BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Ruth Hawley, Charging Party, versus **Hays Lodgepole School District No. 50**, Respondent.	Case No. 9401006265 *Hearing Examiner's Decision*

I. Procedure and Preliminary Matters

Ruth Hawley ("Hawley") filed a verified complaint with the Montana Human Rights Commission on January 7, 1994. She alleged that Hays Lodgepole School District No. 50 denied her equal employment opportunities because of her race, violating the Human Rights Act and the Governmental Code of Fair Practices. On November 27, 1995, the administrator certified her complaint for a contested case hearing and appointed the undersigned as hearing examiner.

The contested case hearing began September 17, 1996, and proceeded September 18, November 19 and 20, 1996, and January 21, 1997. Hearing concluded on January 21, 1997. Hawley and her attorney, D. Patrick McKittrick, McKittrick Law Firm, P.C., attended the entire hearing. Hays Lodgepole School District No. 50 ("the district") designated Superintendent Robert Smith as its representative. Smith attended[1] nearly all of the hearing, and the district's attorney, Michael Dahlem, did attend the entire hearing. The hearing examiner excluded witnesses on Hawley's motion. Witnesses and exhibits appear on the attached dockets.

On February 21, 1997, Hawley filed her written closing argument and a motion to amend the prehearing order to conform to the evidence. The district filed its written closing argument on March 14, 1997. Hawley filed her reply argument on March 25, 1997. The district had not briefed its defense that §2-18-111 MCA required preferential hiring of Native Americans.

[1] At the district's request and without objection, Smith was excused from attendance for periods of time during the hearing. The times of his absences are noted in the hearing record itself.

However, the defense was still part of the record. On March 26, 1997, following a telephone conference with counsel, the hearing examiner struck the district's Native American hiring preference defense.[2] That same day, the district filed a "sur-reply brief," responding to allegedly new issues raised by Hawley in her reply argument. The record then closed.

II. Issues

A full statement of issues appears in the Final Prehearing Order (September 17, 1997). The pivotal issue is whether the qualifications of Hawley and the successful job applicant are so nearly equivalent that the district presumably chose between the applicants based upon their races. This mixed question of fact and law bridges all three tiers of the *McDonnell Douglas* analysis of circumstantial proof of a discriminatory motive. Has Hawley proved a prima facie case of presumed discrimination (first tier)? Has the district responded by showing a legitimate business reason for choosing Stiffarm over Hawley (second tier)? Finally, is the district's business reason for choosing another applicant over Hawley a pretext (third tier)? Because the district did discriminate against Hawley, the final issue is fashioning a remedy for the harm done to Hawley, and for the prevention of future discrimination by the district.

III. Findings of Fact

1. Charging party is Ruth Hawley ("Hawley"). She is a resident of Hays, Montana. She is white. She worked for the respondent from "around August" 1989 through 1991 as a substitute teacher, "on call" as needed. She worked in both elementary and high schools for the district. In September of 1991, she began to work in the Lodge Pole elementary school resource room, with students in grades K-5 with special needs. She continued in this job until April 1992 when the district hired a certified teacher to replace Hawley (who was not certified). She worked for the district as a tutor in the summer of 1992. Hawley then worked as a substitute secretary for the high school secretary (Kathy Hawley--no relation to Hawley), from February through May 1993. She then worked, starting in June 1993, as an "aide" in the business office, for Lou Walters, the new business manager, while still sharing the general office work with the "front" office where the secretary was situated. She continued in this position after Walters

[2] Counsel for both parties stipulated to this order.

resigned in February of 1994, and continued when the assistant business manager went on maternity leave. Hawley continued to work as a substitute or temporary, in the business office with some duties in the front office, through April of 1995, when she was laid off. The district hired her back in June of 1995 until February of 1996, again in the business office, and again as a temporary.

2. Respondent is Hays Lodgepole School District, a public school district organized and operated under and in accord with the laws of Montana, in Hays, Blaine County, Montana ("district"). In September of 1993, when the hiring decision at issue here occurred, the chairman of the board for the district was Robert Fox. Other board members were Franklin Doney, Dave Hawley (an "in-law" of charging party Ruth Hawley), Ken Morin and Ramona Wing.

3. Hawley applied for the position of Home School Coordinator/Attendance Monitor ("coordinator"). This job was open for the 1993-94 school year. On September 20, 1993, Respondent hired Wendy Stiffarm, another candidate for the position, who is Native American. Both Hawley and Stiffarm were qualified for the job.

5. The district offered evidence that it chose Stiffarm because of her superior academic qualifications. She received an Associate of Applied Science in June of 1992 from Fort Belknap College, Harlem, Montana. She completed 45 hours of formal computer training while at that college. Hawley had two semesters of business education at Eastern Montana College, and some computer workshops or classes. Stiffarm graduated from the district high school in May of 1986, with scholastic honors. Hawley graduated from high school elsewhere in 1977. The district denied considering the race of the various candidates.

6. The district followed a pattern of using hiring committees. The committee appointed for a particular hiring decision would make recommendations to the school board. The committee recommending Stiffarm for this job consisted of Norma Jean King, the elementary principal (a Native American); Pam Nells, a non-tenured teacher in a federally funded "Chapter I" program (a white); Rebecca Johnstone, a non-tenured regular curriculum teacher (a white); and Bernard Lambert, the high school principal (a Native American). Dale Shupe, superintendent during the 1993-94 school year, testified that none of the four committee

members had any racial bias.

7. Hawley submitted an application letter, a resume and four letters of reference. JE 2. Stiffarm submitted an application letter, a resume, a certificate of completion of "Computer Applications" at the Fort Belknap College, her A.A.S. degree from that college and three letters of reference. JE 3. The complete applicant files were not given to the whole hiring committee. The complete applicant files were not reviewed by the entire board. Dale Shupe, superintendent during the 1993-94 school year, prepared a summary of each applicant's qualifications before the hiring process was completed. JE 5. Shupe testified that the summaries were neither complete nor exhaustive. Shupe had very little participation in the actual hiring process. He did not intend for the summaries to be used in the hiring process, but simply as a means to "identify" the applicants. The committee and the board got the summaries, without indications that they were incomplete and not exhaustive.[3] Shupe did not know, at the time he prepared the summaries, the particular qualifications for the job.

9. In addition to her employment for the district, Hawley coached junior high volleyball for one year, and was a 4H leader for two years. As a substitute teacher and in the resource room position, Hawley did lesson plans, trained on special problems such as learning disabilities and fetal alcohol syndrome, attended IEP meetings and consulted with staff and parents, graded students, instructed and helped students, prepared progress reports on students, and used and maintained the district's confidential files on students. In the "front office," Hawley used the district's computer programs on attendance, grades and schedule (the "SASI" program), and worked from the administrative side on the district's files. In the "front office" and in her previous instructional jobs, she dealt with students, families and staff. In the business office, she worked with vendors as well, and became familiar with the forms and filings involved in the funding and expense end of the district's operations. Hawley was very familiar with the way the

[3] Shupe initially testified that the committee members and board received JE 5. Later, the district's attorney led Shupe to agree that he gave the summaries to the district secretary, and that he, Shupe, did not know whether the board or the committee had the summaries. Some board and hiring committee members acknowledged having and using the summaries. Others either did not remember or denied having and using the summaries. But only one board member and no committee member claimed to have used the full applications the applicants submitted to the district.

district did things in administration. She knew how to find papers and people, where to file papers, how to fill them out, and what it took to get things done. Neither party offered evidence of credible complaints about Hawley's job performance.

10. Stiffarm had been a student in the district. Besides her formal education, she had worked for the district, but did not possess the experience or practical expertise of Hawley. The summaries prepared by superintendent Shupe did not reflect that difference. According to Shupe's summaries (JE 5), Hawley "had served" in 3 jobs for the district, while Stiffarm "has many and varied skills in the use of office machines and computers" and "has skills in bookkeeping/accounting." Shupe attributed no "skills" to Hawley in her portion of the summaries. Skills that Shupe admitted in his testimony were important for the job of home school coordinator/attendance monitor (such as experience with the SASI program and the attendance register) were not referenced to Hawley in his summaries. Shupe admitted that specifically that experience with the SASI program and attendance program would fit the job description statement "limited computer knowledge" (JE 1). Hawley had that experience. Shupe's summaries did not show that experience.

11. Hawley and Stiffarm both participated in the interviews for the position of home school coordinator/attendance monitor. The interviews lasted less than half an hour each. Each candidate was asked the same questions. Some of those questions appear in JE 4.

12. Pam Nell testified that Rebecca Johnstone, another committee member asked her to participate in the hiring committee. Nell did not recognize JE 5, Shupe's summaries of qualifications. Nell did not see those summaries, and likewise did not see the actual materials submitted by Hawley and Stiffarm (JE 2 and JE 3) during the hiring process. Nell recalls that Bernard Lambert "went over" each candidate's qualifications for the committee as part of the interview process. Nell does not recall discussing Hawley's familiarity with district computer programs such as SASI. According to Nell, both Norma Jean King and Bernard Lambert had prepared questions to ask the candidates. Nell was not told to prepare any questions. Nell did take notes of the interviews, but has not been able to locate her notes. Nell believed, based on the interviews, that Stiffarm had more familiarity than Hawley with programs such as SASI.

Nell denied any preliminary meetings or conversations with Lou Walters.

13. Rebecca Johnstone, a teacher in the Chapter I program in the district in 1993-94, testified that she wrote the grant application from which funding for the home school coordinator/attendance monitor position derived. The job description for the position did not include a degree requirement because the school did not wish to disqualify applicants on education alone. Johnstone denied discussing the desirability of hiring a Native American with Walters. She denied considering the races of the applicants. She denied any pressure from the board or the community to hire Native Americans. She did not expect SASI experience in the applicants, and did not know Hawley had such experience. She did not know Hawley had any college education.[4]

14. Bernard Lambert, the high school principal, was twice prevented from testifying by weather conditions. The district's motion for a third continuance to obtain Lambert's testimony was denied (this matter is discussed in the opinion). He never did testify.

15. Norma Jean King, the elementary principal, testified that high school principal Bernard Lambert asked her to serve on the hiring committee. She recognized Shupe's summaries (JE 5) and believed she saw at least a similar list of names and qualifications at the time of the interviews. She testified that Lambert read these summaries to the committee during the interview process. She also testified that "as far as I know" Shupe's summaries of the applicants' qualifications were complete.

16. Hawley herself believed, but had no personal knowledge to support her belief that Pam Nell, Norma Jean King, Bernard Lambert and Rebecca Johnstone selected Stiffarm for the home school coordinator/attendance monitor position because of race. But the committee did act without full knowledge of the applicants' qualifications. The committee's recommendation does not screen the board's motives from scrutiny.

17. The record is replete with evidence of tension within the district and within the board over hiring. The community elects the board. Members of the community had voiced, at public

[4] Johnstone testified that the committee "thoroughly reviewed" the candidates' applications. This contradicts testimony of other committee members. Also, Johnstone's lack of knowledge of Hawley's experience and schooling further undercuts her testimony that the committee "thoroughly reviewed" the applications.

board meetings and elsewhere, the conviction that the district should give "locals" preference for jobs. There is substantial evidence that the board shared this conviction. There is substantial evidence that the board did not consider Hawley a “local” because she was white.

18. Lou Walters was the business manager of the district from 1993 to June of 1995, He testified that board member Ramona Wing expressed her belief that the district should hire only enrolled members of the Ft. Belknap tribes. Walters witnessed discussions by Wing and other board members about the tribal employment rights ordinance under which only enrolled members could work on the reservation. Wing believed the ordinance applied to the school district. Walters testified that other board members also advocated hiring Native Americans “from time to time” for all permanent and temporary positions. Walters testified that the “jargon” used to cover such discussions included “one of our own.” Walters suggested to chairman Fox that it would be much better to use more neutral terms, such as “area residents” rather than overtly racial terms. He was attempting, as an employee of the district, to keep racist language out of the records and minutes of the district. Walters identified Morin and Fox as two board members who used such jargon. Walters testified that Morin, Fox and Wing backed a plan, adopted by the district, to hire Native American principals and superintendent, over the next three to five years (starting in 1996). Walter testified that Morin, Fox and Wing expressed their dislike for Hawley even working in the business office as a temporary employee. Walter also testified that two of the four committee members, Nell and Johnstone, prior to the hiring decision, agreed hiring a Native American for home visits would be best. Walter also testified that Dale Shupe, the superintendent, told him that Hawley “wouldn’t stand a chance of getting” the job of home school coordinator/attendance monitor because she was white.[5]

19. Walters also testified that the board grappled repeatedly with its policies about temporary employees. Walters observed that at least part of the board’s concern was because of Hawley’s continued employment as a temporary. He observed the board attempt action, and

[5] Walters testified that Shupe made the statement during the application process, before the actual hiring decision. Walters then agreed that Shupe may have made his statement after the hiring decision had taken place. Overall, his testimony suggests he remembers the statement being made both before and after the decision. Shupe denies making any such statement at any time, to the best of his memory.

engage in discussion, about how to curtail Hawley's temporary hiring. He also testified that he believed, from what he observed and what he heard, that the board tried to prevent Hawley from obtaining a permanent position.[6]

20. Douglas Milliron, during his one year as a counselor for the district, witnessed racial remarks regarding hiring, including at least one identified comment about Hawley ("Ruth") "trying to take our jobs." Milliron also testified that Ken Morin, a member of the district's board, said to him (in May of 1994) that had Morin been aware Milliron was not Native American, the district would never have hired him.[7]

21. When Hawley applied for the coordinator's job, she held the temporary job of substitute office secretary. Milliron testified that she was helpful in that position. She helped him learn the district's computer use and the district's file systems. She generally helped him in learning district methods. Hawley oriented Milliron to the use of the computer and filing system to track absenteeism and other student problem areas. She explained the filing system. Milliron found Hawley useful and competent during the year that he worked for the district. He may have a bias--the district did not renew his contract. Still, his testimony about Hawley is credible.

22. Melanie Hawley Vinberg (no relation to Hawley) attended board meetings in both 1990-91 and 1992-93. She testified that board members did voice opinions about hiring whites versus Native Americans for a number of positions. She heard these comments both at board meetings and at the school. Vinberg lived in Hays at the time, and had children in the school system at both elementary and high school levels. She testified that Ken Morin and Ramona Wing, while serving as board members, both expressed preferences for hiring "one of their own." Board members made similar comments about substitute teachers--that the district should

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[6] This is arguably lay opinion testimony about motive, based upon personal knowledge and observation of the behavior and statements of the board members. As corroborating evidence, it is admissible and relevant. Walters was business manager and dealt with the board. His experience and knowledge qualify him to testify to actions of the board that he observed, and apparent goals of the board in taking those actions.

[7] Douglas Milliron, as well as other witnesses, also presented sweeping generalizations about racial bias and discriminatory treatment, to which numerous objections were interposed by the district. This wealth of "background" testimony is not part of the basis of this decision. Such testimony, not cited in this decision, was too general and too vague. It lacked specificity as to time and place. It sometimes came after leading and suggestive questions, followed by proper questions to elicit the very information the improper questions suggested. Such testimony plays no role in this decision.

"call our own." Vinberg testified she heard such comments in January 1993, or "around" that time.

23. According to the minutes of the special board meeting of January 28, 1993, a member of the community made similar comments. Exhibit CP1. Among many other complaints that the speaker (identified as Janice Brockie) made to the board, the minutes reflect her comment that "people are coming to her, they want to know why white people are being hired as subs." The only response from the board the minutes reflect is that "Mr. Peterson" (principal Tim Peterson of the district high school) hired substitute teachers. The board, according to the minutes, did not otherwise respond to the question about hiring whites instead of Native Americans. Vinberg's testimony calls the completeness of the minutes into question.

24. Former high school principal Tim Peterson also testified for Hawley. According to Peterson, Brockie's comments included a question about why whites rather than Native Americans were working in the school office and working as substitute teachers.[8] Also according to Peterson, members of the board had themselves asked about hiring Native Americans rather than whites in board meetings before January of 1993. Peterson testified that he felt pressure from the board to favor Native American applicants for hiring involving "any individuals we were bringing on board in the system." Peterson testified he felt this pressure during the entire time he worked for the district as the high school principal. Although he technically worked for the district from 1990-91 through 1994-95, Peterson actually worked in the district only during the 1990-91 through 1992-93 school years.[9]

25. According to Peterson, in 1992, Hawley applied for another position with the district, that of a secretary for the superintendent (with some office reception duties attached). According to Peterson, the hiring committee considered Hawley the best one, "overwhelmingly the best candidate." Hawley's experience working for the district, and her communications

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[8] The board struggled with its policies about temporary employees. The long-term presence of Hawley as a "temporary" fueled that struggle. Jobs are scarce on the reservation. Applicants for any position are numerous. There is substantial evidence that Hawley's continued employment was a source of on-going controversy.

[9] During the last two years that Peterson was technically working for the district, various legal processes relating to the March, 1993, district decision not to renew his contract, were moving forward. He was not regularly at the school, and was not doing any work. He was instructed to stay home, in Harlem, Montana, and was paid, for much of those last two years.

skills made her the best choice for the hiring committee. Nevertheless, Ken Morin, a board member, told the committee that the board would not hire Hawley because she was "not a local member of the community." The committee responded, according to Peterson, that Hawley was married to a Native American. Morin responded "that didn't matter, she's an outsider, she's not a local member of the community." The committee then recommended a Native American who apparently had better computer qualifications and an associate's degree. The board accepted the recommendation and hired that person.[10]

26. Peterson also testified that during the 1992-93 school year, the board chose not to renew the contract of superintendent Leo Beardsley. This decision generated considerable controversy and conflict. Peterson testified that the basis for the decision was the board's desire to hire a Native American superintendent. The sentiment he heard expressed on "more than one occasion" was by board members was, "We want our own kind" (i.e., Native American). Peterson remembers board members Ramona Wing, Kirby King and Robert Fox making these statements.

27. Peterson also testified that he observed, while employed by the district, efforts to fire two non-tenured white employees, a librarian and extracurricular activities supervisor and a teacher in a federally funded "chapter" program. Even though Peterson saw no actual basis for not renewing the two employees, the board sought justification for firing them. Neither remained with the district by the time of this hearing.[11]

28. Leo Beardsley also testified. Beardsley was the district's superintendent during the 1992-93 school year. The district's non-renewal of Beardsley generated considerable local controversy as well as litigation. Beardsley testified that he also heard board members Ramona Wing and Franklin Doney (during the year prior to the hiring of Stiffarm) make comments about

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[10] The committee selected Victoria Belgard, and reported to the board that on computer testing she had the "highest score in proficiency and the highest level in training." JE 6. The job notice indicated that an associate's degree would be useful in the job. CP 4. Yet the committee, on the merits, had selected Hawley as most qualified first, before Morin told them the board would not hire Hawley. Better computer proficiency and training did not matter sufficiently to the committee to select Belgard initially. The parallels to the present case are striking, as the district defends here on the basis of Stiffarm's superior computer training and associate's degree.

[11] Non-tenured employees can be terminated with little to no cause. Peterson's testimony does not prove district wrong-doing with regard to these two employees. This is additional circumstantial evidence of the "thinking" of the board members, reflecting the "thinking" of the community. This evidence is relevant to motive.

not hiring whites, in the context of substitute teachers. He also testified that these comments by board members were made at the same time as Janice Brockie's comments. Brockie's comments were reported in the minutes of a board meeting (CP 1). Those minutes do not report the board members' comments. Beardsley both corroborated the board members' comments and testified that such comments were fairly routine during his tenure as superintendent, and that he mainly heard such comments from board members rather than members of the community.

29. Beardsley also testified that he was present and heard Ken Morin tell the hiring committee (selecting a candidate for superintendent's secretary in 1992) the board would not hire Hawley because she was "not from there." Beardsley understood Morin to mean that Hawley was white rather than Native American.

30. Beardsley was asked why he considered it derogatory for a board member to say "why don't we hire our own." He testified that he considered it derogatory to decide to remove folks based upon their race and considered it derogatory to fill open positions based upon race. He admitted he never heard a board member specifically recommend non-renewal of an employee based on race. He testified that he did observe, in the hiring of Belgard as the superintendent's secretary, the district hire a less qualified applicant who was Native American, as opposed to a more qualified applicant who was white.

31. Counsel asked Beardsley why he did not take to the full board his recommendation of Hawley as the most qualified applicant for superintendent's secretary. He testified that he believed Morin, a board member selected to be on the hiring committee, spoke for the board. Having worked with and observed the attitudes and behavior of the board members, Beardsley believed he knew the feelings of the board about hiring whites.

32. Beardsley also testified that board members Ramona Wing and Franklin Doney objected to Hawley's work as a substitute in the office. He thought these objections indicative of the board's attitude toward hiring Hawley for a full time position. He also testified that he heard board members comment upon Janice Meadows' race after considering her non-renewal.[12]

[12] Meadows was the librarian and extracurricular activities supervisor who was one of two white employees targeted for non-renewal during Beardsley's year as superintendent.

These comments, together with the others to which he testified, made Beardsley “disappointed” in the board. Given what he considered the board’s attitudes toward hiring whites, and what he had observed about the board’s attitudes toward Hawley (a white employee), Beardsley did not consider going to the board with his recommendation that she was best-qualified to be superintendent’s secretary. By this time, Beardsley himself was a “lame duck”--not being renewed. He thought that submitting Hawley for superintendent’s secretary “was not a war I could win.”

33. Beardsley’s non-renewal resulted in a Human Rights Act claim. The Human Rights Commission issued its final decision in the Beardsley contested case on November 22, 1996. That decision included the following final determinations on issues, which apply against the district here:

a. During the 1992-1993 school year, the trustees of the school district were Chairman Robert Fox, Trustee Ramona Wing, Trustee Kirby King, Trustee Franklin Doney and Trustee Ken Morin. All are Native Americans. *Beardsley*, Finding No. 3

b. During his first six months as superintendent, Beardsley received performance evaluations indicating he was doing (despite some areas needing improvement) a satisfactory and even above expectations job. *Beardsley*, Finding Nos. 13-18.

c. At the end of that six months, a majority of the board (Fox, Wing and Doney) voted not renew Beardsley’s contract. *Beardsley*, Finding Nos. 19-21.

d. The January 28, 1993, board meeting was heavily attended and became very heated. There was discussion of whether racial preferences should be used in hiring other district personnel, specifically substitute teachers. The minutes for the meeting reported that people in the community "wanted to know why white people are being hired as subs." Chairman Fox agreed with those concerns to the extent that there should be effective role models for students in the school district and that "local persons" could provide such role models. According to Fox, the term “local person" had a fairly expansive definition, including persons born in the area who had moved away. According to board member Morin, it was generally understood the term "local" person meant Native American as opposed to non-Native American. *Beardsley*, Finding

No. 28.

e. At the regular school board meeting on February 9, 1993, a large number of faculty, administrative staff and community members were again in attendance. Shannon Brockie read a letter on behalf of concerned parents requesting that the board revisit the issue of renewing the charging party's contract. The meeting again became heated as the audience renewed their demands that the board provide its reasons for terminating the charging party's employment as superintendent. In the interchange between board members and the audience, at least two board members made remarks indicating their preference for a Native American superintendent. Board member Wing stated that the trustees wanted "one of their own" for the superintendent position. Board member King also made a statement to the effect that the board wanted a Native American superintendent. *Beardsley*, Finding No. 30.

f. The district refused to renew Beardsley's contract as district superintendent because of race. *Beardsley*, Conclusion No. 1.

34. Ken Morin, a member of the district's board at the time, denied that an environment of preferential consideration of Native American applicants existed. He denied saying to Milliron (in May of 1994) that had Morin been aware Milliron was not Native American, the district would never have hired him. Morin denied telling a district hiring committee in 1992 that the board would not hire Hawley for a full-time position because she was "not a local member of the community." He also denied telling that committee that Hawley's marriage to a Native American "didn't matter, she's an outsider, she's not a local member of the community." He denied personal racial bias, and denied that the board acted out of racial bias.

35. Morin also denied signing a statement (CP 8) in which he purportedly said the board had looked at all of the candidates for the job Stiffarm obtained. In the statement he also purportedly said that the board had looked at the resumes, applications and qualifications of all the candidates. The board did not look at all of the candidates. The board did not look at the resumes, applications and qualifications of all of the candidates. After Morin completed his testimony, the district stipulated that he had signed the statement. The district offered no explanation either for Morin's testimony under oath that he did not sign the statement, or for

Morin's testimony that the signature on the statement did not even resemble his writing.

36. Chairman of the district board Robert Fox testified. Fox testified that neither he nor any other member of the board ever discriminated against Hawley because of her race. He testified that neither he nor any other board member ever attempted to prevent Hawley from working for the district. He denied ever making or hearing any statement by another board member to the effect that whites should be fired or not hired. He admitted the board had discussed hiring a Native American superintendent, in January of 1993. He testified that the board wanted to know whether the statutory hiring preference for Native Americans, under §2-18-111 MCA, applied to public school districts. He testified that the board in 1993 did not get a clear answer to this question. He testified that he now believes the law does not apply to school districts. He testified that the district has never adopted a hiring policy that provided a preference based on race.

37. Fox was shown his own affidavit, from June of 1994, to the Human Rights Commission staff (CP 5), that he admitted he had signed. He also admitted that in June of 1994 he told an investigator from the HRC staff that the board reviewed the applications and qualifications of the candidates for the home school coordinator/attendance monitor position before making the hiring decision. Fox admitted the affidavit and his prior statements to the investigator were not correct regarding whether the board reviewed the applications and qualifications of the candidates. In the affidavit, as in his prior statements, Fox said the board did so. In testimony Fox said the board did not undertake such action, but simply relied upon the committee's recommendation.[13]

38. Fox testified that even if the district "were allowed" to use a Native American hiring preference, he would prefer to base hiring decisions solely on qualifications. Fox testified that, as chairman of the board, he did not know of any district job notices that included reference to

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[13] Fox testified that he and the rest of the board simply relied upon the committee's recommendation. He also testified that he believed Stiffarm had experience with both the attendance register and the SASI program, and that had he known she had no such experience it "probably would have" made a difference in his vote regarding who to hire. He also testified that he knew of Stiffarm's qualifications (or some of them) when voting to hire her. He then testified that he knew of her qualifications at the time (June of 1994) he signed his affidavit because he was **at that time** shown copies of her application materials documenting her qualifications. He also testified that he did not recall whether he was shown her qualifications at the time of the vote.

such a hiring preference ("Q: None whatsoever, is that correct? A: That's correct."). Fox specifically denied that the "filing clerk" job notice contained a hiring preference. Fox testified that, as chairman of the board, he did not consider a Native American hiring preference as a necessary part of filing vacancies at the school district--for any and all positions. He testified that inquiry by the board into the legality of a hiring preference "never has" had an effect on the district's hiring. He testified that the board would not advertise a hiring preference. Then he testified that he "individually" would not do so, but that he could not speak for the board. He then testified the board had never authorized advertising a hiring preference. After being confronted with a published advertisement[14] by the district that did give notice of a Native American hiring preference for a filing clerk's job, he acknowledged the existence of the ad. He denied knowledge of the ad. He denied knowledge of whether the ad was "official" and authorized by the district. He denied personal knowledge of the district's use of the hiring preference. He testified that he opposed the hiring preference and thought it an invalid consideration for hiring. He denied knowledge of board approval of the job notice, or adoption of a job preference policy.

39. Fox gave this testimony in September of 1996. When this hearing reconvened in January of 1997, Fox was recalled by the district (over the objection of Hawley), and testified that he now recalled that the board actually had adopted the Native American hiring preference in January of 1996. He testified that he, Fox, had voted in favor of the hiring preference. The motion and vote appears on page 5 of R 1. Fox also testified that he did not think the board "formally put it [the Native American hiring preference] in their policies and procedures as such." Just a few minutes later, Fox identified the actual hiring policy adopted by the board for Native American hiring preference in January of 1996 (R 2).

40. Franklin Doney, a member of the board, also testified. Doney testified that the candidates' full application materials were available to the board at the meeting in which Stiffarm was hired. He testified that he, at least, reviewed the applications and qualifications of both Hawley and Stiffarm. He denied seeing Shupe's incomplete summaries at any time prior to

[14] CP 6, identified, marked and admitted by stipulation. Published in the Harlem *News* on 1-31-96.

his testimony at this hearing. Doney also testified, after lengthy questioning, that if he had known one candidate had SASI experience and the other did not, it would have made a difference, but that he had no way of knowing.

41. Board member Dave Hawley testified that he was not aware, at the time of the hiring decision, that Ruth Hawley had experience in the attendance monitor or the SASI program. He was not specifically asked if that would have made any difference to him. He did testify that he relied upon the committee recommendation in voting for Stiffarm's hiring.

42. Peterson testified that in May of 1994, he heard Dale Shupe, the superintendent at that time, say, in effect, that the board was pressuring him to fire Hawley from her job in the office. According to Peterson, Shupe also said he would not fire Hawley, that the board would have to fire her itself. Shupe denied the statements, and denied the pressure. However, Shupe did write and circulate a memo to the board (CP3), dated May 20, 1994. Shupe did testify that Lou Walters, in this same time frame, reported pressure from board members not to employ Hawley.[15] In further testimony, Shupe claimed he could not recall what he heard, or from whom, to prompt the memo to the board. He testified he could not recall talking with board members at any time about the memo or its subject matter. Given the content of the memo, and Shupe's other testimony, this testimony is incredible. The memo reads, in pertinent part:

> There has been some 'gossip' that the District should not allow her to work because she filed the [Human Rights] complaint. It is the position of this administration that action of that type would only validate her claim.

43. Hawley applied for two other jobs with the district after she was laid off (in what she testified was called a reduction in force lay-off) from her temporary position in 1995. One job was, by her testimony, the assistant to the business manager position that she held as a temporary from 1993 through 1995 and again in 1995-96. Hawley testified that this job was renamed "file clerk" and filled in March of 1996 as a permanent position. She testified she was the most qualified applicant but the district hired Mike Morin (whom she agreed has both a degree and work experience at the business college, perhaps even as the business manager). Morin's

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[15] Shupe's confirmation of Walters' prior consistent statement is relevant and admissible, since the district challenges all the statements (of Walters and other witnesses) that board members exhibited and urged racial bias in hiring decisions.

position appears to be the "filing clerk" position for which the hiring preference was advertised, but this is not clear from the evidence. The district wanted to hire Jerome Main for the second job Hawley sought--Hawley does not believe she was the most qualified applicant for that job.

44. Since Hawley's temporary work with the district ended in 1996, she has worked, beginning in September of 1996, for the Dodson school district, some 45 miles one way from her home.[16] She earns $5.50 an hour for six hours a day, 180 days a year. There are no benefits available in her current job. The wages and benefits Hawley earned before her job with the district ended are stated in exhibit JE 10. Hawley earned $23,454.40 in wages and $2,991.08 in benefits. Hawley earned, in Dodson, $5,940.00 per school year, commencing in 1996-97.[17] Hawley also worked at Beck's General Store in Lodge Pole in 1993 and/or 1994, and earned $2,000.00.

45. The wages and benefits Stiffarm earned in the home school coordinator/attendance monitor job are a matter of record. JE 10. Stiffarm earned, from the beginning of calendar 1994 through the end of the 1995-96 school year, $38,791.76 in wages and benefits. From January 1996 through the end of the 1995-96 school year, Stiffarm received $9,836.46 in wages and benefits. Approximately one-third of what she received in calendar 1995 came from the 1995-96 school year (September through the end of December), or $4,894.40. Thus, Stiffarm received, commencing in 1996-97, $14,730.86 per school year in wages and benefits (based on her 1995-96 wages and benefits--$9,836.46 for the first two-thirds of the calendar year plus $4,894.40 for the last third of the calendar year).

46. Had the district hired Hawley in 1993, she would have received the difference between her actual earnings from 1994 through the 1997-98 school year and what Stiffarm has received and will receive. Comparing Stiffarm's earnings with Hawley's, Hawley did not lose any money in 1993. JE 10. Stiffarm's total receipts, calculated from testimony and JE 10, for

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[16] Hawley testified that her children have also changed schools. She did not prove that she has incurred commuting costs solely because of the district's discrimination. No travel expenses are included in the award.

[17] Hawley testified that she elected not to participate in the employer's health insurance plan. No evidence was presented of what value, if any, that plan offered--Hawley also testified that she would be required to pay for the health insurance under the Dodson plan. Her election not to participate is useless in calculating damages, absent some proof of value to her in buying health insurance through her present employer.

those four and two-thirds years, total $68,253.48 ($14,730.86 times 2 plus $38,791.76). Hawley's actual earnings for the same times total $36,763.68 ($5,940.00 times 2 plus $22,883.68 plus $2,000.00). Hawley's total loss is $31,489.80.

47. Interest at 10% per annum is appropriate, but Hawley only proved amounts lost with a broad brush, as amounts per calendar year or school year rather than amounts per month or pay period. The $2,000.00 Hawley earned in Beck's General Store apply to 1994 earnings. The uncertainty about the earning date results from Hawley's own testimony. The latest earning date (which favors the district) is 1994, from the range of possible earning dates Hawley provided. Applying the facts proved and the 10% per annum pre-judgment interest rate, interest due Hawley can be calculated.

48. In 1993, Hawley had no loss of income--she actually earned more than she would have earned had she obtained Stiffarm's job. Since there was no loss, no interest accrues.

49. In calendar 1994, Stiffarm earned $14,272.10. JE 10. Hawley earned $10,161.94. JE 10 and Hawley testimony about Beck's General Store. Hawley lost $4,110.16 due to the district's acts. Interest at 10% per annum for 1995, 1996 and 1997 is 30%, or $1,233.05.

50. In calendar 1995, Stiffarm earned $14,683.20. JE 10. Hawley earned $12,147.64. Hawley lost $2,535.56 due to the district's acts. Interest at 10% per annum for 1996 and 1997 is 20%, or $507.11.

51. During the first eight months of 1996, Stiffarm earned $9,836.46. JE 10. Hawley earned $2,574.10. JE 10. During those eight months, Hawley lost $7,262.36 due to the district's acts. Interest at 10% per annum on that amount for the last four months of calendar 1996 is $242.08. During the last four months of 1996, Stiffarm earned $4,894.40. JE 10 and Finding 45. Hawley earned $1,980.00 (one-third of a Dodson school year's earnings). During those four months, Hawley lost an additional $2,914.40 due to the district's acts. Thus, at the end of the calendar year she had lost $10,176.76. Interest at 10% per annum for 1997 is $1,017.68. Total interest accrued through the end of 1997 on the 1996 losses is $1,259.77.

52. During the first eight months of 1997, Stiffarm made $9,836.46. JE 10, Finding 45. Hawley made $3,960.00 (two-thirds of a Dodson school year's earnings). During those eight

months Hawley lost $5,876.46, due to the district's acts. Interest at 10% per annum for the last four months of 1997 is $195.88. During the last four months of 1997, Hawley lost $2,914.40 due to the district's acts. Finding 51 regarding the last four months of 1996 applies. Thus, as of January 1, 1998, Hawley's back pay total loss is $25,613.34. 10% per annum on that amount is $7.017 per day. For January, 1998, interest accrued is $217.53.

54. Hawley's total interest entitlement on February 1, 1998, is $3,217.46. Interest continues to accrue at $7.017 per day until September 1, 1998. At that time, the final $5,876.46 of loss (for the first eight months of 1998, applying the same facts and calculations as for the first eight months of 1997) will no longer be "front pay," and will begin to accumulate interest. From that date forward, interest on the entire $31,489.80 will accrue at $8.627 per day until paid. Annual interest will accrue at $3,148.98 per annum.

IV. Opinion

A. Federal precedents are appropriate sources of guidance.

Guidance from the federal courts in reviewing cases brought under the Human Rights Act has been explicitly approved by the Montana Supreme Court. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. MDU Co.*, 198 Mont. 56, 643 P.2d 841 (1982). This opinion uses federal guidelines which address discrimination where the purpose and intent of the federal law, case holding or regulation is consistent with the Montana Human Rights Act.

B. Hawley can amend her complaint, adding a count of retaliation, if she proved it.

A charging party can file an amended complaint with the Commission. 24.9.323 A.R.M. A charging party can amend a complaint, during investigation, to add a claim of retaliation. *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990). An amended complaint relates back to the date of the original filing, even if filed after the time for filing the retaliation claim has expired. *Id.* Similarly, a charging party has a right to file an amended complaint before the prehearing conference in a contested case. After the prehearing conference, the hearing examiner or the commission give permission for an amendment. 24.9.323(4) A.R.M.

Simmons involved amendment during investigation. Investigation is the necessary precursor of a contested case certification. Investigation leads to a reasonable cause finding or a

dismissal. §§49-2-504 and 49-2-507 MCA. Certification follows a reasonable cause finding or a public policy determination mandating hearing. §§49-2-504 and 49-2-505 MCA. Amendment after certification adds a new theory to a case with a basis in fact or public policy to go to trial.

Hawley could not, at the time of hearing, timely file an original complaint regarding the retaliation assertions. The time within which to file such a claim had run. §49-2-501(2) MCA. *Simmons* establishes that she can assert this time-barred claim by amendment, unless the district suffers unfair prejudice if she does.

The Commission rule mirrors Rule 15, M.R.Civ.P. regarding amended pleadings. When a party must obtain court permission for an amendment, the courts freely grant that permission. A court refuses an amendment only for extraordinary reasons--dilatory motive, undue delay or bad faith. ***E.g.***, *Lien v. Murphy Corp.*, 201 Mont. 488, 656 P.2d 804 (1982, ***reh. den.***, 1983) (amendment allowed nine years after complaint filed).[18] The key is the impact upon the opponent's rights, not the motive or excuse of the amending party for a late amendment.

> Defendants cite *McGuire v. Nelson*, 162 Mont. 37, 42, 508 P.2d 558, for the proposition a plaintiff is denied the right to amend his complaint when the amendments materially change the theory of recovery and prejudice defendant by denying defendant sufficient time for preparation of a defense. *McGuire* held:
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> "Although Rule 15(a) M.R.Civ.P., establishes that leave to amend shall be freely granted, amendments should not be allowed where the theory presented by the amendments is totally 'inapplicable to the case. . . .'" 162 Mont. 42, 508 P.2d 560.
>
> In *McGuire* plaintiff initially sought recovery on a negligence theory. Shortly before trial plaintiff sought to amend his complaint seeking recovery on a breach of warranty theory. This Court reversed the district court and denied plaintiff leave to amend his complaint because of the basic inconsistency between a negligence action and a breach of warranty action and the prejudice incurred by defendant as a result of the amendments.
>
> The facts in the present action do not present a case of substantial prejudice incurred by defendants. The motion to amend the amended complaint was filed on January 19, 1976, one week prior to the date of trial, and defendants were duly notified of plaintiff's intent to amend. The effect of the amendments was to change the basis of recovery on particular claims from tort to contract. However, some of the claims had previously been plead on the theory of recovery based on contract and no additional facts or agreements between the parties were interjected by the amendments. Defendants' recourse to any prejudicial effect from the late filing of the amendments was to seek a continuance for the purpose of preparing their case. The trial record fails to disclose any motion by defendants for a continuance and the element of surprise is clearly absent. ***See*** *Mitchell v. Mitchell*, 169 Mont. 134, 545 P.2d 657.
>
> Therefore, we hold the district court's granting of plaintiff's motion to amend the

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[18] *Morrison v. Concordia Fire Ins. Co.*, 72 Mont. 97, 231 Pac. 905 (1924), suggested that a complaint can be amended during trial. In *Morrison*, the opponent did not timely object to the amendment during trial, and lost the change to argue that permitting the amendment was an error. *Morrison* is not useful for the present case.

amended complaint was not an abuse of discretion. *Kearns v. McIntyre Construction Co.*, 173 Mont. 239, 248-49, 567 P.2d 433 (1977). Of course, when the legal theory is simply inapplicable to the facts, a trial court can properly refuse an amendment. *Fry v. Heble*, 191 Mont. 272, 623 P.2d 963 (1981). Here, unlike *Fry*, the legal relationship between the parties does not preclude the amendment as a matter of law. The key question is whether the Hawley's amendment prejudices the district.

The district had ample notice that Hawley would be offering evidence of its conduct both before and after the hiring decision at issue. The motion for administrative notice of the *Beardsley* decision showed Hawley's intent to present evidence about prior conduct. Her witness and exhibit lists clearly suggested her intent to offer evidence regarding post-hiring conduct and pre-hiring conduct. The district cannot legitimately claim surprise.

The motion to add a claim of retaliation is timely. No prejudicial lack of notice to the district bars it. The precise motion was to conform the pleadings/prehearing order to the evidence. The pivotal question is whether Hawley proved retaliation, which is addressed later in this opinion.

C. The District had ample chances to call Bernard Lambert.

The hearing in this case originally convened in Chinook, Montana, on September 17, 1996. Bernard Lambert was one of the district's witnesses. He was served with a subpoena. Lambert, at the time of hearing, lived in Brockton, Montana. Ruth Hawley's discrimination complaint was certified for hearing in November of 1995. The original hearing date was vacated by stipulated order in January of 1996, because the parties were seeking to settle. The next hearing date (in May of 1996) was likewise continued by stipulation of the parties. In August of 1996, the district moved to continue the next hearing date (September 17, 1996) because it had changed attorneys. At that time, the district had actually kept the same lawyer, but he had changed law firms, necessitating a "change of counsel" so he could keep the case. The motion for continuance was denied.

Less than two weeks before hearing, the district did change lawyers, retaining its current counsel, Mr. Dahlem. An additional defense (statutory Native American hiring preference) was permitted, over Hawley's objection. Four additional witnesses, Johnstone, Fox, Morin and Dave

Hawley, were added, also over Hawley's objection. Two additional witnesses were not allowed.

The hearing could not be completed during the available time in Chinook the week of September 17, 1996. The hearing was reconvened on November 19, 1996. In the order setting that date, the hearing officer specifically warned the parties that the evidentiary record would close after that second session. "Order Setting Resumption Date of Contested Case Hearing," 9-20-96. Bernard Lambert was unable to get from Brockton to Chinook during the November session, because of weather. The hearing was then reconvened on January 21, 1997. The same admonition was given in the order setting that date. "Order Setting Resumption Date of Contested Case Hearing," 12-2-96. Bernard Lambert was unable to get from Brockton to Chinook during the January session, because of weather.

The district's motion to allow Lambert's testimony by telephone was opposed by Hawley. The importance of live testimony is patent, given the credibility issues. The district elected not to pursue any remedies against Lambert, but instead to seek either additional time or leave to call him by telephone. Hawley's opposition to both approaches was well taken. The district had ample opportunity to bring Lambert to hearing, and ample warning that its failure to produce him would result in the record closing without his testimony.

D. To the extent relevant, facts decided in the *Beardsley* case are binding on the district.

Hawley has requested judicial notice, effectively asserting collateral estoppel of the district based on *Beardsley v. Hays/Lodgepole School District,* (HRC # 9401005996) 11-22-96. Collateral estoppel applies in administrative proceedings. *Niles v. Carl Weissman & Sons, Inc.*, 241 Mont. 230, 235-37, 786 P.2d 662 (1990). Hawley has met the standards of the doctrine.

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

Montana v. United States, 440 U.S. 147, 154, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979).

> In Smith v. Schweigert (1990), 241 Mont. 54, 58, 785 P.2d 195, 197, this Court made the following observation regarding the doctrine of collateral estoppel:
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> > "Collateral estoppel is a form of res judicata. Quite simply, the doctrine `precludes relitigation of issues actually litigated and determined in a prior suit.' Lawlor v. National Screen Service (1955), 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122. It differs from res judicata, in that res judicata bars the same parties from relitigating the same cause of action, while collateral estoppel bars the same parties, or their privies, from relitigating issues which have been decided with

> respect to a different cause of action. Brault v. Smith (1984), 209 Mont. 21, 679 P.2d 236."
>
> Collateral estoppel has three elements. These are: (1) the issue has been decided in a prior adjudication and is identical to the one presented; (2) a final judgment on the merits was issued; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. Smith, 241 Mont. at 58, 785 P.2d at 197; In re Marriage of Stout (1985), 216 Mont. 342, 349-50, 701 P.2d 729, 733-34.

Anderson v. State, 250 Mont. 18, 21, 817 P.2d 699 (1991); ***see also***, *Berlin v. Boedecker*, 268 Mont. 444, 453, 887 P.2d 1180 (1994); *Farmers Plant Aid, Inc. v. Huggans*, 266 Mont. 249, 254, 879 P.2d 1173 (1994).

Of the three elements, the first is most critical. *Berlin*, ***supra***. To satisfy this element, the identical issue or "precise question" must have been litigated in the prior action. *HKM Assoc. v. Northwest Pipe Fittings*, 272 Mont. 187, 193, 900 P.2d 302 (1995). *Anderson*, ***supra***; *Helena Aerie No. 16 v. Montana Dept. Of Rev.*, 251 Mont. 77, 81, 822 P.2d 1057 (1991); *Stapleton v. First Security Bank*, 207 Mont. 248, 258, 675 P.2d 83, 89 (1983).

"Collateral estoppel or issue preclusion refers to the situation where an issue has been previously litigated by a party in a former case and that party is estopped from relitigating it in a subsequent case." *Marriage of Stout*, 216 Mont. 342, 349, 701 P.2d 729 (1985). Collateral estoppel serves the dual purposes of judicial economy and judicial Finality. *Colstrip Faculty v. Rosebud Co. Trustees*, 251 Mont. 309, 314, 824 P.2d 1008 (1992). Having decided an issue against a party, the tribunals will not again hear the same party (or its privies) on the same issue. *Nat'l Coal Ass'n. v. Hodel*, 675 F.Supp. 1231, 1237 (D.Mont. 1987); *Fetherston v. Asarco Inc.*, 635 F.Supp. 1443, 1445 (D.Mont. 1986). Any other rule defeats both economy and finality. ***See***, *Pacific Power & Light v. Dept. Of Rev.*, 246 Mont. 398, 404-05, 804 P.2d 397 (1991).

Hawley was not a party to *Beardsley*. But *Beardsley* still binds the district, to the extent that the Commission decided issues relevant to Hawley's case. In *Boyd v. First Interstate Bank*, 253 Mont. 214, 833 P.2d 149 (1992), the Montana Supreme Court affirmed a summary judgment in favor of First Interstate Bank. The plaintiffs asserted the bank had converted their property. In another lawsuit, to which the bank was not a party, a jury decided against plaintiffs, on claims that the same property had been converted by the third-party defendants in the bank suit. The Montana Supreme Court affirmed that jury verdict. *Boyd v. State Medical Oxygen and Supply,*

Inc., 246 Mont. 247, 805 P.2d 1282 (1990). The bank then won summary judgment, because plaintiffs had already lost one conversion claim--the jury decided the plaintiffs had no interest in the property allegedly converted. *Boyd v. First Interstate*, 253 Mont. at 220. Since the plaintiffs had no interest in the property converted, as between plaintiffs and the third-party defendants, plaintiffs could not maintain a conversion claim against the bank, and could not relitigate their interest in the property allegedly converted. ***Id***.

In the context of a civil suit in which an issue previously decided in a criminal case was presented again, the Montana Supreme Court has specifically said, "The fact that Aetna was not a party in the previous action is immaterial. As long as the party against whom the claim is advanced remains the same from the previous action, it is immaterial that the other parties are not precisely identical." *Aetna Life & Cas. Ins. Co. v. Johnson*, 207 Mont. 409, 412, 673 P.2d 1277 (1984). Aetna lost the *Johnson* case, in which it sought a chance to litigate (in a civil case over insurance coverage) Johnson's previous conviction for arson. Aetna was not a party, in any respect, to the criminal case. But the issue of whether Johnson intentionally burned down his own business to collect the insurance money was finally decided by the conviction. When Aetna, standing effectively in privity with Johnson by taking the same position (innocent of arson) he took in the criminal case, attempted to relitigate the issue, collateral estoppel applied.[19]

In 1984, this holding applied to prior final criminal judgments. "We have since broadened this holding by applying this test to all cases in which collateral estoppel is at issue." *In Re Marriage of Holland*, 224 Mont. 414, 730 P.2d 410, 412 (1986). This "broadening" has continued. Issue preclusion (collateral estoppel) can go a further step, by means of judicial notice of facts established against a party.

> The District Court granted the first motion for partial summary judgment by analyzing facts established in the prior litigation, applying them to this cause of action, and concluding that as to certain issues raised in Peschel's complaint there was no genuine issue as to any material fact and that defendant Jones was entitled to a judgment as a matter of law on those

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[19] Case comments exist suggesting the need for a closer relation between the prior final decision and the party asserting that collateral estoppel applies. These comments appear in cases that address whether the precise question--the same issue--exists in the prior final decision and the case in question. In context, these comments still relate to whether the question previously determined is being relitigated by the party against whom the previous decision applies. ***See***, *Dept. of Comm. v. Gallatin Dairies, Inc.*, 221 Mont. 492, 495, 719 P.2d 790 (1986).

> issues. In other words, certain facts established in prior litigation now make some of Peschel's current claims to be without merit. Counsel for Peschel has admitted that he is bound by those facts established in the prior litigation. The District Court certainly has the authority to take judicial notice of facts established in related prior litigation. In doing so, the District Court correctly determined that there was no genuine issue as to any material fact regarding certain issues raised in Peschel's complaint.

Peschel v. Jones, 232 Mont. 516, 523, 760 P.2d 51 (1988).

Relevant findings and conclusions from *Beardsley* bind the district. To be relevant, the findings and conclusions must address questions of fact or issues in Hawley's claim.

E. Hawley has established a prima facie case of illegal discrimination.

Federal and Montana law analyzes discrimination claims in terms of "membership in a protected class." ***E.g.***, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[20] Everyone belongs to particular "classes" of people, by race, creed, religion, color, national origin, age, marital status and sex. Discriminating against a person in employment because of that person's membership in any of these protected classes is illegal, with a few limited statutory exceptions. §49-2-303(1)(a) MCA.

The provisions that assure protected groups freedom from discrimination under Title 49 of the Montana Human Rights Act closely mirror Title VII of the Civil Rights Act of 1964, §42 U.S.C. Section 2000(e), *et seq*. The Montana Supreme Court has examined the rationale of federal case law. Our court has expressly adopted, for cases involving disparate treatment of a protected class member, the three-tier standard of proof of *McDonnell Douglas*, ***supra***.[21]

To establish a *McDonnell Douglas* prima facie case, Hawley must prove four elements:

> (i) that [s]he belongs to a [protected class] . . .; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1924. This is the "first tier" of proof. This standard of proof is flexible. The four elements may not necessarily apply to every disparate

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[20] *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. Human Rights Comm'n*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welfare Dept.*, 192 Mont. 42, 626 P.2d 242 (1981).

[21] *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson*, ***supra***; *European Health Spa*, ***supra***; *Martinez*, ***supra***.

treatment claim. In *Martinez*, the Montana Supreme Court recognized that a charging party could satisfy the fourth element in *McDonnell Douglas* by showing that the applicant who filled the job vacancy was not a member of the particular protected group. ***See*** *Martinez*, 626 P.2d at 246, ***citing*** *Crawford v. Western Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980).

In the present case, Hawley proved membership in a "protected class." She is white. The successful applicant, Wendy Stiffarm, is Native American. The district concedes that Hawley had the qualifications for the position. The inference arises of reliance upon the racial difference.

Employers rarely confess to illegal motives. Claimants often have only circumstantial proof of discriminatory motives. *McDonnell Douglas* defines the elements of circumstantial proof of an illegal discriminatory motive. Hawley did prove a prima facie case based on circumstantial evidence.

Hawley also produced direct evidence of discriminatory intent. The school board attempted to insulate itself from the decision-making by resort to a hiring committee. The board decided, after reviewing the committee's recommendation of Wendy Stiffarm, to rely upon the committee's recommendation. The record is replete with evidence of pressure brought to bear upon the board to hire Native American applicants. Board members made and heard comments showing a strong preference for Native American applicants wherever possible. Even if the committee made a proper and independent decision, for reasons unrelated to race, a question remains about the board's reasons for accepting that decision.

Direct evidence "is that which proves a fact without an inference or presumption and which, in itself, if true, establishes that fact." §26-1-102(5) MCA. ***See also***, *Black's Law Dictionary*, p. 460 (6th Ed. 1990) (quoting the California version of the same definition). If not answered by sufficient proof disputing its truth or demonstrating a legal justification, direct evidence of discrimination will establish a civil rights violation. ***See***, *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985) (religious discrimination). Under the Human Rights Act, direct evidence relates both to the particular decision affecting the charging party and to the intention of the respondent to discriminate. *Foxman v. MIADS*, HRC Case #8901003997 (June 29, 1992)

(race discrimination in employment).

The district struggled with multiple claims of discrimination in hiring and firing. It also struggled to formulate a policy that would both promote the hiring of Native American applicants and stay within the mandates of the law. Hawley's presence as a "temporary" employee was at least one reason for revisions in the policies regarding hiring of temporaries. Criticism of the district for keeping Hawley employed was directed toward the board and the superintendent.

When a plaintiff bases his prima facie case on direct evidence of discriminatory intent, the applicant's "qualifications are irrelevant to the existence of the prima facie case of discrimination." *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir.), ***cert. denied***, 136 L. Ed. 2d 214, 117 S. Ct. 295 (1996). In *Schnidrig*, the plaintiff offered direct evidence of discriminatory motives, introducing statements made by directors and notes taken during board meetings. ***Id.*** at 1409-10. The evidence in the present case is more diffuse, with direct evidence regarding racial basis in other circumstances. That evidence still supports a prima facie case. The question of qualifications, of both Hawley and Stiffarm, arises only in the second tier of *McDonnell Douglas*. Hawley has proved her prima facie case, even if the committee's recommendation was unquestionably based on the applicants' qualifications. Hawley has presented proof from which the inference of discriminatory motive arises.

F. The district articulated a legitimate, nondiscriminatory reason for not selecting Hawley.

The *McDonnell Douglas* prima facie case raises an inference of discrimination at law.[22] The burden then shifts to the respondent to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. Respondent

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[22] Some courts reject or modify *McDonnell Douglas* for complaints alleging "reverse" discrimination. The D.C. Circuit, for example, requires a claimant asserting reverse discrimination to go beyond the *McDonnell Douglas* circumstantial evidence test and also prove "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Parker v. B.&O.R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). ***See also*** *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985). Other circuits change the prima facie case standards to require proof the plaintiff "belongs to a class" (rather than a racial minority) in reverse discrimination cases. ***E.g.***, *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991). Neither the United States Supreme Court nor the 9th Circuit has addressed whether the prima facie showing is modified in a reverse discrimination case. ***See, e.g.,*** *Lemnitzer v. Philippine Airlines, Inc.*, 816 F. Supp. 1441, 1447 (N.D. Cal. 1992), ***aff'd in part and rev'd in part***, 52 F.3d 333 (9th Cir. 1995) (Table). In this case, whites are admittedly a small minority of the residents of the district. This is not a reverse discrimination case. *McDonnell Douglas* applies.

bears the burden of showing a legitimate nondiscriminatory reason. This is the second tier of proof under *McDonnell Douglas*. The respondent bears this burden because:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981).

A respondent meets its burden by clearly and specifically articulating a legitimate reason for the rejection of an applicant. *Johnson*, 734 P.2d at 212. The district has done so. Wendy Stiffarm has an associate's degree (including formal computer training), while Hawley does not.

An educational institution *can* identify superior academic qualifications as significant for hiring. A college can consider a doctorate a plus for an applicant seeking a college teaching position. *Penk v. Oregon State Bd. Of Higher Ed.*, 48 Fair Empl. Prac. Cas. (BNA) 1724, 36 CCH Empl. Dec. P35,049 (D.Or. 1985). A primary or secondary school can consider an associate's degree a plus for an applicant seeking a clerical position. All the district must do is show the business connection between the job requirements and the degree.

Here, the job announcements did not list a post-secondary degree as a prerequisite. JE 1. Even without that notice, the district could legitimately rely upon more formal education in areas potentially pertinent to the clerical job duties. The district met its burden of production, particularly since the committee members included both white and Native American members, some with no particular connection with the board.[23]

G. Hawley has met her burden of proving pretext.

Once the district showed a legitimate reason for its hiring decision, Hawley had to prove that the district's reasons were in fact a pretext. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Martinez*, 626 P.2d at 246. This is the third tier of proof under *McDonnell Douglas*. Hawley's proof of respondent's pretext could be either direct or indirect:

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[23] The district bears the burden of production only, at this point in the analysis. The ultimate burden of persuasion always rests with Hawley. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1995). Although *Heiat* is primarily concerned with summary judgment motions, it also applies to trial decisions in this context. The party seeking relief always must carry the ultimate burden of persuasion.

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.
>
> *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095.

Hawley must persuade the fact-finder by a preponderance of the evidence that the district intentionally discriminated against her. *Crockett*, 761 P.2d 813, 817-18; *Johnson*, 734 P.2d at 213. Hawley argued here that her experience as an employee of the district made her at least as qualified a candidate as Wendy Stiffarm. Stiffarm had less experience but better academic credentials. If the candidates had equivalent though different qualifications, the apparent distinction between the two candidates would be race.[24]

"Protected class" membership matters when that membership motivates the employer's adverse action. Absent statutory exemption from the Human Rights Act prohibitions, an employer may never favor one job applicant over another because of race, among other "protected classes." If Hawley and Stiffarm had *equivalent* qualifications, the presumption of discrimination survives the district's proof of Stiffarm's superior academic credentials.

The *McDonnell Douglas* approach to discrimination claims bars the employer from free choice between equally qualified job candidates, if those candidates differ in protected class membership. Choosing against a member of a protected class, with no other relevant differences between the candidates, is prima facie illegal discrimination. The law *presumes* a discriminatory motive, because historically, protected class status has been a basis for discrimination.

The Montana Constitution itself identifies the classes, and prohibits discrimination:

> *Individual Dignity*. The dignity of the human being is inviolate. . . . [N]o person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.
>
> Art. II, Sec. 4, Mont. Const. 1972.

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[24] Human Rights Act cases are generally "fact-driven." Circumstantial evidence of discriminatory motive is relevant, but whether such evidence overcomes a business reason of better academic credentials counting more than more pertinent experience can only be addressed on a case by case basis. For example, hiring a certified teacher rather than a non-certified teacher with more experience, could probably stand as a legitimate business reason rather than a pretext, despite considerable circumstantial evidence of racial animus. Certification is a significant qualification for a teaching position in a public school. Ultimately, facts, not law, dictate the outcome of this case.

These statuses have too often been the grounds for rejecting people. State and federal courts presume an illegal and discriminatory motive when the successful applicant and the rejected applicant differ, not by significant qualifications, but only by sex, age, culture or race. This is not "special treatment" for the member of a protected class. It is a public policy decision that "choosing against" a member of a protected class, without a demonstrable legitimate reason, has the distinct odor of discrimination. The focus of the inquiry usually becomes the legitimacy of the proffered reason--the question of pretext.

Hawley has presented powerful evidence that racial bias against "outsiders" (among other "code" words used to designate people the community did not acknowledge as tribal members) was a motivating factor in the community. Hawley has amply shown the racially based animus toward her. The presence of Ruth Hawley as a district employee had generated criticism of the board, and even helped force board consideration of different hiring policies.

The district's defense here--denial of any consideration of Hawley's race--is singularly unconvincing. The involvement of board members in discussions and disputes about hiring whites is clear. The use of a hiring committee did not insulate the board. The committee recommendation itself was not beyond question. At least some hiring committee members did not have access to the full resumes of the candidates. At least one of the hiring committee members agreed with Hawley's attorney that information about Hawley's experience with the systems and reports involved in this job would have been pertinent to the hiring decision. Though the hiring committee members were more credible than the board members in denying any racial animus, the district kept the committee from having full knowledge of the candidates' qualifications. The district adopted the committee's recommendation with at least imputed knowledge of Hawley's full qualifications.

The Commission, like the courts:

> should not intrude in the day-to-day employment decisions of business owners. ***See, e.g.***, *Coombs v. Gamer Shoe Co.* (1989), 239 Mont. 20, 778 P.2d 885; *Hobbs v. Pacific Hide and Fur Depot* (1989), 236 Mont. 503, 771 P.2d 125. An employer's legitimate right to exercise discretion over whom it will employ must be balanced, however, against the employee's equally legitimate right to secure employment. [*Buck v. Billings Montana Chevrolet, Inc.* (1991), 248 Mont. 276, 281-82, 811 P.2d 537, 540]. The balance should favor an employee who presents evidence, and not mere speculation or denial, upon which a jury could determine

> that the reasons given for his termination were false, arbitrary or capricious, and unrelated to the needs of the business. [*Cecil v. Cardinal Drilling Co.* (1990), 244 Mont. 405, 797 P.2d 232, 797 P.2d at 235.]

Kestrell v. Heritage Health Care Corp., 259 Mont. 518, 525-28, 858 P.2d 3 (1993).

The same reasoning applies with equal force to a racial discrimination in hiring claim. Public policy recognizes an employer's right to decide whom to hire and whom to fire. *Cecil*, ***supra***, 244 Mont. at 409-10. However, once the presumption of discrimination does arise, the legitimacy of the business decision is subject to scrutiny based upon the evidence of record.

The evidence that Wendy Stiffarm's better education was more valuable than Ruth Hawley's greater experience is flimsy at best. *McDonnell Douglas* requires a "legitimate nondiscriminatory reason" for Hawley's rejection. Favoring the applicant with the most education is on its face reasonable for a school. Yet given Hawley's greater experience, including experience with the very computer programs to which Stiffarm could apply her associate degree, this "business reason" is pretextual.[25] Based upon the testimony given, the board more likely than not would have accepted a recommendation to hire a Native American applicant over Hawley, and more likely than not would have questioned and reexamined a recommendation to hire Hawley instead of a Native American applicant, no matter what the reasons for either recommendation.

Finally, the "overkill" testimony of the board members undercuts their credibility. The chair of the board denied categorically, under oath, that the district had ever considered race in any hiring situations. Confronted with an advertisement expressly stating a racial preference, he disclaimed knowledge and authorization. Confronted with authorization by the board, he professed ignorance.

The most credible board member, by demeanor while testifying, was Ken Morin. His credibility was seriously damaged by his flat denial that he had signed his statement, which the district's then-attorney had faxed to the Human Rights Commission staff. After the hearing

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[25] In *Kestrell*, ***op. cit.***, a reduction in force discharge case rather than a hiring case, the opposite circumstance occurred. A highly educated employee was replaced with a far less educated candidate. The new employee had virtually no related experience, to go with far less education. The court found the employer's explanation of a "more congenial philosophical approach" incredible. Here, Hawley's related experience balanced Stiffarm's academic credentials, so that the choice of the better educated candidate appears mere pretext.

examiner excused him as a witness, the district stipulated that Morin had signed the affidavit. The district never offered any explanation for stipulating that Morin did the very act that he had emphatically denied under oath. A witness false in one part of his testimony is to be distrusted in others. §26-1-303(3) MCA.

The district denied ever holding racial animus toward Hawley. The district also denied any efforts to retaliate against Hawley for her Human Rights Act complaint. The acting superintendent sent a memo to the board, explaining that firing Hawley because she filed her complaint was illegal. Although Hawley has not proved retaliation, the superintendent's memo speaks volumes about the board's most likely motivation in selecting Stiffarm instead of Hawley. Both before and after the decision to hire Stiffarm, the racial animus with which the board regularly approached its work is vividly presented in the credible evidence of record. Absent that animus, the superintendent would not have felt the need to send the memo to the board members.

H. Evidence of Other Incidents of Discrimination Is Relevant.

Relevant evidence is admissible. Irrelevant evidence is not. Rule 402, Mont.R.Evid. Relevant evidence is defined by Rule 401, Mont.R.Evid. It states:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

The Montana Supreme Court has adopted the test of relevance stated by the Commission on Evidence. The test is:

> whether an item of evidence will have any value, as determined by logic and experience, in providing the proposition for which it is offered. The standard used to measure this acceptable probative value is 'any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.' This standard rejects more stringent ones which call for evidence to make the fact or proposition for which it is offered more probable than any other. It is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules . . . .

State v. Fitzpatrick, 186 Mont. 187, 606 P.2d 1343, 1354, ***cert. den.***, 449 U.S. 891 (1980); ***cited and followed***, *Derenberger v. Lutey*, 207 Mont. 1, 9-10, 674 P.2d 485 (1983) (intent evidence relevant to punitive damages); ***overruled on other grounds***, *Martel v. M.P.C.*, 231

Mont. 96, 752 P.2d 140 (1988).

Admissible evidence tends to prove or disprove an element of a claim. Evidence of the conduct of the parties is admissible when it tends to prove or disprove an element of the claim. *Withers v. County of Beaverhead*, 218 Mont. 447, 710 P.2d 1339 (1985). In *Withers*, conduct of the parties was an element of the mandamus claim.

In a claim for punitive damages, proof of the state of mind of the defendant:

> was required in this case to show the oppression, fraud, or malice required for punitive damages. We agree with the ruling of the District Court. The evidence of Edward Towe's statements and opposition to the bank charter were relevant, as defined under Rule 401, M.R. Evid. We hold that admission of this evidence is not reversible error.

Stensvad v. Towe, 232 Mont. 378, 388, 759 P.2d 138 (1988).

In a shareholder oppression case, evidence of actions of related corporations was similarly relevant:

> Here, it is of consequence to the issue of oppression to examine the documents in question. Considering the interrelationship of the three corporations, both in membership and in business dealings, it is difficult to imagine how they could be understood as independent entities. As we have noted, Fox Land and Cattle is the exclusive lessee of 7L Bar's grazing land, as well as its financing agent. If any claim of intercorporate manipulation resulting in oppression is to be established, and it was argued extensively in the lower court, then the records of all the corporations involved must necessarily, be admitted. Those records reflect a history of joint operations. They are relevant and all relevant evidence is admissible, unless excepted by the constitution, statute or rules of court. Rule 402, M.R.Evid.

Fox v. 7L Bar Ranch Co., 198 Mont. 201, 207-08, 645 P.2d 929 (1982).

Obviously, without a connection between the alleged discriminatory hiring and the other incidents, the bare facts of the other incidents are irrelevant even if they may suggest wrong doing or wrong thinking in those instances. ***See, e.g.***, *Kuiper v. Goodyear Tire and Rubber Co.*, 207 Mont. 37, 53, 673 P.2d 1208 (1984) (evidence of defendant's participation in illegal campaign contributions not sufficiently tied to any efforts to avoid recall of defective tires, including the kind of tire that allegedly harmed plaintiff).

Here, the other incidents, in which board members either advocated or listened without an objection to advocacy of racial preference, relate to the motive for the hiring decision here. *McDonnell Douglas* routinely allows circumstantial evidence of motivation. Rare, indeed, is the

defendant who will admit to an illicit motive, and rarer still the employer who will document an illegal discriminatory motive in the business records of the company. Under the *McDonnell Douglas* standards, the charging party's prima facie case creates, through indirect or circumstantial evidence, "an inference that an employment decision was based on a discriminatory criterion illegal under the act." *Teamsters v. United States*, 431 U.S. 324, 358 (1977). Given the self-serving nature of denials of wrongdoing, resort to circumstantial evidence, including other incidents, to corroborate or rebut the employer's professed innocence is both common and proper.

Corroborative evidence is "additional evidence of a different character to the same point." §26-1-102(3) MCA. An employer's general treatment and practices toward members of a protected class are relevant to the defendant's motives when a member of that class claims discrimination. *McDonnell Douglas* at 804-805; *Slack v. Havens*, 522 F.2d 1019 (9th Cir. 1973).

The Fifth Circuit explained this relevance, in a rental housing case: "When there is a finding of a pre-Act pattern or practice of discrimination, and little or no evidence indicates a post-Act change in such a pattern . . . a strong inference that the pre-Act pattern or practice continued after the effective date of the Act arises." *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 227 (1971). The fact-finder properly considers evidence of past discrimination by the defendant, to decide whether that defendant's current conduct is motivated by an illegal animus. *Cortes v. Maxus Exploration Company*, 977 F.2d 195, 199-200 (5th Cir. 1992). Other discriminatory acts are admissible "to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives." *Cortes* at 200, ***citing*** *United Air Lines v. Evans*,[26]
431 U.S. 553, 558 (1997).

In discrimination cases, evidence that tends to prove the motivation of the defendant in related contexts bears directly upon proof of illicit motive. Conduct of the defendant is relevant, as it is in mandate cases like *Withers*, because it provides proof of motive. Incidents and actions

[26] "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue . . . ."

can pertain to motives, precisely as in punitive damage cases, like *Derenberger* and *Stensvad*, and as in a shareholder oppression case, like *Fox*. Evidence of other acts and events sheds light on the motivation of the party. The motivation of the party bears directly upon proof of a claim in the case. The other incidents relate to whether the district acted out of an illicit motive.

I. Hawley has not proved retaliation.

Hawley proved a prima facie case of unlawful retaliation in violation of §49-2-301 MCA. She proved three elements. First, she engaged in activities protected by the Human Rights Act--she filed a human rights complaint. Second, she was subjected to an adverse employment decision--the district refused to hire her for the filing clerk job. Third, the adverse action occurred while her claim was pending and known to the district. 24.9.803(2) A.R.M., ***repealed*** 10/25/96, ***and*** 24.9.603(3) A.R.M. ***adopted*** 10/25/96.[27] The presumption establishes a causal connection between the protected activity and the adverse employment decision. *Laib v. Long Construction Co.*, HRC Case #ReAE80-1252 (August 1984), ***quoting*** *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982); ***accord***, *Schmasow v. Headstart*, HRC Case #8801003948 (June 26, 1992).

Even without the presumption recognized in the rules, Hawley proved her prima facie case. She also showed the causal connection between protected activity and adverse employment action by proof of proximity in time between the protected activity and the adverse action. *Love v. Re/Max of America*, 738 F.2d 383 (10th Cir. 1984). She proved that the district had knowledge of her Human Rights Act complaint before the adverse action. *Wall v. A.T.&T. Technologies, Inc.*, 754 F.Supp. 1084 (D.C. N.C. 1990). Finally, she produced direct evidence of the district's express desire to punish her for her discrimination complaint.

Once Hawley established her prima facie case of retaliation, the district had to produce credible evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Id*. If respondent satisfies its burden of production, then the charging party must be afforded the opportunity to show that the asserted reason is in fact a pretext for retaliation. *Id*.

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[27] Whether the regulation in place at the time of alleged discrimination or the regulation in place at the time of the hearing applies, the substance of the two regulations is identical on this particular "prima facie case" or "rebuttable presumption." The current regulation replaced 24.9.803(2).

This is still the *McDonnell Douglas* method of evaluating discrimination claims. The charging party carries the ultimate burden of persuading the fact finder that the respondent would not have taken the adverse employment action but for the fact that charging party was engaged in protected activity. ***Id.***; ***accord***, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513-1514 (9th Cir. 1989); *Ruggles v. Cal. Polytechnic State University*, 797 F.2d 782, 785 (9th Cir. 1986).

By Hawley's own testimony, she was the best qualified applicant for only one of the two jobs she sought after filing her discrimination complaint. For the job she believes she would have and should have gotten but for racial discrimination, the district hired Mike Morin. Again, by Hawley's own testimony, Morin had experience working in a business office at the college, and may even have been the business manager at the college. He also had a degree. Although Hawley noted that a degree should not be a requirement for a "filing clerk" position, her testimony also establishes that Morin apparently had at least comparable experience and superior academic qualifications. Unlike Stiffarm, whose experience was proved to be far less than Hawley's, Morin could (on this record) have been hired for business reasons based on experience and education. Hawley's testimony that she was the most qualified applicant for the "file clerk" job has been rebutted by her own answers in cross-examination. Hawley has not established a pretext in the district's business reasons for hiring Morin. Hawley admitted she was not the most qualified applicant for the other job sought after filing her claim.

Hawley's proof of retaliation fails. Because Morin, by Hawley's own testimony, has both superior academic credentials and apparently comparable experience, race is not the presumptive basis for his hiring. Because he is a better qualified applicant, the decision to hire him as a permanent employee in a position Hawley believes is the same one she previously held as a temporary employee, is not on its face a discriminatory act.[28]

J. Five Years of Lost Wages and Benefits, Plus Interest, Fully Remedies the Loss.

Tribunals award damages in employment discrimination cases to rectify the harm caused

[28] Hawley testified that she had filed a retaliation complaint. The complaint apparently is still before the Human Rights Bureau. Because Hawley's motion to amend is **to conform to the evidence**, the effect of this decision is **not** to bar her retaliation complaint. The evidence does not establish retaliation. The amendment is therefore denied. The retaliation complaint (wherever it may be) is not impacted by this decision.

and to make the victims whole. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District #10,* 195 Mont. 340, 636 P.2d 825, 830 (1981); ***accord***, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2372 (1975). Hawley lost a full time job in the district. Given the continuing controversy about jobs and management within the district, this job was not necessarily permanent. The evidence in this case suggests that continued turn-over among district employees has been and is prevalent.

Back pay awards should redress the full economic injury that the charging party has suffered as a result of the unlawful discrimination. *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983). Calculation of the back pay award should include lost wages or salary, plus lost benefits (vacation pay, health insurance, pension contributions, etc.), less the value of any wages or benefits earned by the claimant in the interim. ***Id.*** at 626-628. In addition, the charging party may recover for losses in future earnings if the evidence establishes that those losses are likely to occur as a result of the discriminatory acts of the respondent. *Martinell v. Montana Power Co.*, 268 Mont. 292, 886 P.2d 421,439 (1994).

Interest on the award, calculated at the statutory rate of 10% simple interest per annum, is also proper. *P.W. Berry, Inc.*, ***supra***, 779 P.2d at 523; *Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987). The Commission awards prejudgment interest either from when the wages would have been paid, *P. W. Berry Co.*, ***op. cit.***, or from when the hearing was held, *Amstutz v. Mountain Bell*, Case No. HpE80-1235 (Montana Human Rights Commission, 1986). The differences in commencement dates for prejudgment interest result from differences in proof. When the amount lost and the accrual date for it are proved, interest from the due date is proper. *P. W. Berry Co.*, ***op. cit.***, *Foss*, ***op. cit.***

"Front pay" is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible. Front pay is temporary, lasting until the victim should reasonably be able to reestablish her "rightful place" in the employment market. *Sellers v. Delgado Community College*, 839 F.2d 1132 (5th Cir. 1988), ***citing*** *Shore v. Fed. Ex. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *Rasmussen v. Hearing Aid Inst.*, Case No. 8801003988 (Montana Human Rights Commission, 1992), ***aff'd sub nom.***

Hearing Aid Institute v. Rasmussen, 258 Mont. 367, 852 P.2d 628 (1993). Front pay is awarded when reinstatement is impossible or inappropriate. *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986); *EEOC v. Pacific Press Publ. Assoc.*, 482 F.Supp. 1291 (N.D. Cal.) (when effective employment relationship cannot be restored, front pay is appropriate), ***aff'd***, 676 F.2d 1272 (9th Cir. 1982).

In *Rasmussen*, ***supra***, the Montana Supreme Court articulated the front pay standard: "An award of front pay is made in lieu of reinstatement when the antagonism between employer and employee is so great that reinstatement is not appropriate." 258 Mont. at 378, ***quoting***, *Fadhl v. City and County of San Francisco*, 741 P.2d 1163, 1167 (9th Cir. 1984). The evidence of continuing controversy over hiring whites, the evident hostility of some board members, during their testimony, toward even suggestions that any of their decisions have been discriminatory, the evidence of community reactions, threats of violence--the record as a whole supports and mandates the conclusion that no effective employment relationship between Hawley and the district can be restored.

Front pay, as noted, is a temporary expedient. With no clear evidence to indicate how secure Hawley would have been in this job, reference to the Montana Wrongful Termination Act is appropriate. As a matter of public policy, Montana limits recovery for an wrongfully fired worker to four years. §39-2-905(1) MCA. The Montana Human Rights Act has no such limitation. Under the Human Rights Act, there is no public policy to limit liability and define the exposure of an employer for wrongful acts. However, under either Act there remain factors of uncertainty about the future. Absent a statutory limitation, this becomes a pure proximate cause question--how long does the harm continue? Here, Wendy Stiffarm continues to hold the job in question, at least through the 1996-97 school year. Would Ruth Hawley, had she been offered the job, continue to hold it? Given the uncertainties that question poses, and given the increasingly strong public policy in Montana (evidenced both in the Wrongful Termination of Employment Act and in the 1997 revisions to the Human Rights Act) favoring certainty and specific limitation upon long-term damages from loss of employment, some limitation is proper. Under the specific facts of this case, five school years is a sufficient time over which to calculate

damages, including the initial school year (1993-94) in which Hawley suffered no economic losses. By the time this case is concluded, the entire five years will be back pay.

In addition to recovery for economic injuries, a victim of a discriminatory practice is entitled to recover for other harm, including emotional distress, proximately caused by the unlawful conduct of the respondent. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). The emotional impact on Hawley of the board's not unexpected racially conscious decision to hire a Native American undoubtedly caused some emotional harm. But there is insufficient evidence upon which to predicate an award for emotional distress.

K. Affirmative Relief Is Necessary

The affirmative relief imposed in this case mirrors that imposed in *Beardsley*, ***op. cit.*** The discrimination against Hawley occurred before the decision in *Beardsley*. The Commission can not assume that more sweeping affirmative relief is necessary. This case followed *Beardsley* closely--the district did not know the *Beardsley* outcome when it made decisions about Hawley.[29]

V. Conclusions of Law

1. Respondent did not hire the charging party in September 1993 as the district home school coordinator/attendance monitor because of her race, violating §§49-2-303 and 49-3-201 MCA.

2. Pursuant to §§49-2-506(1)(b) and 49-3-309, MCA, charging party is entitled to the sum of $31,489.80 as and for lost wages and benefits, plus $3,217.46 as prejudgment interest on that amount through January 31, 1998. Prejudgment interest shall continue to accrue on the back pay and benefits at $7.017 per day until September 1, 1998. On that date, the entirety of the award for lost wages and benefits shall become back pay, and interest shall accrue on the entirety of that award at 10% per annum, simple interest, or $8.627 per day.

3. Affirmative relief is necessary in this case. §§49-2-506(1)(a) and 49-3-309(1)(a), MCA.

[29] The district withdrew its defense of statutory preference (§2-18-111 MCA) in this case. The defense was raised after the hearing officer suggested it in the proposed *Beardsley* decision. The questions posed by the possible application of the statutory preference remain. Thus, the statutory preference is a part of what the district must address in order to comply with the proposed affirmative relief. If the district now decides it will continue to apply the statutory preference, in accord with its 1996 policy, questions about the legality of prior hiring decisions that ignored the preference obviously do arise, but are outside the scope of this decision.

Respondent must refrain from engaging in any further unlawful discriminatory practices.

4. For purposes of §49-2-505(4), MCA, the charging party is the prevailing party at the hearing of this matter.

VI. Proposed Order

1. Judgment is hereby found in favor of the charging party and against the respondent on the charge by Ruth Hawley that the Hays/Lodgepole School District failed and refused to hire her as the home school coordinator/attendance monitor because of race.

2. Respondent is ordered to pay to the charging party the sum of $31,489.80 for lost wages and benefits, plus prejudgment interest in the amount of $3,217.46 through January 31, 1998, and continuing to accrue at the rate of $7.017 per day until paid, up to September 1, 1998, and thereafter continuing to accrue at $8.627 per day until paid.

3. Respondent is enjoined from taking adverse employment action against any current or future employee because of race, national origin, creed, gender, religion, color, age, disability, marital status, or political ideas and in violation of the Montana Human Rights Act or the Governmental Code of Fair Practices.

4. Respondent is ordered to take the following affirmative actions to minimize the likelihood that it will engage in future violations of the Human Rights Act or the Governmental Code of Fair Practices:

> a. Within 90 days of the date of the final order in this case, the respondent shall prepare written employment policies prohibiting unlawful discrimination based on race, national origin or any other impermissible factor under state law and shall furnish copies of the draft policies to the staff of the Human Rights Commission for review and comment;
>
> b. Within 30 days after receipt of the comments of the Human Rights Commission and after revision of the draft policies in conformance with those comments, the respondent shall adopt those nondiscrimination policies and shall then distribute a copy to all current employees;
>
> c. Within 30 days of adopting the described nondiscrimination policies, the respondent shall post appropriate notices in conspicuous places informing all employees and employment applicants that the school district does not discriminate in violation of state or federal law and that further information concerning their rights to be free from unlawful employment discrimination may be obtained from the offices of the United States Equal Opportunity Commission, the Montana Human Rights Commission or other appropriate government offices;

d. Within 120 days after the final order in this case, the respondent shall produce to the Human Rights Commission a written statement, accompanied by legal memorandum and an opinion from the respondent's attorneys, stating whether it has concluded that the district is obliged to conform to §2-18-111, MCA, and, if so, what specific hiring procedures the respondent intends to adopt in order to conform to that mandate while safeguarding the rights of current and future employees.

Dated: January 30, 1998.

_____

Terry Spear, Hearing Examiner for the
Montana Human Rights Commission
Hearings Bureau, Montana Department of Labor and Industry