# BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

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| **Kathy Denke**, Charging Party, vs. **City of Thompson Falls** and **Maurice Shoemaker**, Councilman for City of Thompson Falls, Respondents. | HRC Case Nos. 0009009180 & 0009009181<br><br>*Final Agency Decision* |

## I. Procedure and Preliminary Matters

Kathy Denke filed two complaints with the Department of Labor and Industry on March 3, 2000. The department consolidated the complaints. In her consolidated complaints Denke alleged that:

(1) Maurice Shoemaker retaliated against her by publishing or causing to be published false public statements about her job performance, her prior discrimination and retaliation charges against the city and its mayor (HRB Case No. 0009008998, EEOC Case No. 32D990214) and the settlement of the prior charges;

(2) Shoemaker retaliated against her by making public references to the settlement, contrary to the terms of that settlement, calling for her resignation, circulating or encouraging the circulation of petitions to place Shoemaker on the February 14, 2000 council meeting agenda to discuss Denke's prior Human Rights charges, falsely stating that he did not know the terms of the settlement and causing the mayor to place him on the agenda for the February 14, 2000 council meeting to discuss the prior Human Rights charges and their settlement;

(3) Shoemaker retaliated against her by stating at the February 14, 2000 council meeting that he had not heard an apology yet from Denke for her prior sexual harassment complaint and by making, soliciting, encouraging or failing to limit false, defamatory, humiliating and abusive comments to and about Denke during that meeting;

(4) The City of Thompson Falls, through the city council, retaliated against her by making, soliciting, encouraging or failing to limit false, defamatory, humiliating and abusive comments to and about Denke during the February 14, 2000 council meeting; and

(5) The City of Thompson Falls was responsible for Shoemaker's actions.

On September 14, 2000, the department gave notice Denke's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. On November 29, 2000, respondents filed motions for summary judgment. Subsequently, they filed motions to continue the hearing. Denke filed briefs in opposition to these motions. The department denied the motions to continue the hearing. Respondents objected to the department hearing oral argument on the summary judgment motions at the final prehearing conference, on the grounds that they needed more time to prepare and file written replies to Denke's briefs in opposition to their summary judgment motions. Allowing time for written replies would have necessitated postponing the hearing, and Denke refused to stipulate to extend jurisdiction in order to permit such a postponement. In accord with the scheduling order, the department sustained the objections and postponed rulings on the summary judgment motions until after hearing. This final decision subsumes within it the rulings on the summary judgment motions.

This contested case hearing convened on December 20, 2000, in Thompson Falls, Sanders County, Montana. Denke attended and participated with her attorneys, James A. Manley and Ann L. Moderie, Manley & O'Rourke-Mullins. The city participated through its attorneys, Walter E. Congdon, Congdon Law Office, and Ted Hess-Homeier, Thompson Falls City Attorney.[1] Shoemaker attended and participated with his attorney, Edward A. Murphy, Datsopoulos, MacDonald & Lind, P.C. Hearing concluded on December 21, 2000. The hearing examiner's witness, exhibit and file dockets accompany this decision.

Denke filed her proposed decision on January 26, 2001. Respondents filed the last of their proposed decisions on March 28, 2001. Denke filed her reply brief on April 11, 2001.

## II. Issues

The issues in this case are (1) whether Shoemaker published or caused to be published letters, either with reckless disregard for the truth or falsity of statements therein or with provably false connotations about Denke therein, those statements imputing to her failure properly to perform her accounting work and collusion to obtain money improperly from her employer, and

[1] The city did not designate a representative to attend with counsel.

(2) whether the respondents' other acts were protected by privilege, immunity or constitutional right. The prehearing order contains a full issue statement.

## III. Findings of Fact

1. The City of Thompson Falls (the city) is a local government formed pursuant to Title 7, Montana Code Annotated, in Sanders County, Montana. It operates under the council-mayor form of local government. The mayor is the city's chief executive officer.

2. At all times pertinent to this case, Maurice Shoemaker was a member of the city's council. He was first appointed as a council member in 1995, and thereafter elected to continue as a council member. He received a monthly check from the city for his work as a council member. He is retired, having worked for the Thompson Falls Lumber Company as a supervisor.

3. At all times pertinent to this case, Kathy Denke was the city's clerk, an employee of the city. Her job title was "Town Clerk /Finance Officer." Her job duties included acting as the city's treasurer. Her immediate supervisor was the mayor. The city paid her wages for her work as the city clerk. By the year 2000, she had worked for the city for almost eighteen years. She had seven and one-half years to work before retirement.

4. In 1998 and early 1999, the city hired a certified public account to examine the bookkeeping and records of the city. The CPA reported some problems. Shoemaker was aware that other council members worked with Denke and the CPA to remedy the problems.

5. In the spring of 1999, the CPA reported that the books were in good order. He recommended some additional procedures to improve the city's financial record keeping. The city authorized the CPA to make the changes. He charged $50.00 per hour to do the work. Shoemaker, as a member of the council, received the accountant's report and participated in the decision to authorize the accountant's work. Despite the CPA's explanations, Shoemaker, who had no accounting expertise, thought Denke was responsible for causing the city to incur the expense of the changes. Until January 2000, Shoemaker did not tell anyone that he held Denke responsible.

6. Shoemaker also believed that the council tabled too many agenda items, particularly involving reports about ongoing city business. He thought Denke was responsible for failing to provide completed reports and sufficient information to address the items the council tabled. Before January 2000, Shoemaker had, at council meetings, expressed this thought.

7. In August 1999, Denke filed a complaint against the city pursuant to the Montana Human Rights Act (HRB Case No. 0009008998), alleging sexual harassment and retaliation by the mayor, Jerry Neal.

8. During the October 11, 1999, regular meeting of the city council, the council met in executive session (open to the public at Denke's election) and agreed to a settlement of Denke's complaint and her companion federal complaint (EEOC Case No. 32D990214). Shoemaker knew all of the terms of the settlement, which he reviewed and which were read during the October 11 council meeting.

9. Shoemaker objected to the settlement. He generally disapproved of the law providing remedies for sexual harassment. He believed that Denke, or any other complainant, could not be a victim of sexual harassment without inviting or participating in the allegedly objectionable conduct. He thought it inappropriate for Denke, a city employee, to bring a discrimination claim against the city for conduct of the mayor that occurred on the job. He suspected that her complaint was a response to criticism of her job performance, rather than a legitimate complaint of inappropriate treatment. He resented a state agency investigating the city's conduct and interfering in what he viewed as purely local concerns and an autonomous local government. After the discussion during the executive session, he voted to approve the settlement despite his objections.

10. Settlement between the parties to a Human Rights Act complaint does not conclude the matter without approval of the department's Human Rights Bureau, which may sometimes proceed further on the matter despite settlement by the parties. The parties submitted the settlement agreement of Denke's complaint to the Bureau in November 1999. As part of the settlement, the parties also agreed not to discuss the terms of the settlement agreement with anyone.[2] This confidentiality provision was part of the settlement agreement discussed, read and approved at the October 11 council meeting. The mayor, the city attorney and the council (including Shoemaker) also signed a separate document as part of the settlement, by which they agreed not to discriminate or retaliate against Denke because of her complaint. Denke feared retaliation from the city for her complaint.

11. In December 1999, Shoemaker received questions and comments from citizens about the settlement. He heard rumors that the city had paid

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[2] Although the parties to Human Rights Act settlements often agree to confidentiality clauses, the documents comprising the settlements, the underlying complaints and investigations may still be matters of public record, available from the Human Rights Bureau.

$15,000.00 to settle the case. Shoemaker did not know if the settlement had been approved by the Human Rights Bureau. He knew the settlement that he voted to approve did not include any such payment. He felt his constituents might blame him for an excessive settlement and wanted to respond publicly.

12. Shoemaker went to City Hall and asked Denke to put him on the agenda for the next council meeting. Denke told Shoemaker that she would ask the mayor, since the mayor made agenda decisions. Shoemaker tried to call the mayor, but did not reach him. Denke told the mayor about Shoemaker's request. The mayor did not put Shoemaker on the agenda.

13. On January 6, 2000, Shoemaker wrote a letter to the Sanders County *Ledger*, the local Thompson Falls newspaper. The *Ledger*'s editor and co-owner, Tom Eggensperger, was another council member. Shoemaker personally delivered the letter to Eggensperger. Eggensperger told Shoemaker that he would print the letter, but only after removing portions of it that Eggensperger considered improper and possibly actionable if the statements were untrue. Although Eggensperger did not know whether any of the statements were false, he made the deletions and printed the rest of the letter, including an expression of Shoemaker's belief that both the Mayor and Denke should resign. Shoemaker's statements in the printed version of the letter were neither statements he knew to be false nor statements that he made with a reckless disregard for their truth or falsity. Eggensperger added an editorial comment, noting that he had deleted accusations he considered unfair, unsubstantiated, misrepresentations of facts or inappropriate, and defending himself from conflict of interest accusations in the printed letter.

14. Shoemaker was unhappy about the editorial deletions and the editorial comment. He made copies of the original letter available to citizens of Thompson Falls. He read the deleted portions of the letter to citizens who called him and inquired about the letter and editorial comment in the *Ledger*.

15. The two deletions pertinent to this case involve three paragraphs of the original letter, exhibit 4, which read as follows:

> The city had an audit in 1998 which shows there was poor bookkeeping at city hall. In fact it was so bad it is now costing the city $50.00 per hour to get it corrected. This money was actually wasted, as the bookkeeping is already paid for. Maybe this is money that could have been used on city streets. This is your tax dollar. [end of first deletion]
>
> And now to top everything off the city clerk filed sexual harassment charges against the Mayor and the city. This is why I wanted on the agenda, to talk about this with all parties present.

I feel that as I represent the city I have been accused of something that I had nothing to do with and should have a right publicly to speak in my defense.

So far I have heard a "He did" but I have not heard a "I did not." [end of second deletion]

16. Shoemaker made the comments in all of the deleted paragraphs because he disapproved of Denke for filing her first Human Rights complaint. He distributed copies of the entire January 6 letter to citizens only because the *Ledger* refused to print the deleted portions. He wrote the letter after Denke's complaint and the settlement, because public comment and speculation about the settlement made him feel defensive and the mayor refused to put him on the council agenda to discuss the settlement.

17. Shoemaker had no information to contradict the accountant's 1999 report that the books were in good order. He had no informed source reporting that the prior problems in 1998 were Denke's fault. He believed that to be true, but he personally could not tell an asset from an angle iron under generally accepted accounting principles.[3] Shoemaker made the statement, in the first deleted portion of the January 6 letter, that it was Denke's fault that the city had to spend $50.00 an hour for the retained accountant to make changes in accounting procedures, with reckless disregard for the truth or falsity of the statement. He included the statement in the letter in furtherance of his goal of getting on the council's agenda to discuss Denke's Human Rights claim. He took this action with retaliatory animus toward Denke.

18. Shoemaker knew or reasonably should have known that Denke's complaint of sexual harassment was a denial of any wrongdoing on her own part. Sexual harassment is defined as <u>unwelcome</u> sexual attention. However, Shoemaker's statement in the second paragraph of the second deletion was ambiguous. A reasonable reader would understand that Shoemaker was asserting that he had heard Denke allege sexual harassment and retaliation by the mayor ("He did"). A reasonable reader would not know whether Shoemaker was also asserting that Denke had not denied misconduct on her own part or that the mayor had not denied the truth of the Denke's allegations ("I didn't"). Because of that ambiguity, Shoemaker did not make the statements in the second deleted portion of the January 6 letter either with reckless disregard for the truth or falsity of the statements or with provably false connotations regarding Denke.

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[3] In addition to the absence of any evidence that Shoemaker possessed knowledge or experience regarding accounting and generally accepted accounting principles, his testimony explaining his rationale for blaming Denke established his lack of knowledge.

19. On January 19, 2000, Shoemaker wrote a second letter. In it, he repeated his complaints about not getting on the agenda and his accusations about Eggensperger's conflict of interest. He made comments about the Denke settlement [***see*** finding 20, ***infra***]. He called for resignations by the mayor and Denke.

20. Shoemaker provided copies of the letter to citizens, including Laurie Brass. On or about January 24, 2000, Brass and others who had learned of Shoemaker's actions and views started circulating petitions calling for the mayor to place Shoemaker on the agenda for the February 14 council meeting, to talk about Denke's sexual harassment charges against the city and the mayor. Through Brass, Shoemaker knew of the petitions and of the use of his letters with them.

21. The statements in the January 19 letter, exhibit 6, about the settlement are as follows:

> The city clerk filed a sexual harassment complaint against the MAYOR and the city. At this time has there has been a settlement or a pay off? If so whow [sic] and how much? Who got the money, the clerk and the MAYOR or what happened? I do not know as nothing has been told to me. Some one seems to want to sweep this under the carpet and not let the public know about it.

22. At the time he wrote the January 19 letter, Shoemaker knew the terms of the settlement he had approved, and knew or reasonably should have known that the settlement submitted to the Human Rights Bureau was exactly the settlement he had approved. He knew exactly who would receive money under that settlement and how much money. He wrote the letter with the false statements it contained about his knowledge of the settlement, because he wanted a chance both to tell the citizens during a council meeting that the city had not made a $15,000.00 settlement payment and to repeat his objections to sexual harassment liability law.

23. Shoemaker's question about who received the settlement money contained a deliberate suggestion that Denke and the mayor had divided settlement money from the city. Shoemaker had no factual basis for that suggestion. A reasonable reader would understand that Shoemaker was asserting that Denke and the mayor had colluded to obtain a settlement from the city for a sexual harassment claim that had no merit. Shoemaker's suggestion raised provably false connotations regarding Denke. He made the statements with knowledge of their provably false connotations. He wrote the letter in furtherance of his goal of getting on the council's agenda to discuss

Denke's Human Rights claim. He took this action with retaliatory animus toward Denke.

24. Shoemaker was not properly discharging any official duty as a council member in writing the letters of January 6 and 19, 2000.

25. On January 27, 2000, council member Linda McKahn told Shoemaker that the Human Rights Bureau had approved the settlement presented during the October 11, 1999, council meeting. Shoemaker did not provide that information to the people circulating the petitions.

26. Before publication of the agenda for the February 14, 2000, council meeting, Denke had learned of Shoemaker's letters and the petitions. She received hostile comments in person and by telephone as a result of the letters and the petitions. On February 14, Shoemaker talked to Denke about his views on the settlement and her first complaint. His comments to her were consistent with his comments in his letters. As a result of learning of the publication of Shoemaker's letters and receiving hostile comments in the community triggered by those publications, Denke suffered severe emotional distress before attending the February 14 council meeting.

27. The first item on the agenda for the February 14, 2000, council meeting was "Human Rights Complaint, Maurice Shoemaker/Laurie Brass." Because of the size of the anticipated crowd, the meeting convened at the Community Center building, which has a meeting room substantially larger than the City Council chambers. Approximately 75 people attended the meeting. Denke attended, because she knew the first item on the agenda would involve her, the petitions and the comments and allegations in Shoemaker's letters. She feared that her absence would aggravate the situation and further jeopardize her reputation and her job.

28. At the commencement of the council meeting the mayor, who presided over council meetings, resigned and left the meeting. Eggensperger, who had been on the council for over 12 years, ordinarily would have presided, but he was absent. McKahn, as the senior council member present, assumed the duty of chairing the meeting. She was not experienced in chairing such a council meeting.

29. Shoemaker began, because he was identified with the first agenda item. After lengthy remarks about the *Ledger*'s censorship and the mayor's refusal to put him on the previous agenda, he discussed the rumors about the amount of the settlement, which were inconsistent with his understanding of the settlement, and the absence of any confirmation during a council meeting

that the settlement had been accepted. He repeatedly talked about council members "sweeping it under the rug [or carpet]" and "keeping it behind closed doors." He also commented that he had not heard an apology to date from either the mayor or Denke. He told the assembly that Denke had agreed with his account of what happened between the mayor and Denke. He turned to Denke and asked her to acknowledge her agreement with him. Denke said, "No." After Shoemaker, numerous citizens, members of the council and the city attorney spoke, in a free-ranging discussion.

30. During the course of discussion, the city attorney and members of the council pointed out that there was a confidentiality agreement. Laurie Brass told the assembly that she had obtained copies of documents from the investigative file from the Human Rights Bureau. She passed some of the copies around the room. Shoemaker commented that Denke had elected to have the October discussion of the settlement in an open rather than a closed council session, and therefore the matter was open for discussion. The discussion was prolonged. McKahn did not know how appropriately to limit the discussion, so she did not. Many of the citizen comments were not per se attacks upon Denke, but were instead critical and suspicious comments regarding the conduct of council and government business. Some citizens made comments suggesting that Denke had been a willing participant in the sexual harassment of which she had complained. A smaller number of the comments insinuated or directly asserted that Denke had voluntarily engaged in sexual activity with the mayor at work during working hours. When the discussion lagged, council members asked if there were any other comments, prefatory to closing the discussion and moving to the next agenda item. That question repeatedly prompted additional comments.

31. The size of the crowd at the February 14 council meeting was due to the agenda item about Denke's Human Rights complaint. The citizen participation during the council meeting was almost exclusively regarding that agenda item. Denke attended the entire meeting, seated prominently in front of the crowd. Her attendance was not mandatory, but she anticipated discussion regarding her, and did not want to be conspicuously absent.

32. Subsequently, the *Missoulian* printed an extensive article reporting the February 14 meeting and the public comments during it. Radio stations in western Montana (as far away as Great Falls) broadcast reports of the meeting. Denke was humiliated. She suffered physical, emotional, and mental harm as a result of the meeting and its publicity. Since then, she missed a substantial number of work days and the wages for them because of that harm. She has required hospitalization for suicidal ideation and inability to function. Her ability to cope with her physical and emotional problems, as well as her ability

to cope with the stresses of every day life, have been seriously compromised.

33. Much of the harm Denke suffered resulted from the February 14 council meeting and the publicity attendant upon it. However, even without that harm, Denke suffered severe emotional distress because of Shoemaker's statement, with reckless disregard for its truth or falsity, that it was Denke's fault that the city had to spend $50.00 an hour for its retained CPA to make changes in accounting procedures, and his false question as to whether Denke and the mayor together received payments in settlement of her Human Rights complaint against the mayor. To rectify the harm of that severe emotional distress, Denke is reasonably entitled to $7,500.00.

34. Injunctive relief barring future retaliatory statements by Shoemaker is adequate, since his other actions in this matter are subject to immunity or qualified constitutional protection.

## IV. Opinion

Montana law bans retaliation against a person who files a discrimination complaint under the Act or participates in a proceeding under the Act. §49-2-301 MCA; *Mahan v. Farmers Union Central Exch., Inc.*, 235 Mont. 410, 422, 768 P.2d 850, 857-58 (1989). The department exercises exclusive original jurisdiction over complaints in which the gravamen is illegal discrimination. §49-2-509(7) MCA; *Great Falls Public Schools v. Johnson*, __ Mont. __, 26 P.3d 734, 2001 MT 95 (2001); *Shields v. Helena School District*, 284 Mont. 138, 943 P.2d 999 (1997); *Fandrich v. Capital Ford Lincoln Mercury*, 272 Mont. 425, 901 P.2d 112 (1995); *Bruner v. Yellowstone County*, 272 Mont. 261, 900 P.2d 901 (1995); *Chance v. Harrison*, 272 Mont. 52, 899 P.2d 537 (1995); *Hash v. U.S. West Communications Serv.*, 268 Mont. 326, 886 P.2d 442 (1994); *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200 (1990).

The gravamen of Denke's complaint is illegal discrimination–alleged retaliation against her because of her prior complaint and the proceedings leading to its settlement. Denke alleged that part of the retaliation was defamation, a statutory tort under Montana law. ***See*** Title 27, Chap. 1, Part 8, MCA. Clearly, the department does not have jurisdiction to decide whether either respondent defamed Denke. Such determinations are solely within the power of the Montana district courts, and the law reserves some of those determinations to the jury. ***Id.***

The department can exercise jurisdiction over this complaint. However, this is a case of first impression regarding how the department properly

exercises its jurisdiction without encroaching upon the province of the judiciary regarding defamation claims. The department will decide the claim by applying the elements of proof for a retaliation claim under the Human Rights Act rather than the elements of proof for a defamation claim under Title 27. Defamation law may become relevant regarding the respondent's defenses, but this decision addresses the Human Rights Act claims only.

If Denke proves a prima facie case of retaliation, Shoemaker and the city must either controvert that evidence or present proof establishing affirmative defenses. Denke may then present evidence of pretext or other rebuttal. Ultimately, she has the burden of persuading the fact finder that she suffered illegal retaliation for which the department should impose affirmative relief, and require that any responsible respondents rectify the harm she suffered. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987).

1. Prima Facie Case

To establish her prima facie case of unlawful retaliation in violation of §49-2-301 MCA , Denke must prove three elements: (1) that she engaged in activities protected by the Human Rights Act; (2) that Shoemaker and the city subjected her to significant adverse acts and (3) that there was a causal connection between the significant adverse acts and her protected activities under the Act. 24.9.603(1) A.R.M.[4]

Denke filed a Human Rights Act complaint in August 1999, which was pending until Human Rights Bureau approval of settlement in January 2000. Filing and prosecuting her complaint before the Human Rights Bureau was protected activity. This satisfies the first element of her prima facie case.

Unlawful and retaliatory actions include "coercion, intimidation, harassment . . . or other interference with the person or property of an individual." Rule 24.9.603(2)(a), A.R.M. Denke presented evidence that Shoemaker and the city subjected her to coercion, intimidation and harassment. This satisfies the second element of her prima facie case.

Rule 24.9.603(3) A.R.M. dictates a disputable presumption of retaliatory motive for significant adverse acts against a Human Rights Act complainant while the complaint is pending or within six months after its

[4] Sub-chapter 6 of the Commission's rules applies to this contested case before the department, including section 603. 24.9.107(1)(b) A.R.M.

resolution.[5] All of the conduct at issue in this case occurred while Denke's prior complaint against the city was pending or within six months after its resolution. Thus, she is entitled to the disputable presumption of retaliatory motive.

The rule's presumption of retaliatory motive establishes a causal connection between Denke's protected activity and the adverse employment decision. *Laib v. Long Construction Co.*, HRC Case No. AE80-1252 (Aug. 1984), ***quoting*** *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982); ***accord***, *Schmasow v. Headstart*, HRC Case No. 8801003948 (June 1992). ***See also*** *Foster v. Albertson's*, 254 Mont. 117, 127, 835 P.2d 720 (1992), ***citing*** *Holien v. Sears, Roebuck and Co.*, 689 P.2d 1292 (Or. 1984). Montana can follow federal discrimination case law when the same rationale applies under the Montana Human Rights Act. *Crockett*, ***op. cit.***, 761 P.2d at 818; *Johnson*, ***op. cit.***, 734 P.2d at 213. The use of federal case law is proper but not mandatory. *Longan v. Milwaukee Station Restaurant*, HRC No. AE82-1796 (Nov. 83). Resort to federal precedent is appropriate here. The federal and state cases cited above are consistent with other federal decisions as well. ***See*** *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); *Alexander v. Gerhardt Ent., Inc.*, 40 F.3d 187, 195 (7th Cir. 1994). The presumption satisfies the third element of her prima facie case.

In addition to the presumption, there is direct evidence that Shoemaker took some of the adverse actions specifically because of Denke's prior Human Rights complaint.[6] He sought to get on the council's agenda to discuss settlement of that complaint. He wrote about the complaint and its merits in his letters, one of which he provided to the *Ledger* for publication and both of which he provided to citizens. In his letters he also criticized Denke's job performance and suggested she resign, actions he had not taken outside of council meetings before Denke's prior complaint. He raised these subjects at

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[5] The alleged retaliator must have knowledge of the complaint, which was admittedly true for Shoemaker and the city in this case.

[6] 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); *Laudert v. Richland County Sheriff's Department*, 301 Mont. 114, 7 P.3d 386 (2000). Direct evidence of discrimination establishes a violation unless the respondents proffer substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert,* ***supra,*** *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). In Human Rights Act cases, direct evidence can relate both to the respondent's adverse action and to the respondent's discriminatory intention. *Foxman v. MIADS*, HRC Case No. 8901003997 (June 1992) (race discrimination); *Edwards v. Western Energy*, HRC Case No. AHpE86-2885 (August 1990) (disability discrimination); *Elliot v. City of Helena*, HRC Case No. 8701003108 (June 1989) (age discrimination).

the February 14 council meeting and was the first to speak about them.

Denke has satisfied the elements of a prima facie case of retaliation. The presumption of retaliatory motive applies to both respondents. In addition, she presented direct evidence of Shoemaker's retaliatory motive.

2. Affirmative Defenses of Constitutional Protection, Privilege and Immunity

The significant adverse acts that Denke proved consisted of speech. Freedom of speech is a fundamental right under the constitutions of Montana and the United States. "Speech," in this context, includes communicative behavior, not simply spoken and written words. The state and federal courts regularly protect that fundamental right, even when the speech involved is unpleasant, repugnant or worse. The conflict between the right to free speech and the right to be free of illegal retaliation are central to this case.

Shoemaker and the city asserted privilege, immunity and constitutional rights with regard to all of the alleged acts. The privileges asserted were those related to claims of defamation. §27-1-804 MCA. The immunity asserted was legislative immunity, as applied to local as opposed to state government. The constitutional rights alleged all involved freedom of speech. Each affirmative defense requires separate analysis. However, there is one common thrust to all of these affirmative defenses. Respondents argue that because of the privilege, immunity or constitutional right, the Human Rights Act cannot impose liability. Although there is little to no current Montana law defining the interaction between the Human Rights Act's prohibition against retaliation and these affirmative defenses, the department agrees that privileged, immune or constitutionally protected communications cannot be retaliatory. To hold otherwise would be to impair constitutionally protected freedom of speech. The legislature did not intend, in adopting the Human Rights Act, to impinge upon that constitutional right.

Therefore, the affirmative defenses are necessarily the first level of analysis, as applied to the various acts of the respondents.[7] If the respondents' acts were privileged, subject to immunity or constitutionally protected, no further analysis is necessary regarding Denke's retaliation claims, unless Denke presented rebuttal evidence that defeated the defenses of privilege, immunity or constitutional protection.

2a. Affirmative Defenses–the Shoemaker Letters

[7] Respondents' summary judgment motions were premised upon these defenses.

The first affirmative defense Shoemaker raised was one of privilege pursuant to §27-1-804 MCA. The privileges the statute lists are among the defenses to defamation claims. Defamation is a statutory tort that involves unprivileged and false publication[8] of information that exposes the claimant to hatred, contempt, ridicule, obloquy, shunning, avoidance or a risk of harm in her occupation. §27-1-802 MCA.[9] The privilege defenses protect four kinds of communications. The first two kinds of protected communications are potentially pertinent here. They are (1) communications in the proper discharge of any official duty and (2) communications in any legislative or judicial proceeding or any other official proceeding authorized by law.

The public policy requiring that publication be unprivileged as well as false in order to be defamatory is well addressed in the case law, discussed ***infra***. The very same public policy that led to the adoption of the defense of privilege in defamation cases applies with equal force under the Human Rights Act. Privileged speech is speech required of the speaker, either in discharge of an official duty or within an official proceeding authorized by law. If a citizen or public officer can be sued for speech required within an official duty or an official proceeding, the business of the public is impeded or harmed. Thus, what might otherwise be actionable becomes protected, for the good of the public.

Defenses to discrimination claims include justification of significant adverse action by evidence that the defendant took the action for a legitimate non-discriminatory reason. 24.9.610(3) A.R.M. Each of the privileges listed in the defamation defense statute present legitimate non-discriminatory reasons for a defendant to communicate otherwise defamatory matter to others. Thus, when a claimant asserts retaliatory speech as a violation of the Human Rights Act, a respondent can appropriately interpose the privilege defense to defamation claims as a legitimate business purpose defense to discrimination claims based upon allegedly retaliatory speech. The legitimate business purposes are the good of the public and the conduct of the public's

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[8] "Publish" refers to sharing the statement, whether spoken or written, with others. This is the sense of "publication" when the word appears in the Montana defamation statutes. Title 27, Chap. 1, Part 8. "[T]he defamation must have been communicated to someone other than the person defamed. This element of communication is given the technical name of 'publication.'" *Wade v. Lewis*, 162 Mont. 401, 406, 512 P.2d 702, 705 (1973). The significant adverse acts Denke proved were likewise communications to persons other than Denke, so use of "publication" and "publish" to describe the acts is appropriate.

[9] The cited statute defines libel, which is defamation by writing or other visual means. Slander (defamation other than libel) is narrower, but does include imputation to the plaintiff of lack of chastity or of characteristics that expose her to a direct risk of harm in her occupation. §27-1-803 MCA.

business.

Shoemaker's letters commented upon Denke's job performance and her first Human Rights complaint. Had Shoemaker read his letters to the council and the other attendees at the February 14 council meeting and provided copies during the meeting to the press and other attendees, absolute privilege would have applied to his letters. *Skinner v. Pistoria*, 194 Mont. 257, 261-63, 633 P.2d 672, 675-76 (1981). However, his publication of the letters occurred outside of any council meeting, and he cannot assert the privilege accorded to statements made during any official proceeding authorized by law, pursuant to §27-1-804(2) MCA.

There is neither authority nor reason to hold that the mayor's initial refusal to put Shoemaker on the city council agenda had the effect of extending the privilege he enjoyed for statements made during council meetings to the statements he made in his letters. The legislature intended the absolute privilege only for those proceedings identified in §27-1-804(2) MCA, choosing otherwise to condition the privilege upon "proper" discharge of an official duty or upon truth and fairness and/or lack of malice. ***Compare*** §27-1-804(2) MCA ***with*** §27-1-804(1) MCA. *Skinner* and its progeny[10] do not directly address the extension of the absolute privilege outside of the legislative proceeding, but federal law addressing the same point provides a persuasive rationale. A legislator is not entitled to absolute protection for publishing statements such as news releases and public statements outside of actual legislative proceedings. ***See***, *Hutchinson v. Proxmire*, 443 U.S. 111, 130-31 (1979). The department will not extend the absolute privilege outside the specific proceedings for which the legislature granted it.

The conditional privilege of proper discharge of an official duty under §27-1-804(1) is inapplicable. Shoemaker could not have believed that Denke and the mayor together received settlement money from the city. He may have believed that Denke's bookkeeping caused the city to spend money on the CPA's changes. Making statements about both matters in a letter sent to citizens was not within the qualified privilege, as a matter of both fact (***see*** Finding No. 24) and law, ***see*** *Hale v. City of Billings*, ***supra at*** 507-8, 986 P.2d ***at*** 421-22.

Immunity under §2-9-111 MCA applies to Shoemaker for all legislative acts and for lawful discharge of official duties. Shoemaker was not engaged in

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[10] *Hale v. City of Billings*, 295 Mont. 495, 986 P.2d 413 (1999); *Burgess v. Silverglat*, 217 Mont. 186, 703 P.2d 854 (1985).

a legislative act when writing these letters and publishing them outside of a council meeting. He was likewise not involved in lawful discharge of official duties. Applying the same reasoning applied to §27-1-804(1) and (2) MCA, the department holds that Shoemaker has no immunity for the publication of his letters pursuant to §2-9-111 MCA. Further, the mayor's refusal to put Shoemaker on the agenda cannot serve to extend Shoemaker's legislative immunity, for the same reasons it cannot extend his privilege.

Shoemaker may have had remedies against the elected government official (the mayor) who refused to put him on the agenda. Perhaps he could have sought a writ of mandate, for example, asking for a court order requiring that the mayor put him on the agenda. But Shoemaker has offered no legitimate rationale for using the mayor's refusal as a basis for extending either privilege or legislative immunity beyond council meetings themselves to reach the publication of his letters.

Regarding the affirmative defense of constitutional free speech, an administrative agency lacks the authority to decide whether a statute is constitutional, since that power is reserved to the judicial branch of government. *Jarussi v. Lake County School District*, 204 Mont. 131, 136, 664 P.2d 316, 319 (1983). However, administrative agencies regularly and properly construe and apply the laws that authorize them to act, doing so in ways that are consistent with the constitutional constraints upon their administrative power. Because the legislature entrusted enforcement of the Human Rights Act to the executive branch, the department properly decides complaints under the Act. The department can decide whether respondents' acts in this case are constitutionally protected or subject to the Act's prohibition against retaliation.

The First Amendment to the Constitution of the United States secures freedom of expression upon public questions. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). The constitutional safeguard assures "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.*, ***quoting*** *Roth v. United States*, 354 U.S. 476, 484 (1954). Maintaining the opportunity for free political discussion to assure that government is responsive to the will of the people and that changes may come by lawful means is a fundamental principle of the American constitutional system. *New York Times*, ***supra***, ***citing*** *Stromberg v. Calif.*, 283 U.S. 359, 369 (1931). "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *New York Times*, ***supra***, ***quoting*** *Bridges v. California*, 314 U.S. 252, 270 (1941). This opportunity is for "vigorous advocacy" not merely "abstract discussion." *New York Times*, ***supra***, ***quoting*** *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

In *New York Times*, the United States Supreme Court considered an Alabama state court judgment in favor of an elected city commissioner and against individuals, for authoring published criticisms, and the *Times*, for publishing the editorial advertisement containing the criticisms, which included some false statements and accusations. The Alabama libel law made it defamation as a matter of law if the published statement harmed the plaintiff's reputation, profession, trade or business or tended to bring him into public contempt. The editorial advertisement was in support of Martin Luther King and the non-violent efforts to force integration in Alabama. The city commissioner won a jury verdict for $500,000.00 after the judge instructed the jury that criticisms and false statements about the police in the publication were defamatory of the commissioner as a matter of law. The Supreme Court reversed, noting the case's context, *New York Times* at 270-71:

> [T]he background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. ***See*** *Terminiello v. Chicago*, 337 U.S. 1, 4; *De Jonge v. Oregon*, 299 U.S. 353, 365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

The Court concluded that a state libel law could not regulate protected political speech based solely on any test of truth. The Court considered untrue statements inevitable in the heat of free debate and still protected, even extending the protection to such things as baseless charges of anti-Semitism.[11] *New York Times*, ***op. cit***., is unequivocal:

> The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *N.A.A.C.P. v. Button*, 371 U.S. 415, 445. As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' 4 *Elliot's Debates on the Federal Constitution* (1876), p. 571.

The Montana Supreme Court has applied *New York Times* regarding

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[11] *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942), ***cert. den.***, 317 U.S. 678 (editorial calling congressman anti-Semitic for opposing judicial appointment was protected speech).

protected political speech 14 times.[12] The principles of protected speech apply with equal force to Montana's Human Rights Act as to Montana's defamation laws. The proceedings regarding Denke's prior Human Rights complaint were a matter of proper public interest, involving a claim of misconduct in office against an elected city official (the mayor), and eventual settlement of that claim by the city.[13]

The Montana Human Rights Act is not a weapon to use against protected speech. Writing for publication in a newspaper or private distribution to citizens on a public issue is protected speech. Neither factual error nor defamatory content, nor even the two combined, can suffice to remove the constitutional shield from criticism of an agency's conduct or comment upon public issues. *Sullivan*, ***supra***. The Montana Legislature did not intend, in adopting the Act, to impose constraints on political speech based on retaliatory motive or politically incorrect content. Information relating to alleged governmental misconduct is speech at the core of the First Amendment's protection. *Butterworth v. Smith*, 494 U.S. 624, 632, (1990), ***citing*** *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ***and*** *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962).

*New York Times* also held that a "public figure" could not recover damages for defamation directed at him individually without proof of actual malice in the publication, in other words, without proof that the statement was made with knowledge of its falsity or with reckless disregard for whether it was false. ***Id. at*** 279-80. Montana follows this holding, requiring that a public figure plaintiff establish publication of either provable false factual

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[12] *State ex rel. Missoulian v. Mont. 21st Jud. Dist.*, 281 Mont. 285, 933 P.2d 829 (1997); *State v. Helfrich*, 277 Mont. 452, 922 P.2d 1159 (1996); *Roots v. Mt. Human Rights Network*, 275 Mont. 408, 913 P.2d 638 (1996); *Lence v. Hagadone Investment Co.*, 258 Mont. 433, 853 P.2d 1230 (1993), ***ov. on oth. grds***, *Sacco v. High Country Ind. Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995); *Kurth v. Great Falls Trib. Co.*, 246 Mont. 407, 804 P.2d 393 (1991); *Rasmussen v. Bennett*, 228 Mont. 106, 741 P.2d 755 (1987); *Sible v. Lee Ent. Inc.*, 224 Mont. 163, 729 P.2d 1271 (1986); *Cox v. Lee Ent. Inc.*, 222 Mont. 527, 723 P.2d 238 (1986); *Williams v. Pasma*; 202 Mont. 66, 656 P.2d 212 (1982); *Skinner*, ***op. cit.***; *Gallagher v. Johnson*, 188 Mont. 117, 611 P.2d 613 (1980); *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (1978); *Big Spring v. Blackfeet Tribe*, 175 Mont. 258, 573 P.2d 655 (1978); *Granger v. Time, Inc.*, 174 Mont. 42, 568 P.2d 535 (1977).

[13] The public's right to know about the complaint and the settlement demonstrate the public's interest in the case. The confidentiality agreement would not survive a challenge, and the HRB properly provided documents to Laurie Brass. *Pengra v. State*, 302 Mont. 276, 14 P.3d 499 (2000); *Bozeman Chronicle v. City of Bozeman Police Department*, 260 Mont. 218, 859 P.2d 435 (1993); *Citizens to Recall Mayor v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992). The public's right to know about such matters demonstrates that these are matters of public interest and proper subjects for protected speech.

connotations or statements of fact with reckless disregard for their truth or falsity. *Roots*, ***op. cit. at*** 412, 913 P.2d at 640; ***cited in*** *Hale*, ***op. cit.***

Private citizens become public figures when they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc. ,* 418 U.S. 323, 345 (1974). Given the nature and extent of Denke's participation in the Human Rights claim that generated this controversy in Thompson Falls, she was a limited purpose public figure, for the purpose of public interest in that case against the city, having filed and prosecuted the case to settlement. ***Id.***; *Kurth*, ***op. cit.*** To prove significant adverse speech, i.e., retaliatory speech, she had to establish that Shoemaker's letters contained provable false factual connotations about her or statements of fact about her with reckless disregard for their truth or falsity, or statements unrelated to the limited purpose for which she was a public figure. She did.[14]

Shoemaker published his letters with reckless disregard for the truth or falsity of some pertinent statements they contained, and knowing other pertinent statements to be false. However, only the statements in the first deleted portion of the January 6 letter regarding the CPA costs to the city and the question in the January 19 letter about Denke and the mayor receiving payment under the settlement are false and unprivileged statements about Denke which had a significant adverse effect upon her. Shoemaker made other false statements in his second letter involving disingenuous assertions of his ignorance of the settlement terms,. Those statement are protected speech under *New York Times*, since they do not assert facts about Denke. His liability to Denke for retaliation is only for the specific items noted in this decision.

2b. Affirmative Defenses–the Council Meeting

As noted above, Shoemaker and every other speaker at the February 14 council meeting enjoyed an absolute privilege for comments during the council meeting about the sexual harassment complaint and its settlement, as well as for comments about Denke's job performance. *Skinner*, ***op. cit.***; §27-1-804(2) MCA. The propriety of citizens and council members commenting on the item on the agenda before the council is beyond cavil. The absolute nature of the

[14] Denke may not have been a public figure for purposes of criticism of her job performance, even though Shoemaker considered her original Human Rights complaint a ploy to stave off critical performance reviews. The department has nontheless used the more stringent "public figure" test for the accounting criticisms. Since Denke prevails under that test, she clearly prevails on her retaliation claim for those comments if her accounting job performance was outside of the limited purpose for which she was a public figure.

privilege is clear as a matter of law. An absolute privilege must be a legitimate non-discriminatory reason for the speech. As abhorrent as many of the comments during that meeting were, the speakers are answerable for their views in the political and not the legal arena. There is no liability on the part of Shoemaker or the city for any comments during the council meeting. Since the absolute privilege applies, the department need not consider the immunity and freedom of speech affirmative defenses.

2c. Affirmative Defenses–the Council's Regulation of the Meeting

No doubt, Shoemaker and some of his supporters made comments that confirmed they viewed sexual harassment as an improper subject for government regulation. Indeed, some of the comments were premised upon the theory that any victim of sexual harassment was responsible for the harassment by encouraging or colluding in the inappropriate sexual overtures or behavior of the harasser. However repugnant such comments may be, disagreement with the law is an appropriate subject for comment during a city council meeting regarding settlement of a claim under that law.

It may be that the council could have limited these comments, in terms of time or topic. However, whether and how to limit comment during a council meeting is a legislative act. A more fundamentally legislative act than deciding how much public comment to permit during a session is hard to imagine. The conduct of McKahn, the other council members and the city attorney in allowing the public discussion about the human rights complaint during the February 14 council meeting consisted of the discharge of official duties associated with the council's legislative acts. Such acts are immune to suit pursuant to §2-9-111 MCA.

3. Respondeat Superior

There is neither law nor fact upon which to base a ruling that the city was responsible for Shoemaker's acts in writing the letters. Since that is the sole basis for his liability, the city is not responsible for his retaliatory conduct.

4. Damages

Denke proved that she suffered severe emotional distress because of Shoemaker's publication of the accusations about the accounting expenses. While the ultimate harm to her from the ugliness of the council meeting was far more severe, neither respondent is legally liable for what she endured during that meeting. Thus, the damages reasonably necessary to rectify the harm for which Shoemaker is legally responsible consists solely of emotional distress

recovery for the retaliatory comments in Shoemaker's letters.

In 1995, Montana adopted a standard for the recovery of emotional distress damages, and applied that standard to all emotional distress recoveries. *Sacco, **op. cit.*** (footnote 14, p. 17). Later that year, the Court ruled that family members of a deceased could experience serious or severe emotional distress when learning without actually seeing that the embalming process was not completed. *Contreraz v. Michelotti-Sawyer and Nordquist Mortuary, Inc.*, 271 Mont. 300, 308, 896 P.2d 1118, 1122-23 (1995).

Before *Sacco*, the Montana Supreme Court had distinguished between "parasitic emotional distress claims (deriving as elements of damages from a "host" cause of action) and independent emotional distress claims (in causes of action for negligent or intentional infliction of emotional distress).[15] *Sacco* began the application of the same standard to all emotional distress claims. "This case [*Day*] was reasoned pursuant to pre-*Sacco* derivative or 'parasitic' tort analysis, which is no longer the law in Montana." *Maloney v. Home Investment Center, Inc.*, 298 Mont. 213, 229, 994 P.2d 1124, 1135 (2000).

*Sacco* held that "[a]n independent cause of action for infliction of emotional distress will arise under circumstances where a serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission." *Sacco* at 238, 896 P.2d at 429. The Court adopted a standard for determining whether emotional distress was serious or severe:

> [Emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved . . . .

*Sacco* at 234, 896 P.2d at 426, quoting *Restatement(2d) of Torts* §46,

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[15] ***Compare*** *Day v. Montana Power Co.*, 242 Mont. 195, 789 P.2d 1224 (1990) ***and*** *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 20 (1984) (parasitic emotional distress claims) ***with*** *Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 853 P.2d 1230 (1993) ***and*** *Niles v. Big Sky Eyewear*, 236 Mont. 455, 771 P.2d 114 (1989) (free-standing emotional distress claims).

comment (j).

*Sacco* expressly simplified emotional distress claims by applying this single standard of proof of all such recoveries, no matter how they arose. While *Sacco* overruled the prior case law regarding standards of proof of emotional distress, the Court continued to use the prior case law to explicate the meaning of "serious or severe emotional distress." In *Maloney*, the Court considered the *Sacco* requirement that compensable emotion distress be serious or severe. Commenting on the *Restatement* quote from *Sacco*, the Court noted:

> Measuring this element requires a careful consideration of the circumstances under which the infliction occurs, and the party relationships involved, in order to determine when and where a reasonable person should or should not have to endure certain kinds of emotional distress.

*Maloney* at 230, 994 P.2d at 1135 (emphasis added).

In *Sacco*, the Court established that the fact finder decided whether the claimant had suffered serious or severe emotional distress, and decided that proof of such distress did not necessarily require expert testimony:

> The requirement that the emotional distress suffered because of the defendant's conduct be "serious" or "severe" ensures that only genuine claims will be compensated. . . . [A] jury is capable of determining whether the emotional distress claimed to have been sustained is "serious" or "severe." As stated in *Molien*,[16] citing *Rodrigues*:[17]
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> > "In cases other than where proof of mental distress is of a medically significant nature, [citations] the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case. [Citation.]" (472 P.2d at p. 520.) This standard is not as difficult to apply as it may seem in the abstract. As Justice Traynor explained in this court's unanimous opinion in *State Rubbish [Collectors] Assn. v. Siliznoff*, ***supra***, 38 Cal. 2d. [330] at page 338, 240 P.2d 282, the jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience.

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[16] *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 837, 616 P.2d 813, 819 (1980).

[17] *Rodrigues v. State,* 472 P.2d 509, 518 (Hawaii, 1970).

> In addition, there will doubtless be circumstances in which the alleged emotional injury is susceptible of objective ascertainment by expert medical testimony.
>
> *Molien*, 616 P.2d at 821. (Citation omitted.)

*Sacco* at 233, 896 P.2d at 425. In some circumstances expert medical testimony may support serious or severe emotional distress, but it is not always necessary since sometimes the fact finder can determine without expert testimony that the claimant suffered serious or severe emotional distress.

Because a fact-driven analysis is necessary to decide whether a particular claimant has proved serious or severe emotional distress, similar levels of emotional distress can sometimes be severe and other times not, as the Montana Supreme Court noted in *Maloney* ***at*** 230-31, 994 P.2d ***at*** 1135-36:

> Thus, the very same descriptive terms that have been used to characterize compensable emotional distress in some circumstances have also described emotional distress that has been denied recovery. ***Compare*** *Zugg v. Ramage* (1989), 239 Mont. 292, 298, 779 P.2d 913, 917 (affirming emotional distress damages for "chest pains," worries over financial stability, and "sleepless nights" resulting from tortious misrepresentation in sale of resort) ***and*** *Niles v. Big Sky Eyewear* (1989), 236 Mont. 455, 465, 771 P.2d 114, 119-20 (concluding that such evidence as a personality change and marital problems was sufficient to raise jury issue on negligent infliction of emotional distress) ***with*** *Lence v. Hagadone Inv. Co.* (1993), 258 Mont. 433, 444-45, 853 P.2d 1230, 1237 (concluding that evidence of one visit to a hospital emergency room "for stress and heart-related problems and circulatory problems" insufficient for recovery) ***and*** *McGregor v. Mommer* (1986), 220 Mont. 98, 111-12, 714 P.2d 536, 545 (concluding that financial problems resulting from tortious conduct, which "bothered" plaintiff "a lot" and "at times, it would show up at home," were not sufficiently serious to warrant jury instruction for emotional distress damages). ***See also*** *First Bank*, 236 Mont. at 206, 771 P.2d at 91[18] (disapproving of recovery for loss of sleep and nervous tension).

Montana law expressly recognizes a person's right to be free from unlawful discrimination. §49-1-101, MCA. Violation of that right is a *per se* invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from

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[18] *First Bank of Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989).

the violation of a fundamental human right. *Vainio*, ***op. cit.*** (ftnt. 12, p. 16); *Choteau Bar and Steak House*, ***supra***; *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994).

Under federal civil rights law, "compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms." *Johnson v. Hale*, ***op. cit.*** From the victim's testimony, the fact finder can infer that serious or severe emotional distress resulted from the illegal discrimination. ***See***, *Carter*, ***op. cit.***; *Seaton*, ***op. cit.***; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass.App.Ct. 172 (1985); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or. App. 253, 261-262, ***rev. denied***, 287 Ore. 129 (1979); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 114 (1970).

These cases from other jurisdictions are consistent with the *Sacco* cases regarding the case-by-case factual nature of placing values on recovery for serious or severe emotional distress. Often a charging party's emotional distress manifests itself from the discriminatory act itself, coupled with the testimony of the charging party. In this case, Denke also provided expert testimony from health care professionals to confirm the emotional distress.

In *Johnson v. Hale*, ***op. cit.***, two black plaintiffs sought recovery for a denial of housing based upon race. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. They were able to find other housing. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the court increased an award of $125.00 to $3,500.00 each for the overt racial discrimination. By comparison, Denke suffered far more severe emotional distress, documented in the evidence, which began before the council meeting. Thus, $7,500.00, based upon her testimony of emotional distress, her doctors' testimony, and the circumstances in which she was subjected to public derogation through Shoemaker's letters, support an emotional distress award of $7,500.00.

5. The "Other Wrongs" Defense

Respondents presented considerable evidence in attempts to establish that Denke also violated the Montana Human Rights Act. The department made no findings about this evidence. Shoemaker at least by implication argued that concerns about Denke's treatment of other city employees was another reason for his comments about her job performance regarding the bookkeeping. However, the evidence about Denke's treatment of other employees has no relevance to the issues in this case. A false public imputation

of one kind of misconduct cannot be justified by evidence of another kind of alleged misconduct which Shoemaker did not impute to Denke in the letters. Whether Denke was unkind to other employees or often absent from work without justification cannot change the findings regarding Shoemaker's liability for retaliation, and has no relation to the affirmative defenses absolving the city from all liability and Shoemaker for any further liability. The evidence was, in any event, insufficient to establish any viable applicable defense.

## V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. Shoemaker illegally retaliated against Denke when he circulated the statement, in his January 6, 2000, letter, with reckless disregard for its truth or falsity, that it was Denke's fault that the city had to spend $50.00 an hour for its retained accountant to make changes in accounting procedures and the provably false suggestion, in his January 19, 2000, letter, that Denke and the mayor had together received settlement payments from the city for Denke's sexual harassment claim against the mayor. Shoemaker did not otherwise illegally retaliate against Denke, since his other actions complained of were all protected speech or immune legislative acts.

3. The city did not illegally retaliate against Denke, since its actions complained of were protected speech or immune legislative acts.

4. The city was not responsible for Shoemaker's illegal retaliation.

5. As a result of the illegal discriminatory action, Denke suffered serious and severe emotional distress, for which she is entitled to recover the sum of $7,500.00 from Shoemaker. §49-2-506(1)(b) MCA.

6. The law mandates affirmative relief against Shoemaker. The department enjoins Shoemaker from making any further statements containing provably false connotations about identified employees of the city who file and/or participate in Human Rights Act complaints and from making statements about such persons with reckless disregard for the truth or falsity of such statements. §49-2-506(1) MCA.

## VI. Order

1. The department awards judgment in favor of Kathy Denke and against Maurice Shoemaker, on the charge that he illegally retaliated against her when he published or caused to be published letters, either with reckless

disregard for the truth or falsity of statements therein or with statements having provably false connotations about her therein, and those statements imputed that she both caused unnecessary expense to the city by failure properly to perform her job regarding accounting and colluded with her harasser to obtain money improperly from her employer, the city. By those publications Shoemaker inflicted severe emotional distress upon Denke.

2. The department awards Denke the sum of $7,500.00 and orders Shoemaker to pay her that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

3. The department enjoins and orders Shoemaker to comply with all of the provisions of Conclusion of Law No. 6.

4. The department awards judgment in favor of the City of Thompson Falls and against Kathy Denke on all of the charges that it illegally retaliated against her.

5. The department dismisses Denke's charges of discrimination against the City of Thompson Falls.

Dated: November 16, 2001.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry