

1 Respondent's request for administrative notice of MCA §§53-20-102, 204, 205 and 301
2 through 304, and A.R.M. §§11.12.101, 115, 205 through 208, 236, 246 and 413 A.R.M.; and
3 46.8.722 was granted without objection.

4 Witnesses and exhibits are listed in the Witness Docket and Exhibit Docket of June 24,
5 1996. Copies are attached to this proposed decision for convenience. The exhibit labels
6 denominate the parties as "Plaintiff" and "Defendant." In this decision, as in the docket and
7 the record, the exhibits of charging party ("CP") and respondent ("R") are referenced.

8 II. ISSUES

9 The issues to be addressed are set forth in the Final Prehearing Order, May 16, 1996,
10 pp. 5-7. Reduced to simpler form, the question is whether her employer took Marge
11 Campbell's job and offered her a lesser position at a lower wage because she was a fifty-six
12 year old female. There are facts from which an inference of discrimination can be drawn. Is
13 the legitimate business purpose offered by respondent a pretext?

14 III. FINDINGS OF FACT

15 1. The stipulated facts are found as facts. The charging party is Marge Campbell. She
16 is female, and a resident of Big Fork, Montana. Her date of birth is February 7, 1937.
17 Respondent is A.W.A.R.E., Inc., a Montana corporation doing business in Montana.
18 Charging party commenced employment for respondent in Anaconda, Montana, on April 1,
19 1976. In August, 1992, Larry Noonan (Executive Director), hired Geri Allick. On or about
20 February 10, 1993, Charging Party's position as office manager was for 40 hours a week at
21 \$12.50 per hour. Final Prehearing Order, p. 2, lines 6-14.

22 2. Respondent was started in 1976, with an initial goal of providing work training and
23 experience for developmentally disabled adults. The corporation's purpose grew into provision
24 of services for developmentally disabled persons and their families. Exhibit CP 2.

25 3. A.W.A.R.E., Inc., had grown substantially over the years. When Campbell first
26 started as office manager in 1976, the first executive director was the only other employee.
27 When Noonan became executive director in the fall of 1988, the organization had one group
28 home, a day-work program, and 12 or 13 employees. The total revenue budgeted for the 1989

1 Fiscal Year was \$261,178.00. With increasing state interest in "deinstitutionalization" of
2 developmentally disabled persons, A.W.A.R.E., Inc., obtained more contracts and larger
3 commitments to delivering services. In early 1991, A.W.A.R.E., Inc., was able to obtain
4 commitments from the state for the construction of five group homes--two in Anaconda for
5 developmentally disabled persons, and three in Butte for developmentally disabled adolescents.
6 Hiring of staff preceded the construction itself. The total projected budget by FY 1993 was
7 well in excess of a million dollars. Testimony of Noonan. Exhibit R DD.

8 4. With the growth of the corporation, Marge Campbell's job of office manager had
9 evolved into a substantial list of responsibilities:

- 10 a. She prepared budgets for A.W.A.R.E., Inc.'s use internally and with the
contracting governmental agencies;
- 11 b. She prepared financial statements of A.W.A.R.E., Inc.;
- 12 c. She maintained the ledgers for internal bookkeeping;
- 13 d. She billed the revenue sources for services rendered;
- 14 e. She maintained the accounts payable records for A.W.A.R.E., Inc.;
- 15 f. She maintained the accounts receivable records for A.W.A.R.E., Inc.;
- 16 g. She maintained the inventory records and ordered supplies;
- 17 h. She accounted for client funds (clients' money from government agencies);
- 18 i. She maintained and generated the payroll records;
- 19 j. She supervised office staff under Noonan;
- 20 k. She handled communication between Noonan and the projects and operations;
- 21 l. She did office clerical tasks--typing, reception duties and appointment
22 scheduling within the office.

23 Testimony of Campbell and Noonan.

24 5. Marge Campbell functioned, for years, at a level of sophistication and expertise
25 higher than her education and experience would lead a reasonable employer to expect. She had
26 a high school diploma and night classes at the Butte Business College as her educational
27 background. She had also worked in a bookkeeping position at Dunn and Bradstreet some
28 years before, and was "trained by the state" to keep ledgers. During her years at
A.W.A.R.E., Inc., Anderson Zurmuillen "reset" the bookkeeping methods from pegboard to
ledger. Campbell was given some instruction on how to handle the "reset" books. Her limited
training in accounting was enough for the small business accounting methods which the
corporation initially used. But as the business grew, the technical demands of her job also
grew. Testimony of Campbell, Berry, Noonan and Allick. Exhibits R CC and R TTT.

6. Larry Noonan testified that there were no significant problems with Campbell's

1 performance--she was a loyal, cooperative and productive employee. This is confirmed by her
2 evaluations. Testimony of Noonan and Campbell. Exhibit CP 1. As her job grew, Campbell
3 continued to be a loyal, cooperative, productive employee. In order to do this, Campbell
4 worked extra hours and faced increasing stress. Testimony of Campbell.

5 7. Marge Campbell was an excellent employee. She did good work because of her 17
6 years of experience within A.W.A.R.E., Inc. She did it by spending extra hours (she
7 estimated two to four extra hours every week, on average) to complete the work. She did it
8 with limited supervision and direction, without adequate formal education or training. She did
9 it because she enjoyed her work, the sense of value and significance it gave her, and because of
10 her loyalty to and personal identification with A.W.A.R.E., Inc. Because she did good work
11 without the benefit of adequate formal training and supervision, there were increasing
12 problems with the sufficiency of the accounting methods of the corporation. These problems
13 were not Campbell's fault so much as the inevitable result of the growing demands placed upon
14 her. Testimony of Campbell, Berry, Micheletti and Noonan, Exhibits CP 11 and CP 13.

15 8. In 1990, Marge Campbell asked Larry Noonan if she could start to accrue overtime
16 instead of compensatory time. She was increasingly struggling with the financial record
17 keeping and reporting. In the fall of 1990, A.W.A.R.E., Inc., hired Carrie Conn. Conn was
18 a good employee and did help, but there was still a periodic need for Campbell to work extra
19 hours in order to complete her duties. Conn remained employed at A.W.A.R.E., Inc., until
20 the fall of 1991. Testimony of Campbell.

21 9. In the fall of 1991, A.W.A.R.E., Inc., undertook the process of hiring a person
22 whom Campbell understood to be a replacement for Conn. Campbell sat in on the interviews.
23 Noonan testified that the person to be hired was not to be Campbell's assistant, but rather
24 someone with the education and background to take over Campbell's duties in payroll and
25 accounting. Respondent hired Kathy Hickey. Noonan directed Hickey and Campbell to divide
26 Campbell's existing duties. Campbell accepted this. It did bother her, and was the beginning
27 of the mistrust toward Noonan which would grow over the remaining time of her employment.
28 Testimony of Campbell and Noonan. Exhibit CP 7.

1 10. Before the fall of 1992, the "team" of Hickey and Campbell was unable to revamp,
2 computerize and run the expanded fiscal system at A.W.A.R.E., Inc. Noonan decided another
3 specialist was needed. He already had received an inquiry from a very well qualified young
4 woman, Geri Allick, and had invited her to submit a letter and resume. Respondent advertised
5 a position in 1992, and hired Allick in August of that year. Testimony of Noonan, Campbell
6 and Allick. Exhibits CP 22 and CP 24.

7 11. Throughout the early 1990's, Campbell continued to view her job, in effect and
8 function, as one of assistant executive director. Noonan relied upon his staff to provide
9 technical expertise in their various areas of responsibilities. Campbell believed that she also
10 could rely upon Hickey, and later Allick, to perform the technical accounting and computer
11 work. She believed she could supervise the accounting functions which she had been
12 struggling to perform. Campbell welcomed the addition of more technically trained staff.
13 Testimony of Campbell. Preparing the minutes of the August 19, 1992, Area Managers'
14 Meeting, Marge Campbell reported that she would no longer be doing accounting or payroll
15 and noted parenthetically, "there is a GOD." Exhibit CP 29.

16 12. The hiring of the specialists did not work out as Campbell had envisioned it. With
17 Allick's hiring in the fall of 1992, three people were employed to do the work that Campbell
18 had previously been assigned. Her role in the office diminished because of Noonan's increased
19 reliance upon Hickey and Allick. Campbell was hurt and confused. She was no longer doing
20 most of the tasks which had been her job. She even lost her desk, and was moved down to the
21 floor below, a receptionist location. She felt exiled, untrusted, demoted and victimized. The
22 scope of her involvement in company business narrowed substantially. She struggled with fear
23 and suspicion about what was happening. Testimony of Campbell.

24 13. In late 1992 and early 1993, A.W.A.R.E., Inc., experienced a severe financial
25 crisis. In November of 1992, the payroll checks bounced. Within a few days, enough money
26 was received to cover the checks, but Executive Director Larry Noonan was unable to obtain a
27 clear explanation from his office staff as to why this happened. He sought financial help from
28 the government agencies funding A.W.A.R.E., Inc.'s programs. The agencies were willing to

1 help, but required an immediate analysis of what was wrong and how it could be fixed.

2 Testimony of Campbell, Noonan, Hudson, Hanshew and Lovelace.

3 14. The analysis presented a stark picture. The Department of Social and
4 Rehabilitation Services and the Department of Family Services of the State of Montana
5 arranged an audit or financial review of the records of A.W.A.R.E., Inc., in December of
6 1992 and January of 1993. Walt Berry, Audit Manager of the State Audit and Compliance
7 Bureau, projected, with no additional unforeseen problems, that A.W.A.R.E., Inc., on June
8 30, 1993, would be short by approximately \$107,300.00 in meeting FY 1993 expenditures.
9 Testimony of Berry, Exhibit CP 46.

10 15. In his report to the Administrator of the Developmental Disabilities Division of the
11 Department of Social and Rehabilitation Services, Berry stated his opinion that A.W.A.R.E.,
12 Inc., had the capability and operating latitude to reduce expenses without negatively affecting
13 services, to overcome the projected deficit. Testimony of Berry, Exhibit CP 46. The agencies
14 wanted the corporation to survive. Otherwise, considerable problems in placing clients would
15 result. Testimony of Hudson, Hanshew and Lovelace.

16 16. The corporation's funding sources effectively dictated the acceptable means of
17 recovery. On January 21, 1993, the Directors of the Department of Family Services and the
18 Department of Social and Rehabilitation Services wrote to A.W.A.R.E., Inc., after reviewing
19 Berry's audit report. They concluded the financial condition of A.W.A.R.E., Inc., did not
20 appear to be sound. They told the corporation that to survive it must take immediate actions to
21 restructure debt and reduce expenditures. The Directors requested that A.W.A.R.E., Inc.,
22 submit by February 8, 1993, a plan that would balance its budget without adversely impacting
23 the individuals being served by the corporation. The funding agencies would not accept
24 reductions below certain levels of ratios of staff to clients or of wages of direct service staff.
25 These agencies were major funding sources for A.W.A.R.E., Inc. Without continued support
26 from them, A.W.A.R.E., Inc., would not survive in any case. Testimony of Noonan,
27 Hudson, Hanshew, Berry and Lovelace. Exhibits CP 46 and R H.

28 17. Noonan prepared a plan which he believed did not impact client services but did

1 eliminate the deficit. On February 9, 1993, A.W.A.R.E., Inc., submitted its plan to reduce
2 expenditures and restructure debt without adversely impacting services. The funding agencies
3 concluded that the plan was workable, with some changes which did not relate to cuts in
4 salaries and personnel. Testimony of Noonan, Hudson, Hanshew, Berry and Lovelace.
5 Exhibit R J. The Board of Directors of A.W.A.R.E., Inc., approved the plan. Testimony of
6 Noonan and Smith.

7 18. The final plan involved elimination of four staff positions. Campbell's office
8 manager position was eliminated. The service and support coordinator position of Theresa
9 Nordholm, another female employee over age 40, was eliminated. Kathy Hickey's accountant
10 position (to which she had been demoted at the end of December, 1992) was eliminated. A
11 male bus driver over forty had his part-time driver position eliminated. Testimony of
12 Campbell, Nordholm and Noonan. Exhibits CP 53 and R J.

13 19. Respondent offered other positions to Campbell, Nordholm and the male bus
14 driver. Respondent offered Campbell a newly created administrative assistant position at \$8.00
15 an hour. Respondent offered Nordholm a direct services position at a lower wage, which she
16 accepted. Respondent shifted a probationary employee who had been in that position to a
17 "relief" spot. Respondent placed the male bus driver in a similar "relief" position as a driver.
18 Testimony of Campbell, Nordholm and Noonan. Exhibits CP 53 and CP 55.

19 20. Respondent terminated Kathy Hickey. Noonan testified at hearing that this was a
20 reduction in force termination, a lay-off. However, in responding to Montana Human Rights
21 Commission staff investigative inquiries, A.W.A.R.E., Inc., reported that Hickey had been
22 fired for unsatisfactory job performance. Exhibit CP 67.¹ Noonan's testimony at hearing
23 about the alleged "lay-ff" was not credible. Hickey's performance deficiencies helped cause
24 the financial crisis. Geri Allick was assuming most of her duties (and would soon take over all
25 of them). A.W.A.R.E., Inc., utilized the elimination of Hickey as a savings which could be
26 plugged into its financial plan. Treating her discharge as a lay-off unrelated to her

27
28 ¹ The pertinent portion of this exhibit was whited out by the Commission staff, to protect the
privacy of a non-party (Kathy Hickey). Noonan was ordered to testify about it. He admitted
A.W.A.R.E., Inc., told the Commission that Hickey had been fired for poor performance.

1 performance also gave her a better chance at finding future employment, and may have given
2 her an entitlement to unemployment insurance benefits. Treating her firing as a lay-off was
3 mutually beneficial to employer and employee, but Respondent nonetheless fired her.

4 Testimony of Campbell and Noonan.

5 21. Respondent reduced hours, wages, or both, for a number of other employees,
6 including Noonan, whose cut in pay was a disciplinary action by the Board. A.W.A.R.E.,
7 Inc., projected that the cuts, together with other changes in accounting and spending, would
8 prevent the massive short-fall predicted by the audit for the end of June, 1993. Some of the
9 cuts in hours and wages which were included in the plan were reorganizations which would
10 have occurred even without the financial crisis, as part of the restructuring necessitated by the
11 opening of new group homes and restaffing resulting from the corporation's overall increase in
12 service delivery. Testimony of Campbell, Noonan and Allick, Exhibits R GG and R HH.

13 22. The implemented plan was not the only method the corporation could have selected
14 to resolve its financial problems. Other available options included reducing wages across the
15 board, eliminating different or fewer employee positions and questioning the accuracy of the
16 projected deficit. Cross-examination of the agency witnesses, the accountants and Noonan did
17 demonstrate other possible alternatives.

18 23. Noonan credibly testified that business reasons weighed against the other
19 alternatives. Reduction of wages across the board would have been directly contrary to the
20 efforts of the funding agencies to get higher wages for the direct service staff of such providers
21 as A.W.A.R.E., Inc. A.W.A.R.E. did pay higher than minimum wages for its direct service
22 staff. Reductions in those wages could also have seriously damaged morale, as well as leading
23 to higher turn-over in direct care staff. Reducing the wages of the remaining accountant, Geri
24 Allick, would have risked the loss of the one member of the small administrative staff in whom
25 Noonan had confidence.² Allick also was the best qualified of the administrative staff. Exhibit
26 CP 22. Elimination of other employees appeared to Noonan to create problems for adequate
27

28 ² Geri Allick, during her testimony, demonstrated that she is knowledgeable, capable and reliable. Mr. Noonan's reliance upon her and concern about losing her was credible.

1 staffing and assumption of additional duties by remaining employees. Challenging Berry's
2 conclusions would have required additional expense and delay to obtain an alternative
3 explanation of the problems. Testimony of Noonan, Hudson, Hanshew, Berry, Lovelace,
4 Micheletti and Allick.

5 24. Marge Campbell refused to accept the administrative assistant position. Had she
6 accepted the job, it would have meant a cut in pay of \$4.50 per hour. She believed she was
7 being unfairly treated. She filed a grievance, in accord with the corporation's procedures.
8 Noonan refused the grievance, on the grounds that the action taken against her was not
9 disciplinary and therefore not grievable. Campbell saw changes in her job duties which had
10 occurred before the financial crisis as part of a long-term plan to get rid of her. Her Human
11 Rights complaint followed. Testimony of Campbell and Noonan, Exhibits CP 53, CP 55, CP
12 57, CP 57A, CP 58 and CP 60.

13 25. Before the financial crisis, Noonan had been in the process of reorganizing the
14 corporation. He asked for and obtained job descriptions from the employees. He tried various
15 changes in job titles and duties. He attempted to fit existing employees into appropriate slots
16 and to identify needs for which additional employees might be hired. Testimony of Noonan.
17 Exhibits CP 4, CP 6, CP 7, CP 18, CP 26 and R Y. The minutes of various manager and staff
18 meetings also demonstrate the adjustments of jobs and duties through which Noonan was
19 attempting to meet the growing demands the corporation faced.³

20 26. In February of 1992, Respondent hired Greg Micheletti, a private accountant, to
21 help create a computerized and effective fiscal management system for the growing company.
22 Micheletti suggested to Noonan that Marge Campbell was overpaid for the job she now had.
23 This was before the hiring of Allick, and the further reduction in Campbell's duties.
24 Micheletti also testified that Larry Noonan said he intended to make a lateral transfer with
25 Campbell, to a niche in which she could continue to benefit the corporation and earn her
26 salary.

27
28 ³ The exhibit docket identifies these meetings. There are minutes from at least sixteen such meetings in the record.

1 27. Prior to the financial crisis, A.W.A.R.E., Inc., had at least once acted to avoid
2 reducing the wages of employees in reorganizations. The exact time of this action was not
3 established. The evidence does demonstrate that the prior action involved expansion rather
4 than reduction in force. A.W.A.R.E., Inc., in its growth had added more direct care
5 employees for delivery of services to the developmentally disabled clientele. In that expansion,
6 a uniform base wage was set for each level of direct care staff. Applying these changes to one
7 existing employee would have resulted in a reduction from his existing wage, because of his
8 length of service. The corporation made an exception in order to maintain his existing wage
9 base. Testimony of Campbell, Nordholm and Noonan.

10 28. Marge Campbell was selected as one of the employees subjected to adverse action
11 in the financial crisis plan because she was not involved in direct care and could be demoted (in
12 practical effect) without immediate impact upon delivery of services. Campbell could be
13 conveniently subjected to adverse action rather than lateral transfer. She was at risk. She was
14 at risk because of the growth of the company, the hiring of specialists for the financial
15 management and record-keeping, and because her new position in the reorganized company
16 had not been established prior to the financial crisis. None of these factors were related to her
17 age or her sex.

18 **IV. OPINION**

19 This case involves a company that grew rapidly. In the expansion, it began to hire
20 specialists to assume some of the duties of a generalist office manager, Marge Campbell. She
21 was a long-time employee who had spent years doing important work for A.W.A.R.E., Inc.
22 Her work-load outgrew her capacity. She needed help. She wanted to stay in her generalist
23 role, involved in virtually every phase of the business, working with or perhaps even
24 supervising the specialists. She did not see a need to ask for or obtain more specialty training
25 herself. When asked why she did not seek training on computer and/or accounting techniques
26 and methods, she testified that she did not feel she needed such training.

27 Marge Campbell, a capable generalist, was one of the victims of fiscal belt-tightening.
28 The victims of the cut-backs were disproportionately women and older employees. But in the

1 particular circumstances of Campbell's case, the corporation has proved that it made a decision
2 based upon legitimate business reasons. Those reasons are not pretextual. It is more likely
3 than not that Campbell lost her job (and was offered a position with reduced pay and reduced
4 importance) because the corporation honestly chose a financial plan that included eliminating
5 her job, not because of her age or sex.

6 The elements of a prima facie case are:

- 7 (1) Proof that charging party was in the group (or groups) protected by the Act;
- 8 (2) Proof that charging party was subjected to adverse employment action;
- 9 (3) Proof that at the time of the adverse action, charging party was performing the job
10 at a level that met the employer's legitimate expectations; and
- 11 (4) Proof from which an inference can be drawn that charging party's status (within the
12 protected group or groups) caused the adverse action.

13 *See, e.g.,* **Tonack v. Montana Bank of Billings**, 258 Mont. 247, 854 P.2d 326
14 (1993); **Crockett v. City of Billings**, 234 Mont. 87; 761 P.2d 813 (1988); **Martinez v.**
15 **Yellowstone County Welfare Dept.**, 192 Mont. 410, 768 P.2d 850 (1981).

16 Marge Campbell was a woman over the age of 40 at the time of the adverse action over
17 forty. Respondent cut her wages by about one-third. Respondent offered her, upon the
18 elimination of the job she had held for over seventeen years, a lower paid position with less
19 status within the organization. Adverse action was taken against her.

20 There is ample evidence that Marge Campbell was struggling to perform the increasing
21 technical and complex tasks associated with the finances of the organization. Her difficulties
22 (and requests for help) prompted the corporation to hire people with more specialized training
23 and expertise to assume many of her duties. These actions predated the financial crisis and
24 were not adverse to Campbell. The corporation considered her job performance to be
25 satisfactory, as it certainly should have. The change in her duties, which in part she
26 welcomed, resulted both from the increase in the weight of those duties as the organization
27 grew and from dissatisfaction with her performance through no fault of her own.

28 Under the **McDonnell Douglas** standards, the charging party's prima facie case creates,

1 through indirect or circumstantial evidence, "an inference that an employment decision was
2 based on a discriminatory criterion illegal under the act." **Teamsters v. United States**, 431
3 U.S. 324, 358 (1977). The elements of a prima facie case will vary according to the charge
4 made, **McDonnell Douglas**, 411 U.S. at 804, n. 13, but in each case it serves a critical
5 function, "it eliminates the most common nondiscriminatory reasons" for the adverse action by
6 the employer. **Burdine**, 450 U.S. at 254. Charging party took exception to the hearing
7 examiner's statement of the fourth element of the first tier of the **McDonnell Douglas** *prima*
8 *facie* case (charging party's Exceptions to Pre-Trial Order, May 20, 1996). Since the proposed
9 decision determines that charging party has established a *prima facie* case, this exception is
10 moot.

11 Marge Campbell has satisfied the requirements of establishing a prima facie case. She
12 presented evidence from which the fact-finder could decide that she was subjected to age
13 discrimination, sex discrimination, or both. Three of the adversely affected employees were
14 older women (including Marge Campbell). There is evidence of a prior policy of going to
15 "extreme lengths" to avoid reducing wages of existing employees in restructurings. A younger
16 employee with less seniority in administration (Geri Allick) was not subjected to adverse
17 actions. Allick and Noonan assumed Campbell's remaining duties when she left employment.

18 But A.W.A.R.E., Inc., has offered a legitimate business reason for the adverse action.
19 There were other choices the corporation could have made instead. However, the business
20 reasons presented by an employer to justify its RIF decisions are not required to be well-
21 advised, but merely true. **Donaldson v. Merrill Lynch & Co.**, 794 F.Supp. 498, 505
22 (S.D.N.Y. 1992).

23 The crux of this case is pretext. Campbell's charges stand or fall upon whether the
24 Respondent has satisfactorily explained why this individual employee was selected for adverse
25 action. Taken individually, every decision A.W.A.R.E., Inc., made about Marge Campbell
26 was reasonable. The decision to hire help because she was struggling to complete her work
27 was reasonable in 1990, when Carrie Conn was hired. The decision to find someone with
28 more expertise and experience in accounting was reasonable in 1991, when Kathy Hickey was

1 hired. The decision in 1992 to hire Geri Allick was entirely reasonable. Even the shifts in
2 responsibility, by which most of Campbell's responsibilities were taken from her, were each
3 reasonable. There is no sinister cast to the series of decisions which stripped Campbell of most
4 of her responsibilities and put her "on the bubble" when the need for reduced expenses arose.

5 Campbell attempted to raise an issue about the obligation of the employer to provide
6 her with training or at the least the opportunity to be trained in more sophisticated accounting.
7 That is not an issue in this case. It is clear from Marge Campbell's testimony that until her job
8 was eliminated, she welcomed transfer of accounting and financial management duties to
9 others. She did not want training.

10 The proprietary feeling that Campbell had toward A.W.A.R.E., Inc., is understandable
11 given her years of service and unflagging efforts to do more than a reasonable employer could
12 expect of her. But this feeling was not based upon her real job status. Because the financial
13 crisis came at the very time when her duties had been decreased the most, she was a logical
14 target for a reduction in force decision. It was reasonable for A.W.A.R.E., Inc., to include in
15 its plan of action the elimination of Marge Campbell's job.

16 Campbell claims that Noonan has fabricated his testimony that Campbell was not being
17 set up for discharge when her job duties were shifted to Hickey and then to Allick. A
18 statement to his own accountant in 1992 (before the financial crisis and the RIF decisions)
19 about his intentions for Campbell rebuts the claim of recent fabrication. It is more likely than
20 not that Noonan was contemplating creating a position for Campbell which would have
21 justified her \$12.50 per hour wage, and would have retained for her the level of responsibility
22 which she had earned. Before this job could be designed, the corporation was confronted with
23 the directives of its funding agencies. To satisfy the demands of those agencies, cuts had to
24 made. Campbell was one of the victims of those cuts.

25 Despite damaging his own credibility by taking occasional incredible positions, Larry
26 Noonan was generally a credible witness. So was Marge Campbell. But the overwhelming
27 evidence supports two general findings. (A) There was an immediate financial crisis to which
28 an immediate cost-cutting response was required. (B) Selection of Marge Campbell's existing

1 job for elimination was supported by legitimate business reasons.

2 Loyalty to a long-time employee who has performed very well under sometimes
3 difficult circumstances is not required when business necessity arises. Larry Noonan has
4 presented a plausible explanation for preserving and soon increasing Geri Allick's wages while
5 substantially reducing Marge Campbell's. The choice the corporation made may have been
6 repugnant, but it was not illegal discrimination. When there are too many people in the
7 lifeboat, a rational and unbiased decision about whom to toss overboard is defensible.

8 **V. CONCLUSIONS OF LAW**

9 1. Marge Campbell has established a prima facie case that A.W.A.R.E., Inc.,
10 discriminated against her.

11 2. A.W.A.R.E., Inc., has proved a legitimate, nondiscriminatory reason for the
12 adverse action taken against her.

13 3. Respondent was suffering from a financial crisis, and the decision to take adverse
14 employment action against charging party as part of the response to the crisis was not
15 discriminatorily based on her age or sex.

16 4. Respondent's business reason was not a pretext for unlawful discrimination against
17 charging party.

18 5. The conduct of respondent does not mandate any relief.

19 **VI. PROPOSED ORDER**

20 1. Judgment is found in favor of respondent, A.W.A.R.E., Inc., and against charging
21 party, Marge Campbell, on the charge that respondent denied her equal employment
22 opportunity because of her sex and age and in violation of §49-2-303 MCA.

23 2. The three complaints consolidated in this contested case are dismissed with
24 prejudice.

25 Dated: February 4, 1997.

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27
28 _____
Terry Spear, Hearing Examiner
Montana Human Rights Commission