IN THE
SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 21-0603

NORVAL ELECTRIC COOPERATIVE INC.,

Appellant/Cross-Appellee

v.

SHALAINE LAWSON,

Appellee/Cross-Appellant

On appeal from the Montana Seventeenth Judicial District Court, Valley County
Nos. DV 2020-11 and DV 2020-15 (Laird, J.)

COMBINED RESPONSE AND CROSS-APPEAL BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Should this Court disregard the credibility determinations and overwhelming adjudicated facts that supported the Human Rights Bureau's ("HRB") findings of sexual harassment and retaliation – which were affirmed by the Human Rights Commission ("HRC") and the Valley County District Court ("District Court") – and reverse the liability findings against NorVal Electric Cooperative, Inc. ("NorVal") and enter judgment for NorVal when its appeal is without any reasonable grounds?

2. Should this Court reverse the District Court's ruling which modified Shalaine Lawson, C.P.A.'s ("Lawson") front pay damages to the amount originally requested by Lawson when there was unrefuted evidence supporting the amount, and the District Court determined that the four-year damages cap in the Wrongful Discharge from Employment Act ("WDEA") – which the HRB expressly utilized to cap

Lawson's front pay damages at precisely four years – did not apply to Lawson's claims?

3. Did the District Court err when it denied Lawson's request to apply a multiplier to her awarded fees and costs when it made contradictory findings concerning the applicable hourly rate for services, and did not apply the requisite factors – virtually all of which were satisfied – to the multiplier request?

STATEMENT OF THE CASE

Lawson was the Office Manager and Chief Financial Officer of NorVal. Craig Herbert ("Herbert") was, and remains NorVal's General Manager, and was Lawson's immediate supervisor.

In October 2017, Lawson complained to Herbert that he was sexually harassing her. Consistent with NorVal's policy, neither NorVal nor Herbert permitted Lawson to assert her complaint to anyone other than Herbert. Given this, and pursuant to her medical providers' advice, Lawson took a medical leave from NorVal, and on November 20, 2017, filed a Complaint against NorVal with the HRB. NorVal's Answer denied that all claimed instances of sexual harassment ever happened.

On May 22, 2018, the HRB determined that no unlawful harassment or retaliation occurred, and Lawson's Complaint was dismissed.

On June 26, 2018, Lawson appealed the dismissal with the Montana Human Rights Commission ("HRC"). On September 18, 2018, the HRC unanimously reversed the dismissal, and the Office of Administrative Hearings ("OAH") then issued an expedited discovery schedule and hearing dates.

In February and March 2019, an OAH Hearing Officer presided over a three-day hearing. On October 22, 2019, the Hearing Officer issued a Hearing Officer Decision ("HOD") which found NorVal liable for sexual harassment and retaliation, and awarded damages, but limited front pay to four years based on a damages cap that only applies to claims under the WDEA. Also, the HOD awarded injunctive relief against NorVal, and determined Lawson was entitled to fees and costs.

On November 21, 2019, NorVal appealed the liability findings with the HRC. Lawson then filed a cross-appeal contending, among other things, that the HOD's use of the WDEA's damages cap was an error.

On January 24, 2020, the HRC unanimously affirmed the liability findings, increased Lawson's damages due to a mathematical error, and affirmed the HOD's use of the WDEA's damages cap. The HRC then issued its Final Agency Decision ("FAD").

On March 5, 2020, NorVal appealed the FAD with the District Court. Lawson then filed a cross-appeal challenging the application of the WDEA to her claims.

On February 24, 2021, the District Court affirmed the liability findings and determined that the WDEA did not apply to Lawson's claims. Given this, and Lawson's unrefuted evidence, the District Court modified the front pay damages to the amount originally requested by Lawson.

On November 5, 2021, the District Court awarded Lawson attorneys' fees and costs, but denied her request to apply a multiplier to the award.

On November 30, 2021, NorVal filed a Notice of Appeal, and Lawson then filed a Notice of Cross-Appeal.

On February 23, 2022, NorVal filed its brief challenging the District Court's affirmance of the liability findings and its modification of the front pay award.

STATEMENT OF FACTS

This statement of facts is in response to NorVal's appeal, and in support of Lawson's cross-appeal, and is written in a chronological format but at times refers to different points within the procedural history.

I. Background, And Lawson's Employment With NorVal.

Lawson earned her bachelor's degree in accounting in 2002, moved to Glasgow, Montana in 2004 to work at a local accounting firm, and then obtained her

CPA license. (HOD, ¶¶ 6, 7.)[1]

In 2010, Lawson began working for NorVal, an electric cooperative located in Glasgow. (HOD, ¶¶ 1, 8.) In 2015, Herbert promoted Lawson to Office Manager and Chief Financial Officer. (HOD, ¶ 8.) "All NorVal employees report to Herbert [and]… are subject to Herbert's whim and caprice." (HOD, p. 37.) Herbert reports to NorVal's Board. (HOD, ¶ 5.)

While employed with NorVal, Lawson earned multiple raises, including a 2% raise in September 2017 authorized by Herbert, and averaged approximately 16% annual salary increases. (HOD, ¶ 13.)

Lawson's compensation included "very generous" benefits for herself and her family. (Day 1 Tr.[2], pp. 57-58.) NorVal jobs are "coveted" in Glasgow. (Read-ins[3], p. 33.)

Prior to asserting her sexual harassment complaint Lawson never received a poor performance evaluation from NorVal. (HOD, ¶ 15.)

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[1] The HOD was attached to NorVal's brief.
[2] This citation refers to the transcripts of the 3-day HRB hearing.
[3] At the hearing Lawson relied on deposition transcripts, and "read-ins" refers to the pages within the composite of transcripts submitted.

II. Timeline Of Sexual Harassment And Retaliation.

A. May 2017 Through October 2017.

In May 2017, Herbert began making inappropriate sexual comments to Lawson when during a ride for work he asked why she started wearing false eyelashes. (HOD, ¶¶ 20, 21.) Lawson said they made her feel better, and Herbert commented, "when women go and try to improve their looks, it's because they're looking to have an affair." (HOD, ¶ 21.)

Lawson felt Herbert's comment was inappropriate and he "was interested in having an affair." (HOD, ¶ 22.) Lawson stopped wearing false eyelashes at work given Herbert's comment. (HOD, ¶ 23.)

In June, Herbert asked Lawson, while they were alone in his office, if she had "fooled around" with an employee of an entity hosting a conference that Lawson planned on attending. (HOD, ¶ 27.) Lawson was "shocked" and very "uncomfortable" with the question and as a result did not attend the conference. (HOD, ¶¶ 27, 28; Day 1 Tr., pp. 71-73.)

In NorVal's Answer to Lawson's HRB Complaint (hereinafter, "Answer"; the HRB Complaint is discussed below), NorVal denied Herbert asking the above

question to Lawson. (Ex.[4] 35.) Herbert later acknowledged asking the question because he was concerned that any such relationship would be a "conflict of interest," but did not tell Lawson about this alleged concern as he "didn't feel it was necessary." (Day 2 Tr., p. 203.) Herbert never asked another NorVal employee if they had "fooled around" with a work colleague. (HOD, ¶ 27; Day 2 Tr., p. 204.)

That same month, Lawson had a massage which she mentioned to Herbert. (HOD, ¶ 29.) Herbert asked Lawson if her husband gave her massages, and said, "I give a really good massage, and if we're [sic] ever given an opportunity, I would like to get you relaxed." (HOD, ¶ 30.) Lawson did not respond, and felt "degraded, dirty and really uncomfortable." *Ibid.*

Around this time, Lawson was in Herbert's office and said her back hurt. (HOD, ¶ 31.) Herbert then directed Lawson to turn around, shut his office door, and popped her back. *Ibid.* Lawson felt Herbert was smelling her hair while he popped her back, and his conduct was "very inappropriate." *Ibid.*

Lawson was then in Herbert's office alone and he gave her a hug and stated it was "just for friends." (HOD, ¶ 32.) Lawson "felt this was inappropriate." *Ibid.*

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[4] "Ex." refers to Lawson's exhibits introduced at the hearing. All exhibits were entered into this Court's record. (Valley County District Court Record 39.000.)

In mid-July, Lawson was at NorVal's copy machine and wearing knee length shorts, and Herbert said, "you are filling your pants out nicely." (HOD, ¶ 34.) Lawson felt "Herbert was interested in pursuing a sexual relationship with her. Lawson threw away the shorts she was wearing as a result." (HOD, ¶ 35.)

NorVal's Answer denied that Herbert made the above comment. (HOD, pp. 32-33; Ex. 35.) Herbert later acknowledged the comment, but he explained "I meant it as a compliment…" (Day 2 Tr., pp. 236-237.) "Herbert did not explain why a female subordinate would appreciate her male supervisor commenting…on how well she was filling out her shorts." (HOD, p. 33.) Herbert never told another female employee that they were filling out their pants nicely. (Day 2 Tr., p. 205.)

In August, NorVal was doing power shutoffs and the term "turn off" was mentioned, and Herbert asked Lawson, "are there things that turn you off?" (HOD, ¶ 37.) Lawson immediately left Herbert's office. Herbert used the term "turn off" as a sexual reference several times later that day in her presence. *Ibid*.

Also, during the summer of 2017, Herbert, while in Lawson's office, asked about her sex life, and "Lawson felt disgusted by the question." (HOD, ¶ 33.)

NorVal denied that Herbert asked about Lawson's sex life, but Herbert explained the denial was "not accurate" as he asked this question because he was knowledgeable about the female anatomy. (HOD, p. 32; Ex. 64, Request to Admit,

no. 5; Day 2 Tr., p. 173.) "Lacking in Herbert's self-serving testimony was why a female subordinate would want her supervisor to inquire about her sex life…." *Ibid.* Herbert never explained to Lawson why he asked about her sex life, and "never asked another NorVal employee about their sex life." (HOD, ¶ 33.)

Lawson began to feel so uncomfortable that she stopped showering as often and wearing nice clothes to work to '"ward him off." (HOD, ¶ 36.)

Lawson then spoke to her husband about the harassment, and on September 19th, Mr. Lawson emailed attorneys about "potential sexual harassment" to see "how maybe to proceed." (HOD, ¶¶ 38, 39; Ex. 26.) Following this, Lawson understood that she could find a new job or file a complaint. (HOD, ¶ 40.) Mr. Lawson encouraged Lawson to continue working, and hoped the situation improved. (HOD, ¶ 40.)

On October 3rd, Lawson and Herbert were at a work conference and he asked if they could have their previously scheduled meeting in his hotel room, and that he had an extra key made so she could go to his room surreptitiously. (HOD, ¶ 45.) Lawson refused, and they then had their meeting by the pool. (HOD, ¶ 46.)

NorVal's Answer denied the hotel room invitation, but Herbert later acknowledged the invitation, and that Lawson responded, "absolutely not." (HOD, ¶ 45; Ex. 35; Day 2 Tr., p. 215.) Herbert had "never asked another NorVal employee

to meet with him in a hotel room." (HOD, ¶ 45.)

B. In October 2017 Lawson Asserts A Sexual Harassment Complaint, And The Retaliation Begins.

On October 6th, Lawson told Herbert that she had documented his hotel room invitation; "Lawson suspected Herbert may fire her, but she felt it necessary to tell him that he needed to stop his behavior." (HOD, ¶ 47, 48.) "Herbert knew or should have known at that point that Lawson was wanting to file a sexual harassment complaint based upon his knowledge of NorVal's harassment policy…." (HOD, ¶ 50.)

NorVal's harassment policy provides that any form of "sexual harassment" should be reported to the employee's "immediate supervisor, or if the immediate supervisor is involved the employee should report to the General Manager …" but "[t]here is no provision in NorVal's policy as to an employee's recourse if the harasser is the General Manager …." (HOD, ¶¶ 53, 54; Ex. 37C.)

On October 9th, Lawson asked to meet Herbert with a Board member to address the sexual harassment "so that we could move on and move forward." (HOD, ¶ 55.) A Board member then came to the office but only met with Herbert, and Herbert informed Lawson "they needed to work it out or she needed to go." (HOD, ¶ 56.)

Later that day, "Herbert accused Lawson of threatening him when she told him that she had documented his inviting her to his hotel room, which he took as being a threat that she was going to file a sexual harassment complaint." (HOD, ¶ 56.)

On October 10th, Lawson asked Herbert how to report her sexual harassment complaint, and he responded that NorVal's attorney, Matthew Knierim, was drafting something for her to review. (HOD, ¶ 57.) That afternoon Herbert handed a "written reprimand" to Lawson entitled, "Employee Behavior" which stated,

> You have no authority or right to engage Board members …. with any of your employment issues or authority issues. Those issues will be exclusively resolved by me…. (HOD, ¶¶ 58-61; Ex. 3.)

The reprimand listed alleged performance problems and in reference thereto stated, "if it occurs again, you will be terminated immediately." (HOD, ¶ 60; Ex. 3.)

Prior to drafting the reprimand on Herbert's behalf, Knierim had not been informed about the sexual harassment complaint, nor had he ever discussed terminating Lawson's employment with Herbert. (HOD, ¶ 59.)

Herbert claimed that he told Knierim about the sexual harassment complaint before Knierim drafted the reprimand, but Herbert did not know why the reprimand failed to mention the complaint. (HOD, p. 47; Read-ins, p. 13.)

"The reprimand basically accused Lawson of not being able to do her job in a satisfactory manner [and] had a material adverse impact on Lawson's employment." (HOD, p. 44.)

After reading the reprimand, Lawson emailed Herbert that "you just came to my office, handed me a letter" and,

> I was also told that I was not allowed to speak to any board member about this under ANY circumstances, by you. I am saddened that you…now have chosen to retaliate and threaten termination…I would like the harassment and retaliation to cease immediately. It is causing me extreme stress and anxiety and is unacceptable. (Ex. 5.)

Lawson's email referenced an "attached letter" (that she had previously drafted) and she explained its purpose:

> I wanted to express that I wanted him to stop because it was making me uncomfortable. But I still wanted to write it in a nice enough way that we could continue to work together…I felt like [the sexual harassment] was just getting progressively worse. (Day 1 Tr., pp. 106-109.)

Lawson's letter cited instances of sexual harassment, stated that "these actions are not wanted and make me feel uncomfortable[,]" confirmed that Herbert said he was "threatened" by the hotel room invitation complaint, explained how he had retaliated against her, and that "[m]y ability to perform these duties has never been questioned in the past, nor has my quality of work." (Ex. 5.)

After Herbert received Lawson's email and letter responding to his hand-

delivered reprimand, he texted Lawson, "would [sic] please call me tonight. I don't want any attitude from either one of us. I think we owe each other one last civil talk before this gets too far out of hand." (HOD, ¶ 62; Ex. 4.)

Lawson called Herbert and he immediately offered a severance if she resigned, but she declined it and said she had done nothing wrong. (HOD, ¶ 63.) Lawson told Herbert she "just wanted the sexual harassment to stop" and she did not want either of their families to "suffer any embarrassment." (HOD, ¶ 63.)

Herbert testified that he "didn't discuss [the severance] with anybody" but then testified that he discussed the severance with the Board, and it approved the severance. (Day 2 Tr., p. 159; Read-ins, p. 7; Interrogatory Response No. 4.) Herbert did not have the authority, or request permission from the Board, to make the severance offer and he never made a severance offer to any employee other than in reduction-in-force situations. (HOD, ¶ 64, 65.)

On October 11th, Herbert asked Lawson to go for a car ride so they could speak privately. (HOD, ¶ 66.) Lawson agreed provided that Herbert agreed not to discuss her complaint. *Ibid.* Immediately after they got into the car Herbert told Lawson that the severance offer still stands, and after Herbert brought up the complaint a second time on their ride, she asked him to return to the office. (HOD, ¶ 67.) Lawson felt Herbert "was trying to discourage her from pursuing her" complaint. *Ibid.*

Unbeknownst to Lawson, Herbert had been compiling a "timeline" about her. (HOD, p. 33.) NorVal produced two versions of the timeline. (Exs. 31A-B.) "The second timeline, which was not provided to the HRB [investigator] but was produced during discovery, included much more detail, including comments about his car ride in which he wrote, 'I tried to bring up the letter [Lawson] sent me the night of October 10, 2017, and [Lawson] said she did not want to talk about [it] at all.'" (HOD, p. 33; Ex 31B, p. 10.) "Herbert professed to have no idea why that sentence [and other "information concerning Lawson's complaint"] was not included in the timeline provided to the HRB [investigator]." (HOD, p. 33.)

Later, on October 11th, Herbert told Lawson "that he did not want to sleep with her" and then showed her a photo of a woman he previously worked with "[t]o show…that I've never had a sexual harassment case against me [ ]"; "I thought I got through to her but hindsight being 20/20, I don't think I did." (HOD, ¶¶ 68, 69; Read-ins, p. 9.)

On October 17th, Herbert became "visibly angered" when Lawson asked him again as to whom she should report her complaint. (HOD, ¶ 70.)

On October 23rd, Herbert informed Lawson that she would no longer be taking the Board minutes, which had been her responsibility, and that her subordinate would assume that role. (HOD, ¶ 71.) When Lawson asked why, Herbert said "he

was the boss and did not have to give her a reason." *Ibid.* "The reassignment of the note taking duties communicated not only to Lawson, but also to her co-workers and the Board that Lawson was not in a favored position…[and] had a material adverse impact on Lawson's employment." (HOD, p. 44.)

Lawson then went to Knierim's law office and tried to give him the reprimand, her written response, and complain about the sexual harassment but Knierim refused to accept the documents "and directed her to leave his office." (HOD, ¶ 72.)

After leaving Knierim's office, Lawson called the HRB. (HOD, ¶ 73.) Upon returning to NorVal, Herbert directed Lawson "to report to him when she left the office and when she returned." *Ibid.* This directive "was obviously intended to demean her and to punish her for daring to complain of Herbert's behavior." (HOD, p. 44.)

On October 25th, Lawson emailed a Billings attorney:

> I would like to consult with someone in regards to possible discrimination by my current employer after I reported to my supervisor that sexual harassment occurred. (Ex. 27.)

The attorney did not take the case because it was in Glasgow. (Day 1 Tr., p. 53.)

Herbert's October 27th entries in both of his timelines noted that Lawson wanted to talk to the Board but "that will not happen," and that Lawson told him she

would be filing a complaint with the HRB. (HOD, ¶ 76; Exs. 3lA, p.23, 31B, p. 14.) Herbert testified that he "contacted everyone [on the Board]" by telephone "right away" in "late October" after he learned Lawson intended to file a Complaint with the HRB. (HOD, p. 47; Read-ins, pp. 3-4.) The Board members never received such a call. (HOD, p. 47; Read-ins, p. 24.)

On November 3rd, Lawson emailed Herbert:

> [Y]our continued harassment and retaliation and threats has caused me physical and psychological distress. I am unable to sleep, eat, and have become physically ill. I will be seeking medical attention. I will deliver a form I want filled out with work comp tomorrow. I will inform you when I'm able to return to work. (HOD, ¶ 78.)

That day Lawson received counseling from Elizabeth Drydahl, LCPA, LAC, and Drydahl found that Lawson was "severely depressed," "had a plan to harm herself" and strongly recommended hospitalization. (HOD, ¶ 79; Day 1 Tr., p. 362.) Drydahl testified that:

> Shalaine reported having had some very inappropriate attention from a coworker, which had become such a problem that she was unable to cope with it. (Day 1 Tr., p. 362.)

Mr. Lawson immediately took Lawson to the hospital where she was diagnosed with "[d]epression with suicidal ideation." (HOD, ¶¶ 79, 80; Ex. 41D.) Lawson then treated with Jennifer Durward, APRN, PMHNP-BC, who has the

training to diagnose mental health illnesses, make medical assessments, and prescribe medication. (HOD, ¶¶ 80, 81.)

Lawson "reported to Durward that she had been sexually harassed by her boss and he would not stop despite her having confronted him, and he continued to retaliate against her after she complained." (HOD, ¶ 82.) Durward's diagnoses included "stress reaction" and "sexual harassment on the job." (HOD, ¶ 85.)

On November 6th, Mr. Lawson provided Herbert with Lawson's hospitalization records for her requested Workers' Compensation claim. (HOD, ¶ 86; Ex. 77A.) Herbert tried to "dissuade" Lawson from filing a Workers' Compensation claim. (HOD, ¶ 87.)

On November 8th, Herbert's assistant filed a Workers' Compensation claim but noted the cause of Lawson's injury was "unknown." (HOD, ¶ 88; Ex. 47A.) Lawson promptly filed an amendment that stated:

> On 11/3/17, I sought medical help due to continued retaliation and threats at NorVal. I was sexually harassed by general manager Craig Herbert for several months. I attempted to report to someone other than Mr. Herbert and was told I could only report to him. I tried to report to the cooperative attorney Matthew Knierim and was told to leave his office. I continued to be depressed, anxious, and had suicidal thoughts…. (HOD, ¶ 89; Ex. 47B.)

On November 10th, Lawson detailed the sexual harassment and retaliation to a Workers' Compensation representative during a recorded interview. (HOD, ¶ 90;

Ex. 48.) The interview was played at the HRB hearing and was consistent with Lawson's hearing testimony. (HOD, ¶ 90.) Because Workers' Compensation does not cover mental health injuries, the claim was denied. (HOD, ¶ 91; Ex. 47C.)

On November 10th, Lawson received a letter from Herbert stating, "[y]ou are not to return to work until we have had [sic] a meeting to discuss how we will proceed…until then you are not to be on the property." (HOD, ¶ 93; Ex. 9.)

On November 17th, Lawson emailed Knierim her recent medical records, including a letter from Durward prohibiting Lawson from working pending NorVal's investigation, and stated:

> [G]iven that NorVal did not investigate my sexual harassment or retaliation complaint, I contacted the Montana HRB and filed a complaint… (HOD ¶ 95; Ex. 32.)

Knierim did not respond to Lawson, so she forwarded her email to Herbert. (HOD, ¶ 96; Ex. 71.)

On November 21st, Herbert wrote to Lawson:

> I am your direct supervisor and you need to communicate with me directly on all matters of employment…all of your previous complaints lodged with NorVal have been investigated. The earlier severance package that the Cooperative offered, was refused by you on October 11, 2017, is no longer available. NorVal wants our facility keys, credit card, cell phone, and iPad immediately returned to the Cooperative while you are on this extended sick leave. (HOD, ¶ 97; Ex.17.; emphasis added.)

Herbert's letter did not provide the results of the claimed investigation, or explain why the above work items were being requested. Herbert later testified the credit card was requested because "we were investigating fraud." (Day 2 Tr., p. 220.) However, Lawson was never informed of any fraud allegations, and as noted below, there was never a fraud investigation, and the fraud claim was a "fabrication." (HOD, ¶ 124, p. 43.)

That same day, Lawson emailed Herbert that she would return the requested work items, and "requested the results [ ]" of the investigation. (HOD, ¶ 98; Ex. 18.) Herbert's directive "to return all Norval property" subjected Lawson to different treatment than other NorVal employees who had gone out on leave and "had a material adverse impact upon" Lawson's employment and was "clearly intended to make it impossible for Lawson to return to work or to perform any work for NorVal from home." (HOD, pp. 43-44.) Herbert "did not reply to Lawson's email." (HOD, ¶ 99.)

On December 8th, Herbert wrote to Lawson:

> As of December 14th, you will be placed on unpaid leave; all salary and benefits will stop at that point…If it is your intention to return to work after December 15th, you will need to report to [sic] directly to me. (HOD, ¶ 101; Ex. 73.)

On December 13th, Lawson emailed Herbert requesting that her leave be extended based upon an updated letter from Durward, and Herbert responded that

Durward was not qualified to support the request. (HOD, ¶ 104; Ex. 20.)

Lawson immediately emailed Herbert with Durward's qualifications. (HOD, ¶ 106; Ex. 20.) Based "on advice on council," Herbert did not respond to Lawson's email. (Day 2 Tr., pp. 174-175.)

On January 2, 2018, NorVal "paid out all of [Lawson's] accrued vacation and sick leave." (HOD, ¶ 107; Ex. 69 A-B.) NorVal's policy states that it will pay out all accrued leave upon the termination of employment. (HOD, ¶ 108; Ex 42, p. 3.)

On January 3rd, Lawson emailed Herbert and asked for NorVal's investigation results, and why her accrued leave had been paid out. (HOD, ¶ 109; Ex. 21.) Herbert replied the next day without answering Lawson's questions, but stated:

> As far as your employment status, you are still listed as an employee with NorVal on unpaid leave. How long this will last is up to the attorneys or if you accept employment elsewhere then you will no longer be a NorVal employee. (HOD, ¶ 110; Ex. 21; emphasis added.)

On January 12th, Lawson emailed Herbert and asked for the investigation results, and that he forward an updated letter from Durward to NorVal's Board. (HOD, ¶ 111; Ex. 77F.) Upon "advice of council" Herbert did not respond. (HOD ¶ 111; Day 2 Tr., pp. 174-175.)

On January 25th, Lawson wrote a letter to NorVal's Board on several employment issues and requested permission to seek interim employment while on

leave given Herbert's January 3rd email noted above. (HOD, ¶¶ 112, 113; Ex. 22.) "Based on advice of council" the Board did not respond to the letter. (HOD ¶ 114; Read-ins, pp. 17, 34-35.)

On January 31st, Lawson emailed Herbert an updated medical leave letter from Durward, and again requested the investigation results. (HOD ¶ 115; Ex. 74.) On February 5th, Herbert responded but did not provide the investigation results or a response to Durward's letter, and stated that if Lawson wanted to return to NorVal she had to acknowledge "serious deficiencies in [her] job performance" and that she would work directly underneath him. (HOD, ¶ 116; Ex. 24.)

C. After Lawson Went On Unpaid Medical Leave, Herbert "Maliciously Attacked," "Maligned" and "Defamed" Lawson.

After Lawson went on unpaid medical leave, Herbert "malign[ed]" and "malicious[ly]" "attack[ed]" Lawson. (HOD, pp. 43, 50.)

Also, following her leave, Lawson contacted a NorVal employee to see if she would be a witness, and the employee texted:

> I feel like a really shitty person and friend for not helping you, but overall I need to think about myself and providing for my family and I don't want to jeopardize that in any way. I am so sorry. (Ex. 13.)

Lawson responded, "I understand. You're not even close to being a shitty person or friend." *Ibid.*

Further, after Lawson went on leave Herbert "directed NorVal employees to cease contact with Lawson" and claimed Lawson "harassed" and "intimidated" witnesses, but "Lawson's contact with NorVal employees was never harassing or intimidating." (HOD, ¶ 123, p. 47.) Additionally, Herbert announced at multiple NorVal meetings that so long as Lawson received her same salary, he "could make [Lawson] clean toilets" if she returned to NorVal. (HOD, pp. 41-42.)

Also, "Herbert advised NorVal employees that Lawson was being investigated for possible fraud. Herbert failed to advise those same employees that he had no direct or credible evidence of fraudulent behavior." (HOD, ¶ 124.) Additionally, Herbert testified he directed two individuals to investigate Lawson's alleged fraud, but the two individuals were not "aware of Herbert's supposed concerns or ever being asked to investigate" any fraudulent behavior. (HOD, ¶ 124, p. 47.)

"Herbert's comments suggesting Lawson was guilty of fraudulent conduct could only have been intended to harm Lawson's reputation in retaliation for her having complained of his behavior…and had a material and adverse effect on Lawson's employment …" (HOD, ¶ 124, p. 43.) "Given Herbert's concerted effort to defame Lawson…Herbert was clearly intent on communicating that she was, at the very least, a poor employee." (HOD, p. 44.)

D. In April 2018, NorVal Continues To Ignore Lawson's Requests For The Investigation Results And Medical Leave, And Unbeknownst to Lawson, Confirms It Never Investigated Lawson's Complaint.

On April 2nd during the HRB's investigation of Lawson's Complaint, NorVal advised the HRB that "there was no internal investigation of a sexual harassment complaint." (HOD, p. 3; Ex. 46, p. 2.) As noted below, Lawson did not become aware of this admission until after the HRB dismissed her Complaint.

By April, Lawson had sent NorVal seven letters issued by Durward prohibiting Lawson from returning to NorVal until it provided its investigation results. (HOD, ¶ 84; Ex. 40.) NorVal ignored Durward's letters, and on April 11th asserted that Durward was not qualified to support Lawson's leave request. (HOD, ¶¶ 127, 128; Ex. 42, p. 1.) Lawson reminded NorVal that she previously provided Durward's qualifications to Herbert but he never responded. (Ex. 42, pp. 7-8.) Nonetheless, "in an effort to comply with" NorVal's new request Lawson sought and attended an appointment with a Chris Laviola, Ph.D. (HOD, ¶ 129.)

On May 18th, Dr. Laviola reported that he "concurred" with Durward's "findings" and Lawson was "at high risk for increase in symptoms that could be life threatening if she returned to work" without the investigation results. (HOD ¶¶ 132-133; Ex. 44.)

On May 21st, Lawson sent Dr. Laviola's report to NorVal asking that her leave be extended, and if NorVal was "satisfied with Dr. Laviola's credentials." (HOD, ¶ 133; Ex. 75.) NorVal never responded to Lawson's letter. (HOD, ¶ 133.)

"NorVal's repeated refusal to provide Lawson with the results of its investigation" and ignoring her multiple letters requesting leave, "made it impossible for Lawson to be able to continue in her employment with NorVal, thereby having a material and adverse impact on Lawson's employment." (HOD, p. 44.) Also, "Herbert's conduct created roadblocks for Lawson that were not forced upon other NorVal employees" who took a leave of absence. *Ibid*.

E. In May 2018 The Department of Labor Dismisses Lawson's Complaint.

On May 22nd, the HRB investigator issued a report finding that no unlawful discrimination or retaliation occurred. (11/5/21 Order, p. 3.) The report relied upon Herbert's first timeline along with NorVal's response statement, neither of which were provided to Lawson.[5]

Based on the investigator's report, the Montana Department of Labor and

[5] Lawson subsequently discovered that the investigator forwarded all her submissions to NorVal for its response, but with the exception of NorVal's Answer –which denied all claims of sexual harassment—the investigator did not send any of NorVal's submissions to Lawson for her rebuttal. (7/7/21 Hearing Transcript, p. 8.)

Industry dismissed Lawson's Complaint. *Ibid.*

F. In October 2018 Lawson Successfully Appeals The Dismissal Of Her Complaint.

Lawson appealed the dismissal with the HRC which required "succinct and well-crafted briefs" given "that the HRB Investigator's findings were based on incomplete or inaccurate facts and that his conclusions were premised on misapprehensions of law…" (11/5/21 Order, pp. 3, 4, 11.)

On October 12th, the HRC ruled that the dismissal was an abuse of discretion and reinstated Lawson's Complaint. *Id*. at 4.

G. Expedited Discovery, And Hearing In 2019.

After the HRC reinstated Lawson's Complaint, the parties engaged in "expedited" and "extensive discovery" which involved "the production of thousands of pages of documents and 11 depositions taken in Bozeman, Havre, and Glasgow" and Lawson served vocational and economic expert reports. *Ibid.*

At the February 2019 hearing, NorVal made it clear that Lawson was not welcome to return to NorVal because she filed a complaint for sexual harassment, and the HOD found that reinstatement was not feasible. (HOD, p. 50; Read-ins, pp. 18, 32.)

A vocational expert – Karen Black – testified that as a result of "Herbert's

defamatory accusations of fraud," Lawson "will likely only be able to secure a 'lower level bookkeeping position' which generally pays $10-15 per hour [ ]" without any benefits. (2/24/21 Order, p. 30.)

Based on Black's testimony, Lawson's salary and benefit information, and at least 20 years of future work expectancy, Dr. Adair – an economic expert – testified that a "conservative" calculation of front pay losses was $1,379,338. (2/24/21 Order, pp. 30, 31; Day 2 Tr., pp. 32-34; Ex. 54.) Dr. Adair utilized a "conservative" 2% discount rate, and her calculations did not consider Lawson's 16% average annual salary increases with NorVal. (Day 2 Tr., pp. 27-28.) Dr. Adair subtracted estimated replacement earnings beginning on June 1, 2019.[6] from her assessment. (2/24/21 Order, p. 30; Ex. 54.)

H. Hearing Officer Decision In October 2019.

On October 22nd, the HOD found Lawson was the victim of "severe" and "pervasive" sexual harassment, and "immediate" and ongoing retaliation by NorVal. (HOD, pp. 38, 45.)

[6] Given NorVal's threat that "if you accept employment elsewhere then you will no longer be a NorVal employee [,]" and because as of June 1, 2019, Lawson was still a NorVal employee, and the HOD had not yet been issued, Lawson notified the Hearing Officer that she had not obtained replacement employment by June, 2019. (Supreme Court Record, hereinafter "Record", no. 73.)

Lawson's testimony "was clear, detailed and specific" and was "corroborated by her medical providers," and other witnesses. (HOD, p. 34.)

Conversely, Herbert's testimony was:

- "[E]vasive, and self-serving," "not persuasive," and "manufactured." (HOD, pp. 32, 34, 48.)
- "[D]irectly contradicted by two witnesses" (HOD, pp. 33, 34); and
- Herbert repeatedly displayed "perplexing logic" and was "combative and defensive throughout much of the hearing." (HOD, pp. 32-34.)

Additionally, the HOD found the unexplained "discrepancies" in Herbert's two timelines "the biggest source of concern" and "most detrimental to Herbert's credibility was his repeated response, 'on the advice of counsel'" as to "why he engaged in certain conduct after Lawson" asserted her complaint on October 6, 2017. (HOD, pp. 33, 34, 47, 48.)

Also, the HOD determined that "the evidence suggests Herbert was less than forthright through [the] HRB's investigation." (HOD, p. 53.)

Given that Lawson's "severe emotional response" to Herbert's conduct "culminated in her hospitalization and seeking mental health treatment", and "will require therapy and medical treatment going forward," the HOD awarded $50,000 in emotional distress damages. (HOD, ¶ 148, pp. 34, 54.)

The HOD also awarded back pay, and front pay capped at four years noting that the "OAH has historically followed the guidance of the [WDEA], which allows

for recovery of lost wages for a maximum of four years." (HOD, pp. 50, 51.) However, the HOD made no findings that Lawson's front pay damages were limited to four years. (2/24/21 Order, pp. 29, 30.) Contrariwise, the HOD found that NorVal's "malicious" retaliation and "defamatory statements" about Lawson "make it highly unlikely that she will ever be able to find work substantially similar to her work at NorVal[,]" and that "Lawson has been faced with an impossible task in trying to find suitable employment that would provide similar wages and/or benefits to that which is offered by NorVal." (HOD, pp. 49, 51.)

Additionally, the HOD awarded "sufficiently robust" injunctive relief against NorVal that "basically requires NorVal to have its policies approved by the HRB [which] is an extraordinary result." (11/5/21 Order, pp. 4, 5,10; 7/7/21 Hearing Transcript, p. 32.)

I. Appeals To The HRC, And Its Rulings In February 2020.

On November 1, 2019, NorVal appealed the HOD with the HRC contesting the liability findings, and Lawson then appealed the damages award. (Record no. 75.) After "extensive briefing" the HRC unanimously denied NorVal's appeal. (11/5/21 Order, p. 5.)

As to Lawson's cross-appeal, the HRC granted it in part increasing the damages by $78,389.89 due to a calculation error in the HOD. (Record no. 86, p.7.)

However, the HRC affirmed the HOD's use of the WDEA to cap Lawson's front pay at four years. *Id.* at 8.

J. Appeals To The District Court, And Its Rulings In February 2021.

On March 5, 2020, NorVal appealed the HRC's liability findings, and Lawson then cross-appealed the HRC's use of the WDEA's cap.

The appeals were fully briefed, and the District Court held a hearing on July 21, 2020. Before the hearing, Lawson notified the Court that NorVal had just terminated Lawson's employment, and her benefits. (Record no. 107.)

On February 24, 2021, the District Court affirmed the liability findings, and modified Lawson's front pay to the amount requested by Lawson ($1,379,388.00) given that use of the WDEA's damages cap was "arbitrary and capricious." (2/24/21 Order, p. 31.)

Also, the District Court held that NorVal did not prove that Lawson failed to mitigate her damages or that Lawson's reinstatement was feasible; it raised "no such argument[s]" and failed to appeal these findings. *Id.* at 28.

K. Motion For Attorney's Fees And Costs, And The District Court's Order In November 2021.

On March 16, 2021, Lawson filed a motion for fees and costs and submitted 11 supporting declarations, and an expert report, and the District Court held two

hearings on the motion in July 2021.

Following the hearings, the Court found, *sua sponte*, that certain NorVal conduct was "sanctionable,"[7] and specifically, "NorVal's assertion was clearly not based on a good faith basis of law or fact. This behavior exemplified the dilatory tactics that NorVal has employed throughout these proceedings which have wasted considerable time for the Court and Lawson's counsel, added to the continued traumatization of the victim, exponentially increased costs to both parties, and delayed finality […]" (9/27/21 Order, p. 4.)

Lawson was "reluctant" to retain a Glasgow attorney given that NorVal is a major employer in this small town, and this "was reasonable." (11/5/21 Order, p. 14.) Lawson then "reached out to several attorneys in Havre, Billings, and the Bitterroot Valley, but none were willing to take on her case" given "the undesirability of Lawson's case." *Id.* at 2, 13.

After searching for attorneys, in November 2017 Lawson retained the Shea Law Firm ("SL") "on an hourly basis." *Id.* at 3. "However, it soon became clear that Lawson would not be able to pay [SL] for legal services on an hourly basis, [and]

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[7] NorVal first stipulated that Lawson's request for costs was timely, and then argued in its post-hearing brief that Lawson's request for costs was barred because it was untimely. (9/27/21 Order, pp. 3, 4.)

because of this and her untenable predicament at NorVal, [SL] reluctantly agreed to represent Lawson on a contingency basis in 2018." *Ibid.* SL has not been paid for any services "since 2017." *Ibid.*

In October 2018 and after the HRC reinstated Lawson's Complaint, SL wrote to NorVal to resolve Lawson's claim, "but received no response." *Id.* at 4.

For the past almost five years, NorVal has defended Lawson's claim with "overall uncompromising tenacity" and its "tendency to dramatically change its position on purely factual matters, [and] haphazard use of string citations" increased "the time and labor required to" prosecute Lawson's claims. *Id.* at 11.

SL has an "impeccable reputation" and "[b]y every available metric, the results [SL] obtained for Lawson are excellent," and SL's "advocacy" "has been exemplary." *Id.* at 2, 3, 10, 11.

Lawson's award was "truly unprecedented," "dramatically changes the landscape" of HRB cases, and removed the improper cap on front pay which had been "historically" applied. (7/7/21Hearing Transcript, pp. 35, 80, 101; HOD, pp. 50-51.)

Due to the expedited discovery and briefing schedule, and the demands of the case, SL was precluded from taking on available billable work. (5/28/21 T. Shea

Supporting Declaration, District Court record no. 122, ¶ 49.)

On November 5, 2021, the Court awarded fees and costs, but declined to apply a requested multiplier. (11/5/21 Order, p. 15.)

STANDARDS OF REVIEW

NorVal has the burden of showing that there is no rational connection between the facts found and the choice made by the HOD. *Wilderness Soc. v. Bosworth,* 118 F.Supp.2d 1082 (D. MT., 2000.) District Courts "may not re-weigh the evidence, but must instead defer to the hearing examiner[,]" and "must generally accord substantial deference to administrative agencies in areas such as fact finding." *Benjamin v. Anderson,* 327 Mont. 173, 112 P.3d 1039 (2005); *Call v. Heckler,* 647 F. Supp. 560 (D. MT.,1986). The "findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference." *Moran v. Shotgun Willies, Inc.,* 270 Mont. 47, 51,889 P.2d 1185 (1995). Further, the determination of "whether there is evidence of intent to discriminate is a 'pure question of fact.'" *Blaine County v. Stricker,* 2017 MT 80, 387 Mont. 202, 210, 394 P.3d 159.

As to NorVal's appeal of the District Court's modification of the front pay award, a District Court may modify an agency's decision if it is "arbitrary or capricious," "in violation of constitutional or statutory provisions," or "affected by

other error of law[.]" 2-4-704(2)(a)(6), MCA.

As to Lawson's cross-appeal, given that the Court did not apply the applicable factors, the standard is whether the District Court's "interpretation of the law is correct." *Steer, Inc. v. Dep. of Revenue* (1990), 245 Mont. 470, 475, 803 P. 2d 601,603.

SUMMARY OF ARGUMENT

NorVal's appeal asserts new unsupported "facts" on dispositive issues, and contradicts its prior testimony along with multiple HOD findings which it never appealed. Also, remarkably, NorVal contends that certain conduct on its part did not amount to retaliation but the HOD determined that the conduct did not amount to retaliation. Leaving all this aside, at best, NorVal's appeal is simply a request for this Court to reweigh the evidence, but this is not a legitimate basis for an appeal, particularly in view of black letter discrimination and retaliation law.

Further, NorVal's cursory challenge to the District Court's ruling on front pay did not address the two reasons for the ruling: the WDEA's cap did not apply, and the unrefuted evidence supported the ruling.

As to the cross-appeal, the District Court's Order declining to apply a multiplier to the fees and costs was predicated on contradictory findings concerning the applicable hourly rate, and the Court did not apply the requisite factors to the

multiplier request despite simultaneously finding that many of the factors had been satisfied.

ARGUMENT

A. The District Court Was Timely Provided With The Entire HRB Record.

NorVal inaccurately claims the District Court did not have the HRB hearing transcripts until after it ruled on NorVal's appeal. (NorVal brief, pp. 3, 24.) As seen by this Court's record, which was supplemented after NorVal made this claim, the entire HRB file, including the hearing transcripts, was received by the District Court a year before it ruled on NorVal's appeal. (4/5/22 Supreme Court Order granting motion to supplement the record.)

B. NorVal Asserts New And Inaccurate "Facts" On Dispositive Issues, And Improperly Reweighs The Evidence.

NorVal claims at the outset that the evidence "must be viewed in a light most favorable to Lawson" (NorVal brief, p. 3), and then presents the evidence against Lawson, and asserts new and unsupported "facts" on dipositive issues.

NorVal pronounces "there unquestionably was an investigation after NorVal saw the Charge of Discrimination itself. See [sic]." (NorVal brief, p. 31.) NorVal provides no supporting citation, and this contention is uniformly contradicted by the record, including, without limitation, Herbert's testimony that NorVal's April 2,

2018, response to the HRB investigator that "there was no internal investigation of [Lawson's] sexual harassment complaint" was "accurate." (4/19/19 FOF/COL, p. 33.) Moreover, the HOD found that NorVal never conducted an investigation,[8] and NorVal never appealed this finding. (HOD, p. 5.)

Also, NorVal claims without any support that Lawson's October 10th letter to Herbert "was not the reaction to" Herbert's October 10th reprimand as the "two documents literally crossed in cyberspace." (NorVal brief, pp. 12, 13.) This new argument is contradicted by the record, including, without limitation, the undisputed fact that Herbert hand-delivered the reprimand to Lawson (it was not sent through "cyberspace"), and Lawson's October 10th email (which attached her October 10th letter) that stated "I had the attached letter ready to be discussed with you and a third party (Board Member). You just came to my office, handed me a letter..." (Ex. 5.)

Also, in connection with Lawson's October 10th letter, NorVal repeatedly relies on Lawson's attempted mollifying comment to Herbert within that letter that, "I did not state that I was looking to initiate any type of legal action" to somehow explain its subsequent retaliation towards Lawson. (NorVal brief, pp. 18, 32.) This

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[8] If NorVal is referring to its counsel's (Maxon Davis) interviewing four witnesses (but not Lawson) in February 2018 "to mount a defense" to the HRB Complaint, this was not an investigation required by the law. (HOD, p.5.) Indeed, when Herbert was asked about the results of Davis' alleged investigation, Herbert responded, "[y]ou would have to ask Mr. Davis []" and "Herbert conceded he had never seen a report about the investigation results." *Ibid.*

wholly improper argument on appeal whitewashes the undisputed fact that Lawson only stated this because Herbert, in a shocking attempt to defend himself, accused Lawson of "threatening" him when she made a complaint about the hotel room invitation, and Lawson simply wanted the harassment to stop so she could do, and keep, her "coveted" job. (HOD, ¶ 55.)

Additional, new and unsupported factual arguments on behalf of NorVal included, but were not limited to, the following:

- NorVal claims it demanded that Lawson return her NorVal property in November 2017 because "NorVal needed to continue to operate." (NorVal brief, p. 18.) NorVal provided no support for this, and the record reveals NorVal never provided a reason to Lawson when it demanded she return all NorVal property including her credit card, and this new argument conflicts with Herbert's prior false testimony that he requested the return of the credit card because he was then allegedly investigating fraud. (Day 2 Tr., p. 220.)
- NorVal sarcastically claims that Lawson's minute-taking duties at Board meetings were taken away because "it might- just might have had something to do with" Lawson's claim that the Board had engaged in "financial misconduct…" (NorVal brief, p.15.) NorVal provided no support for this, nor is there any in the record.
- NorVal argues that before Herbert popped Lawson's back, he had her "position her arms so that he would not be touching her breasts." (NorVal brief, p. 7.) NorVal provided no support for this, nor is there any in the record.

Also, NorVal repeatedly argues that "Lawson's real dispute with Herbert" was due to "work-related" issues such as "inter-office squabbling" between Lawson and a co-worker (Nick Dulaney), and NorVal's initial difficulties with its 2017 audit.

(See NorVal brief, pp. 10-13, 32.) The HOD succinctly disposed of these red herring arguments. That is, "[d]espite these squabbles, Dulaney and his wife had Lawson prepare their tax returns for several years prior to December 2017… [and] Dulaney felt Lawson had the best interest of NorVal at heart and she tried to perform the job duties to the best of her ability." (HOD, ¶¶ 17, 18.) As to the 2017 audit, "NorVal's outside accountant" timely provided an unqualified audit letter in the summer of 2017, and the letter praised NorVal's "accounting staff." (HOD, ¶ 26; Ex. 78.) Lawson was NorVal's "accounting staff."

Tellingly, NorVal does not mention Herbert's staggering credibility problems. Instead, it attacks the Hearing Officer and District Court for not understanding the "context" of the evidence. (NorVal brief, pp. 6, 11.) This does not amount to a legitimate basis for an appeal. Additionally, NorVal claims the HRC ruling was "entirely devoid of any supporting analysis" but this ignores that all of the HRC Commission members described NorVal's arguments as "troubling," "disturbing," "deeply concerning" and "unreasonable." (NorVal brief, p. 21; 1/24/20 Hearing Transcript, pp. 56, 58, 59, 60, 61.)

C. Black Letter Law Supports The Harassment Finding.

NorVal's failure to investigate Lawson's claim standing alone supports the harassment finding as a matter of law. See *Stringer-Altmaier f. Haffner,* 2006 MT

129, 332 Mont. 293, 300, 138 P.3d 419 holding that a Montana employer's "failure to seriously and adequately investigate and discipline [the harasser] …" is a "culpable act of continuing discrimination." Also, reporting mechanisms that require the plaintiff to report sexual harassment to the harasser are unreasonable as a matter of law. *Farragher v. City of Boca Raton,* 524 U.S. 775, 808-09 (1998).

Further, the cases NorVal cites to support its claim that there was no "actionable harassment" entailed the granting of summary judgement motions on behalf of defendant employers prior to a trial. NorVal never moved for summary judgment, and has provided no legal authority to support its argument that despite the HOD's findings of harassment and retaliation, this Court should reverse those findings and enter judgment in NorVal's favor. (NorVal brief, p. 40.)

A totality of the circumstances (which includes whether the victim suffered psychological injury) is used to determine whether a claim for a hostile work environment has been established, and "context matters." *Burlington Northern & Santa Fe Ry. Co. v. White,* 126 S. Ct. 2405, multiple citation omitted. The HOD's findings that Lawson was sexually harassed had overwhelming factual and legal support. (2/24/21 Order, pp. 16, 17.)

D. NorVal's Argument That There Was No Retaliation Contradicts The HOD's Findings As To What Did *Not* Amount To Retaliation, And Ignores Black Letter Retaliation Law.

The HOD set forth a "constellation" of NorVal's actions that Lawson contended amounted to retaliation, but the HOD determined that a number of those actions did not amount to retaliation. (HOD, pp. 40-43.) Specifically, the HOD found that "NorVal's conduct before the [HRC] did not materially affect [Lawson's] employment[,]" and the additional below actions did not amount to retaliation:

- Herbert's severance offer to Lawson, and his revocation of the offer two days after he was notified of her HRB complaint. (HOD, p. 43.)
- Threatening Lawson with termination of employment if she followed through with her no-contact order. *Ibid.*

Notwithstanding the above clear findings, NorVal argues at length as to why the HOD was "wrong" when it considered NorVal's conduct before the HRC, its withdrawal of the severance offer, and its threatening Lawson with termination of employment if she followed through with her no contact order as evidence of retaliation. (NorVal brief, pp. 35-37.)[10]

Leaving NorVal's simply mistaken arguments aside, NorVal did not address the specific conduct found to be retaliatory including the determination that

[10] NorVal previously asserted that other specific conduct amounted to retaliation to both the HRC and the District Court, but the HOD expressly found that that other specific conduct did not amount to retaliation. (2/26/21 Order, p. 25.)

Herbert's October 10th reprimand letter amounted to retaliation. (HOD, p. 44.) However, NorVal correctly notes that "[m]ore recently, in *MSU Northern v. Bachmeier,* ... this court simply determined that a formal reprimand could be such an adverse employment action." (NorVal brief, p. 28.) This supports the HOD.

More fundamentally, NorVal overlooks that the law "provide[s] broader protection for retaliation victims than for victims of discrimination" and a retaliation claim is established if the employer's conduct "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co.,* 126 S. Ct. 2405 (2006), see also A.R.M. 24.9.603(2). Additionally, NorVal overlooks the fact that Lawson's retaliation claim can be established even if her harassment claim failed. *Trent v. Valley Elec. Ass'n., Inc.,* 41 F. 3rd 524 (9th Cir. 1994).

E. NorVal's Challenge To The Modification of Damages Did Not Address The Reasons For The Modification.

NorVal cursorily contends that "it was an abuse of discretion for the District Court to increase the front pay award." (NorVal brief, p. 39.) Similar to its approach throughout this litigation, NorVal has placed all of its eggs in the basket contending that there was no "actionable harassment" or retaliation. For example, NorVal never asserted a mitigation of damages defense.

Also, NorVal is mistaken that the District Court substituted its judgment for the amount of the front pay damages. (NorVal brief, p. 39.) The District Court determined that "the WDEA is not the applicable law [,]" the "HOD's decision to apply the WDEA's damages cap is unsupported by the record and contrary to its findings," and the HOD's "application of the four-year damage cap was arbitrary and capricious." (2/26/21 Order, pp. 29, 30.) Given these findings, and because NorVal did not assert that Lawson failed to mitigate her damages, the District Court modified the award "to provide the front pay damages requested by Lawson." *Id.* at pp. 28, 30. Moreover, the District Court noted that Lawson's requested front pay was "significantly less than [the losses] estimated by the HOD and HRC… over a similar 20-year period." *Id.* at p. 31.

CROSS-APPEAL

The District Court found that SL's "expended hours [and costs] are reasonable" and awarded fees and costs. (11/5/21 Order, pp. 9,17.) NorVal did not appeal the award.

As to the hourly rate[11], the Court made contradictory findings:

(1) "Shea's current hourly rate of $325 is a reasonable

[11] The District Court found that the requested paralegal rate of $125 was "a reasonable rate…" (11/5/21 Order, p. 14.)

rate…" (11/5/21 Order, p. 12,14); and,

(2) The $325 hourly rate "reflects the contingency risk that Shea undertook to represent his client as well as a resulting four-year delay in payment for his services." (*Id.* at p. 14.)

As to the first finding, this was supported by expert testimony "and sworn statements from several attorneys averring that [SL's] $325 rate is reasonable for similarly situated attorneys in his practice area throughout the state, and the Court finds these statements to be credible." (11/5/21 Order, p. 13.) A number of these attorney declarations stated that the $325 rate was "very reasonable[,]" and the Court emphasized the declaration from David Irving, a Glasgow attorney. (7/7/21 Hearing Tr., p. 29; 11/5/21 Order, pp. 2, 14.) Irving's declaration concerning the hourly rate of $325 pertained to "non-contingency cases." (Record no. 142, p. 2.)

As to the Court's second finding noted above, there was no evidence to support this finding, and it conflicted with the evidence, *i.e.,* the "requested hourly rate of $325.00 does not incorporate consideration of the risk of contingency, nor the substantial delay in payment which is now almost [five] years." (8/16/21 FOF/COL, p. 39.)

Moreover, the two findings noted above are irreconcilable.

The Ninth Circuit has explained the "economic rationale" for fee enhancements in discrimination cases as follows:

> A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases. *Trulsson v. County of San Joaquin Dist. Attorney's Office,* 2014 WL 5472787, at 8 (E.D. Cal. Oct. 28, 2014.)

"An enhancement is not a windfall, but earned compensation in the form of a premium reflecting the risk of nonpayment or delay in payment of attorney's fees." *Leuzinger v. County of Lake*, 2009 WL 839056, p. 11, (N.D. Cal. March 30, 200), citation omitted. The Montana Human Rights Act "was closely modeled after Title VII" and therefore "reference to federal case law is appropriate and helpful in construing the" Act. *Stringer-Altmaier,* ¶ 17.

Moreover, there was virtually unrefuted expert testimony that there is "absolutely no incentive for" SL to take on an employment case on a contingency basis "with the hope of recovering less than what he could actually charge on an hourly basis [ ]" "and this case is a very good example of why an enhancement is necessary to incentivize attorneys … who have [the] requisite experience and expertise to take on these type of cases." (7/7/21 Hearing Transcript, pp. 25, 30.) In the same vein, Todd Shea testified that NorVal's approach to this case "has continued to make me extremely reluctant to take on any civil rights case" and therefore, consistent with the law, suggested a multiplier was warranted. (7/29/21

Hearing Transcript, p. 13.)

Also, the District Court noted that "[w]here a meritorious claim is undesirable or counsel is retained on a risky contingency, the Court should account for these factors by awarding a higher hourly rate or by allowing more hours in the lodestar calculation." (11/5/21 Order, p. 13; citations omitted.) The District Court found that Lawson's claim was "undesirable," and after Lawson was no longer able to pay on an hourly basis in late 2017, SL was unquestionably retained on "a risky contingency" particularly because SL had to secure the reversal of the HRB's dismissal of the Complaint, and NorVal has litigated the case with "overall uncompromising tenacity" for the past five years. (11/5/21 Order, pp. 2, 11, 13.) Despite these factors being satisfied in spades, the District Court did not apply them either in its initial lodestar calculation, or in the "second part of" the loadstar test to determine if the fee should be in enhanced based on the 12 factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F. 2d 67 (9th Cir. 1975), cert. denied, 96 S. Ct. 1726 (April 26, 1976). The "failure to consider such factors constitutes an abuse of discretion." *Kerr, ¶ 2.*

Additionally, the District Court noted that "where counsel, owing to his superior performance, has obtained an excellent result, or where the protracted nature of proceedings results in an 'extraordinary outlay of expenses' or 'exceptional

delay in the payment of fees' a multiplier may be warranted to provide reasonable fees." *Id.* at 16; citations omitted. The District Court found "the results that [SL] obtained for Lawson are excellent," all of the requested costs of $48,258.44 were "reasonable," and that SL has not been paid for services since 2017. *Id*. at 3, 10, 17. The District Court did not explain why these factors did not warrant a multiplier.

> Additional *Kerr* factors not considered by the Court included the following:
>
> The novelty and difficulty of the questions involved.
> SL corrected a significant incorrect statutory interpretation that was "historically" applied, and "dramatically changes the landscape" for Montana HRB claims. NorVal added to the "difficulty" of the case by consistently engaging in "dilatory tactics," "dramatically chang[ing] its position on purely factual matters" and defending the claim with "overall uncompromising tenacity." (11/5/21 Order, pp. 10,11.)
>
> The preclusion of other employment by the attorney due to acceptance of the case.
> There was unrefuted testimony that SL was precluded from taking on billable work "numerous instances" during the past five years due to the demands of the case. (5/28/21 T. Shea Declaration, ¶ 49.)
>
> Time limitations imposed by the client or the circumstances.
> It was undisputed the parties proceeded under an expedited discovery, briefing, and hearing schedule.
>
> The amount involved and the results obtained.
> NorVal's expert witness described Lawson's award as "unprecedented," and Lawson's expert witness testified that, "I can't impress upon the Court enough about the type of result that was reached here is really and truly unprecedented, and – something that we might not see for a long time." (7/7/21 transcript, pp. 26, 80.) The award was

by far the largest monetary award before the Montana HRB. (8/16/21 FOF/COL, pp. 22, 23.)

The nature and length of the professional relationship with the client.
SL has been representing Lawson for almost five years without payment for its services, and Lawson testified that SL has "provided exceptional legal services and [she is] grateful for the results obtained in [her] case." (Record, no. 136.)

Awards in similar cases.
Lawson, and the District Court, cited multiple civil rights cases wherein Courts "have applied multipliers of 2.0 and 1.5 where counsel obtained excellent results." (8/16/21 FOF/COL, pp. 43-44; 11/5/21 Order, p. 16; citations omitted.) The District Court repeatedly noted that "excellent results" were obtained, but did not apply a multiplier.

CONCLUSION

It is respectfully requested that this Court affirm the District Court's Order that NorVal discriminated against Lawson based on sex, and retaliated against Lawson, along with its Order modifying Lawson's front pay damages.

The Court should either apply a multiplier to the fees and costs, or remand the matter to the District Court to consider the requisite multiplier factors. Finally, the Court should remand the matter to the District Court for additional fees and costs incurred by Lawson.

DATED this 6th day of June, 2022.

Thomas ("Todd") D. Shea, Jr.
Attorney for Shalaine Lawson

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(e), M.R.App.P. I certify that this *Combined Response and Cross-Appeal Brief* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word, is 9,803 words long, excluding Caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ *Todd Shea*

Todd Shea
Montana Bar No. 8486
Attorney for Shalaine Lawson

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2022, a copy of the foregoing document was served upon the following by:

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CERTIFICATE OF SERVICE

I, Thomas D. Shea, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-06-2022:

Maxon R. Davis (Attorney)
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Representing: NorVal Electric Cooperative, Inc.
Service Method: eService

Electronically Signed By: Thomas D. Shea
Dated: 06-06-2022