telling other employees that Wells wanted to be a male. Biddix became so enraged that he challenged Mike Traynor to a fight.

14. Traynor, who had some training in human resources from previous jobs, instructed Wells and Hotchkiss to fill out written reports about the incident. Traynor himself also filled out a report about the incident. Traynor then provided the reports to Downs.

15. Approximately one week prior to this incident, Downs had spoken to Biddix about Biddix's propensity to make racist and sexist comments at the plant. He further warned Biddix at that time that such conduct would not be tolerated.

16. Downs fired Biddix as a result of the June 18, 2008 incident. Biddex was still in his probationary period at this time. Because Biddix was still in his probationary period, Downs simply noted in his discharge letter to Biddix that Biddex had been fired because of unsatisfactory performance. Downs did not mention anything about Biddix's sexist and racist behavior being a basis for the discharge.

17. After firing Biddix, Hotchkiss told Downs that Biddix had a problem with women. Downs then related to Hotchkiss that he (Downs) had the same problem working with women. Boothe also observed that Downs had a problem with women.

18. Up until the time of the Biddix incident on June 18, 2008, Downs was not on site that frequently. On June 19, 2008, Downs decided to place Wells in charge of the materials warehouse that was on site at the A Tech plant in Malta. After this time, Downs worked more frequently with Wells.

19. Downs had a very short temper. Downs would become easily frustrated with personnel and he would berate them if he became upset over something. One such incident occurred on one Saturday in July, 2008 when Downs and Wells were working together. While inspecting the facility together, Downs noticed a large pile of cut insulation that Hotchkiss had been preparing in one of the rooms of the plant. When Downs pushed the pile back with a broom, he observed boxes of Hilti nails (nails used for fastening objects to concrete) lying under the insulation pile. This angered Downs and he grabbed a broom and began to furiously sweep the insulation

that was scattered about the room. He got so upset that he broke two brooms while sweeping up the insulation.

20. Downs understood in his conversations with Traynor that Wells had some experience with computers. Downs asked Wells if she would be interested in learning to operate a computer assisted design (CAD) program that A Tech utilized in designing and constructing its RTM homes. Wells indicated that she would be interested in doing so. Downs then provided Wells a computer to take home with her so that she could learn the CAD process.

21. Downs also hoped that Wells could learn how to develop spreadsheets that were used by A Tech to keep track of building material inventory. Wells had difficulty learning how to do this. Her inability to be able to complete spreadsheets angered Downs. He would on occasion ask her 'that's as far as you've gotten? He would then add "That's because you're a woman." On one occasion, after Downs had berated Wells concerning her inadequacies due to her being a woman and thus being unable to manage her time as he thought she should, Downs asked Wells, "Oh, did I offend you?" Downs then stated that he probably shouldn't have said what he just said because Wells was probably going to "turn [him] in."

22. On multiple occasions over the course of Wells' almost 4 months employment by A Tech, Downs insulted and demeaned Wells by making derogatory comments about women drivers and because Wells is a female, that she could not drive a forklift. When Downs came into the warehouse and saw Wells on the forklift, he would demand that she get off the forklift because "women can't drive" and he would take over the job. However, when Downs made men get off the forklift, he said it was because he was more experienced and better than anyone else.

23. Wells was not the sole target of Downs' conduct with respect to operating forklifts. Downs would also tell male employees to get off the forklift and let him drive it. However, Downs never used gender as a basis for criticizing the men's forklift driving skills.

24. On one occasion, Wells had been moving a stack of shingles with one of the forklifts. Downs told her to get off the forklift and let him take over. Downs then moved the shingles over to another location and instructed Wells to unload them. After unloading some of the shingles, Wells began to tire. As a co-worker walked by, Downs told the co-worker to help Wells, stating "Why don't you help her because she's too much of a wimpy woman to do it herself."

25. On at least three occasions, when Wells brought quality issues to Downs' attention namely the fact that the roofs needed to be applied to the homes under construction when there was an ambient temperature of 60 degrees, that the pipe jacks had to be installed during the time the roof was being put down and not afterwards, and that the headers over the larger windows and doors needed to be larger, Downs became angry, raised his voice, and berated Wells for being too concerned with technical matters.

26. On multiple occasions, Downs would demean Wells by angrily berating her because he thought she should be able to get more done in an eight hour day while adding more and more duties to her daily job or changing, almost on a daily basis, how he wanted certain things done, such as pull sheets and cut sheets.

27. When Wells inquired about the status of Downs finding someone to hire to clean the offices, Downs told Wells she should be doing the cleaning around the office because she is a woman and cleaning is women's work.

28. Downs embarrassed Wells in front of her son one afternoon when Downs asked him if he was going to grow up and work for Downs so he could be his mother's boss since Wells needed "that", i.e., someone to be her boss.

29. Downs' treatment of Wells caused her to avoid him during the day if it was possible because she felt like she was walking on eggshells, wondering what kind of mood he was in and what might suddenly set him off on an angry tirade. Wells was understandably afraid to tell Downs that his demeaning words and behavior offended her because she did not want to lose her job, and because she was afraid and intimidated by Downs, especially in light of his demonstrated erratic and violent behavior.

30. Because of Downs' demeaning comments and conduct towards Wells concerning the amount of work Wells accomplished during the day, Wells desperately wanted to keep Downs from criticizing her. As a result, she often worked through her lunch hour each day, worked late at the office, and worked on the drafting program at home in the evenings. When Downs was present, she walked on eggshells trying not to upset Downs.

31. Downs treated Wells poorly solely because she was a woman. Downs' treatment of Wells created a hostile working environment for Wells.

32. A Tech had no policy (written or oral) regarding sex discrimination or hostile working environment during the time that Wells was employed at A Tech. At no time was Wells ever told that if she had a problem with the conduct of managers or other employees that she could or should go directly to any Board member to seek redress of the problem. Indeed, Wells was never informed as to which board members she should go to if she wanted to redress a problem with a supervisor.

33. Humbert was a member of the Board of Directors. He did not, however, serve as a liaison between the employees and the Board. At no time did he supervise Wells. Downs was Wells' only supervisor after Biddix was fired.

34. The Board of Directors, however, was powerless to stop Downs even had it been inclined to do so, since he was the majority shareholder and had control of the majority of A Tech's stock.

35. On September 17, 2008, Downs discharged Wells. Wells was shocked and very upset.

36. Wells had no idea who to contact on the Board about her discharge. She had to call Humbert to get Stoltenberg's telephone number.

37. Wells called Stoltenberg and left a message for him. During their conversation, Wells told Stoltenberg about all of her complaints with Downs, including the sexually hostile comments she had endured from Downs. Stoltenberg told Wells that he could "relate"(Wells' testimony) to Wells' concerns because Stoltenberg had been embarrassed by Downs' attitudes toward waitresses which Stoltenberg observed while he and Downs were eating together. Stoltenberg also told Wells that the Board's "hands were tied" (Wells' testimony) with respect to Downs' conduct because Downs was the majority shareholder and Downs could remove anyone from the Board.

38. Wells suffered emotional distress as a result of Downs' conduct. She was subjected to Downs' abusive, illegal behavior in front of both her colleagues and, on one occasion her son. In addition, both in public and in private, Wells was subjected on a regular basis to explosive outbursts that were designed to make Wells feel inferior because she is woman. $20,000.00 is an appropriate amount to compensate her for the discrimination she suffered.

39. Wells was subjected to a hostile working environment. She has not, however, proven nor even argued in her post hearing briefing that there is any causal

connection between the hostile working environment and her discharge. There simply is not sufficient evidence to show that the discharge was part of the hostile working environment. Therefore, no factual predicate exists upon which lost wages or future damages can be awarded to her.

IV. OPINION[1]

A. Wombold's testimony about Boothe's Statement is admissible.

The hearings officer requested that the parties brief the issue of the admissibility of Sharon Wombold's testimony to the effect that Downs had a problem with women. The charging party argues that the statement is admissible as a prior inconsistent statement. The respondent does not dispute that the statement is a prior inconsistent statement, but argues instead that the charging party waived her argument because she did not raise that specific argument at hearing.

As the charging party correctly points out, the hearings officer invited the parties to argue the admissibility of the statement in post-hearing briefs. After the charging party presented her argument that Boothe's statement to Wombold was given a timely opportunity to respond. It is beyond cavil that the fact that testimony is not admissible under one exception to the hearsay rule does not mean that it is not admissible under another exception. Thus, contrary to the respondent's post-hearing argument, the charging party did in fact timely present her argument that Wombold's testimony was admissible.

MRE Rule 801(d)(1)(A) provides that a prior statement of a witness is not hearsay if the declarant testifies at trial and is subject to cross examination concerning the statement and the statement is inconsistent with the declarant's testimony. The rule does not require (as it does in the federal rules of evidence) that the prior statement be under oath. The statement, once admitted, can be used as substantive evidence in the case. State v. Fitzpatrick, 186 Mont. 187, 198, 606 P.2d 1343, 1349 (1980). Fitzpatrick is virtually identical to the situation that exists before this hearings officer. In Fitzpatrick, the prosecutor called witness Radi to testify that the he had discussed the defendant's shooting of the victim. On direct and cross, Radi denied that he had made any such statement. The prosecutor then called witness Bushman to testify that Radi had made the statement that Radi had denied he had made. The supreme court found that Bushman's testimony about

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

Radi's prior inconsistent statements were properly admitted under the rule. Id. Under the rationale of Fitzpatrick, Wombold's testimony about Boothe's statement that Downs had a problem with women is admissible for its substantive value.

B. Humbert's Rebuttal Testimony Should Be Admitted.

From the case law cited by the charging party, it is patently obvious that Joe Humbert's rebuttal testimony should not be precluded. This is because rebuttal witnesses are not properly within the purview of the rule for excluding witnesses. State v. Close, 191 Mont. 229, 244, 623 P.2d 940, 948 (1981). Accordingly. Humbert's rebuttal testimony is admitted.

C. There Is No Basis For Imposing Discovery Sanctions In This Case.

In its closing response brief, the Respondent asserts that the charging party should be sanctioned for failing to comply with discovery rules, specifically, failing to disclose certain bases for her claim that she was subjected to a hostile working environment in response to respondent's interrogatory number 6. The respondent has not articulated in its brief which incidents were not disclosed. After reviewing the charging party's response to the respondent's interrogatory number 6 (attached as Exhibit 3 to the charging party's closing reply brief) and considering the incidents upon which the hearings officer relies to make his determination in this matter, the only readily identifiable incident which clearly was not disclosed to the respondent is the incident regarding Downs' comment to Wells' son (which incident is by no means the critical factor upon which the hostile working environment has been found).

Rule 26 (e)(2) addresses duties to supplement responses to interrogatories. The rule requires a party to supplement responses either when (1) a party knows that the previous response was incorrect when made or (2) the party knows that the response though correct when made is no longer true and the circumstances are such that the failure to amend the response is in substance a knowing concealment. The purpose of the rule is to reduce the possibility of surprise and unfair advantage.

The hearings officer agrees with the charging party that no prejudice has been alleged that would support the imposition of sanctions. This is not a situation where discovery violations "materially affect the substantial rights of the complaining party and allow the possibility of a miscarriage of justice." Anderson v. Werner Enterprises,

1998 MT 333, ¶13, 292 Mont. 284, 972 P.2d 806.[2] Here, no prejudice exists and none has been argued. Indeed, in its final witness and exhibit list, the respondent noted that it would use as a witness "any witness identified by the charging party." The respondent was on notice that the charging party was claiming a hostile working environment and that the charging party would be testifying in this case. The respondent was on notice of the substantial points of the charging party's hostile working environment claim through her responses to its interrogatories. Under the circumstances of this case, sanctions are not appropriate. Weimer v. Lyons, 2007 MT 182, ¶37, 338 Mont. 242, 164 P.3d 922.

In Weimer, the plaintiff argued on appeal that the trial court erred in permitting the respondent to testify as an expert witness on the quality of his workmanship in pouring concrete because the respondent had not listed himself as a an expert witness as required by Rule 26. The Montana Supreme Court rejected the argument, finding that there was no prejudice to the complaining party. In doing so, the court reasoned:

> Lyons was not only the contractor who had performed the work, he was also the party being sued. It was obvious that he would testify regarding the extent and quality of his own work. Indeed, Weimer's responses to Lyons' discovery requests listed Lyons as a person Weimer expected to call as a witness and further explained that he expected Lyons to testify about the defects in his work. Weimer knew Lyons would testify, had ample time to plan his examination of Lyons, and was prepared to respond to Lyons' testimony with his own expert testimony regarding the quality of Lyons' workmanship. Therefore, Weimer suffered no prejudice. Id.

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[2] In its citation to Anderson, the Respondent indicates "the [Anderson] court stated that 'Anderson's change in employment status was material to his lost calculation, Anderson was required to supplement his prior discovery his prior discovery responses to notify Werner/Freeman of his employment termination" Respondent's brief, page 10. The implication in the respondent's brief is that this was the holding in Anderson. It clearly was not the holding of Anderson, as the complete quotation from Anderson reveals. The complete quotation states "Werner/Freeman argues that because Anderson's change in employment status was material to his lost calculation, Anderson was required to supplement his prior discovery responses to notify Werner/Freeman of his employment termination(emphasis added)." In fact, the Anderson court found that "Although Anderson may have had a duty to disclose the change in his employment status, Werner/Freeman cannot claim surprise or prejudice because Anderson, throughout this litigation, asserted an inability to work as a truck driver and based his damage calculations on the assumption that he would not continue working as a truck driver." The court went on to find that the failure to disclose did not constitute a basis for reversal.

In the case before this tribunal, the respondent was aware of the substantial details of the charging party's claim, was aware that the charging party would be testifying, had months to prepare for the charging party's testimony, and in fact listed the charging party as its own witness. The respondent cannot now claim and has not shown prejudice that would require imposition of sanctions.

D. The Respondent Discriminated Against Wells By Creating A Sexually Hostile Work Environment.

Montana law prohibits employment discrimination based on sex. §49-2-303(1), MCA. The Montana Supreme Court has explicitly recognized when a supervisor harasses a subordinate because of the subordinate's sex, that supervisor "'discriminate[s]' on the basis of sex" and violates the Montana Human Rights Act. Harrison v. Chance, 244 Mont. 215, 221, 797 P.2d 200, 204, (1990) citing Meritor Savings Bank FSB v. Vinson, 477 U.S. 57,64 (1986).

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).

In this type of case, the question to be answered is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80-81 (1998). A charging party establishes a prima facie case of sexual harassment with proof that she was subject to "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). "Harassment need not be severe and pervasive to impose liability; one or the other will do." Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted).

A 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, supra, quoting Harris, 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. See Ellison, supra, 924 F.2d at 879. In addition, it is not necessary that a plaintiff enumerate with precision the exact number of times that she was subjected to offensive conduct in order to demonstrate the pervasiveness required to prove a hostile working environment. Testimony that the plaintiff was subjected to numerous instances of offensive conduct can be sufficient to show that the conduct was pervasive. Torres v. Pisano, 116 F.3d 625, 634-635 (2nd Cir.,1997).

The testimony of Wells convinces the fact finder that Wells was subjected both objectively and subjectively to a sexually hostile working environment through Downs' conduct. Downs repeatedly belittled and demeaned Wells work because she was a woman. Though his short temper also caused him to treat his male employees poorly, his hostility to Wells because of her sex was made plain by his criticisms which were frequently punctuated with his comments that what he perceived as poor work was due to he her being a woman. He repeatedly ascribed her inability to drive the forklift to her being a woman. He repeatedly ascribed her inability to get more work done to her being a woman. He ascribed her getting tired while moving shingles to her being a woman. When Wells inquired about obtaining a cleaning service for the office, Downs suggested that she do it because she was a woman. The frequency of Downs' comments(as demonstrated through Wells' testimony) , coupled with Downs' obvious intent to treat Wells differently because of her sex (as shown both through the wording of the comments themselves, Boothe's observations and Downs' comment to Hotchkiss that Downs had a problem with women) demonstrates that Wells was subjected to a hostile working environment. See, e.g., Equal Employment Opportunity Commission v. National Education Assoc., 422 F.3d 840, 845 (9th Cir. 1994)(male employer who subjected women to abuse of screaming, yelling and using invectives because he was "more comfortable bullying women than men" created a hostile working environment because such motivation was no less "because of sex" than motives involving sexual frustration, desire or animus).

A Tech argues that Downs' conduct was equally abusive to the male employees who worked with him. The hearings officer rejects this notion for the simple reason that whatever form his abuse of male workers took, it is obvious from the content of Downs' comments toward Wells that his abuse of her was motivated by her sex (e.g., his comments that Wells could not do her job more efficiently because she was a woman).

A Tech also attempts to insulate itself from Downs' conduct by arguing that A Tech can avail itself of the affirmative defense described in Burlington Industries v. Ellerth, 524 U.S. 742 (1998) and Faragher, supra. (hereinafter referred to as the Ellerth/Faragher affirmative defense). Where a tangible employment action is taken against an employee, the defense is not available.[3] In the absence of a tangible employment action, the employer can defend against the discrimination claim by proving (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid the harm. Ellerth at 765; Faragher at 807. The employer bears the burden of proving the defense by a preponderance of the evidence. Faragher at 807.

It is not at all clear in this case that the supervisor and the entity were sufficiently separated such that the Faragher defense should be allowed. Indeed, given Downs' majority share holder status and his apparent ability to replace or override the Board(as demonstrated by Stoltenberg's statement to Wells that the Board's hands were tied because Downs was a majority shareholder), it appears that Downs' conduct whether or not sanctioned or known by the Board would by itself be enough to create vicarious liability for A Tech as Downs could be considered to be the "organization's proxy." Faragher at 789-90. See, e.g., Torres, supra, 116 F.3d at 634-635 (2nd Cir.,1997)(holding that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer"). On that basis alone, the hearings officer would be inclined to attach liability to A Tech under agency principles.

However, even if the defense can be raised in this case, the employer has not proven it. While there has been no tangible employment action taken by the employer,[4] the evidence fails to prove either that the employer had any procedure in

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[3] Ellerth at 765; Faragher at 807. "Tangible employment action" refers to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Ellerth at 761.

[4]Prior to the hearing, the charging party abandoned that portion of her complaint that alleged that her discharge was the result of discrimination. Wells pursued only her claim of a hostile working environment. There was inadequate proof at hearing and no argument in post-hearing briefing that her discharge was part of that hostile work environment. Therefore, the affirmative defense may be available to A Tech since there is no tangible employment action related to the hostile work environment claim.

place that would reasonably permit Wells to circumvent Downs or that Wells unreasonably failed to take advantage of any protective measures that were available. Downs' comment to Wells when she started work that he was in control of everything and made all of the decisions is enough to show that the Faragher defense should not lie in this case. In addition, Humbert's and Wells' testimony is credible that the employees were never told of specific persons on the board to whom they could report and bypass Downs. In light of the lack of direction, Wells quite reasonably could conclude that there was no mechanism to stop Downs' conduct since he was by all appearances and in fact (as the majority shareholder) the "owner" of the operation. A Tech's argument that there was a mechanism in place ignores the reality of the situation. Humbert was never told that he was to serve as a liason between the Board and the employers nor did he ever act in that regard. Wells had no idea who on the Board she would need to talk to and, after her discharge, she had to call Humbert to find out how to get hold of the Board members and which board member to contact. Wells was never told who the Board members were. Simply put, there was no mechanism to go around Downs to seek redress against for Downs' conduct. This evidence convinces the hearings officer that the affirmative defense has not been met in this case. In light of this, Wells has proven her hostile working environment claim.

E. Damages

The department may order any reasonable measure to rectify any harm Wells 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. 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. Berry, supra; 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).

Here, Wells has not presented sufficient evidence to demonstrate that her discharge flowed from the hostile working environment that she experienced. She has not argued that the discharge was a direct manifestation of the hostile working environment. Neither has she argued that the evidence suggests indirectly that the discharge was a manifestation of the hostile working environment. She dismissed before trial her claim of discrimination based on the discharge. The discharge

occurred during her probationary period, and, while the hearings officer is convinced that Downs created a sexually hostile working environment through his comments toward Wells, the hearings officer is not convinced that the discharge was a manifestation of the hostile working environment. As there is no causal connection between the hostile working environment claim and her discharge, lost wages and front pay do not flow from the hostile working environment discrimination that she proved. Therefore, she cannot be awarded lost wages and front pay.

Wells is entitled to compensatory damages for humiliation and emotional distress which she 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.

Wells unquestionably suffered emotional distress from the hostile working environment to which she was subjected. She was subjected to Downs' abusive, illegal behavior in front of both her colleagues and, on one occasion her son. In addition, both in public and in private, Wells was subjected on a regular basis to explosive outbursts that were designed to make Wells feel inferior because she is woman. She felt anguish over the hostile working environment to which she was subjected. Based on her testimony, $20,000.00 is appropriate and reasonable under the facts of this case to compensate her for the distress she suffered.

F.. 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). 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. A Tech violated the Montana Human Rights Act through Downs' conduct which created a hostile working environment for Wells.

3. Wells is entitled to be compensated for emotional distress damages.

4. Wells is not entitled to compensation for lost wages and front pay as there is no causal connection between those damages and the hostile working environment.

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

6. 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).

VI. ORDER

1. Judgment is found in favor of Shannon Wells and against A Tech for subjecting Wells to a hostile work environment in violation of the Montana Human Rights Act.

2. A Tech is enjoined from discriminating against any employee on the basis of race or national origin.

3. A Tech must pay Wells the sum of $20,000.00 for emotional distress.

4. A Tech must develop and implement specific policies to prohibit discrimination in the work place and to ensure that both employees and management are properly trained about preventing sexual discrimination in the work place. A Tech must also develop an appropriate mechanism to ensure that employees can effectively seek protective measures from the corporation in the event any employee is subjected to discrimination by a supervisor. In developing and implementing this plan, A Tech shall work with the Montana Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau. In addition, A Tech shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: July 22, 2010

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings Officer
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Kim T. Christopherson, attorney for Shannon Wells; and Eric Edward Nord, attorney for A TechBuilder Corporation:

The decision of the Hearings 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 Hearings 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, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
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 6 COPIES 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 Hearings Bureau, 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 Shawndelle Kurka, (406) 444-3870, immediately to arrange for transcription of the record.

WELLS.HOD.GHP