

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

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Stanlee Dull,	)	Human Rights Act Case No. 9908008677
Charging Party,	)	
vs.	)	<i>Final Agency Decision</i>
American Diabetes Association,	)	
<u>Respondent.</u>	)	

**I. Procedure and Preliminary Matters**

Stanlee Dull filed a complaint with the Department of Labor and Industry on September 30, 1998. She charged that beginning on or about August 1, 1998 and continuing to the present, her employer, the American Diabetes Association, retaliated against her by undermining her ability to communicate with staff members, by dealing with problem solving with staff members directly, and by refusing to discuss administrative issues with her, provide suggestions to her, or help her with her administrative duties as needed after she filed an internal sexual harassment discrimination complaint on or about July 20, 1998. On July 12, 1999, the Montana Human Rights Commission heard Dull’s appeal from a Human Rights Bureau investigative determination dismissing her complaint and reversed that dismissal, remanding her complaint for a contested case hearing.<sup>1</sup>

On July 30, 1999, the department gave notice Dull’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. In the course of proceedings on this contested case, the hearing examiner ruled that because the Commission held a hearing within 12 months of complaint filing, the department could extend its jurisdiction for more than 12 months without a stipulation from the parties extending jurisdiction. “Order Continuing Contested Case,” 9/21/99.

During subsequent prehearing proceedings, Dull moved to amend her complaint to add claims of discrimination because she was a woman. The hearing examiner denied that motion. “Order Denying Motion to Amend and Setting Hearing Schedule,” 2/18/00.

This contested case hearing proceeded on May 30-June 2, 2000, in Great Falls, Montana. Dull was present throughout hearing with her attorney, Antonia P. Marra and Barbara Bell, of Bell & Marra, PLLC. The American Diabetes Association (“ADA”) was present through its designated representative,

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<sup>1</sup> See Exhibit 10, “Brief in Support of Respondent’s Motion to Dismiss,” 9/17/99.

Rhonda Lees, with its attorney, Maureen H. Lennon, Garlington, Lohn & Robinson, PLLP. The hearing examiner excluded witnesses on Dull's motion. The transcript of hearing contains lists of witnesses and exhibits. The parties filed post-hearing briefs and proposed findings and conclusions. Dull filed the last post-hearing document ("Notice of Supplemental Authorities") on August 24, 2000.

## II. Issues

The legal issue in this case is whether the ADA illegally discriminated against Dull by taking adverse employment action in retaliation against her because she filed an internal complaint of sexual harassment. A full statement of the issues appears in the final prehearing order.

## III. Findings of Fact

1. The American Diabetes Association (ADA) is a non-profit corporation that raises funds and recruits volunteers to provide research, information, and advocacy to persons with diabetes and their care providers. [Amended] Final Prehearing Order, "IV. Facts and Other Matters Admitted," No. 1 (6/30/00).
2. Stanlee Dull is a female resident of Great Falls, Cascade County, Montana. She is 56 years old. She got involved in the activities of the Montana Diabetes Association when she discovered that her infant son had diabetes. The association hired her in 1977 as the Executive Director. She began by working out of her home. She first hired other employees in 1978 or 1979. At that time, the Montana association began renting an office in Great Falls from which to work. Dull's job as the Executive Director for the Montana association was to direct fund raising activities and programming within the state as well as supervise employees of the association. [Amended] Final Prehearing Order, "IV. Facts and Other Matters Admitted," No. 2 (6/30/00); testimony of Dull.
3. Before July 1, 1998, separate diabetes associations existed in all 50 states, affiliated with a national association, known as the American Diabetes Association. The national association and the state affiliates were separate corporations, each run by its own Board of Directors. From February 1978 until April 1998, Dull worked for the Montana Diabetes Association, a separate corporation with its own Board of Directors. She was the Executive Director of the Montana corporation, with her office located in Great Falls, Montana. [Amended] Final Prehearing Order, "IV. Facts and Other Matters Admitted," No. 3 (6/30/00); testimony of Dull.

4. For several years, the state affiliates and the national organization discussed dissolving the individual state affiliates and creating one nationwide American Diabetes Association. The goal for the merger was to become more efficient and more effective in achieving the ADA's mission of preventing and curing diabetes and improving the lives of those affected by diabetes. In 1997 and the first half of 1998, state affiliates dissolved and merged into the national organization, effective July 1, 1998. Dull supported the merger, and urged the Montana Board to dissolve the Montana Association and become part of the national ADA. The Montana association's board directed Dull and her Montana staff to work with the ADA to begin the merger process by January 1998, and the Montana association became part of the national ADA in February 1998. The fiscal year of the ADA was from July 1 through June 30. Dull became an ADA employee on April 1, 1998. Exhibit 104; testimony of Dull and Gary Berg, regional executive vice-president, Pacific Northwest Region, ADA (see following finding).

5. The ADA divided into twelve regions, with each region divided into areas. The Montana Area was part of the six-state Pacific Northwest Region headquartered in Seattle, Washington. The reorganized ADA finalized its goals in June 1998 in the form of a five-year strategic plan. The plan included quadrupling financial support for research, *i.e.*, increasing research dollars from \$15,000,000 to \$60,000,000 annually; taking a more aggressive approach to advocacy (the ADA launched a massive lobbying effort in every state for the purpose of providing better health insurance coverage for people with diabetes); accelerating and expanding free educational and informational services and resources to people in communities throughout the country; and doubling its income over a five-year period. Testimony of Berg and Steve Hartley, Chief Field Operations Officer.

6. The ADA selected Dull as the Montana Area Executive Director. Her job duties changed to the extent that she did not have permission to discipline, hire or fire without the approval of her direct supervisor. There was no probationary period. During the transition period, and after the formation of a centralized national organization, Dull's accountability changed. She became accountable to the Regional Executive Vice President, Gary Berg, and to the national office. Berg became Regional Executive Vice President of the Pacific Northwest Region in November 1997. He became Dull's direct superior on April 1, 1998. [Amended] Final Prehearing Order, "IV. Facts and Other Matters Admitted," No. 4 (6/30/00); testimony of Dull and Berg.

7. The Montana association's Board had 20 board members from around the state of Montana. Before the merger, Dull reported directly to the board and ran the Montana affiliate with minimal oversight. She recruited

Board members and hired employees. The employees could raise concerns regarding Dull's supervision or their employment either with Dull or with the Board, but Dull effectively prevented employees from bypassing her to go directly to the Board. Melody Bentz, Kim Hatfield and Bette Tomlinson were employees of the Montana Diabetes Association before the merger. Hatfield and Tomlinson were district managers, under Dull's direct supervision. Bentz worked in the Great Falls office as a clerical employee of Dull. All three employees disliked Dull's management style. Bentz felt at times that she was working under a gag order.<sup>2</sup> Hatfield had problems with Dull from the outset of her employment in January 1998. Tomlinson had worked for Dull since 1993, and had problems with Dull from the beginning of her employment. Because Dull had effective control over the operations of the organization, the employees did not pursue their disagreements with Dull before the merger. After the merger, Dull told ADA employees in the Montana Area not to air their dirty laundry outside of the office and to come directly to her and no one else if they had problems. Testimony of Dull, Bentz, Hatfield, Tomlinson and Brian Ruckman.<sup>3</sup>

8. Even employees toward whom Dull had no animosity exercised great caution around her. Julie Scotson began work for Dull in the Great Falls office in March 1998. She observed the problems Tomlinson and Hatfield had with Dull and tried to stay out of the office conflicts, but she also found the working environment in the Great Falls office strained and unpleasant until she resigned the following year. Testimony of Scotson.

9. Before he assumed supervision of Dull, Gary Berg received warnings that working with her would be difficult. In early 1998, ADA employee Jim Woods offered to go to Montana to talk with Dull about taking an early retirement because he thought it would be helpful to Berg's development of the region if Dull took early retirement. Berg declined Woods' offer. Testimony of Berg.

10. In March 1998, Montana Board member, William Walton, a member of the Montana entity's board, expressed concern to Berg about the unbusinesslike atmosphere at Board meetings. Walton told Berg that the

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<sup>2</sup> In April 1998, Dull threatened to make sure that Bentz did not have a career with the ADA, because Dull believed that Bentz had discussed Dull's expense accounts with another employee. Unbridled exercise of her power was characteristic of Dull's management style.

<sup>3</sup> Ruckman worked for Dull for 13 years, until March 1995, when Dull called him into the office on a Friday morning and terminated his employment, effective immediately. Ruckman convinced Dull to let him work one more week to tie up loose ends. There is no evidence Ruckman engaged in any improper conduct.

meetings were very casual, that board members did not receive agendas before the meetings, if at all, and that financial statements were not always available. He told Berg that the meetings were more like coffee parties than Board meetings. Testimony of Berg.

11. Berg was concerned about Dull's management of the Montana Area, because of the comments he heard. He also had concerns because he did not receive timely responses to information requests he made to the Montana affiliate before the merger. He took no immediate action regarding these concerns, deciding to work with Dull over time to see if she could adjust to her new accountability. Testimony of Berg.

12. At regional and national meetings in April 1998 and June 1998, Berg greeted Dull twice by hugging her and kissing her on the cheek. Dull did not tell Berg the physical contact was unwelcome. Berg greeted other ADA employees in the same fashion. Testimony of Dull, Berg, Hatfield and Tomlinson.

13. In late June and early July 1998, Tomlinson wrote five unsolicited letters to Berg complaining about Dull's management of problems in the Montana Area. She did not speak with Berg, except for a brief introductory meeting, until after she had sent him all five letters. Berg did not prompt or encourage Tomlinson to write the letters, nor did he contact Tomlinson to discuss the letters. In July 1998, at a meeting in Cincinnati, Tomlinson asked Berg if he had received her letters and asked if he thought she should file a grievance against Dull. Berg acknowledged receipt of the letters and discouraged Tomlinson from filing a grievance. Exhibits 110 through 114; testimony of Tomlinson and Berg.

14. On July 15, 1998, Hatfield submitted a written grievance against Dull. She sent the grievance to Dull with copies to Berg and Regional Development Director, Kim Hanson. Exhibit 115; testimony of Dull, Berg and Hatfield.

15. Hatfield filed the grievance after Dull countermanded Hatfield's decision to "fire" John Bullshows, a Billings volunteer whom Hatfield feared. Hatfield was very angry at Dull and expressed her anger to Dull in a telephone conversation. Shortly after that telephone conversation, Tomlinson telephoned Hatfield and reported that she had just ended a telephone conversation with Dull. Tomlinson told Hatfield that Dull had referred to Hatfield as "psychotic" and "insubordinate." Hatfield feared that Dull might fire her for insubordination. She proceeded to file her July 15, 1998, grievance against Dull. Testimony of Hatfield.

16. Dull received the Hatfield grievance on July 15 and called Berg to discuss it. She attempted to explain why she had done nothing wrong and why Hatfield had behaved inappropriately. Berg told her not to argue with him, and ordered her to come to Seattle to discuss the grievance. Dull told Berg she was sorry if he had lost confidence in her and asked if he wanted her resignation. Berg responded that it might “come to that” if Dull could not give him satisfactory explanations when they met in Seattle. He also instructed Dull not to take any punitive action against Hatfield. Berg began preparing an “action plan” to improve the communications and relations between Dull and her subordinates. Testimony of Dull and Berg.

17. Dull believed Berg might ask her to resign.<sup>4</sup> On July 20, 1998, Dull filed a grievance against Berg. She complained that Berg allowed and encouraged her subordinates to act unprofessionally and to by-pass her and contact Berg directly; that Berg praised her subordinates in writing for unprofessional behavior by-passing the chain of command; that Berg did not understand that Hatfield violated criminal law by her conduct; that Berg praised Hatfield for professionalism and did not contact Dull until after the fact; that Berg cultivated conflicts between Dull and her subordinates and that Berg had communicated with Dull as Montana Area Director about area matters only four times since becoming Regional Executive Vice President. Exhibit 118; testimony of Dull and Berg.

18. Dull also included in her grievance an allegation of sexual harassment and “discriminatory conduct.” [Amended] Final Prehearing Order, “IV. Facts and Other Matters Admitted,” No. 5 (6/30/00); exhibit 118; testimony of Dull.

19. All the complaints in Dull’s grievance, with the exception of the allegation of sexual harassment and discriminatory conduct, related to Dull’s perception of Berg’s handling of the Hatfield grievance. Berg had no idea what Dull meant by the reference to sexual harassment and discriminatory conduct when he received the July 20, 1998, grievance. Testimony of Dull and Berg.

20. On July 23, 1998, Brooks called Dull to find out the basis of Dull’s concerns and to obtain details regarding Dull’s allegation of sexual harassment and discriminatory conduct. During the conversation, Dull told Brooks that she was concerned with Berg talking directly to her employees, and that such conduct was interfering with her ability to run her area. With regard to her

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<sup>4</sup> In fact, after the July 15 telephone conversation with Dull, Berg discussed offering Dull early retirement, in a memo to ADA Vice President of Human Resources Gail Brooks. Exhibit 117.

allegation of sexual harassment and discriminatory conduct, Dull told Brooks, “I put that in to get somebody’s attention.” Brooks asked about the factual basis of the sexual harassment allegation. Dull explained the basis of her sexual harassment claim for the first time by stating that Berg had kissed her and others in the office on the cheek in greeting on two occasions. This was Dull characterized the kisses on her cheek as “Hi, how are you doing” kisses. Exhibit 187; testimony of Dull and Brooks.<sup>5</sup>

21. Brooks told Dull that Chief Corporate Operations Officer Caroline Stevens would attend the upcoming meeting between Dull and Berg in Seattle as a neutral witness to the conversation. Brooks directed Stevens’ attendance to avoid a situation where Dull and Berg would leave the meeting with different understandings of what they said or agreed. Brooks also wanted to ensure that Dull would not find herself in an uncomfortable situation. Testimony of Brooks.

22. Brooks contacted Berg to discuss the allegations with him. Berg admitted kissing Dull on the cheek twice in greeting. Berg truthfully reported that he did not realize the conduct was offensive and said that he would never do it again. Testimony of Berg and Brooks.

23. On July 30, 1998, Dull, Berg and Stevens met to discuss Dull’s grievance. Stevens kept detailed notes of the meeting, taking those notes throughout the meeting. Dull also made notes of the meeting. Dull told Berg and Stevens that she based her sexual harassment claim on Berg’s two greetings with kisses on her cheek and on Berg’s undue harshness with her during the July 15 discussion of the Hatfield grievance. Berg apologized for any discomfort caused by the kiss on the cheek, explained that he did not realize that it was unwelcome and promised it would never happen again. Berg provided Dull with the “action plan” he had prepared. At the end of the meeting, Berg felt the issue had been resolved and that there was a renewed commitment to focus on the mission of the ADA. Berg never again kissed Dull on the cheek. [Amended] Final Prehearing Order, “IV. Facts and Other Matters Admitted,” No. 6 (6/30/00); Exhibits 8 and 121; testimony of Dull, Brooks, Berg and Stevens.

24. Berg wanted to discuss and resolve Dull’s allegations of sexual harassment during the July 30, 1998, meeting. His original agenda for the meeting was to discuss Hatfield’s grievance against Dull, as well as other staff

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<sup>5</sup> Brooks testified at hearing, but the parties also offered her deposition testimony as part of the record. The hearing examiner makes no distinction between her live testimony and her deposition testimony.

and management problems he perceived in Montana. Berg intended to establish an overall communication plan for the Montana area, which included regular staff meetings. He felt he had made a start toward accomplishing these goals during the meetings. Exhibit 8; testimony of Dull and Berg.

25. After the July 30, 1998, meeting, Dull requested a copy of Stevens' notes. Brooks refused this request. Brooks also told Dull that if she wanted to pursue the matters in the grievance further, she should follow the ADA grievance policy and file a formal grievance directly with Brooks. Brooks included a copy of the policy in her correspondence to Dull. Exhibit 128; testimony of Dull and Brooks.

26. On August 17, 1998, Tomlinson submitted a grievance against Dull. Berg had not encouraged or prompted Tomlinson to submit the grievance after previously discouraging her from taking this approach. Exhibit 129; testimony of Tomlinson and Berg.

27. Berg arranged for meetings in Montana in late August, to begin the process of resolving the grievances in the context of developing a more cooperative team approach by the Montana staff. Dull received an agenda in advance of the meetings. On August 26, 1998, Dull sent a memo to Berg, stating that she had no objection to discussing, "dysfunctional communication and our responsibilities to perform" during the staff meetings. She notified Berg that she also wanted to discuss her "span of control." Her memo also criticized Hatfield and Tomlinson, and suggested either firing them both or placing them on probation with such onerous terms that discharge or resignation would likely result. Exhibits 131 and 132; testimony of Dull and Berg.

28. On August 28, 1998, Gary Berg held meetings with the Montana staff. He wanted to facilitate meetings between Dull, Hatfield and Tomlinson. He wanted to identify dysfunctional communication and discuss how to eliminate it. He also wanted to clarify the communication process among area staff, Dull, and regional staff and encourage focus on accountability for all staff. Berg thought the meetings achieved these goals. He summarized his perceptions in a memo, and forwarded a copy to Dull. She did not respond directly to that memo. Exhibit 134; testimony of Berg and Tomlinson.

29. On August 29, 1998, Dull sent an electronic mail message (e-mail) to Brooks, asserting that the August 28 meeting had been the most demeaning experience of her life, and threatening to complain to the Montana Human Rights Bureau. Brooks called Dull in early September, and discussed with her the possibility that Dull might take early retirement, since she did not seem able to make the changes in management style necessary due to the merger.



On September 5, 1998, she filed another grievance against Berg, claiming that his investigation of the Hatfield and Tomlinson grievances was improper, and that his handling of those grievances was retaliation for her July 20 grievance. Exhibits 8, 17, 28 and 135; testimony of Dull, Berg and Brooks.

30. Berg was surprised and disappointed at Dull's responses to the August 28 meetings. Dull had not raised any of the allegations in her September grievance at the meetings. At the meetings, she had not expressed her feeling of being demeaned. He had hoped that Dull and the other Montana employees might put aside their prior history and work together. Testimony of Berg.

31. In September 1998, the ADA hired an outside investigator to address the problems between Dull, the other Montana employees and Berg. The investigator, Robert Greaux, talked with all Montana ADA employees, as well as Gary Berg and other regional employees. He reported to Brooks by the end of September.

32. On September 29, 1998, Dull filed a Complaint of Discrimination with the Montana Human Rights Bureau and the EEOC, alleging the ADA had retaliated against her for filing an internal grievance on July 20, 1998.<sup>6</sup> Testimony of Dull.

33. On October 15, 1998, Brooks sent memos to Dull, Hatfield and Tomlinson, attaching copies of the Hatfield and Tomlinson memos to Dull's memo. Brooks informed Hatfield and Tomlinson that Dull would supervise them, and would do so more closely. She directed them to follow Dull's directions even if they did not agree with them. She recommended that Dull hold Hatfield and Tomlinson accountable for performance and that Dull should visit the field offices and attend the fund-raising events at the field offices. She also recommended that Dull inform her employees of the reasons for her decisions as well as the decisions themselves. Exhibit 151; testimony of Brooks.

34. On October 15, 1998, Brooks also sent a separate memo to Dull addressing her grievance of September 5, 1998. Brooks recounted Berg's apology for kissing Dull on the cheek twice, the development of the action plan and specific performance objectives in July, the continuation of "regular meetings" between Berg and Dull and the suggestion that Dull take a more

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<sup>6</sup> In 1997, Dull told Kay Smith, a Wyoming Diabetes Association employee briefly under Dull's supervision, that if the association eliminated or downgraded her job, she would file an age discrimination suit. Dull recommended that Smith do the same and faxed documents to Smith on how to file a complaint. Testimony of Smith.

active role in managing the field staff in Montana. Brooks also suggested that Dull decide whether she could change her management style and weather the changes inherent in the merger of the Montana Diabetes Association into the ADA, with the accompanying imposition of supervision upon Dull. Exhibit 152; testimony of Brooks.

35. Despite the October 15 memos, Dull told her Great Falls staff that the ADA would not let her supervise Hatfield and Tomlinson. Dull did exercise some supervision over Hatfield and Tomlinson, and there was some communication between them after the October 15 memos. Exhibits 20 and 197; testimony of Dull and Bentz.

36. In January 1999, Berg confirmed the substance of meetings held with the Montana staff by an e-mail to Dull. He noted in that e-mail the small returns (funds raised) in the Montana area. Exhibit 198; testimony of Berg.

37. On March 3, 1999, Dull visited Tomlinson in the Missoula office, and memorialized the visit in a memo to Berg. On March 8, Dull gave Tomlinson notice by e-mail that failure to meet fund raising goals could result in Tomlinson's termination. On March 9, Tomlinson began sending insubordinate e-mails to Dull. Tomlinson knew the e-mails would lead to her discharge, but her conflict with Dull had reached the point where she no longer cared. Dull forwarded the e-mail to Berg. On March 11, Dull e-mailed Berg and told him she wanted to fire Tomlinson. Berg replied on March 12, telling Dull to keep documenting the exchanges. On March 17, Dull contacted the ADA's CEO, John Graham, about Tomlinson's insubordination. Dull sent Berg another e-mail about firing Tomlinson on March 17, to which Berg replied the same day, asking her to remain focused on the performance objectives presented to Tomlinson several weeks earlier. On March 18, Berg told Dull that she had authority to fire Tomlinson. Dull went to the Missoula office accompanied by her husband and a family friend who practiced law in Missoula. Dull terminated Tomlinson's employment in the presence of these two individuals. When Brooks learned how Dull had handled the discharge, she wrote a memo to Dull telling her that her method of discharging Tomlinson was not appropriate. Exhibits 63, 64, 65, 171, 172, 173, 197; testimony of Dull, Berg, Tomlinson and Brooks.

38. Steve Hartley, Chief Field Operations Officer, had the task of analyzing the current and projected financial performance of areas and regions of the ADA across the country. His primary responsibility was to ensure the performance of the ADA's field operations, its staff and volunteers around the country in reaching the ADA's goals. In its first year of operation, the ADA

continued to evaluate and assess the staff structure across the country in its efforts to evolve into an efficient organization. Testimony of Hartley.

39. Hartley believed that the ADA had too many employees in Montana and Idaho. In July 1998, Hartley told Berg to reduce his staff costs in Montana from 54% of income to 47% of field-generated revenue. The ADA did not take immediate action to reduce staff costs after the merger because it wanted to give the areas and regions a chance to perform within the framework of the new organization. Hartley had been considering reorganization of Montana and Idaho since the fall of 1998 because of the limited potential for fund raising in those large, lightly populated areas. Berg asked Hartley to delay implementation of any changes until Berg had an opportunity to improve Montana's performance. Testimony of Berg and Hartley.

40. In the spring of 1999, Hartley directed Berg to come up with a concrete plan to reduce staff in Montana and Idaho and, as part of the plan, to eliminate unnecessary layers of supervision. The plan developed by Berg and Hartley was to eliminate the Area Executive Director positions in Montana and Idaho, effective July 1, 1999. Hartley believed these positions constituted an unnecessary layer of supervision in each area. Hartley based his decision on a thorough economic review of the Montana Area, its performance in the past, and its projected performance in the future. In each case, the ADA decided to offer the current executive director a position as a district director (or district manager) at the same rate of compensation, including benefits.<sup>7</sup> Testimony of Berg and Hartley.

41. In late April 1999, the ADA offered Dull a position as District Director at her current salary and benefit levels. Dull was qualified for the District Director position, which differed from the executive director's position in requiring more travel and in lacking supervisory functions. Dull declined the job offer and resigned, effective April 30, 1999. [Amended] Final Prehearing Order, "IV. Facts and Other Matters Admitted," No. 7 (6/30/00); testimony of Dull.

42. Dull held an exaggerated view of the amount of travel required. She asserted that the travel involved would be far greater than her travel as the executive director. However, before the elimination of the executive director position, Dull's field employees traveled far fewer miles than Dull claimed to travel. Scotson traveled little more than 1/7<sup>th</sup> as many miles per month as

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<sup>7</sup> Since the merger, Hartley engineered similar staff reductions in half of the 12 ADA regions in the country. At hearing, he testified that 8 former area executive directors accepted "more direct, hands-on" roles at the same salaries.

Dull claimed to travel. Bentz traveled approximately 1/4<sup>th</sup> as many miles as Dull claimed to travel. Hatfield traveled less than 1/3<sup>rd</sup> as many miles per month as Dull claimed to travel. Tomlinson traveled approximately 1/3<sup>rd</sup> as many miles per month as Dull claimed to travel. Bentz performed the job offered to Dull and traveled 1/10<sup>th</sup> to 1/4<sup>th</sup> as many miles per month as Dull claimed to travel as executive director. Testimony of Dull, Scotson, Bentz, Hatfield and Tomlinson.

43. Dull refused the position because she did not want to return to fund raising, a job she felt she had risen above. She did not want to report to a supervisor. She did not want to cease being a supervisor and give up the prestige and public recognition she believed were hers as executive director. Testimony of Dull.

#### IV. Opinion

Montana law prohibits adverse employment action because an employee has opposed any discriminatory practices that the Montana Human Rights Act forbids or participating in proceedings under the Act. §49-2-301 MCA. Dull alleged her internal complaint of sexual harassment constituted opposition to discriminatory practices. She also presented contentions and evidence that she endured a continuing practice of retaliation after her Human Rights complaint.

##### Alleged Retaliation Because of Opposition (Dull's Initial Internal Grievance)

Dull's internal complaint of sexual harassment was not participation in a Montana Human Rights Act proceeding. *EEOC v. Total Systems Service, Inc.*, 221 F.3d 1171, 1174, *rehearing en banc den.*, 240 F.3d 899 (11<sup>th</sup> Cir. 2000).<sup>8</sup> This claim was for retaliation because of opposition. She proffered indirect evidence supporting her claim, so the analysis of her complaint follows that standard of proof.<sup>9</sup>

An indirect evidence *prima facie* case of unlawful retaliation in violation of §49-2-301 MCA has three elements. First, the claimant must prove that she opposed illegal discriminatory activities. Second, she must prove that the respondent subjected her to an adverse employment decision. Third, she must establish a causal connection between the adverse action and her opposition to illegal discrimination.

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<sup>8</sup> Montana follows federal discrimination law if the same rationale applies under the Montana Human Rights Act. *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).

<sup>9</sup> The opinion discusses direct evidence of retaliatory motive at the end of this section.

To prove retaliatory discharge, the appellant would have to show that (1) she was discharged, (2) she was subjected to sexual harassment during the course of employment, and (3) her employer's motivation in discharging her was to retaliate for her resistance to those sexual harassment activities. *Holien*, 689 P.2d at 1300.

*Foster v. Albertson's, Inc.*, 254 Mont. 117, 127, 835 P.2d 720 (1992), **citing** *Holien v. Sears, Roebuck and Co.*, 689 P.2d 1292 (Or. 1984). **See also** *Payne v. Norwest Corp.*, 113 F.3d 1079 (9th Cir.1997)

The indirect standard of proof originates in a United States Supreme Court decision. **See** *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Although the burden of presenting evidence shifts under *McDonnell Douglas*, the charging party carries the ultimate burden of persuading the fact finder that the respondent took the adverse employment action because the charging party was engaged in protected activity. *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett, op. cit.*; *Johnson, op. cit.*; *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welf. Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981).

The opposition must be to a practice that the Human Rights Act prohibits. *Evans v. Kansas City, Missouri School Dist.*, 65 F.3d 98, 101 (8<sup>th</sup> Cir. 1995) **and** *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411-12 (9<sup>th</sup> Cir. 1987). In an opposition case, the employer can fire an employee it reasonably believes is lying about the alleged sexual harassment the employee opposes. **See, e.g.**, *EEOC v. Total System Service Inc.*, **op. cit.** at 1175-76; *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir.1990) (“Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser's peril”). Thus, the absence of any merit to the opposition itself can defeat the retaliation claim.

Dull admitted to Gail Brooks that she made the allegations of sexual harassment in her July 20, 1998, to get the ADA's attention. Her claim of sexual harassment bordered on frivolous and lacked merit. However, even if Dull had established the first element of a retaliatory adverse employment action claim, she failed to complete the proof of her *prima facie* case.

Not every employment action amounts to an adverse employment action. *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9<sup>th</sup> Cir. 1996). Only non-trivial employment actions that would deter reasonable employees from opposing illegal discrimination constitute actionable retaliation. **See** *Ray v. Henderson*, 217 F.3d 1234, 1243 (9<sup>th</sup> Cir. 2000) (“[A]n action is cognizable as an adverse employment action if

it is reasonably likely to deter employees from engaging in protected activity”). Discharge, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion are illustrative of adverse employment actions. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9<sup>th</sup> Cir. 2000).<sup>10</sup> Transfers of job duties and undeserved performance ratings, if proven, would constitute adverse employment decisions. *Brooks, supra* at 928-29; *citing Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9<sup>th</sup> Cir.1987). By contrast, declining to hold a job open for an employee and badmouthing an employee outside the job reference context are not adverse employment actions. *Brooks, supra*.<sup>11</sup>

Dull complained that the ADA took numerous adverse employment actions against her. According to Dull, Berg undermined her ability to communicate with her staff members, by-passed her and dealt directly with her staff members, refused to discuss administrative issues with her, refused to provide suggestions to her and refused to help her with her administrative duties as needed.<sup>12</sup> Dull testified that the Montana affiliate ran smoothly until the merger and Berg’s attempts to supervise the Montana branch of the ADA. Dull attempted to show that Berg orchestrated her staff problems in retaliation for her filing the internal sexual harassment complaint. In truth, Dull’s subordinates found her to be difficult, dishonest and manipulative.<sup>13</sup> Every employee and former employee who testified spoke of the staff problems that

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<sup>10</sup> See *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9<sup>th</sup> Cir.1996) (termination); *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9<sup>th</sup> Cir.1997) (negative reference); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9<sup>th</sup> Cir.1987) (negative performance reviews); *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9<sup>th</sup> Cir.1986) (refusing to consider for promotion).

<sup>11</sup> See *McAlindin v. County of San Diego*, 192 F.3d 1226, 1238- 39 (9<sup>th</sup> Cir.1999) (refusing to hold job open for employee); *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9<sup>th</sup> Cir.1998) (badmouthing).

<sup>12</sup> Her proof that Berg and the ADA actually engaged in these actions was weak at best. For example, Dull claims that, during the July 30, 1998 meeting, Berg admitted that he would not have spoken to her so harshly on July 15, 1998, if she had been a man. Berg denies making this statement. Dull admitted in her testimony that neither Stevens’ notes nor Dull’s notes of the meeting reflected that Berg made such an admission. Dull also claimed that Berg apologized for “sexual harassment.” Again, neither Dull’s notes nor Stevens’ notes reflected an apology from Berg for sexual harassment. He did apologize for kissing Dull on the cheek. Dull’s efforts to recast the meaning and content of communications and actions by Berg were not persuasive.

<sup>13</sup> Several of the employees with whom Dull struggled in 1998 and 1999 were entirely willing to engage in a battle of personalities with their boss. The degree of hostility and insubordination Dull endured was remarkable, eventually leading to the discharge of one subordinate. Dull’s prior autocratic treatment of those employees helped to create the poisonous atmosphere, but the hearing examiner’s recognition of her role in creating the problem is not an endorsement of the conduct of her subordinates.

predated the July 20, 1998, grievance that Dull claimed triggered the retaliation. Berg's caution in dealing with the hornets' nest he inherited in the Pacific Northwest region did not constitute adverse action. His imposition of an action plan requiring better and more frequent communication between Dull and her field employees was reasonable and proper.

Dull also alleged that the reorganization of the ADA structure in Montana, with elimination of the executive director position and the offer to her of a district director position with reduced responsibilities, constituted an adverse employment action. Although the position the ADA offered her did pay the same salary as her executive director position, it involved a substantial reduction in her opportunities to participate in community activities and a possible increase in her required travel.<sup>14</sup> Her executive responsibilities would shrink and her administrative responsibilities would grow. While the legal question is close, the elimination of Dull's executive director position and the proposal to place her as a district director constituted adverse employment action. Dull did satisfy the second element of her *prima facie* case, proof of adverse action.

The pivotal question is whether Dull proved that it was more likely than not that the ADA took adverse employment action against her because she had filed the internal sexual harassment complaint. Dull had the burden of proving that the ADA reorganized the Montana staff and eliminated her executive director position because she filed her internal harassment complaint. *Foster, op. cit.*; *Laib v. Long Construction Co.*, HRC Case #ReAE80-1252 (Aug. 1984), *quoting* *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982); *accord*, *Schmasow v. Headstart*, HRC Case #8801003948 (June 26, 1992); *see also*, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513-14 (9th Cir. 1989); *and* *Ruggles v. Cal. Poly. State University*, 797 F.2d 782, 785 (9th Cir. 1986). She could have met her burden and established the third element of her *prima facie* case, i.e., evidence of a causal link between the protected activity and the adverse action, through a variety of circumstantial evidence.

Proximity in time between Dull's protected activity and the subsequent adverse action could trigger a presumption of retaliation, although the presumption is not conclusive. *See Love v. Re/Max of America*, 738 F.2d 383 (10<sup>th</sup> Cir. 1984). Identification of Berg, the person responsible for the adverse actions, as the subject of the internal sexual harassment complaint could also

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<sup>14</sup> Dull's testimony about her travel was not credible. Therefore, while she failed to prove that she would travel as much as she asserted as a district director, it might have been true that she would have traveled more as a district director than she did as an area executive director.

trigger a presumption of retaliation. *See Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986). Berg was certainly the subject of the complaint of sexual harassment. However, Dull did not pursue the sexual harassment complaint, even though she had adequate notice and knowledge of the additional steps necessary for that pursuit. While the presumption of retaliation can still arise regarding adverse action taken after cessation of the opposition, it is not a mandatory presumption.<sup>15</sup> Here, Berg reasonably believed he had resolved the sexual harassment claim with Dull when she did not pursue the internal grievance procedure after the July 30, 1998, meeting. Dull did not prove that Berg engineered a restructuring of the Montana ADA staff to get even for an internal complaint of sexual harassment that she chose not to pursue. The lack of credible supporting evidence leaves the bare presumption insufficient to persuade the fact finder that retaliation occurred.

Proof of a substantial difference between the ADA's treatment of Dull and that of executive directors in similarly situated other states who did not file internal complaints could be another method of proving retaliation. *Simmons v. Campden County Bd. of Ed.*, 757 F.2d 1187 (11th Cir.), *cert. denied* 106 S.Ct. 385 (1985). Dull did not establish that the ADA treated her differently than other similarly situated executive directors. In Idaho, the ADA took exactly the same reorganizing action. The ADA, at the time of this hearing, had eight former executive directors working (at their former salaries) as district managers due to precisely this kind of reorganization. Dull produced no evidence of possible retaliation regarding the reorganization. Her contention that the ADA singled her out for adverse action because of her internal complaint was unproved.

Dull could also have presented other credible evidence sufficient for the fact finder to conclude that the adverse treatment was due to the protected activity. She was not limited to the above categories of proof. *See, e.g., Cohen v. Fred Meyer Inc.*, 686 F.2d 793 (9th Cir. 1982). However, she failed to establish the necessary causal nexus between adverse employment action and her alleged opposition to sexual harassment by other credible indirect evidence.

Dull did offer direct evidence of actual retaliatory animus on Berg's part. The evidence consisted of alleged negative comments by Berg about Dull or women in management generally, attested to by another disgruntled former employee, Carol Leffall. Leffall's testimony was not credible, and her bias

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<sup>15</sup> In contrast to the opposition case, the presumption in a participation case is mandatory, even though still rebuttable. *See* 24.9.603(3) A.R.M.



against Berg and the ADA was patent.<sup>16</sup> Aside from Leffall's testimony, Dull's case rested largely upon her own subjective perception that Berg treated her with insufficient deference. Given the overwhelming evidence that Dull, despite her support of merger into the ADA, was unwilling and perhaps even unable to accept supervision after years of running the Montana operation herself, her subjective perceptions were simply not reliable.<sup>17</sup>

Had Dull established her *prima facie* case, the ADA presented ample evidence of legitimate business reasons for its action in eliminating the position of executive director in the Montana area.<sup>18</sup> The ADA reorganized to place more of its local expenses in places where greater population density offered greater opportunities for fund-raising. Montana's lack of population density meant that even if the Montana fund-raising efforts were better than average on a per capita basis, the overall return for the ADA would still be very small compared to an average or even a worse than average per capita return in a densely populated area. The ADA's business decision was reasonably related to its business purposes and unrelated to any alleged animus toward Dull.

Once the ADA proved nondiscriminatory reasons for its adverse actions, Dull had to prove that the asserted reasons were merely pretext for retaliation. *Laib and Schmasow, op. cit.*<sup>19</sup> Dull's evidence of pretext consisted of the same evidence as she presented regarding discriminatory evidence. The testimony by Leffall and Dull of statements of discriminatory animus was not credible. The circumstantial evidence of discriminatory motive was not persuasive.

The ADA's decision to reduce its employees in Montana and eliminate the position of executive director was probably not the only option available at the time. The employer need not prove that its business reasons led it to choose the best possible option, or a well-advised option, but merely to prove that its reasons were legitimate and true. *Donaldson v. Merrill Lynch & Co.*, 794 F.Supp. 498, 505 (S.D.N.Y. 1992). The ADA proved the legitimacy and truth of its business reasons, and Dull failed credibly to rebut that proof.

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<sup>16</sup> Because Leffall was not reliable, the hearing examiner made no findings about her allegations that Berg expressed hostility toward Dull.

<sup>17</sup> Dull's argument that she intended her sexual harassment complaint to include her complaints that Berg yelled at her, belittled her and treated her with less deference than a male executive director is unpersuasive on at least two levels. First, she failed to prove that Gail Brooks or any other ADA management employee so understood her sexual harassment complaint. Second, she failed to prove that Berg treated her in the fashion she alleged.

<sup>18</sup> This is the second tier of the *McDonnell Douglas* method of evaluating indirect proof of discrimination claims.

<sup>19</sup> This is the third tier of the *McDonnell Douglas* standard of proof.

The ADA did not retaliate against Dull for her internal complaint of sexual harassment,<sup>20</sup> in the guise of reorganizing its Montana administrative structure. Because that was the situation, Dull's decision to resign rather than accept the district director position was not a constructive discharge. Whether the ADA forced Dull to resign by engaging in retaliatory conduct that rendered her working conditions so oppressive that resignation was the only reasonable alternative is a question of fact. *Snell v. MDU Co.*, 198 Mont. 56, 65, 643 P.2d 841 (1982). Dull probably did feel that the reduction in her status and perceived increase in her travel with the district director's position was intolerable. However, she did not support her feelings with substantial and credible evidence that the reduction in her status was retaliatory. Therefore, it could not constitute a constructive discharge.

#### Retaliation for Participation in Protected Activity (Dull's HRA Complaint)

Although the ADA did not retaliate against Dull for her internal complaint of sexual harassment, Dull also asserted that the ADA engaged in a continuing practice of retaliation after she filed a Human Rights Act complaint in September 1998. The legal analysis of this assertion involves some different standards, since this claim involves participation rather than opposition. Dull is entitled to the presumption of retaliation, because her Human Rights complaint was pending when the ADA reorganization eliminated her job.

However, the evidentiary analysis of whether the ADA presented a legitimate business reason for the reorganization and whether Dull presented evidence of pretext (the second and third tiers of *McDonnell Douglas*) remain the same. Dull's evidence of retaliatory constructive discharge motivated by her HRA complaint did not persuade the fact finder that the ADA acted out of any retaliatory animus. Since the elimination of the area executive director position (with the offer of a district director position) was not retaliatory, it could not constitute constructive discharge.

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

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. The American Diabetes Association did not retaliate against Stanlee Dull by taking adverse employment action after she filed an internal complaint of sexual harassment against her supervisor, Gary Berg on July 20, 1998. §49-2-507 MCA.

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<sup>20</sup> Dull did not allege in her Human Rights complaint, filed after her resignation, that her second grievance (asserting that Berg retaliated against her for her first grievance in his conduct of investigation of the Hatfield and Tomlinson grievances) prompted more retaliation.

## VI. Order

1. Judgment is found in favor of the American Diabetes Association and against Stanlee Dull on the charges that the ADA retaliated against Dull by undermining her ability to communicate with staff members, by dealing with problem solving with staff members directly, and by refusing to discuss administrative issues with her, provide suggestions to her, or help her with her administrative duties as needed after she filed a sexual harassment discrimination grievance on July 20, 1998 or by demoting her after she filed a complaint with the Department on September 29, 1998.

2. The Department dismisses the complaint.

Dated: April 3, 2001.

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Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry