

**BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY**

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<b>Kathy Carson,</b>	)	<b>Human Rights Act Case No. 9801008365</b>
Charging Party,	)	
vs.	)	
<b>City of Billings Police Department,</b>	)	
<b>Chief Dave Ward and</b>	)	
<b>Lt. Larry Reinlasoder,</b>	)	<i>Final Agency Decision</i>
<u>Respondents.</u>	)	

**I. Procedure and Preliminary Matters**

Carson filed a complaint with the department on October 31, 1997. She filed an amended complaint on November 17, 1997. She alleged that the City of Billings Police Department (“BPD”), Chief Dave Ward and Lt. Larry Reinlasoder discriminated against her on the basis of sex (female) and/or disability when they treated her less favorably than male applicants seeking the position of police officer and failed and refused to hire her as a police officer. On October 2, 1998, the department gave notice Carson’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties mutually agreed to permit the department to retain jurisdiction of this case for more than 12 months after the complaint filing. On January 11, 1999, the hearing examiner granted Carson’s motion to amend her complaint to add a claim of discrimination based on marital status.

The hearing convened on May 17, 1999, in Billings, Yellowstone County, Montana. Carson was present with counsel Timothy C. Kelly. Respondents were present with counsel Alan J. Hall. The hearing examiner excluded witnesses on Carson's motion. Witnesses called by Carson were Dorothy Clark, Chad Philippi, Chris Simpson, Larry Reinlasoder, Dave Ward and Kathy Carson. Witnesses called by respondents were Mike Schieno and Dave Ward. The hearing examiner admitted the deposition testimony of Seth Weston due to his unavailability. Attached to this decision is the exhibit docket.<sup>1</sup> Hearing proceeded on May 17, 18, 19, 20, 21 and 22, 1999. The parties gave their telephonic closing arguments on May 26, 1999.

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<sup>1</sup> The hearing examiner sealed some of the exhibits, and some of the testimony, excluding those portions of the hearing record and file from the public record, to protect the privacy of non-parties. The exhibit docket identifies sealed exhibits. The hearing record identifies sealed portions of testimony. This decision does not include designation of sealed versus unsealed portions of the record.

## II. Issues

The legal issue is whether respondents illegally discriminated against Carson in employment because of her sex, marital status, disability or association with persons having disabilities. A full statement of the issues appears in the final prehearing order.

## III. Findings of Fact

1. Carson is a resident of Yellowstone County, Montana, and an unmarried woman. She graduated from high school in Billings, Montana. Her parents still reside in Billings. She entered the United States Army in 1987, serving in Germany and Saudi Arabia. She trained as a Hawk missile crewmember. Her service in the Gulf was in security operations (intelligence). She completed the military prep academy (prep for West Point) then voluntarily withdrew from West Point after two months. She decided the military was not her career, and turned instead to a career in law enforcement. She completed her enlistment in 1991, with an honorable discharge. Final Prehearing Order, "Facts and Other Matters Admitted," par. 1; testimony of Carson.

2. Carson attended Campbell University (North Carolina) as an undergraduate in 1991-92. She attended Methodist College, also in North Carolina, in 1992. She completed basic law enforcement training at Fayetteville Technical Community College in 1992. She worked as a reserve deputy with the Hoke County, North Carolina, Sheriff's Department for approximately eight months. In 1993, she moved back to Montana, to complete her undergraduate schooling and seek law enforcement work. She joined the Yellowstone County Sheriff's reserve in May 1993 as a volunteer reserve deputy. She completed reserve basic training in August 1993. Testimony of Carson; Exhibit KC-1.

3. At all times pertinent to this case, Carson's parents suffered from physical and mental impairments that substantially limited their major life activities. Her father suffered from heart problems and post-surgical back problems. He also had skin grafts resulting from a power-line accident in 1983. He was also an alcoholic who suffered from major depression. Carson's mother suffered from asthma and depression, post-surgical back and neck problems and fibromyalgia. Testimony of Carson.

4. The City of Billings Police Department (BPD) is a law enforcement agency of the City of Billings, Montana. At all times pertinent to this case, the individual respondents resided in Yellowstone County, Montana. Dave Ward was chief of BPD, and made hiring decisions for BPD. Larry Reinlasoder was a

BPD Lieutenant in charge of recruitment, from initial announcements of vacancies through eliminating applicants at each stage of the process, to presenting the final hiring list, with his recommendations, to Ward. Final Prehearing Order, “Facts and Other Matters Admitted,” par. 2; testimony of Reinlasoder and Ward.

5. At all times pertinent to this case, BPD maintained written department directives addressing its recruitment and selection processes for law enforcement officer applications. Reinlasoder considered these directives “guidelines” rather than requirements. He interpreted them according to the particular situation before him at any given time. Testimony of Reinlasoder; Exhibits RE and RF.

6. At all times pertinent to this case, BPD required applicants for law enforcement officer jobs to submit timely and complete applications. Included in the information BPD required applicants to submit was information about the applicant’s marital status.<sup>2</sup> BPD still requires submission of this information. Each time BPD advertised openings, it identified a specific deadline for submission of applications. BPD had a written department directive setting a deadline for submission of applications. Dorothy Clark, City of Billings records custodian, testified that BPD did not hire a prospective officer without a completed application and did not hire late applicants. Testimony of Clark and Reinlasoder; Exhibits B, RG and RE.

7. At all times pertinent to this case, BPD required applicants for law enforcement officer jobs to submit to psychological screening. BPD used Stanard and Associates, who interpreted the results of the psychological test used. Stanard reported its interpretations in simple terms, giving BPD recommendations as “yes” (“do hire”), “no” (“do not hire”) or “borderline” (at least sometimes with a “yes” or “no” indicating how “borderline” the score was). Reinlasoder had some concerns about relying upon the results, and about the costs of the testing. BPD, at Reinlasoder’s recommendation, began to use Dr. Richard Agosto, a local psychologist, to evaluate borderline cases and some “do not hire” recommendations. Reinlasoder made the decisions about when to use this further evaluation. Reinlasoder later switched to Agosto for initial psychological tests. By written directive and by practice, BPD required the psychological test before selecting applicants for conditional

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<sup>2</sup> Reinlasoder specifically admitted this practice while testifying about the application of Kera Schleicher. Later in his testimony, he attempted to qualify his testimony, stating that BPD did not made inquiry about marital status prior to employment, testifying that prior to employment, “We just ask for a marriage certificate.” Reinlasoder did not testify to any procedure to exclude marital status information from the application files BPD utilized in making hiring decisions.

job offers. The written directives governing selection did not at any time identify the option of obtaining this further evaluation. Testimony of Reinlasoder; Exhibits R-4 and RF.

8. In August 1993, Carson applied with BPD to become a police officer. She met the training and physical requirements. She provided the standard personal history statement BPD required as part of the investigation of a candidate's background. The personal history statement elicited information about her marital status, emotional and physical health, marital history, children, parents and siblings. Carson did not pass the police commission panel interview phase of the application process. BPD closed the applications of candidates who failed the panel interview phase. BPD notified Carson in writing that it had rejected her application, and stated the reason why. BPD closed and retained Carson's application file, including information about her marital status, emotional and physical health, marital history, children, parents and siblings. Testimony of Dorothy Clerk (records custodian), Reinlasoder and Carson; Exhibit KC-1.

9. In June 1994, Carson obtained her B.S. from MSU-Billings in sociology, with a minor in psychology. She continued to seek employment in law enforcement. In July 1994, she took a position with the Great Falls Police Department as a probationary officer (a new hire). She then resigned from the Yellowstone County Sheriff's Reserve, where she had served as a part-time crime prevention coordinator. In December 1994, she obtained her legal equivalency certification from the Montana Law Enforcement Academy in Bozeman. Testimony of Carson; Exhibits KC-1.

10. Carson still wanted a job in Billings, where her family lived. In July 1996, she obtained an information packet to apply again with BPD. The packet included the requirement that each applicant deliver the completed application documents by July 26, 1996. According to the description of qualifications in the packet, BPD required a high school degree, although it preferred a minimum of two years of college. BPD also preferred P.O.S.T. (Peace Officers Standards and Training) certification. The packet also stated that before an applicant received an offer of conditional probationary employment, the applicant had to complete personality inventory tests and receive a "do hire" recommendation.<sup>3</sup> Testimony of Carson; Exhibit B.

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<sup>3</sup> The vacancy notice published in late June and early July indicated that applicants selected for a conditional offer must pass psychological and medical examinations. Although Carson obtained the vacancy notice (sent to law enforcement in Montana and Wyoming), it was not a part of the application packet. Testimony of Ward and Carson; Exhibit B (last page).

11. In July 1996, Carson timely applied with BPD to become a police officer. At the time her application, she met all the qualifications as set forth in the vacancy notice and application packet. She passed all required written and physical tests. She had completed her probationary period and was a senior patrol officer with the Great Falls Police Department. Her Great Falls Police Department evaluations were above standard. She had a four-year college degree, two years of full-time police experience and her prior experience in reserve duty in Montana and North Carolina. She had P.O.S.T. certification. Final Prehearing Order, "Facts and Other Matters Admitted," paras. 3 and 4; testimony of Reinlasoder and Carson; Exhibits C and KC-1.

12. On August 13, 1996, Ward wrote to Anne MacIntyre, administrator of the Montana Human Rights Commission's staff, responding to an inquiry about BPD's efforts to recruit in accord with equal opportunity policy under the Governmental Code of Fair Practices. Ward stated that the City of Billings reviewed personnel practices on an on-going basis to ensure compliance with state and federal hiring laws and equal employment opportunity for all applicants. He stated that "starting with the most recent group of applicants, no background investigation will be done or medical examination performed until, and unless, there is a conditional offer of employment offered." He acknowledged that in August 1995 BPD had "significant underutilization" of females as police officers. Ward stated that BPD was "fully compliant with provisions of 49-3-201." BPD's seniority lists reflect, in 1996, one female officer out of 90 officers. Exhibits N and SL.

13. Carson was among the BPD applicants granted an interview with the Billings Police Commission in the fall of 1996. She received a passing score in her Police Commission interview. She received a "do hire" recommendation on the written psychological test given in September 1996. She was the only female finalist for BPD officer in October 1996. Final Prehearing Order, "Facts and Other Matters Admitted," paras. 3 and 4; testimony of Reinlasoder and Carson; Exhibits C and RW.

14. BPD combined Carson's 1993 application file with her 1996 application file. All the information BPD obtained in 1993 was available to Reinlasoder when he made his hiring recommendations to Ward. All the information BPD obtained in 1993 was available to Ward when he made hiring decisions about Carson in 1996. Included were letters of recommendation from Yellowstone County Sheriff Maxwell and Hoke County Sheriff Byrd. Testimony of Reinlasoder and Ward; Exhibits KC-1, E and O.

15. In fall 1996, Reinlasoder and Ward knew that budget problems of the City of Billings might lead to some reductions in the openings for sworn

peace officers. Reinlasoder never advised Carson of this possibility. Testimony of Reinlasoder and Carson.

16. On October 2, 1996, BPD advised all applicants approved to continue in the BPD hiring process after the commission interviews, including Carson, that the “next phase” of the process was background investigations. BPD obtained personal inquiry waivers and authorizations to release information from the successful applicants. BPD, in its letter notifying the eligible applicants of the background investigation phase, told the applicants that BPD had eight current vacancies. Final Prehearing Order, “Facts and Other Matters Admitted,” par. 6; testimony of Reinlasoder and Carson, Exhibits KC-1 and 6 (also identified as exhibit C2).

17. BPD conducted a background investigation of Carson and other eligible applicants in October 1996, before making any conditional offers of employment. During the background investigation of Carson, BPD officers used personal reference questionnaires to solicit information from Carson’s references. The information sought included questions about the applicant’s family and whether the applicant had any chronic disabilities or illnesses. BPD asked Carson and other applicants about their marital status. BPD may have interviewed the spouses of some applicants who were at the Law Enforcement Academy during the selection process in 1996 and 1997. Testimony of Ward and Carson; Exhibits E and 6 (also C-2).

18. On October 11, 1996, during the background investigation of Carson, BPD Sergeant Hinkel provided negative comments about Carson in response to a memo of Reinlasoder. BPD destroyed the Reinlasoder memo, and any other documents soliciting information from BPD officers about Carson. Hinkel stated that BPD had responded to “over 50” calls to the home of Carson’s parents “over the past several years,” and described an incident in which Carson was outside her parents’ home with a dog and a handgun, looking for a prowler. Hinkel stated that “he can see problems with [Carson] wanting to focus on stakeouts or whatever, when her mom is having problems with medications” and stated his concerns about “what kind of problems are going to develop in the future if [Carson] is hired.” BPD placed the information in Carson’s application file, and Reinlasoder discussed it when making hiring recommendations to Ward. Ward had the information when he made hiring decisions about Carson in 1996. Testimony of Reinlasoder and Ward; Exhibits KC-1 and E.

19. Carson recalled the incident, although she could not place a date upon it. She was visiting her parents in Billings when she heard someone outside the residence break a sprinkler on the lawn. Unaware of any call to the

police, Carson took the leashed dog outside, with a gun she owned (not her police service weapon) for protection. A detective drove up in front of the residence, and Carson put down her weapon as he drove up to the residence. The entire incident took less than three minutes. BPD made no inquiries to Carson regarding the incident before she filed her Human Rights complaint. Testimony of Carson.

20. On October 18, 1996, during the background investigation of Carson, BPD Officer Keyes, who was not trained in BPD's current practice for background investigations, obtained negative comments about Carson from Detective Mike Schieno and Officer Seth Weston, members of the Yellowstone County Sheriff's Office. According to Keyes, Schieno and Weston claimed to be very familiar with Carson because they coordinated the Sheriff's reserve program. According to Keyes, Schieno said that because Carson was opinionated, a troublemaker, vocal against the establishment and not a "team type player," the Sheriff's office did not hire her when it had an opening. According to Keyes, Weston agreed. According to Keyes, neither man would recommend Carson for a position with BPD. BPD placed that information in Carson's application file. Reinlasoder called Schieno or Weston about the information in the memo. Reinlasoder left the memo in the application file after the telephone conversation or conversations, with a yellow post-it note attached listing many of the comments from the memo. Reinlasoder discussed the memo while providing hiring recommendations to Ward. Ward had the information when he made hiring decisions about Carson in 1996. BPD made no inquiries to Carson regarding the negative comments until after the 1996 hiring decisions were complete. Testimony of Reinlasoder and Ward; Exhibits KC-1 and E.

21. Weston had no contact with Carson for over two years between her departure from the Sheriff's reserve and BPD's contact with him. He was the reserve coordinator for the Sheriff's Office from January 1994 until 1996. As coordinator, he did not evaluate reserve officers. Schieno did not become reserve coordinator until 1996, after Carson had left the reserves. Deposition testimony of Weston.

22. Schieno had conversations with Carson while she was in the Sheriff's reserve. She rode with him on patrol one or more times. He never supervised her, evaluated her or coordinated the reserve while she was in the reserve. He considered Carson competent, but based on conversations with other officers he thought Carson had a bad attitude and that she thought she knew more than she did. Schieno had no contact with Carson for over two years after she left the Sheriff's reserve before Keye's contact with him. Testimony of Schieno.

23. On October 18, 1996, during the background investigation of Carson, BPD detective Ballantyne provided negative comments on Carson, attributed to an anonymous Great Falls Police Department officer. According to Ballantyne, the anonymous source reported that Carson had claimed to have a “vision” about the whereabouts of a missing child. Ballantyne reported that according to the anonymous source, Carson shared her “vision” with other officers, who then had to decide whether to ignore her information or explain to the residents why they sought to look through the house. BPD placed the information in Carson’s application file. Reinlasoder discussed the information while providing hiring recommendations to Ward. Ward had the information when he made hiring decisions about Carson in 1996. BPD made no inquiries to Carson regarding the negative comments until after the 1996 hiring decisions were complete. Testimony of Reinlasoder and Ward; Exhibit E.

24. On October 22, 1996, BPD made a conditional offer of employment to Albert Del Vecchio. Del Vecchio declined the offer. Testimony of Reinlasoder; Exhibit AD.

25. Del Vecchio timely applied for the 1996 hiring process. He had community college training (no degree) in mechanics while in the Air Force. He had completed basic law enforcement training. He was P.O.S.T. certified. He had ten years full-time law enforcement experience with police departments in Nevada and California. Del Vecchio’s BPD application file included a background information “Personal History Statement” that on its face solicited information about the applicant’s family and whether the applicant had any chronic disabilities or illnesses. BPD asked Del Vecchio his marital status (married) while interviewing him. He received a “do pass” on the psychological test. Del Vecchio had a 3-day disciplinary suspension on his record as a peace officer, and Reinlasoder told Ward about the suspension during the hiring decision process. Testimony of Reinlasoder and Ward; Exhibits AD and RW.

26. In late October 1996, before BPD made further hiring decisions but after BPD obtained most of the information about eligible applicants, Reinlasoder made a recruiting trip to the Montana Law Enforcement Academy. Reinlasoder encouraged potential applicants at the Academy to make immediate applications. BPD treated at least some of those immediate applications, from male applicants, as part of the pool of eligible applicants for hire in 1996, contrary to the descriptions of the process included in the application materials and contrary to the procedures outlined in the department directives on recruitment and selection. Testimony of Reinlasoder; Exhibits RE and RF.

27. At the beginning of November 1996, Ward made hiring decisions regarding the eligible applicants. Ward and Reinlasoder discussed the eligible applicants. Ward decided, consistent with Reinlasoder's recommendations, not to consider Carson because of the negative information obtained during the background investigation. During November 1996, BPD made conditional offers of employment to Scott Conrad, Steve Swanson, Christopher Simpson, Jason Sery and Pat Curry, in accord with Ward's hiring decisions. All five hires, like Carson, received commission interview scores (after adjustment for applicable veteran's preferences) averaging above 70. Testimony of Reinlasoder and Ward; Exhibits CS-1, R-4, RZ, SC and V.

28. On November 12, 1996, Reinlasoder wrote a memo to Ward regarding the hiring process, and reporting on the current applicants. In the memo, Reinlasoder emphasized the problems caused when BPD hired applicants without P.O.S.T. certification. Reinlasoder did not consider the eligible applicants a "strong group." Reinlasoder also reported that he had contacted Captain Adcox of the Great Falls Police Department to discuss the applicant pool. Reinlasoder did not discuss Carson with Adcox. He did not include Carson on the list of applicants. As of November 12, 1996, BPD did not intend to undertake further consideration or investigation of Carson as an applicant. Testimony of Reinlasoder, Exhibit R-4.

29. BPD did not tell Carson she had been excluded from the list of eligible applicants, contrary to its own written directive regarding officer selection, which stated that unsuccessful applicants would be notified of their status. The directive also stated that if their disqualification resulted from "a single test, examination, interview or *investigation*, they are informed in writing of the specific reason they were rejected" (emphasis added). Testimony of Reinlasoder and Ward; Exhibits CS-1 and RF.

30. Scott Conrad timely applied for the 1996 hiring process. He had a two-year degree in applied science from Sheridan College. He had completed basic law enforcement training. He was P.O.S.T. certified. He had eight months experience with the Laurel Police Department as a police officer, and three months experience with the Musselshell County Sheriff's department as a deputy sheriff. Conrad's BPD application file included a background information "Personal Reference Questionnaire" completed in October 1996 by the Laurel Police Department that omitted questions about his marital status, marital history, children, parents and siblings, but included inquiries about emotional and physical health. BPD asked Conrad his marital status (single) while interviewing him. He received a borderline "do pass" on the psychological test. BPD hired him effective November 12, 1996. Testimony of Reinlasoder and Ward; Exhibits RW, SC, X18 and V.

31. During the application process in 1996, Conrad told BPD that he had been arrested as a minor in possession at age 18 and at age 20. Conrad did not disclose that he had been arrested in 1994. BPD did not find any records of that arrest, although Carson was later able to discover records of that arrest. Reinlasoder was not concerned about Conrad's failure to disclose that arrest. Testimony of Reinlasoder and Carson; Exhibits RF and SC.

32. Steve Swanson did not timely apply for the 1996 hiring process (deadline July 26, Swanson application dated July 30). He had a high school diploma and no college study. He had completed basic law enforcement training. He was not P.O.S.T. certified. He had almost two years experience as a police officer with the Havre Police Department. Swanson's BPD application file included a background information "Personal Reference Questionnaire" completed by the Havre Police Department in October 1996 that omitted questions about his marital status, marital history, children, parents and siblings, but included inquiries about emotional and physical health. BPD asked his marital status (single, getting married in six months) while interviewing him. He received a "do pass" recommendation on the psychological test. BPD hired him effective November 12, 1996. Testimony of Reinlasoder and Ward; Exhibits B, RW, X17 and V.

33. Christopher Simpson did not timely apply for the 1996 hiring process. BPD recruited his application at the Montana Law Enforcement Academy in October 1996. His application file contained no documentation of any background investigation. He had two years of college study with no degree. He had completed basic law enforcement training. He did not participate in the physical ability testing with the timely applicants. He was not P.O.S.T. certified. He had 18 months experience as a peace officer with the Poplar Police Department and four months experience in the Beaverhead County Sheriff's reserve training course. Simpson included in his application materials the fact that he was married and had a child. BPD asked Simpson during the application process whether he suffered from any chronic disabilities or emotional or mental problems. During the commission interview, Simpson responded to a question about how his family "felt" about his career in law enforcement by stressing the importance of family. BPD confirmed telephonically that Simpson received a "do hire" recommendation on the psychological test, and obtained written confirmation after hiring him. BPD hired him effective November 12, 1996. Testimony of Simpson, Reinlasoder and Ward; Exhibits B, CS-1, RN, RQ, X16 and V.

34. Jason Sery timely applied for the 1996 hiring process. He had almost three years of college study, and expected to obtain a B.S. in December 1996 from M.S.U.-Billings. He was not P.O.S.T. certified. He interned with

BPD in the summer of 1996, and had no other law enforcement experience. He had almost two years service in the Marine Corp. reserves, with a medical discharge for a knee injury. His application file contained no documentation of any background investigation. His application file contained medical information from the Billings Clinic about his knee, dated July 9, 1996. BPD confirmed telephonically that Sery received a borderline “do hire” recommendation on the psychological test, and obtained written confirmation after hiring him. BPD hired him effective November 12, 1996. Testimony of Reinlasoder and Ward; Exhibits JS-1, RN, X18 and V.

35. Pat Curry did not date his application with BPD. His name appeared on the physical ability test scores with the timely applicants, but so did Swanson’s name, so that listing did not prove Curry timely applied.<sup>4</sup> BPD had an incomplete application file, from which the date of his application was missing. His application file contained no documentation of any background investigation. He had a B.S. from the University of Montana. He was not P.O.S.T. certified. He had no law enforcement experience. BPD confirmed telephonically that Curry received a “do hire” recommendation on the psychological test, and obtained written confirmation after hiring him. BPD hired him effective November 12, 1996. Testimony of Clark, Reinlasoder and Ward; Exhibits RN, RQ, X18 and V.

36. Carson matched or exceeded the qualifications of the applicants BPD hired in November 1996. Had BPD ignored or resolved the negative background information questions about Carson before the November hiring decisions, BPD would have offered Carson a position.<sup>5</sup>

37. Carson called Reinlasoder on December 2, 1996, and asked about the status of her application. In response to that inquiry, Reinlasoder told Carson that BPD had not placed her on the eligibility list at that time because of negative information in the background investigation. Reinlasoder also asked Carson if she had a reference from the Yellowstone County Sheriff’s Department. Carson was surprised by the question, because she had submitted a recommendation letter from Sheriff Maxwell. Relying upon Reinlasoder’s statements, Carson believed the background investigation was continuing. She

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<sup>4</sup> Had Curry’s participation in the physical ability testing on August 3, 1996, been determinative of whether his application was timely, the appearance of his name on the list of scores would still be inconclusive. BPD listed the passing scores first, followed by the failing scores. Curry’s name appears at the very end of the list, after the last of the failing scores, even though his score passed. A note also appears in written test scores that Curry failed the physical ability testing. Exhibit RR.

<sup>5</sup> The cumulative weight of the testimony, exhibits and uncontested facts cited for paragraphs 1-32 support this finding.

requested the opportunity to support her candidacy with additional favorable information from her superiors at law enforcement agencies where she worked. She did provide that information to Reinlasoder on December 4, 1996. As of December 2, 1996, Carson believed BPD was still considering whether to add her to the list of eligible candidates. She did not have, at that time, sufficient information about the “negative background information” to discover the basis upon which BPD had considered her ineligible. Final Prehearing Order, “Facts and Other Matters Admitted,” par. 5; testimony of Reinlasoder and Carson; Exhibit P.

38. On December 2, 1996, Reinlasoder also offered Carson an opportunity to undergo further psychological evaluation, from Agosto. Agosto had been Carson’s professor at MSU-Billings. Although she was embarrassed by the referral to her professor, Carson correctly believed that unless she accepted the “offer” from Reinlasoder, BPD would not consider her application further. She agreed to the evaluation. On December 4, 1996, BPD confirmed that Agosto would see Carson. Testimony of Reinlasoder and Carson.

39. BPD sent four applicants to Agosto in December 1996. Three male applicants, Robert Vickery, Steve O’Brien and Michael Broast had all received “do not hire” recommendations from Stanard. Carson was the fourth applicant BPD sent to Agosto. On December 24, 1996, Agosto reported to BPD that although Vickery’s prior scores may have been valid, Vickery now had “achieved some level of personal stability” and that BPD could, in effect, consider Vickery a “do hire” in terms of psychological profile. Agosto considered O’Brien a potential “do hire” but expressed some reservations regarding O’Brien. Agosto made some positive comments about Broast, without endorsing Broast as a “do hire.” Agosto found Carson to be a qualified and fit officer applicant. Agosto named Carson and Vickery as the “top two” applicants, writing that both “should prove to be very good law enforcement officers should they be selected.” Agosto reiterated his reservations about O’Brien and Broast before concluding that BPD need not eliminate any of the four applicants on the basis of psychological test results, but could consider all four on the basis of all information available. Testimony of Reinlasoder and Carson; Exhibits RN and RO.

40. On January 5, 1997, Reinlasoder wrote to Vickery and Carson, notifying them that both were now on the 1997 hiring eligibility list. This meant neither had to prepare a new application and start the process from the beginning. Carson reasonably believed at this time that BPD would fairly consider her for openings that already existed for new officers. She had some reservations about the process, because she thought she was the only qualified carry-over from the original 1996 process. BPD, according to Reinlasoder, had

hired or disqualified all of the other applicants. Reinlasoder told Carson that because of a lack of qualified applicants, BPD was reopening the hiring process. Although she knew from Reinlasoder that some negative information was in her file, she did not have sufficient information about the “negative background information” to discover the basis upon which BPD had previously left her off of the eligibility list. Testimony of Reinlasoder and Carson; Exhibits 16 and 17.

41. On February 7, 1997, as it had expected, BPD received a memo from the City Administrator implementing a hiring freeze on all full-time positions. Because he understood that the freeze might be temporary, and expected some additional funds for new hires, Reinlasoder continued processing applications. Testimony of Reinlasoder; Exhibit RD.

42. On February 15, 1997, Carson, while working as a police officer in Great Falls, was involved in an altercation with a female prisoner at the Cascade County jail. Final Prehearing Order, “Facts and Other Matters Admitted,” par. 7; testimony of Carson.

43. On February 24, 1997, Carson’s father called her in Great Falls. He told her that he was at his home in Billings, had taken an over-dose of pills and was saying his “last goodbye.” Carson called BPD. BPD made a standard report of her call, and of the results of the police visit to the home. BPD placed a copy of this confidential criminal justice record (two pages) in Carson’s application file. Reinlasoder and Ward had the information during hiring decisions about Carson in 1997. BPD never made inquiries to Carson regarding the incident. Testimony of Reinlasoder and Carson; Exhibit KC-1.

44. Because of the February 15, 1997, altercation with the prisoner at the Cascade County Jail, the Great Falls Chief of Police suspended Carson without pay for one day, February 28, 1997. The *Great Falls Tribune* published two articles regarding the suspension, on or after the date of the suspension. Final Prehearing Order, “Facts and Other Matters Admitted,” par. 8; testimony of Carson; Exhibits 19 and 20.

45. On March 14, 1997, Carson wrote to Reinlasoder. She wrote the letter to maintain contact with BPD regarding her application because it had been over a month since she had any contact with BPD. She advised him that she had not obtained a SWAT position with the Great Falls Police Department. Since she had earlier advised BPD of her efforts to join the SWAT team, she considered this appropriate information to provide. Carson had also heard that due to budget constraints, BPD had not obtained seven new officer openings it sought, and she mentioned this in her letter. She did not mention her suspension. Testimony of Carson; Exhibit RH.

46. On March 14, 1997, BPD made conditional offers of employment, effective April 7, 1997, to Randy Helderop, Robert Ellison, Mathew Nickoloff, Kera Schleicher, Amy Knisley, Dan McDaid and Robert Vickery. Reinlasoder did not consider hiring Carson, despite the notice of eligibility BPD had sent to her. Testimony of Reinlasoder; Exhibits AK, DM-1, HR, KS, MN, RE-1, RV-1 and V.

47. Randy Helderop applied December 2, 1996. His application file contained documentation of a background investigation that did not seek information about his family, whether he had any chronic disabilities or illnesses, or his marital status. He had a B.S. in Criminal Justice from Boise State University and was attending MSU-Billings classes in psychology. He had completed basic law enforcement training. He took physical ability testing in December when he applied. He was P.O.S.T. certified. He had two weeks experience as a deputy with the Yellowstone County Sheriff's Department, and three months experience as a security officer at St. Vincent Hospital in Billings (before obtaining the deputy job). BPD had no record of Helderop passing the psychological test.<sup>6</sup> Testimony of Reinlasoder and Ward; Exhibits HR and V.

48. Robert Ellison applied December 7, 1996. His background investigation included disclosure of administrative punishment while in the Air Force for dereliction of duty (watching TV while assigned security on a missile site). He completed basic law enforcement training as a member of the Montana Highway Patrol. His file materials contain no record of physical ability testing. He was P.O.S.T. certified. He had four years experience as a highway patrol officer, and over ten years experience as an Air Force security specialist. BPD did not ask Ellison during the application process whether he suffered from any chronic disabilities or emotional or mental problems. BPD presented no evidence that Ellison took psychological testing. Testimony of Reinlasoder and Ward; Exhibits RE-1, X-12 and V.

49. Mathew Nickoloff applied December 19, 1996. His application file documented a background investigation that disclosed some past misconduct with an employer, and some past alcohol-related problems and offenses resulting in cessation of drinking some years before. Nickoloff had a B.S.Ed. in History from MSU-Billings, military training (infantry and O.C.S.) and experience, including infantry service in the Gulf War. He had not completed basic law enforcement training. He did not participate in physical ability testing. He was not P.O.S.T. certified. He had no experience as a peace

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<sup>6</sup> Included in proposed exhibits, but never offered or admitted, was exhibit X-13, application materials involving Trevor Helderop, a BPD officer hired in 1993. Neither party presented the corresponding exhibits for Randy Helderop.

officer. Agosto grouped Nickoloff among the highest scoring applicants on the psychological testing.<sup>7</sup> Testimony of Reinlasoder and Ward; Exhibits MN, RP, X-11 and V.

50. Kera Schleicher applied December 14, 1996. Her application file contained documentation of a background investigation. She had a B.A. in law enforcement from St. Cloud University after some previous study at the University of North Dakota. She had completed basic law enforcement training. BPD's application materials do not indicate that she participated in the physical ability testing. She was P.O.S.T. certified. She had three and a half years experience as a parole officer, juvenile detention officer and victim's advocate in the Dakotas. Agosto grouped her among the middle scoring acceptable applicants on the psychological testing. Testimony of Reinlasoder and Ward; Exhibits KS, X10 and V.

51. Amy Knisley applied December 19, 1996. Her application file included a "personal reference questionnaire" sent to an employer that included questions about the applicant's family and whether the applicant had shown any evidence or indication of emotional instability. She had an associate degree in law enforcement from Spokane Community College. She completed a basic training course with the Kootenai County Sheriff's Department (Coeur d'Alene, Idaho), but had not completed the law enforcement academy training in Idaho. BPD's application materials do not show that Knisley participated in the physical ability testing. She was not P.O.S.T. certified. She had six months experience as a seasonal deputy with the Kootenai County Sheriff's Department, and one years experience as an intern with the Spokane Police Department. Agosto evaluated Knisley, but reported that she was so defensive in her responses to the tests that he could not reliably interpret her scores. Testimony of Reinlasoder and Ward; Exhibits AK, RP, X-9 and V.

52. Dan McDaid applied on July 14, 1996. His application file contained no documentation of any background investigation. He had a B.S. in Sociology from MSU-Billings. He had not completed basic law enforcement training. He participated in the physical ability testing and interviewing with Carson and the other 1996 applicants. He was not P.O.S.T. certified. He had no prior law enforcement experience, except that during the second hiring process (culminating in the 1997 hiring decision) he was in an internship with BPD. His military experience as a tank crewman included Gulf War service.

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<sup>7</sup> Included in the exhibits admitted is information about Nickoloff's subsequent performance with and departure from BPD. Subsequent performance is not relevant to the hiring decisions, and plays no part in this decision.

On November 14, 1996, Stanard gave McDaid a “do not hire” evaluation. On November 20, 1996, BPD gave McDaid written notice it would not consider his application further, but Reinlasoder encouraged him in the same letter to reapply immediately, so his 1996 application and physical ability test scores could be used as part of a new application. On March 10, 1997, Agosto grouped him among the bottom scoring acceptable applicants on the psychological testing. Testimony of Reinlasoder and Ward; Exhibits DM-1, RN, RP, X-8 and V.

53. Robert Vickery applied on July 7, 1996. His application file contained documentation of a background investigation in October 1996, and a single paragraph statement dated March 13, 1997 (the day before his conditional offer of employment), that BPD had conducted a background investigation. He had four years of college (Bible study, according to his application) with no degree at The Master’s College (Newhall, California) and two years of study in communications at MSU-Billings. He completed the basic law enforcement training at the Montana Academy in October 1996. He participated in the physical ability testing with Carson and the other 1996 applicants. He was P.O.S.T. certified by the time of his 1997 hiring decision. He had no prior experience with law enforcement. On November 14, 1996, Stanard gave Vickery a “do not hire” recommendation. Reinlasoder knew that Vickery had completed the MLEA basic course. Instead of rejecting Vickery and encouraging him immediately to reapply as he did McDaid, Reinlasoder sent Vickery to Agosto. [See finding No. 39.] Testimony of Reinlasoder and Ward; Exhibits RN, RP, RV-1, X-7 and V.

54. On March 28, 1997, as part of her continuing effort to improve her prospects for hire with BPD, Carson wrote to Sheriff Maxwell, seeking additional information about the “negative recommendation” from the Yellowstone County Sheriff’s Department she believed, based on her telephone conversations with Reinlasoder, BPD had received. Maxwell responded on April 1, 1997, indicating his ignorance of any “negative recommendation” and asking for identification of the BPD contact who reported the recommendation. Testimony of Carson; Exhibits KC-6 and KC-7.

55. After she received Sheriff Maxwell’s April 1 response, Carson called Reinlasoder. She wanted to ascertain the status of her employment application. She also may have wanted an opportunity to discuss Maxwell’s letter with Reinlasoder. Reinlasoder told her he had “heard a rumor” about a suspension by the Great Falls Police Department. He asked her if BPD needed to conduct a further background investigation. Reinlasoder did not ask Carson for the particulars of the suspension. Carson did not volunteer them. Carson told Reinlasoder that BPD should do what it deemed appropriate. Reinlasoder

did not tell Carson that BPD had hired seven officers effective April 7, 1997. Testimony of Reinlasoder and Carson.

56. After her conversation with Reinlasoder in April 1997, Carson suspected that BPD would never hire her. However, to her knowledge she was still a qualified candidate for hire by BPD. Unlike the 1993 hiring process, in which she had received written notification of her disqualification and the reason for it, she had not received any notice that BPD had removed her name from the 1997 eligible hire list. After this conversation with Reinlasoder, Carson did not receive any further correspondence or inquiry from BPD. Although she suspected BPD would not hire her, she had no knowledge of BPD taking any adverse employment action regarding her eligibility for hire. Testimony of Carson.

57. During April 1997, Reinlasoder contacted Captain Adcox of the Great Falls Police Department and asked Captain Adcox if GFPD had suspended Carson. She referred him to the newspaper articles. Reinlasoder verified the suspension. His notes of his conversation with Adcox indicate the newspaper articles appeared "1 ½ mos ago." Reinlasoder discussed this suspension with Ward. They decided not to consider Carson for any further openings and not to tell Carson of that decision. Final Prehearing Order, "Facts and Other Matters Admitted," par. 9; Testimony of Reinlasoder and Ward; Exhibit 18.

58. On April 17, 1997, BPD offered Kerry Pribnow a job as an officer, effective April 28, 1997. Testimony of Reinlasoder and Ward; Exhibits KP and V.

59. Kerry Pribnow applied with BPD on July 9, 1996. His application file contained summaries stating that no negative information appeared during the background investigation. He had a B.S. in Sociology from Montana State University--Bozeman. He had some law enforcement schooling both through MLEA (while a Drill Instructor for the Swan River Correctional Training Center) and in his current job in Probation and Parole. He had not completed basic law enforcement training. He participated in the physical ability testing with Carson and the other 1996 applicants. He was P.O.S.T. certified. He had, by the 1997 hiring decision, almost a years experience as a probation and parole officer in Billings, and three months experience in the Swan River Correctional Training Center. He emphasized his football experience, at MSU and with a professional team, and Reinlasoder considered that a strong indication of Pribnow's fitness and work ethic. There is no record of Pribnow receiving a psychological evaluation from Stanard, although at the time of his application Stanard evaluated all applicants. On March 10, 1997, Agosto

grouped him among the bottom scoring acceptable applicants on the psychological testing. Testimony of Reinlasoder and Ward; Exhibits KP, RP, X-6 and V.

60. On June 12, 1997, BPD offered a job to Terry Gauthier, effective June 30, 1997. Testimony of Reinlasoder and Ward; Exhibits TG and V.

61. Terry Gauthier applied December 17, 1996. His application file documents a background investigation. He had a B.A. in management from the University of Phoenix and had completed the Highway Patrol Academy training in Helena, Montana, and was a probationary patrolman, graduating from the Academy less than a week before his application. He was P.O.S.T. certified. He had six years as an Air Force turbine engine repair specialist and supervisor. Gauthier never took psychological testing as part of the application process. Testimony of Reinlasoder and Ward; Exhibits TG, X-5 and V.

62. On July 31, 1997, BPD formally offered Ron Walters and Cheryl Hallsted jobs effective August 18, 1997. Testimony of Reinlasoder; Exhibits CH, RW-1 and V.

63. Ron Walters applied December 19, 1996. His application file contained documentation of a background investigation. BPD asked his employer at the time if Walters had any apparent health problems. He had a B.S. in Social Science from St. John's University (Maryland). He had not completed basic law enforcement training. He had five years experience as a social worker for Child Protective Services in Billings, with prior experience as an elementary school counselor and a juvenile treatment facility counselor. He was not P.O.S.T. certified. Agosto grouped Walters among the highest scoring applicants on the psychological testing. Testimony of Reinlasoder and Ward; Exhibits RP, RW-1, X-4 and V.

64. Cheryl Hallsted applied July 18, 1996. Her application file documented background investigation. In 1997, BPD asked her about her mental and physical health and her marital and familial status. BPD asked her employer at the time if she appeared to be in good health. BPD also discovered that Hallsted first denied use of marijuana, but later admitted a single use. Hallsted also reported some NSF checks at age 17, and some instances of missing work because of hangovers. She had not completed basic law enforcement training. She participated in the physical ability testing with Carson and the other 1996 applicants. She was not P.O.S.T. certified. She had basic reserve training and ten months part-time experience with the Yellowstone County Sheriff's Reserve, and paramedic training with Big Sky Emergency Medical Service in Billings. She had worked for six years as an EMT or paramedic. On November 24, 1996, Stanard gave Hallsted a "do not

hire” recommendation on the psychological test. On November 20, 1996, BPD gave Hallsted written notice it would not consider her application further, but Reinlasoder encouraged her in the same letter to reapply immediately, so her 1996 application and physical ability test scores could be used as part of a new application. On March 10, 1997, Agosto grouped her among the highest scoring acceptable applicants on the psychological testing. Testimony of Reinlasoder and Ward; Exhibits CH, RN, RP, X-3 and V.

65. On September 17, 1997, BPD offered Kal Bedford a job effective September 29, 1997. Testimony of Reinlasoder; Exhibits KB and V.

66. Kal Bedford applied for a job on July 5, 1996. His application file documents background investigations. In both 1996 and 1997, BPD asked him about his marital status and any physical, mental or emotional problems. In 1996, BPD asked his employer about any indications of emotional instability. He had a B.A. in Political Science from George Washington University. He had completed basic law enforcement training. He participated in the physical ability testing with Carson and the other 1996 applicants. He was P.O.S.T. certified. He had two years experience as a peace officer with the Broadwater County Sheriff’s Department. On September 23, 1996, Stanard gave a borderline (do hire) recommendation to Bedford. On October 2, 1996, BPD notified Bedford that he was eligible for hire and that the background investigation would proceed. Bedford went to active duty (he was in the Navy Reserve) and was unavailable until 1997. BPD carried over his application. Testimony of Reinlasoder and Ward; Exhibits KB, R-4, RW, X-2 and V.

67. On September 23, 1997, BPD hired Chad Philippi, effective October 20, 1997. Testimony of Reinlasoder; Exhibits P-1 and V.

68. Philippi applied on June 24, 1996. He had college study (no degree) in law enforcement from Dawson Community College. He had completed basic law enforcement training. He was P.O.S.T. certified. He had 20 months full-time experience with the Glasgow Police Department as a police officer, and another years experience with the Glasgow Police Department as a part-time officer and volunteer. Philippi disclosed that he had been the subject of an internal affairs investigation in 1996, and reported that he had been cleared. In fact, the Glasgow Police Department suspended Philippi for two days without pay for a conflict with a Lieutenant of the Glasgow Police Department. BPD did not document any investigation of this suspension. Reinlasoder testified that he called the Glasgow Police Department, but was unable to obtain any confidential information regarding the matter. Philippi’s application file included a “report of present employer” that solicited

information about his health. On September 23, 1996, Stanard gave Philippi a “do not hire” recommendation after psychological testing. On September 27, 1996, BPD sent Philippi a letter notifying him that after his oral interview and personality/psychological testing, “we are unable to allow you to continue in our hiring process,” which also encouraged him to re-apply. BPD had no subsequent records of applications by Philippi. On March 10, 1997, Agosto grouped him among the middle scoring acceptable applicants on the psychological testing. Testimony of Clark and Reinlasoder; Exhibits P-1, RP, RW and X-1.

69. On October 1, 1997, Carson contacted Ward to ask why BPD had not hired her. During this heated telephone conversation with Ward, Carson concluded for the first time that not only had BPD not selected her in each of the 19 offers from October 1996 to October 1997, but that BPD would not hire her in the future. She was unable to obtain any particulars from Ward about BPD’s reasons, only that BPD hired the “best qualified” applicants. On October 1, 1997, Carson discovered, as best she was able without the investigatory tools available only after filing a complaint, both that BPD had taken multiple adverse employment actions regarding her application, and that those actions including finally rejecting her as a candidate for hire. Testimony of Carson.

70. Carson filed her first complaint in this matter on October 31, 1997, alleging Respondents discriminated against her based upon her sex. She filed an amended complaint in this matter on November 10, 1997, alleging respondents discriminated against her based upon sex and perceived disability. She filed a second amended complaint on December 28, 1998, alleging respondents discriminated against her based upon her sex, perceived disability or association with people who were disabled and marital status. Final Prehearing Order, “Facts and Other Matters Admitted,” paras. 10, 11 and 12.

71. In 1997, Carson earned \$24,160.00, or \$2,013.33 per month. She also cashed out her pension and annuities from the GFPD (which she left voluntarily in 1997). She found work with Wal-Mart in Billings, and still works there. In 1998, she earned \$29,500.00 as a Wal-Mart salaried managerial employee. In the first eight months of 1999, with a 6% pay increase effective April 1, 1999, Carson earned \$20,424.39. She continues to earn \$2,605.08 per month. Wal-Mart provides some employee benefits, but those benefits do not include overtime or retirement, and include a limited insurance benefit package. Testimony of Carson; Exhibits 41 and 43.

72. From the documents submitted, Simpson earned \$31,120.45 in 1997, taking the average weekly earnings from his November through

December pay periods, and multiplying that weekly wage (\$2,593.37) by 52.143. According to the contents of Exhibit SL, BPD's grade increases for sworn peace officers occur at one and three years. The parties did not establish that the amounts of such increases diverge from wage increases for Carson at Wal-Mart. Exhibits CS-2 and SL (1995 seniority roster, containing grade designations).

73. The difference between what Carson earned and what she would have earned had BPD hired her was \$6,960.45 in 1997. In 1998, the difference was \$1,620.45, and that loss continues, at \$4.44 per day, to the present and into the future. Through September 27, 1999, she lost an additional \$1,198.80 in earnings.<sup>8</sup>

74. Simple interest accrued on Carson's 1997 lost earnings as of September 27, 1999, at 10% per annum, for a total of \$1,566.12, accrued at \$1.907 per day. Interest on Carson's 1998 lost earnings as of September 27, 1999, totals \$196.61, accrued at \$.444 per day. Interest on Carson's 1999 lost earnings for January through September 27, 1999 totals \$44.28. Total interest accrued through September 27, 1999 is \$1,807.01.<sup>9</sup>

75. Carson suffered emotional distress resulting from learning that BPD treated her parents' disabilities as a basis for concern about her fitness, from learning that she was considered less qualified than candidates with less education, less experience and equivalent or more appropriate negative background problems. She also suffered emotional distress from BPD's repeated rejections of her for openings despite her qualifications. She did not seek professional help for emotional distress. The amount necessary to remedy her emotional distress is \$3,500.00. Testimony of Carson.

76. If BPD does not hire Carson by September 27, 2000, it will establish that it will never hire her. The loss of her future career as a BPD officer harms her. She will continue to suffer financial loss. She will continue to suffer emotional distress. She will face the loss either of a home close to her family or of her chosen career, since BPD is the largest and most lucrative career opportunity in the local area. These losses will continue into the future. The amount reasonably necessary to redress this continuing future loss is \$50,000.00 payable on September 27, 2000.

#### IV. Opinion

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<sup>8</sup> This finding consists of mathematical calculations based on findings 71 and 72.

<sup>9</sup> This finding is simply the mathematical results of findings 71, 72 and 73.

### A. BPD Illegally Discriminated Against Carson

The hearing examiner considers BPD to be the primary defendant. There is no evidence that Ward or Reinlasoder acted outside of their authority. There is no evidence that Ward or Reinlasoder intentionally acted, out of personal animus, to harm Carson. BPD is liable for the conduct of Reinlasoder and Ward. BPD has not challenged this approach to liability.

#### 1. Suspect Pre-employment Inquiries

The Montana Human Rights Act prohibits an employer from refusing employment to a person based on a prospective employee's disability, marital status or sex. §49-2-303(1)(a), MCA. The regulations of the Montana Human Rights Commission mandate careful scrutiny of an employer's intentions and conduct whenever that employer makes pre-employment inquiries into sex, marital status or disability. Any such inquiry raises "a suspicion of intent to unlawfully discriminate."<sup>10</sup> 24.9.1406(1) A.R.M.

Carson presented substantial and credible direct evidence that BPD gathered, retained and considered information about her sex, marital status, potential physical and emotional disabilities and disabilities of her family members. Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence," proving a fact without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979). In Montana Human Rights Act employment cases, direct evidence can establish the employer's adverse action and discriminatory intention. *Foxman v. MIADS*, #8901003997 (1992); *Edwards v. Western Energy*, #AHP E86-2885 (1990); *Elliot v. City of Helena*, HRC Case #8701003108 (1989).

Carson's direct evidence establishes BPD's liability unless BPD responds with substantial and credible evidence rebutting her evidence or showing a legal justification. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). To rebut this direct evidence, BPD must persuade the fact-finder that its conduct in gathering, retaining and considering illicit information played no part in its treatment of her applications. *See, e.g., T.W.A., Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *EEOC v. Alton Packaging Co.*, 901 F.2d 1148, 1150 (11th Cir. 1990); *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987); *Blalock v. Metal Trades Inc.*, 775 F.2d 703, 712 (6th Cir. 1985).

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<sup>10</sup> The only exceptions to the regulation involve affirmative action plans, required record keeping and bona fide occupational qualifications. BPD has not defended on the basis of any of these exceptions.

Witness credibility is critical to this case. Reinlasoder and Ward were the two witnesses with personal knowledge of what BPD did during the application and selection processes. While nothing in the demeanor of either witness suggested anything but honesty, both repeatedly answered questions about what BPD did with testimony about what BPD *intended* to do. The record is replete with instances of questions about acts eliciting answers about intentions.

Reinlasoder explained that in late 1996 BPD *tried* to update its personal history statement, used in background investigation interviews of applicants. The old form elicited information about marital status, emotional and physical health, marital history, children, parents and siblings. The new form omitted inquiries in many of these areas. During the late 1996 selection process BPD *tried* to train detectives to use the new form and to omit questions the law prohibited. Nevertheless, BPD failed to stop asking illegal questions, failed to stop gathering and keeping information it could not legally consider, and failed to assign background investigations only to detectives trained in the “new” approaches. These failures continued into the 1997 hiring process. Throughout the hiring process until October of 1997 (and on to the present), BPD “considered” the information it kept. This is not simply an inference the fact-finder draws from the maintenance of the illicit information in Carson’s application files. It also is the direct testimony of Reinlasoder and Ward, who admitted they knew of and discussed the information in Carson’s files.

Confronted with evidence from BPD’s files, Reinlasoder and Ward could not maintain their insistence that no illicit information was gathered, that BPD used the same information gathering process for all applicants, or that BPD consistently kept complete files of the information gathered. Instead, Reinlasoder and Ward repeatedly asserted that BPD did not *intend* to gather improper information. They testified that BPD did not *rely* upon any improper information that was gathered. Repeatedly, they stated under oath that BPD always selected the best applicants, without regard to sex, marital status or disability. In effect, they testified that although they knew of and sometimes discussed matters of sex, marital status and disability, they discounted those matters in decision-making. This testimony lacks credibility.

In one instance, counsel asked Reinlasoder if BPD, during its background investigations, asked Carson’s current and former employers whether she suffered from chronic disabilities. Reinlasoder conceded BPD “might have” done this. Reinlasoder never answered the next question, whether BPD’s policies permitted such inquiries. He replied instead, “Would it have been considered or utilized by us? If I had any type of a concern that it was not a proper question to have been asked, then I would not have utilized

the information. I would have disregarded the information.” The fact-finder can give no credence to self-serving testimony that if any of the information BPD gathered and kept is now found to be illicit, then BPD did not consider that information.

## *2. Differential Treatment*

Given the contents of Carson’s file, and the uncontroverted evidence of what BPD actually did, the testimony of what BPD *intended* and what BPD *relied upon* is not credible. In 1996 and 1997, Carson met not just the minimum standards for hire by BPD, she met or exceeded every preference of BPD--P.O.S.T. certification, law enforcement training, law enforcement experience, two years of college (she had a B.S.) and successful completion of physical and psychological testing. BPD rejected Carson repeatedly. It rejected her because of negative background information it obtained in dubious departures from its own policies and about matters illegal for it to consider. It required her to proceed with additional psychological evaluation otherwise reserved for applicants who failed the initial testing.

During this time, before Reinlasoder heard rumors of disciplinary action in Great Falls, BPD rejected Carson 13 times in favor of other applicants. BPD had negative background information on some of those other applicants. Some had applied late. Some, on this record, had not completed the application process. BPD made illegal inquiries about many of these successful applicants, ascertaining that they were married, male and without personal disabilities or disabilities in their families. BPD’s argument that it selected the “most qualified” candidates without regard to sex, marital status or disabilities is not credible. In many instances, the only appreciable differences between Carson and the successful applicants consisted of information about sex, marital status and personal or familial disabilities.

BPD then decided the disciplinary action in Great Falls was a sufficient basis again to reject Carson in all subsequent hirings. Nevertheless, BPD continued to hire other applicants with negative background information, such as disciplinary actions or arrests. BPD did not disregard the illegal information it obtained about Carson. Instead, it decided not to hire her then kept seeking new reasons for the decision it had already made. It continued to treat her differently than other applicants, with no sufficient reason aside from her sex, marital status, disabilities (purported emotional problems) and association with disabled persons.

## *3. Disability Discrimination*

Both the Montana Human Rights Act and the Americans with Disabilities Act define disability in the same terms. §49-2-101(19) MCA *and* 42 U.S.C. §12102(2). The department properly relies upon federal guidelines when the reasoning and policy of the Human Rights Act coincides with federal law. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. MDU Co.*, 198 Mont. 56, 643 P.2d 841 (1982). The Americans With Disabilities Act prohibits "discriminat[ion] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees[.]" 42 U.S.C. §12112(a). The ADA also provides that "[t]he prohibition against discrimination as referred to in subsection (a) of this section shall include medical ... inquiries." 42 U.S.C. §12112(d)(1). Under this provision, an employer cannot, until an offer of employment has been made, "make inquiries of a job applicant as to whether such applicant is an individual with a disability..." 42 U.S.C. §12112(d)(2)(A); see 42 U.S.C. § 12112(d)(3). The ADA guidelines are appropriate resources to evaluate BPD's conduct.

In its guidelines for employers, the EEOC notes that the ADA prohibits pre-employment questions likely to elicit information about disabilities. Examples of such prohibited questions include the following queries:

Do you have a disability which would interfere with your ability to perform the job?

Have you ever been treated for mental health problems?

"Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act," October 10, 1995, Introduction, Section A. *See also*, 24.9.1406(1) A.R.M.

BPD asked questions similar or identical to these queries, together with additional questions also designed to elicit prohibited information about disabilities. BPD also collected, maintained and considered information about the disabilities of Carson's parents. BPD argued that the disabilities of Carson's parents could not be relevant, yet BPD took confidential criminal justice information involving her father's emotional problems and included it in her application file. This police report as well as file memos questioning Carson's ability to focus on work despite her parents' problems show that BPD questioned Carson's fitness based upon her parents' disabilities. The record is devoid of evidence of any comparable concerns involving the families of male officers or married officers. The record is replete with statements of applicants BPD hired about their commitments to their families. Yet, for this unmarried female applicant, a commitment to her family, with its problems, became

negative information. Carson cited persuasive federal authority in support of the proposition that an employer illegally discriminates when it takes adverse employment action against an individual due to disabilities of persons in that individual's family. Montana takes the same position. The Montana Human Rights Commission has specifically defined illegal disability discrimination in employment to include "discriminating against a person in the terms, conditions or privileges of employment because the person has a relationship with or otherwise associates with a member of a protected class." 24.9.604(2)(h) A.R.M.

BPD's collection and retention of information about the possible disabilities of Carson's parents is another part of the overwhelming evidence that this applicant was treated differently, due to her sex, marital status and perceived emotional problems. In Section A, No. 15, the manual notes that at the pre-offer stage, an employer is prohibited from asking a third party anything that the employer is prohibited from asking the applicant directly. "Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act," October 10, 1995. BPD made virtually every illegal inquiry to both applicants, and applicants' employers. In Carson's case, BPD even solicited comments from its own officers. BPD kept and considered unsubstantiated comments--basically rumors--suggesting emotional problems on Carson's part (the "vision") as well as suggesting that Carson was unstable because of her parents' problems.

Ward and Reinlasoder may have told the absolute truth, as they believe it, in denying both that they ever intended to discriminate against Carson and that they relied upon information they considered inappropriate. Nonetheless, the pervasive presence of improper information in the file, most of it in response to direct inquiries by BPD, tainted their decision-making beyond redemption. An employer's denial of improper motives cannot cure rampant disregard for the law against obtaining and keeping improper information during the hiring process.

The heart of this case does not involve whether BPD illegally discriminated against Carson by considering her parents' disabilities, her marital status, her purported emotional problems and her sex. BPD did all these things. The heart of this case involves whether BPD can sustain either of its affirmative defenses--statute of limitations and mixed motive.

### *B. Carson Timely Filed Her Claim*

Montana law requires a claimant to file a Human Rights Act complaint within 180 days after the alleged discriminatory practice occurred or was

discovered. §49-2-501(4)(a) MCA. If Carson knew or reasonably should have known of BPD's illegal discrimination before May 4, 1997, her claims are barred, except concerning illegal discrimination on or after that date.<sup>11</sup>

When the claimant knows of the adverse employment action and the reason for it, the time for filing a Human Rights Act complaint begins to run. *Powell v. The Salvation Army*, 287 Mont. 99, 951 P.2d 1352 (1997); *see also Hash v. U.S. West Communications*, 268 Mont. 326, 886 P.2d 442 (1994). However, until the claimant knows or reasonably should know the reason for the adverse action, the time does not begin to run.

In *Powell*, on a motion for dismissal on the pleadings, the district court concluded that because the claimant knew the reason for his dismissal (drunk on the job) on the date of dismissal, the complaint he filed with the Human Rights Commission staff was barred because he filed it 304 days after his dismissal, four days beyond the applicable statutory limit. The Supreme Court reversed because Powell alleged that the actual reason for his dismissal was his past history of alcoholism, a fact he did not discover until after his dismissal. *Powell* at 105-06, 951 P.2d at 1356-57.

By contrast, in *Hash* the district court correctly granted summary judgment because the claimant failed to support her position that her discrimination claim did not accrue on the day her employer notified her of the adverse employment action. Since she failed to file her Human Rights complaint within the statutory period after that notification, her discrimination claims were barred. *Hash* at 329-330, 886 P.2d at 444.

The Montana Supreme Court has applied principles of equitable tolling to determine whether a claim filed more than 180 days after the apparent adverse employment action is timely:

Equitable estoppel is not favored and will be sustained only upon clear and convincing evidence. *Ducham v. Tuma* (1994), 265 Mont. 436, 877 P.2d 1002. To constitute equitable estoppel, there must be conduct amounting to representation or concealment of material facts; these facts must be known to the party estopped at time of conduct; truth concerning these facts must be unknown to the other party claiming benefit of estoppel at the time it was acted upon; conduct must

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<sup>11</sup> Carson's amendments of her complaint relate back, so the entire inquiry focuses upon the May 4, 1997, date. *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990) (doctrine of relation back applies to amendment of human rights complaint adding retaliation claim filed more than 180 days after alleged discrimination).

be done with intention, or at least with expectation that it will be acted upon by the other party; conduct must be relied upon by the other party and the other party must in fact act upon it in such a manner as to change his position for the worse. *Kephart v. Portmann* (1993), 259 Mont. 232, 855 P.2d 120.

*Bruner v. Yellowstone County*, 272 Mont. 261, 268, 900 P.2d 901, 905-06 (1995).

On November 12, 1996, Reinlasoder told Ward, in writing, that a weak applicant pool necessitated hiring applicants without P.O.S.T. certification. He proposed strategies about how to hire such applicants with the least likelihood of problems. He analyzed the strengths of applicants receiving “do not hire” recommendations from Stanard and Associates. He did not mention Carson--BPD had already rejected her, although Carson did not know it.

When Carson contacted Reinlasoder in December 1996, he led her to believe that she could resolve the background investigation concerns by undertaking further psychological testing. She did so, and submitted (in part resubmitted, for Sheriff Maxwell’s recommendation) additional supporting information. BPD lumped her with male applicants who did not pass the psychological testing, and subjected her to that further evaluation.

During the first four months of 1997, Reinlasoder led Carson to believe that she was still a viable candidate for hire. BPD then collected information about her disciplinary suspension, deciding not to consider her for hire. BPD did not tell her of its decision, leading her to believe that she remained a viable candidate. She believed BPD, but Reinlasoder and Ward had no real intention of considering her. From the evidentiary record the hearing examiner can find no other reasonable explanation of BPD’s conduct. Carson did not have access to internal information about BPD’s decisions and the reasons for them. She did not reasonably conclude that BPD had finally rejected her as an applicant until October 1, 1997, after her conversation with Ward, and even then she did not have the internal information regarding the reasons for that rejection.

Carson presented clear and convincing evidence of the elements of equitable estoppel. In November 1996, BPD did not initially notify Carson she was not among the applicants eligible for hire. In 1997, BPD represented to Carson that she was eligible for hire, but did not consider her for hire. BPD concealed its decisions not to consider her, and withheld the bases for its decisions. Reinlasoder and Ward knew they did not intend to hire Carson. They knew their investigation of Carson’s background contained the reasons they did not consider her. They withheld those reasons, with very limited

exceptions, and their decisions not to consider her. BPD knew, but Carson did not. While BPD rejected other candidates and told them why, even encouraging or facilitating their continued efforts to obtain jobs, BPD led Carson to believe she either was or might become a viable candidate, while actually rejecting her. BPD's clear intention was to maintain Carson's ignorance of the real factors dictating its undisclosed rejection of her. Carson did rely upon BPD's apparent efforts fairly to consider her applications. She did not file her claim sooner because of that reliance. BPD is estopped from asserting that she should have seen through the subterfuge and filed her complaint sooner.

### *C. BPD Did Not Establish a Mixed Motive Defense*

Although BPD did not clearly articulate a mixed motive argument, the thrust of its case suggested that defense. A "mixed motive" case arises when illegal discrimination is proved, but the discriminator proves a sufficient nondiscriminatory reason also existed for the adverse action. A successful mixed motive defense bars recovery for the charging party.<sup>12</sup> BPD must prove that even without the discriminatory motive, it would have made the same decisions. With such proof, no harm to the charging party resulted from the discrimination--the same result would have occurred without it--and there is nothing to rectify.

A mixed motive defense requires less than rebuttal of a *prima facie* case. To rebut a *prima facie* case of discrimination proved with direct evidence, BPD had to prove the illegal motive played no part in its hiring decisions--it must satisfy the fact-finder that its actual motive was purely non-discriminatory. For a mixed motive defense, on the other hand, BPD had to prove that the same result would have occurred without the illegal motive--it must satisfy the fact-finder that a proper basis existed to make the decisions without illegal motive. If it meets this burden, BPD need not defeat the evidence of illegal motive. In this case, BPD did not prove that without the discriminatory motive, it would have made the same decisions.

Before Carson obtained Agosto's endorsement, BPD made offers to six male applicants. BPD presented four reasons for eliminating Carson from the eligible list in 1996:

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<sup>12</sup> *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367; 852 P.2d 628 (1993), *Johnson v. Bozeman School Dist.* 226 Mont. 134, 734 P.2d 209 (1987).

1. Her parents had problems (disabilities) that caused repeated BPD involvement, and their problems might distract Carson at work.
2. Carson was outside her parents' home with a dog and gun, looking for a prowler.
3. Carson's "supervisors" at the Yellowstone County Sheriff's Department gave BPD negative evaluations of her.
4. A BPD officer reported an anonymous GFPD officer said Carson told other GFPD officers about a "vision" about the whereabouts of a missing child.

Whether reason numbers 1 and 4 impute emotional instability or female flightiness to Carson, either way they are not a legitimate non-discriminatory reason for BPD's rejection of her application.<sup>13</sup> BPD had no justifiable basis for using information about Carson's parents. BPD did not attempt to verify the third-hand information about a purported "vision." When Reinlasoder talked with a supervisor in Great Falls, Captain Adcox, in November 1996, he still made no effort to obtain additional information about Carson. BPD did not follow up with Carson about either reason.

BPD did not follow up on reason number 2, the "dog and gun" report. Had BPD asked Carson, she would have given the same account she gave at hearing. BPD made no effort to follow up with the involved officer. BPD did very limited follow up on reason number 3, the negative reports from Schieno and Weston. Reinlasoder apparently called the two men. But BPD's follow up did not disclose that Weston's information was based on conversations with other (unidentified) YCSO deputies, not on his personal experience with Carson. BPD's follow up did not disclose either that Schieno never supervised Carson, or that neither man ever evaluated Carson. Two years after Weston and Schieno made their comments, their memories failed substantially about what they had said and precisely why. Yet, the comments they made were themselves over two years after Carson had last been with YCSO.

BPD considered the second-hand reports sufficiently serious to disqualify Carson. At the same time, BPD offered positions to Del Vecchio (with a three day disciplinary suspension on his record), Conrad (who applied beyond the deadline and who received a borderline "do hire" from Stanard) and Simpson (who applied late). BPD did not prove it had sufficient information to reject Carson, based upon legitimate background information of

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<sup>13</sup> Carson correctly contends that discrimination against her because of her parents' disabilities is likewise illegal need not be reached in this case.

a type and seriousness sufficient to justify such a rejection without illegal motives.

After Agosto's report, BPD told Carson she was on the eligible for hire list. On February 24, 1997, the incident with Carson's father occurred. It is unclear when BPD placed the police reports of the incident in Carson's file. However, the evidence is clear that the incident with Carson's father was the only additional information BPD obtained before making seven additional hiring decisions.<sup>14</sup> Since BPD had no legitimate basis for changing its consideration of Carson's application based upon illicit use of information about her father's conduct, BPD cannot sustain a mixed motive defense to those seven hiring decisions.

After obtaining information about Carson's suspension, BPD made another six hiring decisions before Carson concluded BPD would never hire her. BPD offered Carson's suspension as further evidence of its legitimate concerns about her fitness. However, in addition to Del Vecchio (offered a job despite a disciplinary suspension), BPD made employment offers to an applicant with a known record of administrative punishment in the Air Force for dereliction of duty, an applicant with a history of bar fights, an applicant with a record of disciplinary suspension due to conflict with a superior and an applicant with a Internal Affairs investigation of undisclosed nature. BPD made employment offers to three applicants with borderline "do hire" reports from Stanard and three applicants with "do not hire" reports from Stanard. BPD considered subsequent acceptable reports from Agosto sufficient to cure the Stanard "do not hire" recommendations, but BPD still viewed Carson as emotionally suspect, despite her "do hire" recommendation from Stanard and subsequent positive report from Agosto. BPD hired one applicant despite Agosto's report of such defensiveness on testing that the applicant could not be meaningfully evaluated. BPD had not established that Carson's GFPD suspension, without consideration of illegally discriminatory factors, would have prompted her rejections.

BPD also offered Carson's failure to disclose her suspension as a basis for hiring other applicants. Reinlasoder never asked Carson directly about her suspension. He did mention the rumor to her and ask if BPD needed to do another background investigation. Carson chose not to disclose the suspension. BPD then verified the suspension, and added her non-disclosure

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<sup>14</sup> Carson's suspension occurred February 15, 1997, but Reinlasoder's notes reveal that he called Captain Adcox about it "1 ½" months later, at the end of March. BPD presented no credible evidence that it had either knowledge or substantiation, of Carson's suspension until Reinlasoder's conversation with Adcox, after the seven job offers of March 14, 1997.

to its internal litany of reasons not to hire her. Nevertheless, during hearing, Carson's counsel asked Reinlasoder about a hiree who did not disclose a recent arrest during the hiring process. Reinlasoder responded that the failure to disclose was not a concern. BPD has not established that Carson's failure to make voluntary disclosure of her suspension warranted her rejections.

BPD's conduct in ignoring the law triggered the scrutiny of its hiring decisions. This department will not second-guess hiring decisions unless and until a charging party proves her case. However, once the charging party has proved her case, then the respondent must meet its burden to establish a valid defense. BPD has not satisfied the fact-finder that legitimate questions about Carson justified 19 rejections, up through October 1997. BPD has not proved it had a legitimate basis secretly to decide never to consider Carson for a job after October 1997. Thus, BPD has failed to establish a mixed motive defense.

#### *D. Individual Relief*

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to correct the discriminatory practice and to rectify any resulting harm to the complainant. §49-2-506(1)(b) MCA. The department can order BPD to hire Carson, as it should already have done. The difference between Carson's earnings since November 1996 and the earnings available to her until BPD hires her are clearly part of the resulting harm she has suffered. Carson did not prove specific increases in wages in 1998 or 1999 for Simpson, the officer whose earnings are presumptively comparable to Carson's earnings had BPD hired her. In the absence of evidence to the contrary, the fact-finder considers the amount of such increases to match the wage increases available to Carson at Wal-Mart. Pre-judgment interest is properly part of the award to compensate for her lost income.

The record does not fairly quantify BPD benefits. Not only is the amount somewhat speculative, Carson voluntarily resigned a police position in Great Falls, with benefits superior to those of her present job with Wal-Mart. She did not resign that position for any reason related to this case, or to take a job in Billings. Therefore, lost benefits due to that resignation are not the responsibility of BPD. Carson considers the benefits available through BPD better than those available through GFPD, but could not quantify the difference. BPD is entitled to the benefit of Carson's higher wages at Wal-Mart, but Carson cannot recover the loss of benefits from GFPD. Under this peculiar fact situation, no recovery for lost benefits is proper, because Carson did not prove either the existence of such a loss as a result of BPD's actions, or the amount of such a loss.

Carson's losses continue progressively. Additionally, her losses continue even after BPD hires her, unless she is accorded the grade and rank appropriate to someone hired when BPD should have hired her. Obviously, this may create problems with other officers or with any union representing BPD's officers. For this reason, BPD has the alternative of arriving at a cash settlement (to be approved by the Human Rights Bureau) addressing the progressive loss, and hiring Carson at the grade and rate appropriate for a new hire. Once BPD hires Carson either at the grade and rate comparable to Simpson or with a cash settlement, her losses cease.

The power and duty to award money for emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (Mont. 1993). Carson's testimony proved her distress. Once a claimant proves violation of civil rights statutes, the claimant can recover for emotional harm that occurred as a result of the respondent's unlawful conduct.<sup>15</sup> The claimant's testimony alone can establish compensable emotional harm from a civil rights violation, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The fact finder can infer that the emotional harm did result from the illegal discrimination.<sup>16</sup> However, that emotional distress cannot include suffering Carson endured because she elected to tell her mother what BPD did. That was Carson's choice to tell her mother of these actions.

Pre-judgment interest is properly part of an award to compensate for lost income. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987).

Given the recalcitrance of BPD to hiring Carson, there is some risk that BPD will choose not to hire Carson despite this decision. Her desires to be a member of a quality law enforcement department and to live in Billings limit her options. If BPD does not offer her a position within the year, then BPD causes her the emotional and monetary cost of career loss, and the costs either of leaving Billings and her family or of settling for a less satisfying and lucrative career. If BPD does not hire Carson within a year, despite the continuing

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<sup>15</sup> *Carey v. Phipus*, 435 U.S. 247, 264, at fnnt. 20 (1978); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7th Cir. 1974); *Brown v. Trustees of Boston Univ.*, 674 F.Supp. 393 (D.C.Mass. 1987); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475 (1984); *Hy-Vee Food Stores v. Iowa Civ.Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990).

<sup>16</sup> *Carter*, *supra*; *Seaton*, *supra*; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172 (1985); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, *rev. denied*, 287 Ore. 129 (1979); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314 (1970).

accrual of its liability to her for her lost front pay, then BPD clearly will never hire her. BPD may choose to inflict this harm, but if so, it must remedy the harm with additional dollars. If BPD does not hire Carson within a year, her recovery includes additional front pay and additional emotional distress, the kinds of damages awarded when restoring the charging party to a job is not feasible. *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986); *see also*, *EEOC v. Pacific Press Publ. Assoc.*, 482 F.Supp. 1291, 1320 (N.D. Cal.), *affirmed*, 676 F.2d 1272 (9th Cir. 1982). In this case, the amount necessary to compensate Carson for those additional losses in the future is \$50,000.00.

#### *E. Affirmative Relief*

The Human Rights Act mandates reasonable affirmative relief to correct discriminatory action. §49-2-506(1)(a) and (b) MCA. Injunctive relief is proper to address the risk of continued illegal discrimination in hiring. Subjective evaluation of the fitness of BPD applicants is entirely appropriate. A policy decision to rely in part upon reports from peers in law enforcement as well as supervisors in other employment is within the ambit and expertise of BPD. Nevertheless, given such practice, scrupulous avoidance of any practice that smacks of discrimination by sex, marital status or disability is vital. BPD must immediately take the appropriate steps to draft and implement policies and practices to achieve this avoidance.

#### **V. Conclusions of Law**

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Respondent City of Billings Police Department (BPD), acting through its agents Chief David Ward and Lieutenant Larry Reinlasoder, unlawfully discriminated in employment against charging party Kathy Carson by reason of her sex, marital status and perceived disability when it decided not to consider her for hire and when it offered positions to applicants with lesser or substantially equivalent qualifications October 1996 through October 1997. §49-2-303(1) MCA.
3. Pursuant to §49-2-506(1)(b) MCA, the department requires BPD to take the following actions to remedy the harm to Carson resulting from the illegal discrimination:
  - a. BPD must hire Carson as the next new hire for police officer. BPD may not hire any other individual as a police officer until it hires Carson. If BPD and Carson reach a mutually acceptable settlement, approved by the department (Human Rights Bureau),

BPD may hire Carson as a probationary new hire, as it would any ordinary new hire. If BPD and Carson do not reach a department approved settlement on this single point, then BPD must hire Carson with the seniority, rank, grade and wage appropriate had she been hired effective November 12, 1996.

b. If BPD does not hire Carson within twelve months after September 27, 1999, then BPD must pay Carson, immediately at the end of the twelve months, \$50,000.00 in addition to all other monetary relief accorded by this decision.

c. BPD must pay to Carson \$9,779.70 for lost wages through September 27, 1999. Each day after judgment that BPD fails to satisfy the requirements of subparagraph (a), BPD must pay to Carson an additional \$4.44.

d. BPD must pay to Carson \$1,807.01 in prejudgment interest accrued through September 27, 1999. Post judgment interest accrues by operation of law.

e. BPD must pay to Carson \$3,500.00 for her emotional distress.

6. Affirmative relief is necessary. §49-2-506(1)(a) and (c) MCA. The department must enjoin BPD from any further violations of the Human Rights Act. BPD must refrain from continuing to gather, keep and use suspect or prohibited information in making hiring decisions. Within 30 days of the date of this decision, BPD must submit to the department (Human Rights Bureau) written policies and procedures that will cure the illegal practices delineated in this decision. The proposed changes must address:

- a. Elimination of background check forms and practices that elicit suspect information, including information about sex, marital status and disability;
- b. Uniform guidelines that must be followed for all applicants regarding the steps involved in obtaining and evaluating applicants, including adoption of procedures to assure that the guidelines are followed and are not treated as optional;
- c. Identification and elimination from the records and from the decision-making process of improper information received despite adoption of (a) and (b);
- d. Insulation of the actual decision-makers from information eliminated according to (c) and

- e. Such other changes appropriate for BPD to accomplish its hiring and recruitment within the confines of the Human Rights Act.

BPD must simultaneously submit the proposed changes to counsel for Carson, for comment to the department. Within 30 days after the Human Rights Bureau approves (with or without suggested modifications) the proposed changes, BPD must file written proof with the Human Rights Bureau that it has adopted and published the changes (with any suggested modifications). BPD must also comply with any additional conditions the Human Rights Bureau places upon its continued hiring practices.

6. For purposes of §49-2-505(7), MCA, Carson is the prevailing party.

## **VI. Order**

1 Judgment is found in favor of Kathy Carson and against the City of Billings Police Department on the charges of illegal discrimination in employment by reason of sex, marital status and disability.

2 The City of Billings Police Department must pay to Carson the sum of \$15,086.71 for lost wages (\$9,779.70), pre-judgment interest (\$1,807.01) and emotional distress (\$3,500.00). For twelve months after the date this decision is final, for each day after September 27, 1999, that BPD fails to satisfy the requirements of paragraph three of this order, BPD must pay to Carson an additional \$4.44. Interest on this judgment accrues by law.

3 The City of Billings Police Department must hire Carson as the next new hire for police officer. The City of Billings Police Department may not hire any other individual as a police officer until it hires Carson. If the City of Billings Police Department and Carson reach a mutually acceptable settlement, approved by the department (Human Rights Bureau), the City of Billings Police Department may hire Carson as a probationary new hire, as it would any ordinary new hire. If the City of Billings Police Department and Carson do not reach a department approved settlement on this single point, then the City of Billings Police Department must hire Carson with the seniority, rank, grade and wage appropriate had she been hired effective November 12, 1996.

4 If the City of Billings Police Department does not make an offer of employment to Carson consistent with paragraph three of this order within twelve months after September 27, 1999, then the City of Billings Police Department must pay Carson, immediately at the end of the twelve months, the sum of \$50,000.00 in addition to all other monetary relief accorded to that date by this decision. Once it makes this payment immediately, the City of

Billings Police Department shall have no further responsibility under paragraph three of this order.

5           The City of Billings Police Department is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 4.

Dated: September 27, 1999.

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Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry