

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

MARK ALAN DENKE, P.R. OF THE  
ESTATE OF KATHLYN N. DENKE,  
DECEASED,

Charging Party,

-v-

CITY OF THOMPSON FALLS,

Respondent.

Case No.: 426-2001  
HRC No. 0009009180

**FINAL ORDER ON REMAND**

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Kathlyn N. Denke (Denke) filed a complaint with the Department of Labor and Industry asserting that the City of Thompson Falls (Thompson Falls) unlawfully retaliated against her when the Thompson Falls City Commission held a public hearing at the February 14, 2000 city council meeting to discuss Denke's previous sexual harassment complaint filed with the Human Rights Commission. The Hearings Bureau held a contested case hearing pursuant to Section 49-2-505, MCA. Following the hearing, the Hearings Bureau issued a decision that determined the City of Thompson Falls enjoyed immunity from suit for the actions of councilman Shoemaker and did not retaliate against Denke by the manner in which the meeting was conducted. Denke filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on March 17, 2010, and May 18, 2010. The parties stipulated to waive oral argument. The Commission hereby reverses the hearing officer's decision and determines damages as set forth by this Order.

## STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *Admin. Rules of Mont. 24.9.123(4)*. A factual finding is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the Commission with a definite and firm conviction that a mistake has been made. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3<sup>rd</sup> 284, ¶ 39. The Commission's standard of review for conclusions of law is whether the hearing officer's interpretation and application of the law is correct. *See, Denke*, ¶ 39.

## DISCUSSION

After careful and due consideration, the Commission determines that the hearing officer's Findings of Fact Nos. 35 and 36 are not based on competent substantial evidence and are clearly erroneous. The Commission also concludes the hearing officer applied the incorrect legal analysis to the facts in this case. By this Order, the Commission modifies the hearing officer's Findings of Fact Nos. 35 and 36; corrects the hearing officer's conclusions of law; and orders appropriate damages and affirmative relief.

On November 16, 2001, the Hearings Bureau issued a decision on Kathlyn N. Denke's human rights complaint against the City of Thompson Falls and city councilman Maurice Shoemaker. After prolonged proceedings before the Human Rights Commission, multiple district courts and the Montana Supreme Court, the case was

remanded to the Hearings Bureau for a determination of whether the conduct of the City of Thompson Falls at the February 14, 2000 city council meeting constituted unlawful retaliation against Denke. *Denke*, ¶ 89.

The Hearing Bureau's Decision on Remand incorporated the findings of fact of the hearing officer's prior decision of November 16, 2001, amended these prior findings, and added new Findings of Fact Nos. 35 and 36. The hearing officer concluded that the City of Thompson Falls did not unlawfully retaliate against Denke by the manner in which it conducted the February 14, 2000 city council meeting. Because Shoemaker's bankruptcy proceedings had been concluded, the hearing officer properly considered the question of whether the City was liable for Shoemaker's retaliatory comments at the meeting and concluded that the City was not liable.

#### **Modification of Finding of Fact No. 35**

The hearing officer found the City could have imposed reasonable and viewpoint-neutral time, place, and manner restrictions on speech at the city council meeting, but failed to do so. While the City's failure more likely than not contributed to the number and duration of hostile comments Denke endured during the council meeting, the hearing officer found the City's failure to impose restrictions "was not the result ("because") of Denke's protected activities" in filing and pursuing her human rights complaint against the mayor for sexual harassment. *Finding of Fact No 35*.

The Commission determines that when the mayor of the City of Thompson Falls added the matter entitled "Human Rights Complaint – Maurice Shoemaker/Laurie Bass" to the February 14, 2000 city council meeting agenda, the City established a forum for public discussion of Denke's legally protected activity before the Human Rights Commission. The mayor's act to include the Denke matter on the agenda within six months of the resolution of Denke's human rights complaint supports a prima facie case

of retaliation. However, the Commission notes that Montana Supreme Court held that the City of Thompson Falls enjoys immunity from suit, pursuant to § 2-9-114, MCA, for the lawful discharge of the official duty of “calling” the city council into session on February 14, 2000. *Denke*, ¶ 57. Therefore, the City is not liable for the mayor’s unlawful retaliation against Denke due to the City’s statutory immunity protection.

Given that Denke’s human rights complaint was listed as an item for discussion on the council agenda, the Commission finds no evidence in the record to indicate that the intimidation, harassment and humiliation Denke experienced could have been prevented completely by reasonable speech limitations. By proceeding to carry out the mayor’s unlawful retaliatory agenda, the City’s elected officers failed to provide Denke the protections mandated by the Montana Human Rights Act. That said, the Commission concurs with the hearing officer’s proposition that reasonable restrictions on speech at the meeting likely would have lessened the duration and hostility of the retaliatory comments against Denke. Therefore, the Commission modifies Finding of Fact No. 35 to read as follows:

When the mayor of Thompson Falls included the matter entitled “Human Rights Complaint – Maurice Shoemaker/Laurie Bass” on the February 14, 2000 city council meeting agenda, the City established a public forum for retaliatory action against Denke. While the mayor’s act supports a prima facie case of unlawful retaliation against Denke, the City enjoys immunity from suit for this action. By proceeding with the retaliatory agenda, the City’s elected officials failed to protect Denke from further retaliation. During the discussion of the “Human Rights Complaint” agenda item, the presiding officer could have imposed reasonable and viewpoint neutral time, place, and manner restrictions on speech, but failed to do so. The City’s failure to impose such restrictions more likely than not contributed to the number of hostile comments that Denke endured during the council meeting.

#### **Modification of Finding of Fact No. 36**

The hearing officer found “[t]he City was not responsible for Shoemaker’s retaliatory comments during the council meeting, when he acted as an independent city

council member, elected by his constituents, rather than acting within the scope of his authority as a city employee.” *Finding of Fact No. 36.*

The Commission determines that the hearing officer incorrectly applied the legal interpretation of the Montana Supreme Court regarding the City’s vicarious liability for Shoemaker’s actions at the city council meeting. While the hearing officer denoted the statement that the City bore no responsibility for Shoemaker’s conduct as a finding of fact, the Commission addresses the City’s liability for the conduct of its elected officials as a question of both fact and law.<sup>1</sup>

The Montana Supreme Court noted that “an employer is liable for the acts of an employee only when the employee is acting within the scope of his or her duties to the employer.” *Denke*, ¶ 74 (citations omitted). Whether an act is within the scope of employment is generally a question of fact; however it is a question of law when only one legal inference may reasonably be drawn from the facts. *Denke*, ¶ 74 (citation omitted). The Court observed that unlawful retaliatory conduct does not qualify for governmental immunity as “the proper discharge of an official duty” under Section 2-9-114, MCA, and does not qualify for the protection afforded to privileged communication pursuant to Section 27-1-804(1), MCA. *Denke*, ¶ 79.

The Court noted that the City conceded that Shoemaker was employed by the City as an elected official. *Denke*, ¶ 75. In prior court proceedings, the City admitted that Shoemaker had acted in his capacity as a councilperson when he wrote public letters about Denke’s human rights complaint in January 2000. *Denke*, ¶ 86. The Court concluded that the City enjoyed no immunity from suit for Shoemaker’s retaliatory actions leading up to the February 14, 2000 city council meeting. *Denke*, ¶ 90. The

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<sup>1</sup> The Commission notes that it is not uncommon for a hearing officer to insert conclusions of law within findings of fact when addressing a question of both fact and law.

Court further held that the statutory immunity from suit for legislative acts or omissions, pursuant to Sections 2-9-111 and 2-9-114, MCA, provides the City no defense against Denke's claim of unlawful retaliation based on the City's conduct of the meeting where councilman Shoemaker and members of the public made extensive hostile comments related to Denke's human rights complaint. *Denke*, ¶ 89. The Court remanded the matter to the district court with instructions to remand to the Hearings Bureau for a determination whether the City's conduct at this council meeting constituted unlawful retaliation. *Denke*, ¶ 89.

The Commission notes that the affirmed findings of fact of the hearing officer contain explicit reference to Shoemaker's hostile comments at the council meeting. *Findings of Fact Nos. 29 and 33*. The hearing officer specifically characterized Shoemaker's comments as "retaliatory." *Findings of Fact Nos. 34 and 36*. While the Commission affirms these particular findings, the Commission rejects as clearly erroneous the hearing officer's determination that the City bears no "responsibility" for Shoemaker's retaliatory comments. The Commission further determines that all city council members acted within the scope of their duties as city employees at the council meeting. Therefore, the Commission modifies Finding of Fact No. 36 to read as follows:

The Thompson Falls city council members acted within the scope of their employment with the City during the February 14, 2000 city council meeting when the council conducted a public discussion of Denke's human rights complaint and when councilman Shoemaker made retaliatory comments against Denke.

### **Correction of Conclusions of Law**

The hearing officer concluded that Denke established the prima facie elements of her discrimination complaint. Therefore, the hearing officer found Denke was entitled to the disputable presumption that she experienced unlawful retaliation at the city council meeting for her protected activity. On the basis of a dearth of evidence indicating that the wide ranging discussion of Denke's human rights complaint was motivated by

“retaliatory animus” on the part of the presiding officer, the hearing officer concluded that the City did not conduct the meeting with retaliatory intention and thereby overcame the presumption of retaliation. While the hearing officer remarked that “Shoemaker’s retaliatory animus was certainly evident,” the hearing officer regarded Shoemaker’s retaliatory comments as non-actionable against the City. The Commission concludes that the hearing officer misapplied the law to the facts of this case.

Montana law prohibits retaliation against a person because the individual has filed a complaint with the Human Rights Commission. Section 49-2-301, MCA states, in pertinent part:

It is an unlawful discriminatory practice for a person. . . or governmental entity or agency to . . .discriminate against an individual because the individual . . . filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

*Mont. Code Ann. § 49-2-301.*

Unlawful discriminatory practice includes “subjecting a person to harassment in the workplace because of the person’s membership in a protected class or protected activity.” *Admin. Rules of Mont. 24.9.604(3)(b)*. Because filing, testifying, assisting or participating in a proceeding before the Human Rights Commission is a protected activity, Montana law prohibits adverse discriminatory action against the charging party in a human rights complaint. Significant adverse action taken against a charging party within six months following the final resolution of the proceedings creates a disputable presumption that the adverse action was in retaliation for the protected activity. *Admin. Rules of Mont. 24.9.603(3)*. Significant adverse acts of retaliation include intimidation or harassment. *Admin. Rules of Mont. 24.9.603(2)(a)*.

The city council meeting at issue occurred within six months of the November 1999 resolution of Denke’s human rights complaint against the mayor of Thompson Falls. The Commission affirms the hearing officer’s conclusion that Denke proved a

prima facie case of retaliation and enjoys the disputable presumption that the adverse action taken against her at the city council meeting occurred in retaliation for her protected activity. Therefore, the burden of proof shifts to the City to establish a legitimate, nondiscriminatory reason for the adverse actions.<sup>2</sup>

Before the hearing officer on remand, the City did not attempt to identify a legitimate, nondiscriminatory reason for the City's conduct of the meeting or for councilman Shoemaker's retaliatory comments. Instead, the City asserted the affirmative defense that the City is immune from suit, pursuant to Sections 2-9-111 and 2-9-114, MCA.

Section 2-9-111, MCA, grants immunity from suit for the legislative acts and omissions of governmental entities, which includes municipalities. The term "legislative act" encompasses actions by a legislative body that result in creation of law or declaration of public policy. *Mont. Code Ann* §. 2-9-111(1)(c)(i)(A). A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts. *Mont. Code Ann.* § 2-9-111(2). A member of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body. *Mont. Code Ann.* § 2-9-111(3).

Section 2-9-114, MCA, grants immunity from suit to local governments and elected executive officers for damages arising from the lawful discharge of an official duty associated with vetoing or approving ordinances or other legislative acts or in calling sessions of the legislative body.

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<sup>2</sup> In his decision of November 16, 2001, the hearing officer concluded that the City overcame the presumption that retaliation occurred at the February 14, 2000 council meeting because the retaliatory comments of councilman Shoemaker and others were privileged communication, pursuant to Section 27-1-804(2), MCA. The Montana Supreme Court reversed and held that the statutory privilege did not apply to unlawful retaliatory conduct. *Denke*, ¶¶ 59-63.

The Montana Supreme Court strictly construes the grant of governmental immunity by limiting its application to that which is granted by the plain wording of the immunity statutes. *Denke*, ¶ 55. The Court held that the actions of the City of Thompson Falls at the city council meeting did not “result in creation of law or declaration of public policy” and, therefore, did not fall within the plain meaning of the term “legislative act” as defined in Section 2-9-111(1)(c)(i)(A), MCA. *Denke*, ¶ 56. Consequently, the City’s conduct of the discussion of Denke’s human rights complaint was not encompassed within the statutory grant of immunity. *Denke*, ¶ 56. Similarly, the Court held the immunity granted to local governments and elected officers for damages arising from “the lawful discharge of an official duty associated with vetoing or approving ordinances or other legislative acts,” pursuant to Section 2-9-114, MCA, did not provide a defense to Denke’s unlawful retaliation claim. *Denke*, ¶ 58. No ordinances or public policy were under consideration during the city council discussion of Denke’s human rights complaint. *Denke*, ¶ 57.

Based upon the holdings of the Montana Supreme Court in *Denke v. Shoemaker*, 2008 MT 418, 347 Mont. 322, 198 P.3<sup>rd</sup> 284, the Commission concludes that the City’s manner of handling the agenda item focused upon Denke’s human rights complaint and the unlawful retaliatory comments of councilman Shoemaker at the February 14 meeting fail to qualify as “legislative acts.” The carrying out of a retaliatory agenda without any time, place or manner restrictions and allowing councilman Shoemaker to retaliate against Denke cannot be characterized as the “lawful discharge of an official duty.” In the course of the lengthy discussion of Denke’s human rights complaint, the city council did not engage in “vetoing or approving ordinances”. Therefore, the Commission concludes that the manner in which the City of Thompson Falls conducted

the council meeting and the retaliatory comments made by Shoemaker at that meeting are not protected by statutory immunity.

In the absence of governmental immunity and a legitimate, nondiscriminatory reason for the manner in which the February 14 meeting was conducted and for councilman Shoemaker's actions, the Commission concludes that the presumption granted to Denke that these acts constitute retaliation stands. The undisputed standing of the legal presumption obviates analysis of the motives of the elected officials and precludes the relevancy of a finding of "retaliatory animus." Consequently, the Commission concludes that the City is liable for the damages incurred as a result of the retaliatory conduct of its elected officials and the attendant media publicity following the February 14, 2000 city council meeting.

#### **Damages and Affirmative Relief**

The Commission concludes that the City of Thompson Falls is liable for the physical and emotional harm Denke suffered as a result of the February 14, 2000 city council meeting and its attendant publicity. The extreme stress Denke experienced caused her to miss a total of 243 hours of work in 2000, which resulted in wage loss totaling \$4,488.21. Not only was Denke hospitalized for suicidal ideation and an inability to function, her ability to cope with the stress of everyday life was seriously compromised, causing her to incur direct medical costs totaling \$3,058.60. For the intense, immediate and long-term emotional distress Denke suffered as a result of the retaliation and subsequent publicity, the Commission determines an appropriate award for emotional damages is an additional \$138,192.40 more than the \$7,500 that Shoemaker was ordered to pay Denke in 2001. *See, Final Agency Decision, 11/16/01.* Consequently, pursuant to Section 49-2-506, MCA, the Commission orders the following:

IT IS ORDERED that the City of Thompson Falls shall pay monetary damages to Denke in the total amount of \$145,739.21, with interest as mandated by law.

IT IS FURTHER ORDERED that the City of Thompson Falls is enjoined from engaging in conduct that unlawfully discriminates or violates the rights of city employees, as protected by the Human Rights Act. The City of Thompson Falls shall affirm its obligations to carry out the nondiscrimination policies required by Section 49-3-201, MCA, and provide the following affirmative relief:

1. Within 90 days of this Order, all members of the City of Thompson Falls city council shall attend a minimum 6 hours of education and training in compliance with provisions of Human Rights Act.
2. Within six months of this Order, the City of Thompson Falls shall host a seminar on the subject of sexual harassment and retaliation, to be conducted by a recognized professional in state and federal civil rights law. The seminar shall be open to all city employees.
3. Within one year of this Order, the City of Thompson Falls shall report in writing to the Human Rights Bureau detailing the manner by which the City has complied with this Order.

By this Order, the Commission modifies the hearing officer's Findings of Fact Nos. 35 and 36; corrects the hearing officer's conclusions of law; and orders the above ordered monetary damages and affirmative relief.

DATED this \_\_\_\_ day of June, 2010.

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Ryan C. Rusche, Chair  
Human Rights Commission

## CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission FINAL ORDER on REMAND was served on the following persons by U.S. mail; postage prepaid, on June \_\_\_\_, 2010.

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Montana Human Rights Bureau