

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

Janet Pendergrass,)	
Charging Party,)	Human Rights Act Case No. 9901008661
vs.)	<i>Final Agency Decision</i>
City of Libby--Department of Water Quality,)	
Respondent.)	

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on August 25, 1998. She alleged the respondent, City of Libby, Department of Water Quality (“the city”) discriminated against her on the basis of sex (female) when it hired a less qualified male to fill its vacant position on or about April 3, 1998. On May 9, 1999, the department gave notice Pendergrass’ 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 October 12 and 13, 1999, this contested case hearing proceeded in Libby, Lincoln County, Montana. Pendergrass appeared with her attorney, Ann C. German. The city appeared through its designated representative, Daniel Thede, with its attorney, Mikel L. Moore. Janet Pendergrass, Shirley Quick, Judy Kirschenmann, William Michael Pendergrass, Clark Peter Volkman, Daniel Thede, Danny D. Burns, Ed Baker, Joseph E. Johnston and Nyleta Belgarde testified at hearing. The hearing examiner’s exhibit docket accompanies this final agency decision. The parties made telephonic closing arguments on October 15, 1999.

II. Issues

The legal issue in this case is whether the City of Libby, Department of Water Quality illegally discriminated against Janet Pendergrass because of sex (female) when it refused her application for employment in favor of the application of Jayson Weber in April 1998. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Janet Pendergrass, a woman, has resided in Libby, Montana, since approximately 1989. Her husband, William Michael Pendergrass, works for the United States Forest Service. From 1987 through 1991, she attended Northern Montana College in Havre (now Montana State University Northern). Pendergrass earned first an Associate degree in Water Quality in 1990, then a Bachelor of Science Degree in "Interdisciplinary Studies: Water Quality Concentration," on August 16, 1991. Final Prehearing Order, "Facts and Other Matters Admitted," Nos. 4 and 10; Exhibits 105 and 110¹; testimony of Pendergrass and her husband.

2. While attending Northern, Pendergrass worked two summers as an intern. In 1989, she worked in the Whitefish waste water treatment plant. She performed lab work (multiple tests necessary to meet state and federal waste water regulations). She was also involved in operating the belt filter press for alum sludge dewatering. In 1990, she worked in the Great Falls water treatment plant. She became familiar with lab quality control procedures to ensure safe drinking water. She conducted tests to evaluate the best chemical dosages to use in treating the water. She became proficient in the use of lab equipment and test kits. In both summer jobs, she did some work, near the end of each summer, without direct supervision. Exhibit 110; testimony of Pendergrass.

3. In both facilities, Pendergrass successfully performed heavy labor. She drove dump truck. She moved manhole covers. Pendergrass learned to operate heavy farm equipment on family farms. In addition, she worked with weights as an adult. In her work and her weight-lifting, Pendergrass demonstrated the ability to lift up to 75 pounds frequently in a job. Testimony of Pendergrass and her husband.

4. Shirley Quick is the program director for the Montana Department of Environmental Quality's water and waste water treatment plant operators' certification program.² The program she manages verifies that all plants have licensed operators, and provides services and training for all operators. Her program licenses operators in Montana. Testimony of Quick.

¹ Pendergrass withdrew her exhibit 3, identical to exhibit 110, the application materials of Pendergrass for the waste water operator position in Libby. Throughout the decision, exhibit 110 rather than exhibit 3 is the reference to Pendergrass' application materials.

² Quick works in the Permitting and Compliance Division, Community Service Bureau, Public Water Supply Section.

5. According to Quick, the state licenses operators to protect the public health and environment. It is against the law to operate a waste water treatment plant without licensed operators. Licensure requires completion of the state's application and successful completion of the state's examination for the particular classification. The state considers a successful applicant without sufficient actual experience to be an operator in training. A municipality can employ an operator in training so long as that individual is not left unsupervised. Exhibit 122; testimony of Quick.

6. The state recognizes 4 classes (1-4) of waste water treatment plant operators, and 5 classes (1-5) of water treatment plant operators. The larger and more complex the system, the higher the classification and the more difficult the exam. Libby, Montana has a plant that requires a licensed operator at class 2 or above. A class 2 operator must complete the application, successfully complete the exam and have 18 months actual experience in the operation of systems of class 2 size and complexity. An applicant can qualify for up to one-half of the required experience (9 months) through formal education. An operator in training (an applicant who successfully completed the class 1 or 2 exam but lacks sufficient experience to be an operator) is an operator in training, class 1. Exhibits 117, 118, 119 and 122; testimony of Quick.

7. The state issues an 8½" by 11" certificate to each applicant who successfully completes the exam. In addition, the state sends each licensed operator or operator in training a wallet-sized certificate, beginning the year after successful completion of the examination. The 8½" by 11" certificate designates the holder as either an operator or operator in training, and identifies the class. For example, the operator in training's full-page certificates for the three finalists for the job at issue in this case designated the holders as class 1 waste water treatment plant operators in training. Exhibit 119; testimony of Quick and Pendergrass.

8. The state, in its computer data base, designates an operator in training as a class 6 operator. There is no extant definition in any written document of a class 6 operator. The class 6 operator designation appears on the wallet-sized certificates that the state sends annually to current operators in training. Testimony of Quick.

9. Pendergrass applied for licensure and successfully completed the examination for waste water treatment plant operator in 1989. She also applied for licensure as a water treatment operator, but elected not to take the exam due to illness. She has not returned to take that examination during the subsequent 10 years. After she received her BS degree and had worked 3

months in the waste water treatment plant in Whitefish, Pendergrass still required 6 months' additional experience before qualifying as a class 2 waste water treatment plant operator. Her Great Falls experience in water treatment did not apply to waste water treatment. She was a class 1 waste water treatment plant operator in training. Testimony of Pendergrass and Quick.

10. Before she completed school, Pendergrass had inquired with City of Libby, Department of Water Quality, about a job in water or waste water treatment. In 1994, after she completed school, Pendergrass applied for a position in the waste water treatment plant. She obtained an interview, but the city did not hire her. Testimony of Pendergrass.

11. In February 1995, a former city water employee, Bill Kemp, suggested to Pendergrass that she volunteer to work for the city. Pendergrass called the city and talked to the Supervisor of City Services, Daniel Thede. She offered to work as a volunteer in either the water treatment plant or the waste water treatment plant. Pendergrass reasoned that such volunteer work would both qualify her as an operator instead of an operator in training and improve her prospects of success in competing for a job with the city. Thede told her the city did not need a volunteer at that time, but to call back after the spring run-off. Pendergrass called back later that spring. Thede told her the city did not need a volunteer and would not need one until the following year. Testimony of Pendergrass.

12. Pendergrass called again in the spring of 1995 and again in the spring of 1996. Thede told her both times the city did not need a volunteer. Testimony of Pendergrass.

13. The city had no formal policy regarding volunteers. The city did not advertise or notify Job Service regarding volunteer service. The city did not maintain any list of willing volunteers. When Thede had a volunteer he wanted to use, he sought the City Council's approval of that volunteer. If the council approved a volunteer (which they did both times he actually asked), the city would then add the volunteer to its list of employees for workers' compensation insurance purposes. Thede chose not to take Pendergrass' requests to the City Council. Exhibits 14 and 138; testimony of Thede (see also testimony of Baker and Johnston regarding the city council's role in approving a volunteer).

14. Pendergrass next called in May 1997. Thede told her the city already had a volunteer³. Because Pendergrass believed there might be actual job openings, she called again in December 1997 about the new water treatment plant. Thede told her that the city expected to advertise an opening after the first of the year. He did not suggest she do anything further about volunteering. Testimony of Pendergrass.

15. In 1997, the state amended regulations governing operation of water treatment and waste water treatment plants. The new regulations required a fully licensed operator to be in charge at all times.⁴ Exhibit 117 (17.40.208 A.R.M.); testimony of Thede.

16. The city hired Jayson Weber, as an intern through Northern (where Weber was a student), to work at the waste water treatment plant during the summer of 1997. This summer hiring was substantially equivalent to the two summer jobs held by Pendergrass during her schooling. Testimony of Thede.

17. In fall 1997, the city began construction on a new water treatment plant. At that time, the city knew that whenever the new plant went on-line, openings would occur for licensed operators in that water treatment plant and perhaps in the waste water treatment plant as well. Testimony of Thede.

18. In December 1997, Weber called the waste water treatment plant supervisor, Daniel Burns, to discuss the possibility of working for the city in the waste water treatment plant as a volunteer. Weber also talked to Thede. Both Burns and Thede told Weber a position would be opening in the waste water treatment plant. At Thede's encouragement⁵, Weber sent a letter making the same request to volunteer. Weber began his volunteer work for the city on January 12, 1998 at the waste water treatment plant. He continued to work as a volunteer until the city hired him. Final Prehearing Order, "Facts and Other Matters Admitted," Nos. 4 and 12; Exhibit 1 (last page—experience voucher for Weber); testimony of Thede and Burns.

19. In January 1998, a city employee left the waste water treatment plant to move to the water treatment plant. The city gave notice in March 1998, through Job Service and newspaper advertisements, that a position was

³ There was no evidence that the city had a volunteer in May 1997. The city did have an intern, Jayson Weber, start at the waste water treatment plant in May 1997. Exhibit 1.

⁴ If a municipality could not hire a fully licensed operator, it could seek permission from the state to hire an operator with a temporary or "in training" license.

⁵ Thede testified that Weber did send the follow-up letter. The substantial and credible evidence of record supports the finding that Thede requested, suggested or otherwise encouraged the written follow-up.

open for a waste water treatment plant operator. The position required a class 2 waste water treatment plant operator's license. Pendergrass applied for the position in March 1998. Final Prehearing Order, "Facts and Other Matters Admitted," Nos. 1, 4 and 6; Exhibits 2 and 110; testimony of Pendergrass, Quick, Thede and Burns.

20. The city received several applications for the waste water treatment plant operator position. Among the applicants were Pendergrass and Weber. Final Prehearing Order, "Facts and Other Matters Admitted," Nos. 2 and 3; Exhibits 110, 119, 120; testimony of Pendergrass.

21. Thede and Burns selected three applicants for interviews and advised the rest of the hiring committee. The rest of the hiring committee consisted of the city personnel board (three members of the city council appointed by the mayor)--Joseph Johnston, Edward Baker and Judy Kirschenmann (chairperson). The applicants Thede and Burns selected were Pendergrass, Weber and Jeff Haugen, a man. The entire hiring committee (Thede, Burns, Kirschenmann, Baker and Johnston⁶) interviewed all three applicants. Final Prehearing Order, "Facts and Other Matters Admitted," No. 5; testimony of Kirschenmann, Thede, Burns, Baker and Johnston.

22. At the time of the interviews, Thede held a Class 2 license in waste water treatment plant operation. He obtained his class 2 license in 1992, by successful completion of the test. He already had sufficient experience (including credit for college studies), so he never held an operator in training license. Final Prehearing Order, "Facts and Other Matters Admitted," No. 7; Exhibit 126; testimony of Thede.

23. At the time of the interviews, Burns held a Class 1 license in waste water treatment plant operation. Final Prehearing Order, "Facts and Other Matters Admitted," No. 8; Exhibit 125; testimony of Burns.

24. At the time of the interviews, Pendergrass, Weber and Haugen each held class 1 waste water treatment plant operator in training licenses from the state. Weber also had a class 1 water treatment plant operator in training license. In their applications, Weber and Haugen identified themselves as class

⁶ Although there was evidence that another unidentified individual participated as part of the hiring committee, and evidence that one or more of the named hiring committee members served as substitutes for other council members, the substantial evidence of record identifies the five named individuals as the hiring committee for this particular hiring decision.

I waste water treatment plant operators in training.⁷ In her application, Pendergrass provided her wallet-size certification, identifying her as a class 6 waste water treatment plant operator. Exhibits 110, 119, and 120. 123 and 124; testimony of Pendergrass and Thede.

25. During the interview of Pendergrass, Thede, Burns, Johnston and Baker questioned her. Burns, who would supervise the new hire, asked the most questions. No one asked Pendergrass about her license. No one asked or said anything to suggest that Pendergrass did not have the requisite qualifications. Burns asked if Pendergrass planned to stay in Libby. Burns explained that because of the city's investment in training a new hire, he wanted to know if she planned to "stick around." Pendergrass assured him that with her husband in the Forest Service, they hoped to stay in Libby. Testimony of Pendergrass.

26. Thede preferred Weber (Weber listed Thede as a reference). Thede knew or should have known that a class 6 license was the same as a class 1 operator in training license.⁸ He did not explain to the hiring committee that Pendergrass had the same license as Weber, allowing the other members of the committee to believe that the candidate he favored had a more appropriate license than Pendergrass. He told the rest of the hiring committee that Weber was a better qualified candidate than Pendergrass.⁹ He touted Weber as just as qualified by education as Pendergrass, although her application materials documented her BS. Weber did not have a Bachelor's degree. Final Prehearing Order, "Facts and Other Matters Admitted," No. 11; Exhibit 119; testimony of Thede.

27. Burns and Thede were both comfortable with Weber's work. They were also both familiar with Weber's abilities, both in the waste water treatment plant and in "cross-overs" to other jobs the city might need an employee to cover. Both men made their comfort and familiarity known to the

⁷ Weber also held class 1 water treatment operator in training and water distribution operator in training licensure. Haugen also held class 1 water treatment operator in training licensure. Pendergrass had no other operator in training licensure.

⁸ If Thede did not know the class 6 license was identical to a class 1 operator in training license, a single phone call to the state would have verified it. But given that Pendergrass and Weber were in the same school program, had interned through that same program and had obtained licenses after testing, Thede's professed ignorance is not supported by the evidence. Thede admitted he knew that both Pendergrass and Weber would, with sufficient experience in the Libby plant, become class 2 operators. His expressed belief that Weber had a more appropriate license is inherently incredible.

⁹ Thede also testified that before the interviews he had told the council members that a class 6 license could be upgraded to a class 2 and that "wasn't a problem."

other hiring committee members. Burns also let the committee members believe that Weber had a more appropriate license than Pendergrass.¹⁰ Testimony of Thede and Burns.

28. Judy Kirschenmann saw the application materials on the morning of the interviews. She knew Thede and Burns were licensed operators, and she relied upon them regarding qualifications. She believed, based on discussion with the rest of the hiring committee after all three interviews, that Weber had the correct license, and had a different and superior license to that of Pendergrass. She believed Weber had the proper educational background. She also believed Weber had a proven ability to operate heavy equipment (to “cross over” to other jobs as needed by the city). She believed Weber had direct experience with the Libby plant, from his volunteer work there. She considered Weber’s volunteer work for the city to be a factor in his favor. She considered Weber the best candidate. Testimony of Kirschenmann.

29. Ed Baker saw the application materials on the morning of the interviews. He believed Weber had better hands on experience (from intern and volunteer experience), the proper license and the right education. He believed Pendergrass lacked experience, lacked the right license and had no better education than Weber. He relied heavily upon Thede and Burns in these evaluations. Had he known that Pendergrass had equal or more experience and the same licensure, the decision would have required more discussion. However, had he known at the time what he had learned by the time of hearing, Baker would still have followed the recommendations of Thede and Burns and selected Weber. Exhibit 1; testimony of Baker.

30. In 20 years on the city council, Baker had never seen an application for the typical city worker job (street department, and so on) from a woman. He knew that the council sees only the applicants selected by the department supervisor and the city director, and did not know whether there have ever been any female applicants not selected for job interviews. Baker believed most of the typical city jobs are not jobs a woman would want. On the selection of Weber over Pendergrass, Baker did not know Pendergrass’ abilities

¹⁰ Thede obtained his license in 1992. Burns obtained his in 1981. Burns may have had more legitimate confusion about the licensure. However, Burns also avoided either giving Pendergrass any opportunity to address the licensure question during the interviews or mentioning the perceived lower quality licensure when explaining to her why the city selected Weber. In statements to the Human Rights Bureau investigator, Burns confirmed that he had explained to the committee that Pendergrass had a lower quality license than Weber. At hearing, he first admitted and then denied that he knew that was untrue at the time of the interviews. Burns’ difficulty expressing what he did and what he knew, coupled with his changing accounts of what he did and what he knew, made him a difficult witness to believe.

to jump into ditches, operate heavy equipment or otherwise “cross over” to typical city street worker duties. Baker did believe Weber was capable of these “cross over” functions. Testimony of Baker.

31. Joe Johnston saw the applications before the interviews. He considered Weber, because of his intern and volunteer work at the Libby plant, more experienced than Pendergrass. He thought Weber, but not Pendergrass, had the proper licensure. He thought Weber could operate more “cross-over” equipment, based upon the information in his application.

32. The city decided to hire Weber. At the time the city made the decision, Weber had between 5 and 6 months’ experience in the Libby waste water treatment plant. Final Prehearing Order, “Facts and Other Matters Admitted,” No. 9; testimony of Pendergrass, William Michael Pendergrass, Kirschenmann, Thede, Burns, Baker and Johnston.

33. Burns called Pendergrass later that same day, and told her that the city had hired someone else. She asked why. He told her the city had hired someone who was better qualified than she was. He told her that her only weakness was “not enough hands on experience with the pumps,” and that the person the city hired had “good all-around hands on experience as a pump hand.” Burns went on to say that trouble-shooting the pumps was difficult, even for him, so that experience with the pumps was important. Burns did not say that Pendergrass lacked the requisite licensure. Testimony of Pendergrass and Burns.

34. Pendergrass asked if she could volunteer, in order to obtain better hands on experience. Burns told her she could not, because of the workers’ compensation insurer’s requirements.¹¹ He offered to let her come and watch him work on the pumps, and said he would call Pendergrass to let her know when they would be working on the pumps. He never called. Baker considered this offer to be an opportunity to volunteer at the plant. Testimony of Pendergrass and Burns.

35. From 1986 through 1998, the city hired 11 women.¹² The city hired a woman for office help in 1986. The city hired a woman police officer

¹¹ From Burns’ testimony, it is clear he did not understand how a volunteer would qualify for workers’ compensation coverage, even though he supervised a volunteer (Weber) less than two years before this hearing. Burns’ testimony, that he explained to Pendergrass that she would need to get city council approval in order to qualify for compensation coverage, was not credible, since Burns did not appear to understand the process.

¹² This number does not include a municipal judge appointed by the mayor, to whom far different criteria apply.

in 1997 who remained with the city for 17 months. The other nine women hired by the city during the 13 year period were all hired consecutively for essentially a single position as a parking meter reader.¹³ From 1996 through hearing, the city hired two women (the police officer and the municipal judge) and ten men.¹⁴ At the time of hearing, the city had 23 male employees and 3 female employees (including the municipal judge). Exhibits 1 and 139; testimony of Thede.

36. From 1992 through 1996, Pendergrass earned an average of \$3,511.00, including approximately \$12,000.00 not reported for Social Security purposes from farm income. She had no earnings after 1996. She lives with her family in Libby. She has had previous stretches of years without income. Her emotional distress reduced her level of functioning. She was unable to earn income during the years from 1998 through the present, and (absent the job with the city) for the next two years. Exhibits 132 through 137¹⁵; testimony of Pendergrass and her husband.

37. Working for the city, Weber earned \$18,610.20 in 1998. The city contributed \$1,246.88 to his PERS account, and \$1,153.84 to his Social Security account. Through September 30, 1999, Weber earned \$19,423.65. The city contributed \$1,308.17 to his PERS account and \$1,204.28 to his Social Security account. He will receive a 2% pay increase every 2 years. Pendergrass would have earned the same amount and received the same contributions had she rather than Weber obtained the job. Exhibit 8; testimony of Thede.

38. Pendergrass lost \$18,610.20 in wages in 1998, and contributions of \$1,246.88 to PERS and \$1,153.84 to Social Security. Pendergrass lost \$25,631.52 in 1999 ($19423.65/9 \times 12$), and contributions of \$1,744.20 ($1308.17/9 \times 12$) to PERS and \$1,605.72 ($1204.28/9 \times 12$) to Social Security. She continues to lose \$70.223 in wages per day, and daily contributions of \$4.779 to PERS and \$4.339 to Social Security. Effective April 1, 2000, her losses increase by 2%. Interest accrues on lost wages at 10% per annum (simple interest). On February 1, 2000, pre-judgment interest accrued for Pendergrass is \$4,201.08.

¹³ According to Thede, the city had no qualified female applicants, to his knowledge, for most of its jobs. Also according to Thede, the city did not keep records of applicants.

¹⁴ Exhibit 139 identified a female police officer hired in 1997. Exhibit 1 did not show that same hire, because she no longer worked for the city. The city hired one man since 1996 who also no longer works for the city and was also not listed. The list in exhibit 139 shows one woman (the judge) and 9 men. Adding the one woman and one man not listed because they no longer worked for the city yields two women and ten men hired since 1996.

¹⁵ These exhibits are sealed, and are not part of the public record.

39. As a result of the job rejection, Pendergrass was desolate. She believed the city had allowed Weber to volunteer and then hired him because she was female. She had thought the city, and Thede in particular, had some interest in hiring her. After the city hired Weber, and she discovered he had been the volunteer, she decided she could not trust Thede, or the other city officials. She felt that they had lied to her and manipulated her. Her distress did not abate over time. Pendergrass had tried for almost 10 years to obtain work in her chosen field of study and licensure in Libby, where she lived.¹⁶ Although she sought work after this rejection, she has not worked since 1996. Her inability to contribute to the family income added to her emotional distress. The family has struggled to survive and keep the family farm, also providing support to their youngest child, who was 19 at the time of hearing. Pendergrass stopped lifting weights after the city hired Weber.¹⁷ She also stopped her oil-painting and fine arts group participation. Testimony of Pendergrass and her husband.

40. In July of 1999, Pendergrass sought therapy for her emotional distress from Clark Peter Volkman. She saw Volkman four times in July 1999. His therapy helped. She continued to see him once more, for a total of five visits. However, after her husband's insurance paid for the first four visits, Volkman's fee for continuing therapy was \$90.00 an hour. She has incurred \$90.00, to date, for his treatment. Testimony of Pendergrass and her husband.

41. Volkman received an M.A. in counseling from Idaho State University. He has practiced for 23 years. He has been a licensed clinical professional counselor in Montana since 1981. He has been a certified mental health professional practicing in Lincoln County since 1991. He met Pendergrass 4 or 5 years before she came to him for counseling in 1999. Comparing her in 1999 to his observation of her 4 or 5 years ago, in 1999 Volkman found her emotionally distraught, tearful, agitated, afraid to be there and not sure she could even talk. Volkman took a history from Pendergrass. He concluded, after a 1 and ½ to 2 hour initial session, that the cause of her symptoms was her inability to understand why she did not get the waste water treatment plant operator job with the city in 1998. She felt, according to Volkman, that she had done the necessary work and more to establish her

¹⁶ Pendergrass had also filed a discrimination claim involving the rejection of her application for a federal job at Grand Coulee dam. She made that application by mail, and did not consider the rejection personal, even though she challenged the basis for it.

¹⁷ In February 1999, Pendergrass injured her knee. She had surgery in April, and recovered to 95% by the time of hearing. For a period of at least 2 months, she could not have lifted weights in any event. The time during which she could have but did not pursue her weight-lifting after the city's hiring decision did not exceed a year.

qualifications and fitness. Because of Pendergrass' perception that the city had rejected her without a valid reason, she had lost her sense of self-worth. She was angry, obsessing and ruminating upon what the city had done and why. She wondered endlessly whether it was because she was female, because of her weight or strength. Because of her emotional distress, she found it a struggle even to talk about her problems. Testimony of Volkman.

42. Volkman found Pendergrass' reaction to the city's rejection of her both realistic and reasonable. He found no red flags to indicate that faulty intellect, motivation or personality had contributed to an unrealistic or unreasonable response. He found that Pendergrass' level of functioning had slipped as a result of her emotional distress at the city's rejection. Her ability to communicate effectively had diminished. Volkman considered it consistent with the emotional distress he diagnosed that Pendergrass would discontinue weight lifting and painting. Testimony of Volkman.

43. Volkman did learn from Pendergrass that she had previously filed a discrimination claim involving the rejection of her application for a federal job at Grand Coulee dam. From his sessions with Pendergrass, he concluded that she had not suffered the same emotional distress, or the resultant slippage in functioning, because of that adverse employment action. She viewed that federal job as a "long shot," and simply wanted to get on the list of eligible applicants. She did not have the personal emotional involvement in that hiring decision. Testimony of Volkman.

44. After five counseling sessions with Volkman, Pendergrass was able to address the issues raised by the city's rejection. Although still emotionally upset and tearful, her level of functioning had improved. She had not regained her "base line" functional level (i.e., the level of functioning she enjoyed before the city's rejection) after the five sessions. She needed some additional counseling, on either a weekly or as the patient requires basis. Testimony of Volkman.

45. Pendergrass needs access to five additional sessions with Volkman, at the city's expense. If she has insurance coverage, the city's liability comes first. The amount necessary to remedy her emotional distress is \$7,500.00.

IV. Opinion

Montana law prohibits an employer from refusing employment to a person based on the prospective employee's sex. §49-2-303(1)(a), MCA. Where there is not direct evidence of the reason for the employer's rejection of the claimant, Montana courts have adopted the three-tier standard of proof

articulated in *McDonnell Douglas*.¹⁸ See, e.g., *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *Euro. Health Spa v. Human Rights Com'n*, 212 Mont. 319, 687 P.2d 1029 (1984).

Pendergrass Established a Prima Facie Case

The first tier of proof in *McDonnell Douglas*, *op. cit.*, required Pendergrass to prove her prima facie case by establishing four elements by a preponderance of the evidence:

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

McDonnell Douglas, *supra*, 411 U.S. at 802, 93 S.Ct. at 1924.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. Pendergrass satisfied the fourth element of the first tier in *McDonnell Douglas* by proof that the employer filled the job vacancy with an applicant who was not female. *Martinez v. Yellowstone County Welfare Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981) *citing* *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980).

Pendergrass complained that the city discriminated against her when it hired Weber and rejected her in March 1998. Pendergrass sustained her burden of proof on this allegation. She established that she is a woman and that she applied for and was qualified for the job position, but that the employer hired a man with qualifications (license, experience and education) not appreciably superior to hers. She presented substantial and credible evidence to establish her prima facie case.

¹⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The City Articulated Legitimate, Nondiscriminatory Reasons for Its Decision

Pendergrass' proof of her *McDonnell Douglas* prima facie case gave rise to an inference of discrimination at law. The burden shifted to the city to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, *op. cit.*, 411 U.S. at 802, 93 S.Ct. at 1824. When the city met its burden, it accomplished two things. It met "the plaintiff's prima facie case . . . and . . . frame[d] the factual issue with sufficient clarity so that the plaintiff [then had] a full and fair opportunity to demonstrate pretext." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981).

The city clearly and specifically articulated potentially legitimate reasons for the rejection of Pendergrass. *Johnson*, *op. cit.*, 734 P.2d at 212. The testimony of all five members of the hiring committee raised four potentially legitimate reasons for hiring Weber instead of Pendergrass—a mistaken good faith belief that Weber had a more appropriate license, better experience on Weber's part, better education on Weber's part and Weber's better "cross over" potential.

Pendergrass Established Pretext

Since the city did produce legitimate reasons in support of its adverse actions, Pendergrass had the burden to show that the city's reasons were in fact a pretext. *McDonnell Douglas*, *op. cit.*, 411 U.S. at 802, 93 S.Ct. at 1824; *Martinez*, *op. cit.*, 626 P.2d at 246. This is the third and last tier of proof required in *McDonnell Douglas*. As stated in *Burdine*, proof of the pretextual nature of the defendant's proffered reasons may be either direct or indirect: "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, *op. cit.*, 450 U.S. at 256, 101 S.Ct. at 1095. Ultimately, the plaintiff must persuade the court by a preponderance of the evidence that the employer intentionally discriminated against her. *Johnson*, *op. cit.*, 734 P.2d at 213. *See gen.*, *Crockett*, *op. cit.*, 761 P.2d at 817-18.

With regard to the hiring decision, Pendergrass rebutted two of the city's potentially legitimate reasons for hiring Weber instead of Pendergrass—the mistaken good faith belief that Weber had a more appropriate license and the better experience on Weber's part.

Judy Kirschenmann testified unconvincingly that she did not consider the purportedly superior licensure of Weber in making her decision about the candidate the city should hire. Kirschenmann is the only member of the hiring committee who did not give an interview to a HRB investigator. Every other member of the hiring committee had, before the commencement of this contested case, gone on record both as believing that Weber had a higher licensure *and as relying upon that licensure*. Although Kirschenmann appeared to believe what she said, the likelihood is great that the witness engaged in convenient recall, justifying her decision by minimizing reliance upon a mistaken belief. Even if she did not rely upon the purportedly superior licensure of Weber, the majority of the hiring committee did rely upon it.

Kirschenmann, Johnston and Baker had a legitimate reason to believe that Weber had a better license than Pendergrass. The three council members relied upon the professionals, Thede and Burns. Thede and Burns had no legitimate basis to believe that someone who passed the same test, obtained the same associate's degree, worked in the same intern program and had actually gone beyond Weber to obtain a BS somehow had an inferior license. Just as Thede preferred Weber for a volunteer position, he clearly preferred Weber as a new hire. Thede, and to a lesser extent, Burns, knew or should have known the licenses were identical. Even though the council members relied in good faith upon their professionals, the actions of Thede and Burns are the responsibility of the city. In choosing to rely upon Thede and Burns, the city elected to stand behind the actions of the two professionals, and be responsible for those actions. The defense of "mistake" fails because their justification is not credible.

Weber's better experience resulted from his volunteer work for the city. Pendergrass established that she volunteered, in December 1997 and before, and that she was qualified when she volunteered. Jayson Weber likewise volunteered in December 1997. The difference between the two was that Pendergrass was female and Weber was male. The testimony of Thede and Burns raised one potentially legitimate reason for accepting Weber as a volunteer and rejecting Pendergrass—Weber's "aggressive" pursuit of the volunteer position, contrasted to Pendergrass' failure to be aggressive.

Weber's "aggressive" pursuit of a volunteer position consisted of talking to Burns on the telephone, coming to see Thede during the Christmas holidays and then writing a letter after receiving encouragement from Thede. Pendergrass' "lack of aggressive pursuit" consisted of calling Thede and taking

his word that no volunteer position was available.¹⁹ In substance, both Weber and Pendergrass followed the directions of the city's representatives in pursuing volunteer work. Weber received directions that led him to a volunteer position. Pendergrass received directions that kept her from a volunteer position. The only appreciable difference between the two was their genders.

In December 1997, Thede treated the visit from Weber far more positively than the contemporaneous call from Pendergrass. Pendergrass had previously applied for a position with the city, so Thede had reason to know that the educational qualifications of Pendergrass actually exceeded those of Weber. He had reason to know that Weber and Pendergrass had each, as of December 1997, spent one summer in intern positions at waste water treatment plants. He had reason to know that Pendergrass had spent another summer as an intern in a class I water treatment plant. Of the two, Pendergrass actually had more experience at that time, although Weber's experience was at the Libby plant. Given that Pendergrass appeared to be at least as qualified a candidate as Weber, drawing a distinction between a telephone call and a visit in degree of "aggressive pursuit" of the position was pretextual. Indeed, both Burns and Thede made certain Weber knew that a job would be opening in the plant where he would be a volunteer. At the same time, Thede gave Pendergrass no indication that a volunteer position was a possibility.

Thede was the gatekeeper for volunteers. The council relied upon his judgment about volunteers, not an independent assessment of need or qualifications. Even Thede himself, who began his testimony advancing the theory that the council decided whether a volunteer was needed, eventually resorted to the theory that Pendergrass was not sufficiently aggressive. Although he sought at first to avoid accepting responsibility for decisions about volunteers, Thede ultimately tacitly acknowledged that he did make those decisions, then proffered a reason ("not aggressive enough") for dismissing Pendergrass' efforts to volunteer. Acting without any guidelines, standards or review, Thede exercised unbridled discretion in picking volunteers. The city has not presented proof of a non-pretextual reason for picking Weber over Pendergrass. The inference of discriminatory motive stands. Thede allowed Weber to volunteer, not Pendergrass, when the only pertinent difference was their sex. Weber's "better experience," resulting from his volunteer work, was itself the result of unlawful discrimination.

¹⁹ Thede could not recall most of Pendergrass' calls about volunteering, but he did not deny them. He clearly recalled the sequence of events leading to Weber's volunteer position.

The city's third reason--that Weber's education equaled or exceeded that of Pendergrass--was inherently incredible. Choosing a candidate with less education in the field of work may, if other factors tip the scales more heavily, be acceptable. Choosing a candidate with less education in the field of work and then insisting that he actually has as much or more education is absurd. A BS is a higher degree than an AA. That the city argued otherwise was convincing evidence of pretext.²⁰

Finally, the city argued that it needed all its city workers to be able to "cross over" to other jobs, and drive snow plows or operate back-hoes or otherwise cover other functions as needed. The city elicited testimony from both Ed Baker and Joe Johnston that they would still select Weber today, knowing what they now know. All three suggested that Weber's heavy equipment operation and his broader driver's license made him a better candidate.

Even if the bases for such testimony were evidentiarily sound (i.e., grounded in facts actually considered at the time of the decision) the testimony is hopelessly speculative and self-serving. Although none of the three council members on the hiring committee engaged in any conscious gender bias, all three made assumptions based on gender stereotypes—that a man was a better employee for cross-over, that women really did not like to do street labor jobs, that a man in the exact same school program got a better education than a woman.²¹ In addition, all three council members relied upon Thede and Baker. Thus, the highly suspect testimony that, even setting aside tainted factors, the three would still have selected Weber for his "cross over" skills, had neither credibility nor relevance.

The "cross over" qualification defense was also suspect for another reason. The HRB investigator, Nyleta Belgarde, testified that after reviewing her investigative file, she could neither recollect nor find any instance of the

²⁰ Eventually Weber will have, or may already have, his BS. He did not at the pertinent time.

²¹ The testimony of Baker and Johnston approaches direct evidence of discriminatory motive. 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. West. Energy*, #AHP86-2885 (1990); *Elliot v. City of Helena*, HRC Case #8701003108 (1989). If this evidence were viewed as direct evidence, it would establish the city's liability unless the city responded with substantial and credible evidence rebutting it or showing a legal justification. *See Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). An indirect evidence analysis led eventually to the same outcome.

city telling the department during the investigation that “cross over” abilities were an important part of the hiring decision process in this case. Although the city’s witnesses now attested to that importance, and pointed to some lines in the job description as documentation of that importance, the city never said so during the first six months of this case. The inescapable conclusion was that the city only decided that “cross over” was important after it discovered it could not defend its decision on either licensure or education.

The city presented testimony that it did not maintain records of applications. It then argued that testimony of how few women interviewed established a defense to Pendergrass’ evidence that a vastly disproportional number of city employees were male. Thede, as director of city services, and the involved department head (Burns, for the Weber hiring) made decisions about who the city would interview. Just as for volunteers, Thede was the gatekeeper, exercising unfettered and unreviewed discretion. Given the evidence of that gatekeeper’s illegal preference for a male applicant in this case, evidence of who the city interviewed was not persuasive. The city’s predominantly male work force resulted from skewing of the interview pool by the male decision-makers in city services director and supervisor positions.

The City Did Not Establish a Mixed Motive Defense

A "mixed motive" case arises when a claimant proves illegal discrimination but the discriminator proves a sufficient nondiscriminatory reason also existed for the adverse action. A successful mixed motive defense would bar Pendergrass’ recovery.²² To prove the defense, the city had to prove that even without the discriminatory motive, it would have made the same decisions. With such proof, no harm to Pendergrass resulted from the discrimination--the same result would have occurred without it--and there would be nothing to rectify. In this case, the city offered the “cross over” justification of Weber’s hire as proof of a mixed motive.

To rebut a *prima facie* case of discrimination, the city had to prove the illegal motive played no significant part in its hiring decisions--it had to satisfy the fact-finder that its actual motive was non-discriminatory. For a mixed motive defense, on the other hand, the city only had to prove that the same result would have occurred without the illegal motive--it had to satisfy the fact-finder that a proper basis existed to make the decisions without illegal motive. If it met this burden, the city would not need to defeat the evidence of illegal

²² *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).

motive. In this case, the city did not prove that without the discriminatory motive, it would have made the same decisions. Thus, the mixed motive defense failed.

Department Jurisdiction Does Not Extend to Federal Claims or Attorney Fee Awards

The department has jurisdiction to consider claims of illegal discrimination under the Montana Human Rights Act. §49-2-509(7) MCA. The department has no jurisdiction to consider federal claims. The adjudication of this case does not reach claims of federally prohibited discrimination.

The department also lacks jurisdiction over prevailing party claims for an award of attorney fees. The power to award attorney fees to a prevailing party resides with district courts. §49-2-505(7) MCA.

*Appropriate Relief to Remedy the Harm to Pendergrass
and to Prevent Further Discrimination Is Necessary*

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 the city to hire Pendergrass, as it should already have done. The difference between Pendergrass' earnings since April 1998 and the earnings available to her had the city hired her are part of the resulting harm she has suffered. Since she earned no income, and the city failed to prove that she reasonably could have earned income, the entirety of her lost wages with the city are the measure of her lost earnings.

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).

Pendergrass also lost the benefit of employer contributions to Social Security and the state Public Employee Retirement System. The city must make those contributions.

Pendergrass must take the requisite steps to remain qualified. The evidence established that she should have and that she could readily get her first aid certification, her water treatment certification and her commercial driver's license. She must do so at her first opportunity.

The evidence indicated that the city has very little turn-over among its employees. Until it hires Pendergrass, it will face a dual expense, paying for her loss without receiving more than volunteer work from her. This should provide the city with an incentive to hire her as soon as possible. In addition, should the city choose not to offer Pendergrass a job, for any reason, then her damages continue into the future. Her wage loss alone will exceed \$50,000.00 in two additional years. Thus, the future earnings recovery is reasonably small, given the scope of Pendergrass' potential future losses. At some point, continued damages become speculative. Opportunity to mitigate those future damages also is relevant. \$50,000.00 is a reasonable sum to cover those future damages should the city not hire Pendergrass.

The department has the clear power and duty to award money for emotional distress Pendergrass proved. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (Mont. 1993). The department has the power, by statute, to remedy any harm resulting from the illegal discrimination. §49-2-506(1)(b) MCA. 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.²³ 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.²⁴

The primary issue regarding emotional distress damages in discrimination cases arises from the degree of proof. Unlike most civil cases, this is purely a matter of whether the evidence adduced convinces the fact-finder that the claimant did suffer severe emotional distress. In civil cases, the issue often involves whether the plaintiff proved the elements necessary to establish liability for intentional or negligent infliction of emotional distress. *See, Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995). Liability in discrimination cases does not arise from these free-standing torts. It flows directly from proof of the illegal discrimination. Thus,

²³ *Carey v. Piphus*, 435 U.S. 247, 264, at ftnt. 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*, 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 Civil Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990).

²⁴ *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).

the pure fact question for emotional distress recovery involves the degree of actual harm suffered by the claimant, not the degree of egregious conduct on the part of the respondent.

Pendergrass testified about her emotional distress. Her demeanor while testifying corroborated that distress. Her husband's testimony verified the changes in behavior and attitude resulting from the city's rejection of Pendergrass. Also, her counselor's professional opinions supported her testimony of emotional distress. Her level of functioning decreased due to her distress. Her ability to deal with others, not just in the labor market but even in her outside activities (weight-lifting and fine arts) declined. Pendergrass presented substantial and credible evidence to support an award of \$7,500.00 for her emotional distress.

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. The unfettered discretion accorded the supervisor of City Services for selecting volunteers and interviewees has failed. The city must adopt policies that restrict that discretion and subject it to review. Given the disparate numbers of men the city employs, scrupulous avoidance of any practice that smacks of discrimination because of sex is vital. The city must immediately take the appropriate steps to draft and implement policies and practices to achieve these goals, and end the illicit use of sexual stereotypes and bias in its hiring practices. The evidence adduced does not mandate further steps by the city. The disparity between male and female employee numbers should no longer persist in new hires after the city implements the mandated steps, unless that continuing disparity results from a lack of female applicants. If a gender-neutral hiring process yields a male-predominant work force, the city may at some future date have an obligation to take affirmative action to encourage applications by women. The evidence adduced does not demonstrate a present need for such action.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Respondent City of Libby--Department of Water unlawfully discriminated in employment against charging party Janet Pendergrass because of her sex when it refused to hire her as a waste water treatment plant operator in March 1998. §49-2-303(1) MCA.

3. Pursuant to §49-2-506(1)(b) MCA, the city must take the following actions to remedy the harm to Pendergrass resulting from the illegal discrimination:

a. The city must hire Pendergrass as the next new hire for waste water treatment plant operator or (if she obtains the proper license) water treatment plant operator. The city may not hire any other individual for a waste water treatment operator or (until Pendergrass' next opportunity to obtain the proper license and thereafter if she obtains it) water treatment plant operator until it hires Pendergrass. If the city and Pendergrass reach a mutually acceptable settlement, approved by the department (Human Rights Bureau), the city may hire Pendergrass as a probationary new hire, as it would any ordinary new hire. If the city and Pendergrass do not reach a department approved settlement on this single point, then the city must hire Pendergrass with the seniority, rank, grade and wage appropriate had she been hired effective April 1, 1998.

b. When the city pays her back pay, it must pay to her PERS account the sum of \$3,139.23, plus \$4.779 for every day between judgment and the effective date of hire. It must in like fashion pay into her Social Security account the sum of \$2,894.07, plus \$4.339 for every day between judgment and the effective date of hire. Both daily amounts increase by 2% effective April 1, 2000.

c. If the city does not hire Pendergrass within 24 months of judgment, then the city must pay Pendergrass, immediately at the end of the 24 months, \$50,000.00 in addition to all other monetary relief accorded by this decision.

d. The city must pay to Pendergrass \$46,418.63 for lost wages through judgment. Each day for 24 months after judgment that the city fails to satisfy the requirements of subparagraph (a), the city must pay to Pendergrass an additional \$70.223, plus PERS and FICA amounts specified in subparagraph (b). The daily amount increases by 2% effective April 1, 2000.

e. The city must pay to Pendergrass \$4,201.08 in prejudgment interest. Post judgment interest accrues by operation of law.

f. The city must pay to Pendergrass \$7,500.00 for her emotional distress.

g. The city must pay for up to five sessions for Pendergrass with Clark Peter Volkman within 6 months of judgment, at his current rate. The city's liability to pay for these sessions takes precedence over any insurance coverage Pendergrass may have at the time of the sessions.

4. Pursuant to §49-2-506(1)(a) and (c) MCA, the department requires the city to take the following actions to eliminate the risks of any further violations of the Human Rights Act:

a. The city must not make hiring decisions or decisions about which applicants to interview for an opening based upon the sex of applicants.

b. In addition, the city must also send its city director and all department heads to four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of eliminating sexual stereotyping and bias from hiring decisions. The city shall obtain the signed statement of the trainer(s) indicating the content of the training, the date it occurred and the identity of the city employees that attended for the entire period. These statements of the trainer shall be submitted to the department (Human Rights Bureau) not later than two weeks after the training is completed.

c. Within 30 days of the date of this decision, the city must submit to the department (Human Rights Bureau) written policies and procedures that will cure the illegal practices delineated in this decision. The written proposals must address:

- i) Maintenance of applications received for each opening
- ii) Adoption of a policy regarding volunteers that includes maintaining records of offers to volunteer, providing a formal mechanism to receive such offers and defining the criteria for decisions about whether to accept volunteer offers;
- iii) 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; and

iv) Such other changes appropriate for the city to accomplish its hiring and recruitment within the confines of the Human Rights Act.

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

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

VI. Order

1. Judgment is found in favor of Janet Pendergrass and against the City of Libby, Department of Water Quality, on the charge that the city discriminated against Pendergrass on the basis of sex (female) when it hired a less qualified man to fill its vacant position on or about April 1, 1998.

2. The City of Libby must pay to Pendergrass the sum of \$58,119.71 for lost wages (\$46,418.63), pre-judgment interest (\$4,201.08) and emotional distress (\$7,500.00), plus accompanying FICA and PERS payments as specified in Conclusion of Law No. 3(b). For 24 months after judgment, the city shall pay Pendergrass an additional \$70.223 in lost wages for each day that the city does not perform the hiring requirements of paragraph 3 of this order, plus accompanying FICA and PERS payments in accord with Conclusion of Law No. 3(b) (the daily amount increases by 2% effective April 1, 2000). Interest on this judgment accrues by law.

3. The city must hire Pendergrass as the next new hire for waste water treatment plant operator or (if she obtains the proper license) water treatment plant operator. The city may not hire any other individual for a waste water treatment operator or (until Pendergrass' next opportunity to obtain the proper license and thereafter if she obtains it) water treatment plant operator until it hires Pendergrass. If the city and Pendergrass reach a mutually acceptable settlement, approved by the department (Human Rights Bureau), the city may hire Pendergrass as a probationary new hire, as it would any ordinary new hire. If the city and Pendergrass do not reach a department approved settlement on this single point, then the city must hire Pendergrass

with the seniority, rank, grade and wage appropriate had she been hired effective April 1, 1998.

4. If the city does not hire Pendergrass within 24 months of judgment, then the city must pay Pendergrass, immediately at the end of the 24 months, \$50,000.00 in addition to all other monetary relief accorded by this decision.

5. The city must pay for up to five sessions for Pendergrass with Clark Peter Volkman within 6 months of judgment, at his current rate. The city's liability to pay for these sessions takes precedence over any insurance coverage Pendergrass may have at the time of the sessions.

6. The City of Libby is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 4.

Dated: February 7, 2000.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry