

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

<hr/> <b>John W. Ray,</b>	)	Human Rights Act Case Nos. 0001009036
Charging Party,	)	and 0011009470
vs.	)	
<b>Montana Tech of the University of</b>	)	<i>Final Agency Decision</i>
<b>Montana,</b>	)	
Respondent.	)	
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**I. Procedure and Preliminary Matters**

John W. Ray filed a complaint with the Department of Labor and Industry on October 5, 1999. He alleged that Montana Tech of the University of Montana discriminated against him on the basis of political belief when it discharged him from his position as department head of the Liberal Studies Department on or about July 6, 1999. On May 12, 2000, the department gave notice Ray's political belief complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

During the final prehearing conference on August 16, 2000, Ray moved to amend his complaint. He alleged that during the deposition of Dean Doug Abbott on July 28, 2000, he first discovered the facts upon which he now based a claim of marital status discrimination regarding his discharge from the department head position. The hearing examiner denied the motion, on the grounds that the time for filing a marital status complaint had not expired and that allowing amendment of the political belief complaint would defeat department jurisdiction by delaying hearing on that complaint beyond the 12-month statutory requirement.

The contested case hearing on the political belief complaint convened on August 21-24, 2000, in Butte, Silver Bow County, Montana. Ray and his attorney, James Reynolds, attended. The college, through its designated representative, Chancellor W. Franklin Gilmore, and its attorney, David Aronofsky, attended. The hearing examiner excluded witnesses on Ray's motion. John W. Ray, W. Franklin Gilmore, Daniel J. Bradley, Doug Abbott, and John Hintz testified.

Ray filed his proposed findings, conclusions and order in the political belief case on October 31, 2000. The college filed its findings, conclusions and order in the political belief case on December 11, 2000. Ray filed his reply brief in the political belief case on January 10, 2001.

During the briefing of the political belief case, Ray filed a new complaint with the department on December 1, 2000. He alleged that the college discriminated against him on the basis of marital status (married to another member of the department) when it removed him from his department head position in July 1999. On June 25, 2001, the department gave notice Ray's marital status complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. Following the final prehearing conference on September 24, 2001, the parties agreed to consolidation of the marital status complaint with the political belief complaint, with a single department decision on both complaints. The hearing examiner included the consolidation order in the final prehearing order in the marital discrimination case.

The contested case hearing on the marital status complaint convened on October 1, 2001, in Butte, Silver Bow County, Montana. Ray and his attorney, James Reynolds, attended. The college, through its designated representative, Chancellor W. Franklin Gilmore, and its attorney, David Aronofsky, attended. The hearing examiner excluded witnesses on Ray's motion. John W. Ray, Doug Abbott, Daniel Bradley, W. Franklin Gilmore and Margaret Jean Peterson testified.

Ray filed his proposed findings, conclusions and order in the marital status case on November 15, 2001. The college filed its findings, conclusions and order in the marital status case on December 11, 2001. Ray filed his reply brief in the marital status case on December 21, 2001. The hearing examiner's consolidated exhibit docket and file docket accompany this decision.

## **II. Issues**

The issues in this case are whether the college decided not to renew Ray as department head either because he engaged in protected speech espousing his political beliefs or because of his marital status (married to another professor in the Liberal Studies department). A full statement of the issues appears in the final prehearing order.

## **III. Findings of Fact**

1. Respondent Montana Tech of the University of Montana ("the college") is a state-owned and operated institution of higher learning. Charging Party John W. Ray has been a faculty member of the college since 1975, and a full professor of Humanities and Social Sciences since 1990. Then college chancellor Lindsay Norman appointed Ray as Liberal Studies

Department Program Manager in August 1997. In August 1998, the college appointed Ray as head of the Liberal Studies Department.

2. Ray's spouse, Roberta Ray, has also been a member of the college faculty since 1975. She has been a member of the faculty of the Liberal Studies Department since 1997. The college and Ray agreed when Ray became department head that he would not directly evaluate his spouse. Ray did not evaluate his spouse, in his capacity as either program manager or department head. He also did not approve either her time cards or her requests for travel.

3. In 1997, the college divided the humanities and social sciences department into the liberal studies department and the professional and technical communications ("PTC") department, because of longstanding conflicts among the department faculty. Norman instructed all former Humanities and Social Sciences Department faculty members to address and resolve these conflicts. When the college designated Ray as head of the liberal studies department, it designated Joanne Cortese as head of PTC. Norman intended the two new heads to address and resolve the conflicts. He considered the conflicts unacceptable and inappropriate for professors at an institution of higher learning. Norman believed the conflicts impaired department faculty relations with students and the rest of the college. He told the department faculty that he would evaluate their performance based on "demonstrated civility and the willingness to work together for the good of Tech and its students." After the creation of the two departments, the conflicts continued.

4. W. Franklin Gilmore became chancellor at the college beginning with the 1998-1999 academic year. A significant job duty of the chancellor is to seek increased enrollment and funding at Tech. When Gilmore became chancellor, Tech had experienced a flat or declining enrollment for several years. It had failed to meet its enrollment projections resulting in a shortfall of \$150,000.00 in its budget.

5. The state created the college as its public mining school. Much of its curriculum related to mineral resource extraction. Although most of the college's revenues derived from public funds appropriated by the Montana Legislature and from student tuition, the mining extractive industries in Montana provided financial and other support to the college. The college had a number of alumni who work in the mining sector, and had good relationships with many companies in this sector. A number of mineral resource companies and employees contributed money to the college, which also received money from many other persons and sources.

6. In the 1998-99 academic year Daniel J. Bradley assumed the Academic Vice Chancellor position. In August 1998, Bradley recommended and Gilmore approved Ray as the Liberal Studies Department Head, with an increase in his program manager's administrative stipend of approximately \$2,500 per year. Ray's immediate supervisors were Douglas Abbott, Dean of the College of Humanities, Social Sciences and Information Technology, and Bradley, who in turn reported directly to Gilmore.

7. Ray and Bradley had been in conflict before they assumed their respective new positions. In June 1998, before Bradley became Academic Vice Chancellor, he was the college's Petroleum Engineering Dean. In that capacity, Bradley had discussed with Liberal Studies Department faculty member Henry Gonshak the possibility of Gonshak teaching a new course for engineering students. Ray was angry and objected to Bradley's discussion with Gonshak, because Ray believed that any such discussion should originate with him as program manager. After his appointment as department head, Ray complained about this matter to the college Faculty Senate. Gilmore, Bradley and Abbott considered Ray's reaction to this matter inappropriate.

8. On October 1, 1998, Bradley and Abbott met with Ray and Cortese to discuss resolving the continuing conflicts among the faculty of the two departments. Bradley gave Ray and Cortese a written memo describing the problems, which included lack of collegial relationships among the faculty, inappropriate involvement of students in faculty disputes, inappropriate involvement of the faculty in student disputes and removal and defacement of posters and other materials placed in the vicinity of the faculty offices of both departments. Bradley warned the department heads that failure to resolve the conflicts might lead him to take action, including relocation of the faculty, restructuring of the departments and removing one or both department heads. He required that the department heads take initial action to resolve the continuing conflicts by the end of the semester. Ray challenged the view of the conflicts held by Bradley and Abbott and the possible actions suggested by Bradley. During the rest of the semester, Ray did not take any action to resolve the conflicts.<sup>1</sup> Ray did complain to the college's Faculty Senate about Bradley and Abbott's instructions and list of possible actions. Bradley, Abbott and Gilmore considered Ray's reactions to be inappropriate, and his complaint to the Faculty Senate about possible actions to be inaccurate.

9. In early 1999, Ray voted against Gonshak's promotion to full professor. He then assented to the consensus of his colleagues in the

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<sup>1</sup> There is no evidence whether Cortese complied or not.

department in favor of the promotion. Ray's February 1999 letter confirming the department vote and assenting to the department recommendation for promotion contrasted markedly with the glowing recommendation he wrote for promotion of another colleague at the same time. The college promoted Gonshak on the unanimous recommendation of the Promotion and Tenure Committee. Gilmore, Bradley and Abbott considered Ray's behavior toward Gonshak possible retaliation for Gonshak's cooperation with Bradley in June 1998. As such, they considered Ray's behavior to be unacceptable.

10. In February 1999, Abbott instructed Ray to schedule an English Composition course to be taught in the evening. Ray responded by challenging the authority of the college to require faculty members to teach night classes. Ray eventually scheduled the class, but Gilmore, Bradley and Abbott considered his handling of the matter to be inappropriately confrontational.

11. During the 1998-99 school year, Ray received one or more complaints alleging that a Liberal Studies faculty member came to classes drunk. Rumors regarding such conduct by the faculty member had circulated in the college for many years. Bradley and Abbott directed Ray to investigate the complaints. Ray resisted the direction and questioned its legal basis. Gilmore, Bradley and Abbott considered his handling of this matter and his response to be inappropriate.

12. While serving as Department Head, Ray requested the right to tape two meetings with administrators. He sought and received permission before taping the meetings. Bradley and Abbott considered these taping requests to be evidence of Ray's adversarial approach to the administration of which he was a member. Although Ray justified his taping requests as a means to get a more accurate record of the meetings than he could obtain from taking notes, he did not consider himself to be a member of the administration. He viewed his department head role as that of a representative of the department to the administration.

13. Ray engaged in environmental advocacy activities during much of his employment with the college, including active membership on the board of directors of the Montana Environmental Information Center and the Clark Fork Coalition as of the time of hearing. Ray actively supported various environmental ballot initiatives. He lobbied in support of both Initiative 137 (a ban on cyanide heap leach mining) and Initiative 122 (a clean water quality issue). From 1990 through 2000, Ray also wrote and spoke publicly on numerous occasions and in many forums (newspaper, radio, television and conferences) regarding environmental issues and the mining industry. He often publicly criticized the mining industry.

14. During Ray's tenure as department head, Gilmore received many reports and comments critical of Ray's environmental activism. People involved with recruiting and fund-raising at the college, including Ray Rogers, director of marketing and recruiting, and Jim Peak, the director of Montana Tech Foundation, a substantial independent funding source for the college, made such critical comments to Gilmore. They asserted that Ray's environmental activism adversely affected their ability to recruit and to raise funds for the college. Gilmore himself believed that Montana's hostile attitude toward the extractive industry impaired the college's ability to attract students in its traditional engineering courses. He also recognized that Ray's environmental activism was an outside issue unrelated to his performance as a professor and administrator at the college.

15. Gilmore also discussed Ray's environmental activism with Tad Dale, a member of the college's local advisory board. Dale asked that Gilmore fire Ray for his environmental views. Gilmore also discussed Ray's environmental activism with Courtney Young and Pete Knudsen, deans and faculty members in the college's engineering departments, both of whom were critical of Ray's environmental advocacy. Gilmore did not consider Ray's environmental advocacy in conflict with Ray's department head position.

16. In March 1999, Roberta Ray injured her ankle. Due to her injury, Abbott called her to discuss relocating her office to a building with disability access. They disagreed and Roberta Ray hung up on Abbott. He called her back and Ray answered the phone, resuming the argument on behalf of his wife. Abbott finally interrupted Ray, telling him the conversation was with Ray as department head, not Ray as spouse of Roberta Ray, and that the administration needed to address the access question for a faculty member in his department. Abbott later discussed the incident with Bradley.

17. In April 1999, at a mine waste technology conference in Polson, Montana, Ray spoke critically of the mining industry and of the environmental insensitivity of the college's engineering students. Gilmore attended this conference. A number of members of the audience approached Gilmore after Ray's presentation. They made angry comments in disagreement with Ray and urged Gilmore to fire or discipline Ray. Gilmore agreed with some of the comments that suggested Ray was intemperate in his expression of his opinions. Gilmore referred to Ray as an "environmental bigot" in explaining why he did not think talking with Ray about his views would be productive. After the conference, Gilmore tried to find a video or audio tape of Ray's presentation. He also discussed the incident with Knudsen, asking about the accuracy of Ray's comments at the conference. His conversation with Knudsen was the last time Gilmore pursued or discussed the matter. Gilmore made no

efforts or plans to impose discipline or take any other adverse action against Ray because of his presentation.

18. Gilmore received a single complaint from a member of the public that Young had given a biased presentation on cyanide heap leach mining. Gilmore did not pursue any inquiries about the content of Young's presentation. Gilmore disagreed with Ray's views on cyanide use in gold mining and agreed with Young's views.

19. In early June 1999, Bradley and Abbott met again with Ray and Cortese. Bradley and Abbott believed that the faculty conflicts remained unresolved. They told the department heads that physical relocation to separate the two departments and consolidate each in a single location might be forthcoming. They also said that departmental faculty realignments could be forthcoming. Abbott asked that the two department heads list where they would locate their faculty colleagues if the departments were going to be reorganized anew. As a result of the listings, Bradley and Abbott discussed moving two members of the Liberal Studies faculty to PTC and two members of the PTC faculty to Liberal studies. Ray considered the suggested moves to be proposals. He agreed to take the moves back to the Liberal Studies department for discussion. When Gilmore learned of Ray's initial reaction to the moves, he commented that Ray "had grown" as a department head.

20. Ray discussed the moves with his colleagues in the department, making clear his opposition during the discussions. He subsequently sent a June 30 e-mail to his supervisors. In the e-mail, he attacked the idea of faculty relocations and suggested the moves were so devoid of merit that they probably constituted harassment. However, Ray than suggested that an alternative to the moves might include moving Gonshak out of Liberal Studies. Gilmore, Bradley and Abbott considered the content and tone of this e-mail to be inappropriate. They recognized Ray's threats in the e-mail to mobilize students and others to oppose relocation, to fight the proposal at every step and turn. They considered this to be inappropriate conduct for a department head.

21. After receiving the e-mail, Bradley and Abbott arranged to meet to decide whether to recommend renewal of Ray as department head. Before the meeting, Abbott prepared a draft evaluation of Ray's performance as department head. He wanted to discuss the draft evaluation with Bradley if they decided during the meeting to recommend Ray's renewal. In that draft evaluation, Abbott noted that Ray had difficulty distinguishing between his role as department head and his role as the spouse of another department member.

22. Abbott and Bradley met and decided that Bradley would recommend Ray's non-renewal to Gilmore. They did not discuss or consider Ray's marital status or environmental activism. They did not discuss the contents of Abbott's draft evaluation of Ray.

23. Abbott never gave Ray the draft evaluation. Abbott never completed or shared with Ray any formal evaluation of his performance as department head.

24. Through late 1999, the college did not have a policy or consistent practice of providing formal evaluations to any of its academic department heads. It did not have formal written position descriptions or criteria for department heads.

25. In early July 1999, Bradley recommended to Gilmore that Ray receive notice of non-renewal as department head. Gilmore then called a meeting on July 6, 1999, with Bradley, Abbott, the college Vice Chancellor for Administration John Hintz and the college Human Resources Director Maggie Peterson, to discuss Bradley's recommendation. The group discussed the concerns of Abbott, Bradley and Gilmore about Ray's performance as department head during the previous year. They discussed Ray's inability or refusal to address and resolve the conflicts and other problems within the Department identified by Norman in 1997, and by Bradley and Abbott in October 1998. They discussed the night class scheduling issue, Ray's reluctance to investigate the allegedly drunk faculty member, Ray's taping of meetings, Ray's reaction to Bradley's discussion with Gonshak, Ray's treatment of Gonshak subsequent to that discussion and the inappropriate tone and inaccuracies in Ray's June 30, 1999 e-mail. They did not discuss Ray's environmental activism or his marriage to Roberta Ray. At the end of the meeting, the group agreed that the college should not renew Ray as department head. Gilmore decided accordingly. Abbott wrote a letter the same day informing Ray.

26. Ray served as Liberal Studies Department Head from August 1998 until July 1999, when Gilmore decided not to renew his appointment. After the non-renewal, Ray remained a tenured full professor on the college faculty.

27. The college ordinarily appointed department heads for successive one-year terms averaging five to seven years. Appointments to such positions were limited to one year. The Regents had an express policy prohibition against guarantees of multi-year renewal. Both the college Handbook and Montana Board of Regents Policies provided that all academic administrators, including department heads, served at the discretion of the college chancellor.

Ray was the only academic department head Gilmore decided not to renew, except for department heads who chose not to continue in the positions.

28. The college selected Robert Ziegler as interim Liberal Studies department head and Jack Crowley as permanent Liberal Studies department head. Neither faculty member belonged to MEIC or other environmental organizations. Neither received criticism for their environmental views by Ray Rogers, Jim Peak, Tad Dale, Professor Young or Dean Knudsen. Neither made presentations at the Polson conference. No one had come to Gilmore angrily criticizing Ziegler or Crowley's public statements or asking Gilmore to take adverse action against them. Neither was married to another faculty member in the Liberal Studies department.

29. During his tenure as department head, Ray promoted the new liberal studies department by hosting an open house, preparing a videotape of the open house presentation, preparing an annual report on the department's activities, participating in a community volunteer fair, publicizing department activities in the media, setting up and awarding scholarships for departmental students, developing a departmental newsletter, having undergraduate students selected to make presentations at national conferences, developing and giving awards to senior students, and developing a web page on the internet about departmental activities. During Ray's tenure, enrollment in the liberal studies increased by 23.53% while engineering enrollment decreased by 3.14%. The college praised Ray for his efforts as head of this department.

30. Neither Bradley nor Abbott ever discussed Ray's environmental views. Their motivation for their interactions with and actions regarding Ray were unrelated to his environmental activism or his marital status. Their recommendation not to renew Ray as department head was not because of his environmental activism or marital status.

31. On July 28, 2000, during prehearing discovery regarding his political belief complaint, Ray first learned of Abbott's draft evaluation of his performance as department head, and discovered the references to his marital status. In his deposition (and at hearing) Abbott gave conflicting testimony about whether Ray's marital status was a subject of consideration during the meeting at which Gilmore decided not to renew Ray as department head.

32. Gilmore made his decision not to renew Ray as Liberal Studies department head for reasons unrelated to Ray's environmental activism and marital status. Those reasons were legitimate concerns about Ray's performance as department head and were not pretextual to conceal discriminatory animus due to Ray's environmental activism and marital status.

## IV. Opinion

Montana law prohibits adverse governmental employment action because of the employee's political beliefs or political ideas or because of the employee's marital status. §§49-2-303(1)(a) MCA, 49-2-308(1)(c) MCA and 49-3-201(1) MCA. Jurisdiction to hear complaints of violation of both the Governmental Code of Fair Practices and the Human Rights Act rest with the department. The college does not dispute that it is subject to the prohibitions of the statutes, as part of the University of Montana.

### I. Political Belief Discrimination

#### Ia. Ray's Prima Facie Case

Ray has no direct evidence that the college decided not to renew his engagement as department head because of his environmental activism. At most, he has evidence that Gilmore decided not to talk with him about his comments at the Polson conference because Ray seemed to be an "environmental bigot." This evidence is relevant but insufficient to establish a direct evidence case. The appropriate standard of proof for Ray is the indirect evidence standard.

The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas*.<sup>2</sup> *See, e.g., Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987); *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). Although Title VII does not prohibit discrimination on the basis of political beliefs or ideas, the standards of proof adopted under Title VII are applicable to HRA claims of such discrimination.

The first tier of *McDonnell Douglas* required Ray to prove his prima facie case by establishing four elements:

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<sup>2</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

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

*McDonnell Douglas*, *op. cit. in note 7*.

The *McDonnell Douglas* standard of proof is flexible. The four elements will not rigidly apply to every claim.<sup>3</sup> In this case, Ray needed to prove that (1) he held political beliefs or political ideas known to the college; (2) he was qualified to remain in his position as department head; (3) despite his qualifications the college replaced him and (4) that the college knew that his replacement shared Ray's qualifications but did not share his political beliefs or ideas.

Ray met his burden to present a prima facie case. Public expressions of opinions on matters of public concern are manifestations of "political belief" and "political ideas." *Taliaferro v. State*, 235 Mont. 23, 30, 764 P.2d 860, 865 (1988). The college does not dispute that Gilmore as well as Bradley and Abbott knew of Ray's environmental activism. Ray proved that he was qualified to continue as department head. The college replaced him with two colleagues (first the temporary and then the new department head) whose qualifications were comparable to those of Ray. Neither replacement was an environmental activist comparable to Ray. Neither engaged in conduct that resulted in calls to chancellor for removal from an administration position.

#### 1b. Discretionary Appointment of Department Heads as a Defense

Ray had no legal right to retain the job. *Ahktar v. Van der Wattering*, 197 Mont. 205, 218, 642 P.2d 149, 156-57 (1982). The college had the discretionary right to decide to replace Ray without any articulated reason. *Farris v. Hutchinson*, 254 Mont. 334, 341, 838 P.2d 374, 378 (1992). Nevertheless, the right of the college to appoint a new department head in its discretion does not defeat the prima facie case.

That the college has a legal right to select another department head without a reason does not mean the college can select another department

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<sup>3</sup> *Cf.*, *Martinez v. Yellowstone County Welfare Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981) *citing* *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5<sup>th</sup> Cir. 1980) (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

head for an illegal reason. In *Leland v. Heywood*, 197 Mont. 491, 643 P.2d 578 (1982), the court ruled that a college had the right, without any cause showing or formal hearing, to decide against retention of a non-tenured professor. *Leland* held, based upon the facts adduced at trial, that the college's decision against retaining the professor was not because he wrote a critical letter to a state legislator. The college proved both that it had already decided against retention before the professor wrote to the legislator and also that the decision-makers did not consider the letter in implementing their decision. *Leland* at 498, 643 P.2d at 582. The court need not have reached the factual basis for judgment on the claim of free speech infringement unless the college's right to decide against retention without any reason still did not permit the college to decide against retention for an illegal reason. Thus, a decision to replace Ray as department head because of his environmental activism would be unlawful, even though the college could replace Ray without any reason. The college's discretion does not extend to a replacement decision based upon discriminatory animus. *See also, Taliaferro, op. cit.*

#### Ic. The College's Legitimate Business Reasons for its Action

Once Ray established a prima facie case, the college had the burden of showing a legitimate business reason for replacing him as department head. *Taliaferro, op. cit. at* 28, 764 P.2d at 864; *McDonnell Douglas, op. cit.* The college had the burden to show, through competent evidence, only that it had a legitimate nondiscriminatory reason. *Crockett op. cit.*, 761 P.2d at 817. The college met that burden by presenting evidence of the conduct of Ray with regard to resolving the intra-department and interdepartment conflicts. Ray opposed and obstructed the college's efforts to resolve those conflicts. Based on the substantial and credible evidence of record, the college reasonably concluded that replacement of Ray as department head was in the best interests of the college because of his conduct regarding department affairs, not because of his environmental activism.

#### Id. Ray's Proof that the Business Reasons Were Pretextual

Once the college produced legitimate reasons for replacement of Ray as department head, Ray had the burden to prove that the college's reasons were in fact a pretext. *See, e.g., McDonnell Douglas op. cit.; Martinez, op. cit.* To satisfy this burden, Ray could present direct or indirect proof of the pretext in the college's proffered reasons. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981). Ultimately, Ray still had the burden to persuade the fact-finder that the college did illegally discriminate against him. *Taliaferro, op. cit.; Crockett, op. cit.*, 761 P.2d at 818; *Johnson, op. cit.*, 734 P.2d at 213.

Ray's evidence was insufficient to establish pretext. The substantial and credible evidence of record established that the college did decide to replace Ray as department head because of his conduct as department head.

Ray also argued that his opposition to changes in his department was itself protected speech or political activity. If it was, then he established illegal discrimination by direct evidence, since the college asserted that his opposition to those changes was one of the justifications for its adverse action.

The conduct the college asserted as justification for replacing Ray included repeatedly failing to act on and opposing action on Bradley's directions to address department problems, giving Gonshak a lukewarm endorsement for tenure and subsequently proposing the transfer of Gonshak from Ray's department to PTC (in apparent retaliation for Gonshak's cooperation with Bradley), opposing and delaying Bradley's direction to schedule and assign an evening English class, resisting and delaying Bradley's direction to investigate whether a member of the department faculty manifested on the job a problem with alcohol, and taping administration meetings (with consent). In each instance, the substantial and credible evidence of record established that Ray's conduct did not involve speaking publicly on a matter of public concern. Instead, Ray's conduct involved job performance and communications with his superiors regarding job action. The college acted because of Ray's job-related conduct, in private settings, and not because of his public speech, political beliefs or ideas.

In *Taliaferro*, the Montana Supreme Court held that a public employee does not relinquish First Amendment rights to comment on matters of public interest because of that employment, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968). The court went on to note that the state's interest in regulating the speech of its employees differs significantly from its interest concerning speech by the public generally. The Court held that a balance must be struck between the interest of the employee as a citizen in commenting upon matters of public concern, and the interest of the state as an employer in promoting the efficiency of public service through its employees.

In *Connick v. Myers* (1983), 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708, the Supreme Court held that the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. There it was held that when a public employee speaks out not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, the courts will not review the wisdom of a personnel decision taken by a public agency. 461 U.S. at 138-139, 103 S.Ct. at 1685-86. Conversely, it seems

proper to hold that if the public employee does speak on a matter of public concern as a citizen, the public employee is exercising a cherished First Amendment right.

The appellants point to an earlier decision by the Human Rights Commission in 1980, holding that a state employee who was dissatisfied with the performance of his superiors in their operations, and who met with legislators challenging the competence of one superior, was not expressing political ideas or beliefs. Obviously, such an employee was speaking about matters of personal interest, and under *Connick v. Myers*, supra, the decision of the Commission was correct.

*Taliaferro, op. cit. at 29-30, 764 P.2d at 864-65.*

In *Taliaferro*, the Court noted that adverse employment action by the state against an employee because the employee did something to express private dissatisfaction with the performance of his superiors did not constitute illegal discrimination. *Id.* The Court went on to distinguish that rule of law, and agree that Taliaferro had proved illegal discrimination because she had testified to a legislative committee, before she was a state employee, that a bill her prospective government employer supported would create a conflict of interest. *Id. at 30, 764 P.2d at 865.*

Ray's conduct as department head, communicating with his supervisors within the administration, was not public expression, nor was it grounded in a concern for the general public good. Rather, Ray disagreed with how the administration chose to address conflicts within his department. While he was free to express his opinion in public forums, he was not free to obstruct the administration, misstate its position, use abusive rhetoric in e-mail and memos to express his disagreement and refuse to act as department head when given express directions. John Ray, professor, would have been well within his rights to mobilize students and others in opposition to faculty relocation and to fight the proposal at every step and turn. When John Ray, department head, chose to say in a hostile e-mail to his supervisors that he might take those actions if they proceeded to relocate faculty, he gave the college good cause to find a new department head.

## 2. Marital Status Discrimination

### 2a. Timeliness of the Complaint

Ray had to file his marital discrimination complaint "with the department within 180 days after the alleged unlawful discriminatory practice

occurred *or was discovered.*” §49-2-501(4)(a) MCA (emphasis added). The college argued that Ray knew of the pertinent facts through his wife’s separate discrimination complaint. It provided no evidence to support that argument. Ray’s un rebutted proof that he discovered those facts at Abbott’s deposition established that he filed his complaint within 180 days after that discovery. The marital status complaint was timely.

#### 2b. Credibility and Weight of the Evidence of Marital Status Discrimination

The direct evidence supporting this complaint was Abbott’s testimony that Ray’s marital status and the comment about it in the draft evaluation were discussed during the nonrenewal meeting with Gilmore. Abbott even testified that his comments during the discussions leading to Bradley’s recommendation not to renew and Gilmore’s ultimate decision were motivated partially by Ray’s marital status.

After giving that testimony during the October 1 hearing, in response to questions from Ray’s counsel, Abbott proceeded, in response to questions from the college’s counsel, to give opposite testimony on each of these issues. He denied that Ray’s marital status and the comment about it in the draft evaluation were discussed during the meeting with Gilmore. He denied that his suggestions during the discussion leading to Bradley’s recommendation not to renew and the discussion leading to Gilmore’s ultimate decision, were partially motivated by Ray’s marital status.

Abbott changed his answers depending upon the wording of the questions, and perhaps even the tone of voice and expression of the questioner. The hearing examiner observed his testimony and demeanor in both hearings and found that Abbott did have concerns about Ray’s ability to distinguish between his role as department head and his concern for his wife. The concerns were prompted by the telephone incident in March 1999, and were legitimate business concerns. Even if those concerns had constituted illegal marital status animus toward Ray, Abbott did not voice those concerns and influence Bradley’s nonrenewal recommendation or Gilmore’s nonrenewal decision, due to Ray’s marital status.

Abbott’s confused and contradictory testimony to the contrary was not persuasive. Gilmore and Bradley were credible in denying any discussion or consideration of Ray’s marital status. Margaret Peterson, who also attended the meeting with Gilmore, likewise confirmed that Ray’s marital status was not a topic during that meeting. Bradley’s recommendation and Gilmore’s decision were not tainted with any animus toward Ray based upon his marital status.

There being no persuasive direct evidence of marital status discrimination, the prima facie case analysis mirrors that of the political belief case. Ray needed to prove that (1) his marital status (the identity of his spouse) was known to the college; (2) he was qualified to remain in his position as department head; (3) despite his qualifications the college did replace him and (4) that the college knew that his replacement shared Ray's qualifications, while not sharing his marital status. He did prove all the elements of his prima facie case.

Since Ray proved his prima facie case, the college needed to present legitimate business reasons for its decision. The same reasons interposed to the political belief complaint applied with equal force to the marital status complaint. The college also presented evidence that Abbott's testimonial admissions of marital status consideration were not credible.

Although Abbot's conflicting testimony raised a question of pretext, it did not establish it. The reasons the college proved for not renewing Ray were substantial and credible, as discussed in the political beliefs analysis of pretext. Ray failed to carry his ultimate burden of proving the college's discriminatory motive. *Crockett, op. cit.*, 761 P.2d at 818; *Johnson, op. cit.*, 734 P.2d at 213.

### 3. Conclusion

As late as June 1999, Gilmore, Bradley and Abbott had not decided whether to retain Ray as a department head. Before Ray's last intemperate memo to the administration, Gilmore remarked that Ray appeared to be growing into the department head job. Ray proceeded to dash the administration's hope that he was growing into the job, with one final internal memo that demonized and dismissed any administrators who disagreed with his view of what should happen in the department. The administration then properly and legally made the discretionary decision that it could function better with someone else as department head.

## **V. Conclusions of Law**

1. The Department has jurisdiction over these consolidated cases. §49-2-509(7) MCA.

2. Montana Tech of the University of Montana did not illegally discriminate against John W. Ray by reason of his political belief, political ideas or marital status when it gave him timely notice of nonrenewal of his one-year appointment as the Liberal Studies Department Head in July 1999. §49-2-303(1)(a) MCA, §49-2-308(1)(c), MCA and §49-3-201(1), MCA.

## VI. Order

1. Judgment is found in favor of Montana Tech of the University of Montana and against John W. Ray on the charges of illegal discrimination against Ray because of political ideas and political belief, in violation of the Montana Human Rights Act and the Government Code of Fair Practices.

2. Judgment is found in favor of Montana Tech of the University of Montana and against John W. Ray on the charges of illegal discrimination against Ray because of marital status, in violation of the Montana Human Rights Act and the Government Code of Fair Practices.

3. The department dismisses the consolidated complaints.

Dated: January 16, 2002.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry