

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1919-2016

NOELLE HOLLIS,)
)
Charging Party,)
) HEARING OFFICER DECISION
vs.) AND NOTICE OF ISSUANCE OF
) ADMINISTRATIVE DECISION
GORAN, LLC,)
)
Respondent.)

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Noelle Hollis brought this complaint alleging that Goran, L.L.C. (Goran) discriminated against her on the basis of gender by subjecting her to a hostile work environment from May, 2015 through December, 2015 and retaliated against her by denying her work without a legitimate reason both before and after she filed her complaint with the Human Rights Bureau.

After the case was certified to the Office of Administrative Hearings, Hollis appeared on her own behalf and Goran appeared through counsel. Goran's counsel was not licensed in Montana. On June 3, 2016, an Order Setting the Contested Case Hearing Date and Prehearing Schedule (Scheduling Order) was issued by the Office of Administrative Hearings.

On August 30, 2016, pursuant to the terms of the Scheduling Order, the Hearing Officer convened a final pre-hearing conference between the parties. Hollis appeared and attorney Tom Checketts appeared on behalf of Goran. Prior to this final pre-hearing conference, neither party had complied with the terms of the Scheduling Order. Neither party identified exhibits to be used or witnesses to be called at hearing. Goran indicated it had local counsel, but did not identify the name of counsel. Goran believed that because Hollis had not identified a hearing site in Red Lodge, Montana that the hearing had been cancelled and as such did not comply

with the terms of the Scheduling Order. Further, Goran's counsel stated that Goran was completely out of business and in the process of winding up its affairs.

The Hearing Officer gave the parties until September 1, 2016 to identify a location and for Goran to obtain counsel licensed in Montana. The parties agreed to confer and get back to OAH by that date.

On September 1, 2016, Hollis contacted OAH and told OAH staff that the parties were unable to reach agreement as required by the Hearing Officer. Instead, Hollis informed OAH staff that Goran told her that they would not be appearing in the matter through local counsel and that they would not be participating in the September 7, 2016 hearing.

On September 2, 2016, the Hearing Officer issued an Order that because Goran did not appear through local counsel, and in the interests of judicial economy, he would be conducting the hearing in the matter by telephone. Further, Hollis would be the only participant/witness at the hearing because she did not identify any witnesses or exhibits to be used at hearing, pursuant to the Scheduling Order.

The Hearing Officer convened a contested case hearing in this matter on September 7, 2016 in Helena, Montana. The hearing was conducted by telephone. Hollis participated and she agreed to proceed by telephone. Goran did not appear and did not participate.

Hollis did not submit any exhibits.

Hollis submitted a post-hearing brief and the matter was deemed submitted for determination after Hollis' brief was timely received in the Office of Administrative Hearings on October 7, 2016. Based on the evidence adduced at hearing and in Hollis' post-hearing brief, the following hearing officer decision is rendered.

II. ISSUES

1. Is Goran, LLC, in default for failing to appear through local counsel as required under Montana law?

2. Did Goran, LLC, discriminate against Noelle Hollis based upon sex by creating a hostile work environment, in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

3. Did Goran, LLC, retaliate against Noelle Hollis by changing her work duties, and by not providing work when other workers were working, after Hollis filed her complaint with the Human Rights Bureau?

4. If Goran, LLC, did illegally discriminate and/or retaliate against Noelle Hollis as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

5. If Goran, LLC, did illegally discriminate and/or retaliate against Noelle Hollis as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

1. Goran, LLC, is a Utah limited liability company registered to do business as a foreign limited liability company in Montana.

2. Hollis is a resident of Red Lodge, Montana and is an experienced equipment operator qualified to operate finish roller and dirt roller equipment. She is also a qualified flagger.

3. In May, 2015, Hollis was hired by Goran as a finish roller and dirt roller operator. Hollis was hired by Goran job-site supervisors Steve Graham and Travis Gardner. Her rate of pay was \$39.00 per hour.

4. Initially, Hollis operated a finish roller for Goran as part of a paving crew on a job in Absarokee, Montana.

5. In June, 2015, Hollis transferred to Red Lodge, Montana to operate a dirt roller for a Goran in Red Lodge. Hollis was the only female crew-member for Goran at the Red Lodge jobsite.

6. Employees of Goran were assigned specific duties and carried out those duties during the course of a work day. It was very rare at Goran for employees to deviate from their work speciality. In other words, a dirt roller operator would perform dirt roller duties at the jobsite and would not be assigned other tasks.

7. Every morning before the start of a shift, Goran would hold a safety meeting with its employees where the employees would get their work assignments for the day and discuss safety issues that might arise. Initially, Hollis felt that she

was just one of the guys and enjoyed her assignment on the dirt roller. She had no issues with any of her fellow employees.

8. On or about June 9, 2015, Hollis timely showed up for the morning safety meeting. As Hollis approached her fellow co-workers, her co-workers became silent and then immediately left the meeting to go to their assignments. Hollis sensed something was off and she felt she was being treated as if she had the plague. Because the meeting broke up before Hollis could get her work assignment for the day, Hollis had to go to her supervisor, Graham to get daily job duties.

9. The treatment of ignoring and not including Hollis in morning safety meetings went on for a couple of weeks. Hollis also started noticing a difference in the attitude of her fellow co-workers and that workers with whom she had previously gotten along with now ignored her. The co-workers began whispering amongst one another, began making jokes towards her, began looking at her differently and would not engage in conversations with Hollis by walking away when she attempted to talk to them. Further, Hollis began hearing job-site rumors that she was a “whore.”

10. Hollis continued to do her job but this treatment began to upset her. One day when Hollis was visibly upset over her treatment by fellow employees, a Goran traffic control foreman named Kevin told her why she was being treated differently.

11. On or about July 20, 2016, Hollis was informed by Kevin that a Goran foreman by the name of Jonathan Blass had learned of an old story about her. Approximately eleven years ago, during the midst of her divorce, Hollis appeared on the “Dr. Phil Show.” Blass had acquired a still picture of Hollis and her ex-husband from the show and had texted and emailed that picture to all members of the Goran crew.

12. Upon learning this information Hollis became further upset. Hollis went to her supervisor, Graham, and asked him about the information. Graham informed her that he knew about the Dr. Phil information and had heard rumors about it. Graham requested Hollis go home so that he could speak to the crew. Because Hollis was sent home early she lost hours and pay.

13. Hollis returned to work the next day, July 21, 2015. Nothing changed. She was still shunned and was confronted by a member of the crew, Jeremy Spencer. Spencer told Hollis that she was a “stupid bitch and shouldn’t be here.” Hollis again went to Graham about Spencer’s comments. Graham informed Hollis that he would

speak to Spencer, but Spencer's off-handed comments about Hollis being a "stupid bitch and whore" continued.

14. Hollis continued to come to work but remained isolated from the crew. Some days Graham, instead of allowing Hollis to operate the dirt roller, would have Hollis walk the job-site with the Montana state employee assigned to supervise the work. Other days Graham would have Hollis dig out sidewalks for concrete and shovel dirt alone. Graham avoided confronting the Goran employees who were making lewd comments to Hollis and did not attempt to rectify the situation. One day Hollis was sent from Red Lodge to Billings to pick up parts in an attempt to keep her away from the crew.

15. Graham told Hollis that "he had a lot on his plate and that she should put on her big girl panties and deal with it." Graham also told Hollis that he kept her around because she came to work every day, worked hard, and was a good equipment operator.

16. The stress at work caused Hollis to contact her physician and Hollis was given Xanax in an attempt to alleviate the stress. Hollis entertained thoughts of suicide and relied on friends and family to ensure her emotional well being.

17. Hollis continued to come to work each day but the incidents continued. On or about August 21, 2015, while operating her dirt roller, Hollis was told by her supervisor Wayne Phelts to leave her roller and find something else to do. Hollis asked Phelts what else she could do and Phelts told her to go speak to Graham. No reason was given for this direction and when Hollis again confronted Graham, Graham did not put her back on the roller but instead assigned her to dig out sidewalks.

18. On or about August 31, 2015, Hollis was operating a dirt roller near a flagger when Goran employees Bass and Dave Gledhill approached the flagger and asked him if he knew about Hollis and Dr. Phil.

19. On or about September 2, 2015, Hollis was taken off her dirt roller and sent to Billings for fire hydrant risers. When Hollis returned from Billings, another employee, Casey Spencer, was operating the roller. Spencer told Hollis that he was sorry, but he could not allow her back on the roller. Hollis was told this was at the direction of supervisor Phelts and supervisor Nate Bryan. When Hollis confronted Bryan she was told by him "doesn't Steve have something for you to do?" Hollis

then went to Graham and Graham asked her to work again with the Montana state employee and do a “walk-around” of the job-site.

20. After work on September 2, 2015, Graham came to Hollis and told her “the men were complaining about her, that he didn’t understand this shit, but it’s here and we only have a couple of weeks left on the job so can we just get it done?”

21. On or about September 7, 2015, Jeremy Spencer called Hollis a “stupid bitch who was fired last week but the bitch still shows up for work.”

22. On or about September 11, 2015, Hollis was again taken off her roller by Phelts without explanation and told to go “use a shovel.”

23. On or about September 14, 2015, Hollis filed her complaint with the Montana Human Rights Bureau. Graham knew that Hollis had filed the complaint

24. On or about September 21, 2015, Graham asked Hollis to drive from Red Lodge to Butte to deliver a check to another construction company to take her away from her dirt roller duties.

25. On or about September 24, 2015, Hollis observed Spencer taking pictures of her with his phone. When she confronted Graham about Spencer’s conduct, Graham’s only response was “if he calls the home office both she and Spencer would be fired.”

26. Sporadically, at the end of September, and in October and November, Graham assigned Hollis to work in the construction site office packing boxes, and doing general office cleaning. Graham also asked Hollis to do payroll, which was a job that normally fell to Graham. When Hollis was out in the field, she was given flagging jobs to keep her away from the crew.

27. Towards the end of October, 2015, Graham informed Hollis that there was no work for her though the job had not ended. On or about November 3, 2015, Graham texted Hollis and told her “she is done.” On or about November 4, 2015, Graham called Hollis and told her not to come to work that day as there was no work for her, either as an operator, or as a flagger. However, when Hollis ventured into Red Lodge that day, she saw the job-site was fully active, with everyone working, including the dirt rollers being operated and flaggers performing their tasks.

28. Under the circumstances of this case, an emotional distress award of \$30,000.00 is reasonable to compensate Hollis for the emotional distress she has endured as a result of the employer's unlawful conduct.

29. Affirmative relief in the form of an injunction to prohibit Goran from engaging in future discriminatory and retaliatory conduct is also warranted.

IV. OPINION¹

Hollis argues Goran discriminated against her on the basis of gender by subjecting her to a hostile work environment from May, 2015 through December, 2015 and retaliated against her after she filed her complaint with the Human Rights Bureau.

- A. Goran is in default for failing to appear in this proceeding through counsel licensed in Montana.

This is a contested case proceeding subject to the Montana Administrative Procedures Act (MAPA) pursuant to Mont. Code Ann. § 2-4-601 et. seq and § 49-1-102. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 49 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a scheduling order and then further fails to respond to a tribunal's direct order.

The Department has adopted the model rules proposed by the Montana Attorney General, which provide in pertinent part, “[I]n a contested case, if a party does not appear to contest an intended agency action, the agency may enter a default order. If a default is entered, pursuant to Mont. Code. Ann. § 2-4-623, the order must be in writing and include findings of fact and conclusions of law” (emphasis added). Admin. R. Mont. 1-3-213(1) and 24-2-101(1).

A corporation can only appear in a legal proceeding through a licensed attorney. *Audit Services, Inc. v. Frontier West, Inc.*, (1992), 252 Mont. 142, 148, 827 P.2d 1241, 1246. A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney. *Weaver v. Graybill*, (1990), 246 Mont. 175, 178, 803 P.2d 1089, 1091, quoting Annotation, Propriety and Effect

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.

of Corporation's Appearance Pro Se, Through Agent Who is Not Attorney, 19 A.L.R. 3d 1073 (1968).

Here, Goran has been on notice since at least June 3, 2016, that it needed an attorney licensed to practice in Montana to represent it in these proceedings. At the final pre-hearing conference on August 30, 2016, Goran was given until September 1, 2016 to appear through local counsel. Goran's counsel indicated that Goran had local counsel in Montana who was assisting them in winding up Goran's Montana affairs. However, Goran's Utah counsel never divulged the name of the Montana attorneys nor did the Montana attorneys ever file a Notice of Appearance in this proceeding. Further, Goran informed Hollis on or before September 1, 2016 that it would not be appearing through local counsel and would not be participating in the hearing on September 7, 2016. Therefore, Goran is found in default.

Even though Goran is in default, the Hearing Officer also finds that it is liable to Hollis for discriminatory conduct.

B. The Unrebutted Testimony of Hollis was credible.

In civil cases, a preponderance of the evidence is sufficient to establish the truth of any fact at issue. Mont. Code Ann. §26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder decides credibility and weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P.2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064. In this regard, the standard for deciding facts remains the preponderance of evidence standard. Cf., *Pannoni v. Bd. of Trustees*, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance standard as "more likely than not").

The department follows the Montana Rules of Evidence in making contested case fact determinations. "Notice of Hearing," October 25, 2013, p. 2; see also Admin. R. Mont. 24.8.704 and 24.8.746. Applying those rules, the evidentiary framework for department discrimination cases is the same as that applicable in District Court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. § 26-1-401. In discrimination cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. *Id.*; *Heiat v. Eastern Mont. College* (1996), 275 Mont. 322, 912 P.2d 787, 791, citing *Texas Dpt. Com. Aff. v. Burdine*,

(1981), 450 U.S. 248, 253; Taliaferro v. State (1988), 235 Mont. 23, 764 P.2d 860, 862; Crockett v. Billings (1988), 234 Mont. 87, 761 P.2d 813, 818.

Mont. Code Ann. §26-1-302, provides, in pertinent parts:

A witness is presumed to speak the truth. The jury or the court in absence of the jury is the exclusive judge of his credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness' testimony; such matters include but are not limited to:

....

- (7) inconsistent statements of the witness;
- (8) an admission of untruthfulness by the witness;
- (9) Other evidence contradicting the witness' testimony.

Mont. Code Ann. §26-1-303(3) provides:

A witness false in one part of his testimony is to be distrusted in other.

To begin the analysis of the credibility, it is important to note that Hollis was the only participant in the hearing and did not present any other witnesses or exhibits to bolster her claims. Goran did not appear or participate. Hollis' testimony was un rebutted and as such can be considered direct evidence of what occurred. The Hearing Officer presumes that Hollis was telling the truth, therefore, her testimony at the hearing was credible.

C. Hollis proved Goran discriminated against her based on sex.

The Montana Human Rights Act prohibits discrimination in the terms and conditions of employment on the basis of sex. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-3-201. Sexual harassment is considered a form of sex discrimination, and a hostile work environment is one form of illegal sexual harassment. Beaver v. D.N.R.C., ¶129, 2003 MT 287, 318 Mont. 35, 78 P. 3d 857; Stringer-Altmaier v. Haffner, ¶120, 2006 MT 129, 138 P.3d 419.

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).

To establish a claim of a hostile work environment, Hollis must prove (1) she was subjected to verbal or physical conduct of a harassing nature; (2) that it was unwelcome; and (3) that the harassment permeated the work environment to the point that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Stringer-Altmaier* at ¶122; *Nichols v. Azteca Restaurant Ent., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001).

A charging party establishes a prima facie case of sexual harassment with proof that she was subject to “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). “Harassment need not be severe and pervasive to impose liability; one or the other will do.” *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted).

A 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. *Oncala*, 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. 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).

This case is a direct evidence case. Direct evidence “speaks directly to the issue, requiring no support by other evidence,” proving the fact in question without either inference or presumption. *Black’s Law Dictionary*, p. 413 (5th Ed. 1979); see also, *Laudert v. Richland County Sheriff’s Department*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. Direct evidence of discrimination establishes a violation unless the

respondent proffers substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert, supra*.

When a charging party establishes a prima facie case of sexual harassment with direct evidence, the burden is then on the employer to prove, by a preponderance of evidence, “that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief.” 24.9.610(5).

The evidence shows that the work environment in which Hollis operated in was hostile, that the conduct and actions of her fellow workers was pervasive in its negativity and because of it there were extreme changes in the terms and conditions of her employment with Goran.

Hollis was the only female crew-member working for Goran at the Red Lodge jobsite. Initially, she felt as if was just “one of the guys” and enjoyed her work with Goran working exclusively as a dirt roller operator. Testimony from Hollis shows that the employees got along with one another and there were no problems in the work environment. But the appearance of a picture from a long ago appearance on a talk show changed everything.

After the male dominated crew found out about the picture, Hollis was shunned and was treated differently. Hollis’ Supervisor Graham knew about the picture and the rumors surrounding it, but initially did nothing. Therefore, by his actions of ignoring the behavior of his male construction workers and by moving Hollis to other job duties, Graham tacitly approved of his workers negative behavior toward Hollis. It was not until approximately five weeks later on July 20, 2015, after Graham found out from Hollis herself as to why she was being treated differently, that Graham attempted to address the issue by holding a crew meeting, without Hollis present.

However, even after this meeting on July 20, 2015, the hostile actions of her co-workers continued. Spencer continued to make negative comments calling her a “stupid bitch and [she] shouldn’t be here.” Hollis continued to be ignored in the morning safety meeting. Her co-workers continued to walk away when she attempted to talk to them. Hollis continued to hear rumors that she was a “whore.”

Graham would do nothing to halt the conduct except continually trying to isolate Hollis from her fellow workers and assign her job duties away from her dirt roller. Graham’s only other solution to Hollis was to tell her to “put on her big girl

panties and deal with it” and to further tell Hollis that the “men were complaining about her, he didn’t understand this shit, but it’s here and we only have a couple of weeks on the job so can we just get it done?” These condescending comments show Graham did not want to fix the situation and instead wanted to bury his head in the sand and hope the issue went away.

While it is true that a woman working in a male dominated field such as construction is going to face certain challenges, Graham should not have buried his head in the sand. As Goran’s on-site supervisor, Graham had the authority to correct the situation and could have taken reasonable steps to correct the work environment. It would have been reasonable for Graham to attempt to correct the behavior of his male employees, especially Spencer. It would have been reasonable for Graham to take steps to ensure that Hollis was included in the morning safety meeting. It would have been reasonable for Graham to monitor and correct the behavior of his supervisors, such as Phelts, so that when Hollis asked for a job assignment she would not be sent away. It would have been reasonable for Graham to make sure Hollis continued to work as a dirt roller operator and not isolate her. Instead, Graham did none of these things and Hollis suffered because of it.

Here, because it has failed to participate, Goran has not presented any evidence to rebut the direct evidence that it discriminated against Hollis. Therefore, the Hearing Officer solely relies on the testimony of Hollis, which he finds credible.

The Montana Human Rights Act is intended to protect individuals who are subject to severe and offensive conduct that adversely affects an individual’s ability to perform his or her job duties. Hollis has shown that the conduct of her fellow co-workers and Goran’s failure to correct the conduct rendered the working environment hostile. Hollis proved that Goran discriminated against her based on sex.

D. Hollis proved Goran retaliated against her.

With respect to this claim, Hollis enjoys a disputable presumption that Goran’s conduct was retaliatory as the action was taken during the pendency of Hollis’ human rights complaint. Admin. R. Mont. 24.9.603(3).

Montana law prohibits retaliation in employment practices for protected conduct. Protected conduct includes opposing illegal discrimination or filing a charge of discrimination and assisting or participating in any manner in an investigation. Admin. R. Mont. 24.9.603(1)(b),(c).

Retaliation under Montana law exists where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603(2). A charging party can prove his claim under the Human Rights Act by proving that (1) he engaged in a protected practice, (2) that thereafter his employer took an adverse employment action against him, and (3) a causal link existed between protected activities and the employer's actions. Admin. R. Mont. 24.9.610 (2).

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. When the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, either by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. So. Cal. Permanente Med. Group*, 79 F.3d 859, 868 (9th Cir. 1996). If a respondent with actual or constructive knowledge of a human rights proceeding takes significant adverse action against a charging party during or within six months of the pendency of those proceedings, a disputable presumption arises that the action was in retaliation for engaging in protected conduct. Admin. R. Mont. 24.9.603 (3).

Evidence of statements made by a decision maker related to the decisional process at issue which reflect unlawful retaliation, is direct evidence of retaliation. Cf., *Laudert v. Richland County Sheriff's Dept.*, 2000 MT 218, ¶29, 301 Mont. 114, ¶29, 7 P.3d 386, ¶29. Against a direct evidence prima facie case, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is neither credible nor worthy of belief. Admin. R. Mont. 24.9.610(5); *Reeves v. Dairy Queen*, 1998 MT 13, ¶17, 287 Mont. 196, ¶17, 953 P. 2d 703, ¶17.

Hollis argues Goran retaliated against her by continuing to isolate her from her job duties on the direct roller and ending her employment after she filed her complaint with the Human Rights Bureau on September 14, 2015.

As noted herein, substantial and credible evidence shows Hollis engaged in protected activity by complaining of her treatment at the Red Lodge jobsite prior to filing her complaint. Additionally, Hollis has shown a causal link between her being isolated from her job duties as a dirt roller and being laid off and the protected practice.

Hollis was a full-time employee hired as a dirt roller operator. Substantial and credible evidence shows that Goran did not allow Hollis to perform those duties. Instead, Hollis was isolated and treated differently. This conduct continued after Hollis filed her HRB complaint. Graham knew about Hollis' HRB complaint. The evidence shows that Graham wanted Hollis away from the jobsite and out of his hair that he even sent Hollis on a seven hour round trip drive from Red Lodge to Butte to simply deliver a check. After she filed her complaint, Graham assigned Hollis to menial jobs in the office such as packing boxes and cleaning. Graham also attempted to shirk his duties of preparing the payroll and passed that job onto Hollis.

At the end of October, 2015, Graham told Hollis there was no work for her even though the job had not ended. On November 3, 2015, Graham texted Hollis and told her "she was done" and called her the next day and told her there was no work for her at all, but when Hollis went into Red Lodge that day she saw the jobsite as fully functioning.

The un rebutted evidence shows that the actions of Goran, through its supervisor Graham, showed a non-legitimate and discriminatory reason for their decision to continue to not allow Hollis to do her job as a dirt roller operator and release her from her position even though work was still available. The un rebutted evidence shows that the menial tasks given to Hollis were retaliatory. The un rebutted evidence show that Graham actions were retaliatory when he told Hollis "she was done" and that there was no work available, even though the work at the Red Lodge jobsite continued. The un rebutted evidence shows that Goran produced no legitimate reason as to why Hollis was terminated. This is especially true that prior to Hollis filing her HRB complaint, Goran always found work for Hollis, even though such work was not part of her job duties and was isolating. It was not until Hollis filed her HRB complaint that "she was done." These actions prove a prima facie case of retaliation.

These actions are direct evidence of retaliatory intent that require Goran to come back in this matter and prove by a preponderance of the evidence that retaliatory intent played no part in the decision. *Laudert, supra*. Because Goran failed to participate, Goran has not presented any evidence that overcomes the circumstances, content, context and nature of Goran's retaliatory actions.

E, Damages

The Hearing Officer is empowered to any reasonable measure to rectify any harm, pecuniary or otherwise, to Hollis as a result of this illegal discrimination.

Mont. Code Ann. §49-2-506(1)(b). That includes recovery of her lost earnings. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); see also *Dolan v. S.D. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830 (1981). She must prove the amounts of her losses, but not with unrealistic exactitude. *Horn v. Duke Homes*, 755 F.2d 599, 607 (7th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3d Cir. 1984); *Rasimas v. Mich. Dep't Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

However, in this matter, Hollis has not met her burden of production or persuasion with respect to lost wages. She has failed to prove with evidence an amount of lost wages or even a specific time period when such wage loss occurred. As such, the Hearing Officer can not make an award of lost earnings.

F. Emotional Distress

Damage awards must include compensation for emotional distress suffered as a result of the illegal discrimination when the facts show that the charging party has suffered from emotional distress. The value of this distress can be established by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶133, 308 Mont. 8, ¶133, 38 P.2d 836, ¶133. Hollis has been subjected to substantial emotional distress as a result of Goran's conduct. She had to go to work everyday knowing that she would be subject to continuing harassment. She had to go to work everyday not knowing whether she would be able to perform her tasks on the dirt roller. These actions caused Hollis to seek medical treatment and consider suicide. Hollis' emotional distress is appropriately valued at \$30,000.00.

G. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct. Mont. Code Ann. §49-2-506(1). 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. Noelle Hollis has proven that Goran, LLC, violated the Montana Human Rights Act by sexually discriminating against her by subjecting her to a hostile work environment based upon her gender pursuant to Mont. Code Ann. §§ 49-2-303(1).

3. Noelle Hollis has proven that Goran, LLC, violated the Montana Human Rights Act by retaliating against her for protected activity pursuant to Montana Code Ann. §49-2-301.

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

5. The Respondent failed to comply with the orders of this tribunal, or to obtain counsel to properly represent it. Therefore, the Respondent is found in default.

6. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Goran, LLC, must pay Noelle Hollis damages for emotional distress.

7. The circumstances of the retaliation 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 Hollis and against Goran, LLC, for discriminating against Hollis in violation of the Montana Human Rights Act.

2. Goran, LLC, is enjoined from discriminating against any employee on the basis of sex.

3. Goran, LLC, shall pay Hollis, within fifteen days of the date of this decision, \$30,000.00 in emotional distress damages.

4. Goran, LLC, 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. Goran, LLC, 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, Goran, LLC, shall work with the Montana Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau. In addition, Goran, LLC, shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

5. Within 120 days of this order, Goran, LLC's officers, managers, and field supervisors must complete four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of discrimination and terms and conditions of employment, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Goran, LLC, shall obtain a signed statement of the trainer indicating the content of the training and the date it occurred. Goran, LLC, must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

DATED: this 18th day of November, 2016.

/s/ DAVID W. EVANS

David W. Evans, Hearing Officer
Office of Administrative Hearings,
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Noelle Hollis, Charging Party; and Goran, LLC, Respondent, and their attorney, Thomas K. Checketts:

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, WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
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 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, (406) 444-4356 immediately to arrange for transcription of the record.

HOLLIS.HOD.DEP