BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Roberta Drew, Charging Party, vs. **Yellowstone County, Yellowstone County Commissioner Jim Reno, and Dwight Vigness**, Respondents.	)	**HRC Case Nos. 0031010360, 0031010361 & 0039010370** *Final Agency Decision*

I. Procedure and Preliminary Matters

Roberta Drew filed a complaint against Yellowstone County and Yellowstone County Commissioner Jim Reno with the Department of Labor and Industry on December 11, 2002. She filed a first amended complaint, adding Dwight Vigness, Yellowstone County Human Resources Director, as an additional respondent, on December 20, 2002. She filed a second amended complaint on January 20, 2003. She alleged, ultimately, that the respondents discriminated against her because of her sex and her political beliefs and retaliated against her because she opposed illegal discrimination and participated in protected activity. She sought damages and equitable relief through December 31, 2003.

On July 29, 2003, the department gave notice Drew's charges would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties stipulated to extend department jurisdiction for more than 12 months after complaint filing.

The contested case hearing proceeded on February 24-27, April 21-23 and May 18-22, 2004, in Billings, Yellowstone County, Montana. Roberta Drew attended. The county's designated representative, Dwight Vigness, and Jim Reno attended. Timothy C. Kelly represented Drew and Calvin J. Stacey, Stacey & Funyak, represented all respondents. The Honorable Diane G. Barz, Curtis Bevolden, Kris Copenhaver-Landon, Roberta Drew, Mark English, the Honorable Russell Fagg, Maris Harris, Yellowstone County Commissioner Bill Kennedy, Brian Kohn, Sue Moss, Teresa O'Connor, Yellowstone County Commissioner Jim Reno, Tom Taggert, the Honorable Gregory Todd, Dwight Vigness and the Honorable Susan Watters attended and testified. The hearing examiner also admitted deposition testimony from Bevolden, Drew, Kennedy, Dennis Paxinos, Reno, Sandy Selvey, Penny Strong and Vigness into the evidentiary record. The hearing examiner's exhibit list accompanies this decision. The hearing examiner sealed portions of the hearing record, subject to this final decision. The parties filed proposed decisions and post-hearing arguments. After filing her last post-hearing

brief on June 24, 2004, Drew moved, on June 28, 2004, for leave to file copies rather than originals of some depositions, because the depositions were taken in a pending companion federal case. The hearing examiner granted the motion. Drew filed the deposition copies on July 12, 2004, and the record closed for the decision on that date. A copy of the hearing examiner's docket accompanies this decision. A sealing order and the notice of entry of final agency decision also accompany this decision.

At hearing, Drew's charges of illegal discrimination were that the respondents took the following adverse actions against her, for illegally discriminatory reasons:

(1) created an interim chief public defender position instead of allowing Drew to serve as acting chief public defender until the County selected a replacement for its departing chief public defender;
(2) hired Curtis Bevolden instead of Drew as the interim chief;
(3) terminated Drew's employment on December 17, 2002;
(4) did not timely process Drew's termination grievance; and
(5) denied Drew's grievance after the Level I and II meetings in March and April 2003.[1]

II. Issues

The issue in this case is whether any of the adverse actions against Drew were taken because of protected class status or in retaliation for protected activity. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Charging Party Roberta Drew is a woman. At all pertinent times she was admitted to practice of law in Montana and in good standing with the Montana Supreme Court and the State Bar of Montana.

2. Respondent Yellowstone County is a local government agency and a political subdivision of the state.

3. Respondent James Reno, a Republican, was an elected Yellowstone County Commissioner, beginning his 6-year term in January 1998. Reno served as commission liaison to the Yellowstone County Public Defender's office during 2002.

4. Respondent Dwight Vigness was the county's Human Resources Director (sometimes also called Personnel Director) since August 28, 2001.

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[1] The hearing examiner omitted department complaint numbers in listing the charges heard.

5. The county employed Drew beginning in November 1994, as a clerk to Judge Maurice Colberg of the 13th Judicial District Court. Judge Colberg, as Drew's supervisor, favorably evaluated her performance in 1995.

6. On July 1, 1995, Drew transferred to a position as an assistant public defender in the public defender's office, under the supervision of Chief Public Defender Sandy Selvey, her immediate supervisor.

7. In 1992 the county had exercised its statutory authority to create a public defender's office. Selvey was the public defender from the creation of the office until November 2002, during which time the staff of the public defender's office grew so that the vast majority of indigent defense cases could remain within the office except for conflict of interest cases. There was considerable turnover of lawyers working in the office. Attracting and keeping experienced criminal defense attorneys to work as deputy public defenders was a constant problem.

8. During his tenure as chief public defender,[2] Selvey routinely acted as counsel for indigent defendants in major felony cases within the office. Sometimes he had another public defender act as co-counsel. He almost never assigned a major felony defense to another attorney in the public defender's office unless he remained lead counsel or co-counsel.

9. After Drew came to work, Selvey became her mentor during their joint tenure in the public defender's office. She respected him and relied upon him for guidance regarding her performance of her duties and the appropriate conduct of the business of the public defender's office.

10. Drew believed providing competent zealous defenses for indigent criminal defendants to be a constitutional requirement. She believed the mission of the public defender's office to be defined by the United States Supreme Court's decision in *Gideon v. Wainright*, that fundamental state and federal constitutional rights were intended "to assure fair trials before impartial tribunals in which every defendant stands equal before the law." She believed her work had fundamental importance.

11. Drew opposed privatization (contracting with private businesses to perform public services) of the public defender office. Drew believed the standards proposed by the ABA Criminal Justice Section for the defense of indigent persons (ABA Standards) were the necessary standards for adequate public indigent criminal defense. The county public defender system in Montana was loosely based on the model proposed under the ABA Standards, as well as the standards set out by the

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[2] In 2002, his formal job description still titled Selvey as the "public defender," but his position was commonly referred to as "chief public defender."

National Association of Criminal Defense Lawyers, the National Legal Aid Defendants Association and others. Key principles underlying the ABA Standards included the independence of public defenders in the performance of attorney-client services from the judiciary, the prosecutors and the elected governing bodies; balanced staffing and resources for public defenders compared to their counterparts in the prosecutor's office; and reasonable assignment of workloads for individual public defenders allowing for quality representation. Drew believed adherence to the ABA Standards for publicly funded indigent criminal defense to be a necessity rather than an ideal. She thought that privatization would subordinate the quality of legal services for poor defendants to the for-profit objectives required in the private sector. She considered privatization an effort to undermine the *Gideon* protections.

12. Reno favored privatization of public services, including the services the public defender's office provided. He believed contracting with private attorneys to provide representation to indigent criminal defendants to be a more cost effective method of discharging the county's responsibilities in this area. Reno considered adherence to the ABA Standards for publicly funded indigent criminal defense a goal or guideline rather than a requirement, because he believed that the commission had an obligation to determine how much publicly funded indigent defense the county could afford. He sought neither to undermine the quality of legal services for poor defendants nor to deny indigent criminal defendants their due process rights. From conversations between Selvey, Drew, Reno and other commission members, Reno was aware that Drew opposed privatization.

13. Selvey prepared and filed a formal evaluation of Drew's job performance in 1997. He considered her work as a public defender from 1995 to 1997 to exceed expectations for the position in almost every category of performance.

14. On April 1, 1998, the county gave Drew a two-grade promotion to chief deputy public defender, at Selvey's request. Drew's job was reclassified based on duties and responsibilities she was already performing for the public defender's office. The reclassification created the chief deputy position and placed her in it.

15. Among her duties as chief deputy public defender, Drew performed the duties and responsibilities of the chief public defender as required during the chief's absences.

16. In October 2000, Selvey requested that the county give Drew a pay raise to 90% of the chief public defender's salary. Selvey requested the raise based on Drew's merit – she was exceeding expectations in her performance as chief deputy public defender. Also, the two chief deputy county attorneys, both male, were paid 90% of the county attorney's salary. Human Resources Director Linda Dixon and Chief Administrative Officer Andy Whiteman opposed the request, arguing that Drew's duties and responsibilities had not changed substantially since her 1998

review and raise and that there was no justification for a pay exception to award the increase. The county gave Drew a raise to 85% of Selvey's salary.

17. The local judges appointed the public defender's office (as an entity) to represent an indigent defendant in a new criminal case. With each appointment, the entire office entered into the attorney-client relationship with its new client, the indigent criminal defendant. No attorney in the public defender's office could ethically represent a new client whose interests conflicted with those of existing clients of the office.

18. The public defender's office had a policy to find counsel as soon as possible after identifying a conflict, so that the clients would have an attorney and not be unrepresented. This policy was consistent with the ABA Standards and was particularly important when the defendant was in jail. When the office identified new cases involving such conflicts, an internal form requesting assignment to outside counsel came to Drew in her capacity as chief deputy. She verified the conflict, approved the request and identified available and appropriate private counsel to substitute for the office. She had a list on her desk of local attorneys willing and able to take conflict cases. She made decisions about which of the attorneys on the list could provide competent representation depending upon the nature of the case (severity of the possible punishment for the kind of crime charged, and so on). She then contacted attorneys she considered appropriate for the conflict cases and confirmed their current availability and willingness to take the particular cases. Not all the attorneys were always available. Once she had identified an attorney who was ready and able to accept the case, Drew completed the form. The office had a standard motion to file, asking the presiding judge in the case to approve withdrawal of the office and substitution of the identified private attorney as counsel for the indigent criminal defendant. The office policy was to complete the process and file the motion within a few days, so that the defendant was not without an attorney for any appreciable length of time. The policy required faster action if the defendant was incarcerated. Drew sometimes signed substitution motions instead of Selvey.

19. Whenever an outside attorney provided representation to an indigent criminal defendant at the county's request, the county paid for the defense. This increased the county's overall cost for provision of public indigent criminal defense. Both the commissioners and the district judges had concerns about the increased cost and attempted to monitor the use of outside counsel. The district judges monitored conflict assignments because they ruled upon the motions for withdrawal and substitution of outside counsel in cases over which they presided. The commissioners monitored use of outside counsel through their liaison member and through fiscal documentation, as well as through informal discussions between the judges and individual commissioners.

20. As the case load of the public defender's office grew, Selvey and Drew used the standard conflict substitution motions to address excessive case loads in the office. When Selvey and Drew decided that all of the attorneys had as many cases as they could competently defend, the office presented conflict substitution motions even without the usual conflicts of interest between existing clients and the clients in the new cases. Selvey and Drew believed undertaking the representation of new indigent defendants with too heavy an existing case load to be unethical and a violation of the ABA Standards, because they believed it diluted the defense of both the new and existing clients. They thought the situation involved a genuine conflict of interest regarding whose defense would be neglected. Neither the commissioners nor the majority of the district judges favored conflict substitution motions in such situations. They did not agree that case load could be an absolute measure of capacity to provide adequate defenses. In opposing case load substitution motions, neither the commissioners nor the district judges sought to undermine the quality of legal services for poor defendants or to deny indigent criminal defendants their due process rights.

21. In the spring of 2002, Reno had discussions with Selvey and Drew about "conflicting out" cases based on case loads. Reno considered this practice to be a work stoppage by the public defender's office. As a commissioner, he viewed heavy case loads of public defenders as a business problem, which the county had to address but which the public defender's office had no right to solve by action that increased county expenditures for indigent public criminal defense. Drew and Selvey argued that case load problems implicated both the constitutional rights of indigent criminal defendants and the professional standards of conduct for public defenders. Drew and Selvey believed that the county had a legal and ethical obligation to fund adequate indigent criminal defenses and that they therefore had the right to use conflict substitution motions to refer cases to private counsel at the county's expense when the case load in the office exceeded what they believed the attorneys in the office could competently defend.

22. In the summer of 2002, Sarah Schopfer, an investigator working in the public defender's office, complained to the county that Selvey was retaliating against her because she had decided to end her romantic relationship with him. She took a medical leave of absence, asserting that the conduct of Selvey and a co-worker (a male investigator) made it impossible for her to work in the office. The county attorney's office declined to advise the commission, recommending outside counsel, because of the adversarial relation with the public defender on criminal prosecutions. The county hired Calvin J. Stacey to investigate on its behalf.

23. William T. Kennedy, a Democrat, had been an elected Yellowstone County Commissioner since January 1993. He was an advocate for state assumption of the cost of providing counsel to indigent criminal defendants. His primary goal

was to reduce the financial burden to the county for public defenders. Kennedy considered adherence to the ABA Standards for publicly funded indigent criminal defense a goal or guideline rather than a requirement, because he believed the government had an obligation to determine how much publicly funded indigent defense it could fund. He thought that state assumption offered a fiscally responsible and better method of meeting the government's duty to provide publicly funded representation to indigent criminal defendants. In pursuing state assumption Kennedy sought neither to undermine the quality of legal services for poor defendants, nor to deny indigent criminal defendants their due process rights.

24. In the fall of 2002, Kennedy discussed with Selvey and Drew whether the public defender's office would support legislative proposals offered by the statewide association of counties for state assumption of the county public defender function. Selvey and Drew demurred. Drew said that her support for state assumption depended on its effect upon services to the clients of the public defender's office rather than on the fiscal impact upon the county. She questioned whether there was enough information to proceed with state assumption without first conducting a study of its effect upon services to indigent defendants. This was the second time during Kennedy's tenure that Selvey and Drew had disagreed with him regarding state assumption.

25. Reno and Kennedy disagreed with Selvey about the appropriate operation and funding of the public defender's office, including privatization, conflict substitution motions based on case loads and state assumption. These disagreements involved underlying policy questions that implicated the ABA Standards. A key issue underlying these disagreements was the proper balance between the county's ability to fund indigent public criminal defense and its overall budget. Reno and Kennedy held differing political beliefs, but both believed that the county had to govern its expenditures, including funding of indigent public criminal defense, to stay within its overall budget. Their efforts to contain costs of county government, including the public defender's office, were not efforts to undermine the quality of legal services for poor defendants or to deny indigent criminal defendants their due process rights.

26. Selvey regularly took the position that constitutional requirements of the representation of indigent criminal defendants were paramount. Drew agreed consistently with Selvey, and expressed her agreements to Reno and Kennedy.

27. From August through October 2002 the Schopfer investigation proceeded. Selvey was increasingly absent from the public defender's office. As part of her duties as chief deputy, Drew served as acting public defender during his absences.

28. In October 2002 the commission decided to end Selvey's employment, firing him if he would not resign. Reports of Schopfer's complaint and Selvey's conduct had begun to appear publicly. The internal problems, the looming prospect

of litigation involving Selvey's conduct and the specter of damage to public relations because of that conduct weighed against retaining him. The investigation of Selvey included negotiation with Selvey regarding his departure. By late October, Selvey knew that unless he resigned he would be fired.

29. One topic of negotiation between Selvey and the county was who would represent the defendants in some major felony defenses Selvey had undertaken as the chief public defender. Selvey wanted to substitute for the office as counsel on the cases when he left. His attorney insisted that the county had an obligation to the defendants to keep Selvey as counsel for them, by either extending his tenure as chief or joining in his request to continue to represent the defendants at county expense after his departure from the public defender's office.

30. Either scenario provided Selvey with a better transition to solo private practice or association with lawyers in an existing law firm. Extension of his tenure would have provided more time to prepare and make a smooth transition. If he kept the six major felony cases,[3] he would have had continuing work and income either to sustain initial solo practice or to present a more attractive prospect to existing firms.

31. Selvey also believed his continued representation would have provided the indigent defendants with better defenses. Trials on all six cases were set within a few months and motions of significance to several of those trials either were pending or being prepared. Any new lead counsel had to have significant experience trying major felony cases and would have needed to do preparation in a short time.

32. The six major felony cases (and their ultimate resolutions) were:

(1) *State v. Cody French*, before Judge Susan Watters on charges of negligent homicide arising out of a motor vehicle accident (guilty plea);
(2) *State v. David Miller*, before Judge Todd Baugh on charges of sexual intercourse without consent (still pending as of the dates of hearing in this matter);
(3) *State v. James English*, before Judge Gregory Todd on charges of negligent homicide (tried to a jury that returned a guilty verdict);
(4) *State v. Richard Verness*, before Judge Russell Fagg on charges of attempted deliberate homicide (two counts) and felony assault (tried to a jury that returned a guilty verdict on attempted deliberate homicide);
(5) *State v. Floyd Tapson*, before Judge Gregory Todd on charges of attempted deliberate homicide, aggravated kidnapping and sexual intercourse without consent (guilty plea); and

[3] The record contains frequent references to "seven major felony cases," although there were actually six major felony cases.

(6) *State v. Timothy Fields*, before Judge Russell Fagg for retrial after appeal and remand on charges of deliberate homicide (tried to a jury that returned a guilty verdict).

33. While Selvey and the county negotiated about the terms of his departure, Reno and Kennedy, acting as the majority of the commission, decided to create an interim chief public defender position and to fill it immediately. They made this decision at an informal meeting that was neither announced nor open to the public, and to which no minutes were kept, sometime before October 26, 2002. The third county commissioner, James A. Ziegler, whose term ended December 31, 2002, did not participate in this decision, and abstained from any participation in the entirety of the following interview and selection process regarding the interim position.

34. Prior to October 2002, the county had confronted situations in which a department head who was not an elected official left a job in departments where there were more than a handful of employees. In those situations, if a formally designated second in command existed, the county had typically placed that second in command in charge of the department until selection of a permanent replacement. There was neither a formal policy nor a requirement under any collective bargaining agreement that the county use the second in command as an acting department head under those circumstances. Reno and Kennedy decided not to use Drew, the chief deputy, as the acting chief until they hired a permanent replacement for Selvey.

35. At the time they decided to create an interim chief public defender position, Reno and Kennedy had concerns about the defense of the six major felony cases. From their negotiations with Selvey, they knew that Selvey contended that the indigent defendants in the six major felony cases would be prejudiced unless he remained counsel on those cases. Reno and Kennedy distrusted Selvey and believed extending his tenure was not in the best interests of the county. They did not accept his assertion that he alone could vindicate the rights of the indigent defendants and discharge the county's duties to provide them with proper public defenses.

36. Reno and Kennedy knew the cost to the county for defense of the six cases by outside counsel could be substantial. This potential expense was important to their decision to seek an interim chief who would keep the six major felony cases in the public defender's office when Selvey left. They assumed an interim chief and the current staff attorneys could replace Selvey in all six cases. They did not believe keeping the cases in the office would deny the defendants their due process rights.

37. Reno and Kennedy knew about some problems between Drew and the district judges regarding her work as the public defender's office liaison with the judiciary. They probably also had some information about the personal views of some of the district judges about Drew as a criminal defense attorney and perhaps as an administrator. They knew generally that Selvey and Drew had both been named

in a union complaint alleging unfair labor practices by the county in the public defender's office. The complaint was filed in June 2002 and still pending in October 2002. Reno and Kennedy did not consider or give weight to any of this information in deciding to create the interim chief position.

38. From August through the decision in October 2002 to create the interim chief position, Drew had served as acting chief public defender for at least one third of the time, due to Selvey's frequent absences. The public defender's office performed its essential mission throughout that time. The commissioners did not create the interim chief position because of complaints about operation of the office.

39. Reno and Kennedy decided to create the interim chief public defender position, instead of relying upon Drew to act as chief until they hired a new permanent chief, because of her affiliation with Selvey. Reno and Kennedy wanted the county to make a complete break with Selvey at the time he left the public defender's office. Allowing Selvey to remain counsel of record or co-counsel in the six major felony cases would either result in increased expenses for the county or extend his tenure in the public defender's office. They believed Selvey would be a risk for both liability exposure and bad publicity if he continued working for the county. They saw Drew's affiliation with Selvey as a twofold problem if she were acting chief. First, she might support substitution of Selvey as outside defense counsel on some or all of the six major felony cases. Second, she might continue to involve Selvey in the office operations, either requesting substitution of Selvey as counsel on new conflict cases or using him as a resource for defense and management questions.

40. Reno and Kennedy had three reasons for seeing Drew as too closely affiliated with Selvey:

> (1) Drew had worked under Selvey's supervision for seven years;
> (2) Selvey had supported Drew, in such actions as seeking pay increases for her and proposing her position be upgraded to chief deputy and
> (3) Drew had supported Selvey on virtually every issue where the commission questioned or disagreed with the prevailing practices in the public defender's office, including opposition to privatization, conflict substitution motions based on work loads and resistance to state assumption legislation.

41. Reno and Kennedy each had policy issues about which they individually disagreed with Drew. However, it was not Drew's disagreements on the particular policy issues, such as privatization, state assumption and conflict substitution motions based on work loads, that influenced their decision to create the interim chief job. The ideological content of Drew's positions was not their concern. Drew's consistent agreement with Selvey on a whole range of issues contributed to their belief that Drew was too closely affiliated with Selvey. Drew not only respected and was loyal to Selvey, she also agreed with him every time Selvey had disagreed with

the commissioners. Drew's constant agreement with Selvey was a major reason why Reno and Kennedy believed that they could not rely on Drew to implement a complete break between the public defender's office and Selvey.

42. The county's general employment policy was to seek as many qualified candidates as possible for an open position. Dwight Vigness, the county's Human Resources Director, knew about the decision to create the interim chief position, although he did not participate in it. He would normally have implemented the county's hiring process for the interim chief job. However, the decision to create the interim position came before the county had reached an agreement with Selvey regarding his departure. At the time of the decision, the county was not ready to make any public announcement regarding Selvey's position. Indeed, any public comment about the negotiations might have been disclosed confidential personnel information without Selvey's consent. As a result, the decision to create the interim position and the subsequent recruitment for the interim position were neither announced nor posted. Recruitment was by word-of-mouth only.

43. The county did not keep any records of the recruitment efforts for the interim position. Reno and Kennedy kept Vigness informed of their approach to finding an interim chief. Vigness took action only as directed by Reno and Kennedy with regard to the process. Vigness took no independent action to follow the normal procedures to hire either a new department chief or a temporary employee, because the situation did not fit either normal hiring procedure.

44. Reno and Kennedy decided to create the interim chief job without asking Drew if she could or would work both to keep six major felony cases in the office and to cut all public defender's office contact with Selvey. They did not ask her because of her affiliation with Selvey, the ongoing negotiations with Selvey, and the potentially confidential information involved in those negotiations.

45. After the decision to create the interim chief public defender position, Reno did the initial recruiting, beginning before October 26, 2002. He asked attorneys he saw during his daily activities to suggest who might make a good chief public defender. He asked County Attorney Dennis Paxinos while they had lunch at a restaurant and talked with Bill O'Connor at a Rotary Club meeting. He also asked two other male local attorneys (whose names he could not recall) about possible candidates for the position.

46. Paxinos recommended Curtis Bevolden, a Deputy County Attorney for Big Horn County and a former employee of Paxinos in the Yellowstone County Attorney's office, as a good candidate for interim chief public defender.

47. Reno spoke to Bill O'Connor to solicit names for the interim position and also to ask if O'Connor would be interested in a contract to privatize public defense

for the county. O'Connor and his wife, Teresa O'Connor, were partners in private practice in Billings. Bill O'Connor turned down the "privatization" inquiry and suggested his wife for the interim chief position.

48. On or about October 28, 2002, as his negotiations with the county were concluding, Selvey confided in Drew that the county intended to fire him unless he resigned. He expressed his concerns about the plight of the defendants in the six major felony cases if he did not remain their counsel. He played upon Drew's loyalty to him and to the mission of the public defender's office. He questioned the adequacy of the defenses the indigent defendants in the six cases would receive if the public defender's office kept the cases. He presented his concerns in a fashion that fired Drew's zeal to help vindicate the rights of the indigent defendants by supporting Selvey's continued representation of them.

49. After her discussion with Selvey, Drew asked for a meeting with Reno to discuss concerns about the public defender's office. They met on Wednesday, October 30, 2002 at a local restaurant. Reno arranged for Kennedy and Vigness also to attend the meeting.

50. Drew inquired about the status of the public defender's office in light of Selvey's impending discharge or resignation. Reno, Kennedy and Vigness refused to discuss the status or any details of the negotiations between the county and Selvey. They did not tell Drew of the decision to create an interim chief public defender job.

51. Drew told Reno, Kennedy and Vigness that the public defender's office could not take over and try the six major felony cases without Selvey. Reno asked why Drew herself could not replace Selvey in the six cases. Drew replied that she and other attorneys in the public defender's office were acting as co-counsel in some of the six cases. She told Reno, Kennedy and Vigness that she could not prepare and try the six cases without Selvey, due to her current case load and the limited time before the trial settings. She said that the other attorneys in the office would not be able to serve as lead counsel in the six cases as scheduled, due to their case loads and experience. She insisted that Selvey would have to remain on the cases. She said that the six cases could remain in the public defender's office only if Selvey still represented the defendants. Unless he did, as either an employee of the office or outside co-counsel, she concluded that the office would need to move to substitute Selvey as defense counsel in the cases when he left.

52. If after October 30, 2002, all six cases had gone to trial as they were scheduled, it would have been a major undertaking to provide constitutionally competent defenses in all six cases without Selvey. However, Drew knew that it was very unlikely that all six cases would go to trial as scheduled. She did not share that knowledge with Reno, Kennedy and Vigness. She also did not consider whether hiring another experienced trial attorney immediately would allow the office to

provide proper defenses in all six cases without Selvey even if all did go to trial as scheduled. Because of her loyalty to Selvey and the way he had presented the situation to her, she had not done and therefore did not provide an accurate and dispassionate analysis of the situation to Reno, Kennedy and Vigness. She told them precisely what Selvey had hoped she would tell them when he told her about his impending departure. She said that the county could not provide adequate constitutional defenses in the six cases without Selvey. She sincerely believed her statement to be true.

53. Drew's conduct in the meeting reinforced the fears of Reno and Kennedy that she would not dissociate herself from Selvey when he left the public defender's office. Reno and Kennedy contemplated hiring an interim chief who would oppose appointment of Selvey in the six major felony cases, with the interim chief or perhaps other office attorneys (including Drew) trying the cases. Drew's insistence that no one in the office except Selvey could try the six cases convinced Reno and Kennedy that the new interim chief had to be able to try all six cases.

54. On October 31, 2002, Stacey and Selvey's attorney reached an agreement on behalf of their respective clients regarding the terms under which Selvey would resign. Selvey submitted a letter of resignation dated October 31, 2002 and effective November 30, 2002. On November 1, 2002, the county received Selvey's letter of resignation. One of the terms Selvey and the county had agreed upon was that the public defender's office (*i.e.*, Selvey's successor) would decide after Selvey's departure whether he would remain as counsel or co-counsel on the six cases.

55. Reno and Kennedy still intended to hire an interim chief willing to sever all connections with Selvey when he left the office at the end of November. That meant the interim chief needed both to oppose appointment of Selvey in the six major felony cases and to avoid appointment of Selvey in any new cases defended at county expense. They already had decided to seek an alternative to Drew serving as acting chief public defender, because they doubted she would be willing to oppose appointment of Selvey in the six cases, let alone avoid Selvey as conflict substitution counsel in new cases. Her comments on the subject during the October 30, 2002, meeting changed the focus of their task of hiring an interim chief. Reno and Kennedy's primary goal changed to hiring an interim chief who could try the six major felony cases, so that the public defender's office would have the ability properly to oppose a motion to appoint Selvey in any of those cases. This became their urgent priority, without regard to the ability and experience of any applicant for the interim chief job in the administrative and management duties of the chief public defender.

56. Reno and Kennedy reasonably decided to make the ability to assume lead counsel responsibility on the six major felony cases the main criterion for selection of an interim chief. Drew's job duties as chief deputy included providing assistance on

many of the chief's administrative and management duties. Reno and Kennedy believed that if they found an interim chief who could try the six major felony cases, the office already had an experienced chief deputy who could help the interim chief carry out necessary administrative and management duties until appointment of a new permanent chief.

57. Upon receipt of Selvey's letter of resignation on November 1, 2002, Reno and Kennedy directed Vigness to schedule interviews as soon as possible with those attorneys who might be interested in the interim chief public defender position. Vigness developed a list of possible candidates, drawn from suggestions from Reno and Kennedy. The list included Mark Errebo (Selvey's attorney in the negotiations), Teresa O'Connor, Brian Kohn and Kevin Gillen (local attorneys in private practice who were visible in criminal defense work) and Curtis Bevolden.

58. On Friday and Monday (November 1 and 4), Vigness contacted the identified potential candidates verifying their interest in the position and scheduling interviews with Reno and Kennedy during the week of November 4, 2002. Gillen and Errebo were not interested. Vigness arranged interviews for Bevolden, O'Connor and Kohn beginning Monday, November 4, 2002. Reno and Kennedy either had not mentioned Drew to Vigness as a prospect for the job or had only done so as an afterthought. As a result, Vigness did not initially contact Drew about an interview.

59. On November 4, 2002, Drew heard talk in the public defender's office that Reno and Kennedy were interviewing persons to replace Selvey and that Bevolden was interviewing that day for the job. Drew called Vigness and asked about the interviews. Vigness then arranged for Drew also to meet with Reno and Kennedy later in the week.

60. On November 4, 2002, Reno and Kennedy interviewed Bevolden for the position of interim chief public defender, with Vigness and Stacey also present. Bevolden provided Reno and Kennedy with a copy of his resume, which showed that he had done both prosecution and criminal defense work (including a short stay in the public defender's office some years before) during his career. In response to questions during the interview, Bevolden recited his felony trial experience and assured the commissioners that he could take over and try the six major felony cases currently assigned to Selvey.

61. Bevolden's assurance was little more than puffing. He had little or no information about either the particulars of the six cases or the state of preparation of the files. Although he had substantial experience and ability as a trial lawyer in criminal cases, he did not have the information realistically to guarantee to the commission that he would be able to prepare and try all six cases should they all proceed to trial as scheduled. Discerning what the commission wanted, Bevolden told them what they wanted to hear.

62. Bevolden also explained that he would continue as a prosecutor in Big Horn County in November on a part-time basis, but could work part-time as the interim chief public defender for the following 2½ weeks (November 11 through 27), after which he would depart to get married over the Thanksgiving holiday and take his honeymoon the following week. He told the commission that he would be able to begin full time work as the interim chief on Monday, December 9, 2002.

63. Reno and Kennedy told Bevolden during the interview that his selection as interim chief would not give him any advantage in the subsequent search for a permanent chief, an opening they intended to advertise and fill.

64. November 5, 2002, was an election day and no interviews took place.

65. On November 6, 2002, Reno and Kennedy interviewed Teresa O'Connor for the position of interim chief public defender, with Vigness present. O'Connor told Reno and Kennedy that she could undoubtedly handle the interim chief position. She assured them that based on her experience in preparing and trying cases, sometimes under severe time constraints, she was certain that she could devote the necessary extra time and effort to prepare and try as many of the six major felony cases as actually went to trial as scheduled. She told them that her experience indicated that some or even most of the six cases would not go to trial as scheduled. O'Connor's answers were honest, strong and reassuring regarding coverage of the six cases. She also qualified her answers with express assumptions based on articulated and reasonable factors.

66. Before Reno and Kennedy had the chance to warn O'Connor that her selection as interim chief would not give her any advantage in the subsequent search for a permanent chief, she told them that she wanted assurance that if she took the interim chief position she would be guaranteed the permanent chief position. The commissioners did not immediately reject her application. Reno and Kennedy understood O'Connor to be making the guarantee a condition upon her acceptance of the interim chief job.

67. On November 7, 2002, the staff of the public defender's office submitted to the county a letter dated November 6, 2002, which they had individually signed, supporting Drew's candidacy.[4] The same day Reno and Kennedy interviewed Drew for the position of interim chief public defender, with Vigness present.

68. Drew came to the interview feeling slighted and defensive. She suspected that had she not learned of the interviews and called Vigness she would never had

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[4] On November 4, Drew was outspoken in the office about both her candidacy and how the county should have made her acting chief. Her comments probably triggered the endorsement letter.

gotten an interview. Because of her state of mind, she did not display the same confidence and command during her interview as had Bevolden and O'Connor.

69. Reno and Kennedy did not ask Drew if she could take over and try Selvey's six major felony cases. She nonetheless reiterated her conclusion that Selvey should remain counsel or co-counsel on those cases. She assured the commission that she had extensive felony trial experience. She reminded the commission that she had run the office during Selvey's absences, that she was competent and qualified to be chief public defender and that she would and could do a good job. She told them she was committed to providing quality public representation of indigent criminal defendants. Reno and Kennedy did not disclose either their reservations about her affiliation with Selvey or their reasons for those reservations, so she had no opportunity to address their concerns during the interview.

70. Drew correctly suspected that Reno and Kennedy did not consider her a serious candidate for the interim chief position. She did not improve her prospects with Reno and Kennedy by her demeanor during the interview. She confirmed the concerns of Reno and Kennedy by telling them again that the office could not try the six major felony cases without Selvey, in contrast to the remarks of Bevolden and O'Connor that the office could try the cases with either of them as interim chief.

71. Drew left her interview deeply worried about what the commission would do. She remained convinced that the length and breadth of her experience in the public defender's office were such strong qualifying factors for the interim chief position that the commission could not fairly and reasonably hire anyone else. She believed that hiring an interim chief public defender whose main and most recent experience in criminal law was as a prosecutor jeopardized the independence and integrity of the office. She believed that taking Selvey entirely off the six major felony cases would result in some or all of the indigent defendants receiving less than adequate representation. She awaited the hiring decision believing that any decision except hiring her would be wrong and unjustifiable. She shared her beliefs with other staff members in the public defender's office.

72. On November 7, 2002, Reno and Kennedy interviewed Brian Kohn for the position of interim chief public defender, with Vigness present. Kohn told Reno and Kennedy he was not interested in the job. He commented upon how unlikely it was that anyone with an established practice would abandon it for a temporary position without assurances of at least a preference for the permanent chief position.

73. Reno and Kennedy made their hiring decision after the conclusion of Kohn's interview. They were committed to a separate hiring process for the permanent position, so they eliminated O'Connor from consideration. Kohn had effectively withdrawn from the process. Reno and Kennedy considered both remaining candidates, Bevolden and Drew, to be qualified and available. Bevolden

had said that he could try the six major felony cases. Drew had said Selvey should try those six cases. Because they did not want Selvey to have any connection with the public defender's office after he left employment, Reno and Kennedy chose Bevolden as the interim chief public defender. They offered him the job on November 7, 2002.

74. On November 7, 2002, Bevolden had no comprehensive knowledge of state laws governing the duties of supervisory personnel at public agencies. He did not know his responsibilities (as a county supervisor) under the Governmental Code of Fair Practices. He had no training and virtually no experience in agency budgets, fair employment practices or the supervision of attorneys. He had no recent experience as a criminal defense attorney. He had no knowledge of the county's internal policies or procedures.

75. Reno and Kennedy's sole and entire focus was upon professed ability to prepare and try the six major felony cases as scheduled. They relied almost entirely upon the conduct of the two candidates during their interviews. In selecting Bevolden, they did not consider that Drew had and Bevolden lacked experience, training and the proven ability to manage an office of seven attorneys and a number of investigative and clerical staff. They did not consider that Drew had and Bevolden lacked prior experience in a management position for Yellowstone County, with resulting familiarity with its management policies and procedures, as a prerequisite for the job. They did not consider the endorsement of Drew's candidacy by the staff of the public defender's office. They did not consider Bevolden's unavailability through much of the initial transition period. They did not consider and had not asked any candidate whether a prosecutor could become an indigent criminal defense attorney, while initially still working as a prosecutor in a neighboring county, without any conflict of interest or switch of allegiance problems.

76. Having heard O'Connor's credible explanation of why it was possible to replace Selvey in the six major felony cases, Reno and Kennedy reasonably relied upon Bevolden's assurances that he could do it, even though he gave the assurances without any knowledge of the cases and without explanation.

77. In the course of her retaliation claim against the county, Schopfer had alleged that Drew and Selvey had a sexual relationship. Stacey had reported this allegation to the commissioners. In deciding to hire Bevolden because they believed he could try the six major felony cases, both Reno and Kennedy considered this second-hand report of a sexual relationship between Drew and Selvey. Neither commissioner made any attempt to determine the truth of the allegation. Neither commissioner gave Drew an opportunity to address it. The report of the sexual relationship between Selvey and Drew played a part in Reno and Kennedy's decision to hire Bevolden, because they considered it another reason to doubt that Drew would sever all contacts between the public defender's office and Selvey. Both

commissioners admitted it was not proper to consider an alleged sexual relationship between Selvey and Drew during the hiring decision.

78. The county had given male management level employees accused of sexual harassment notice of the complaints, a right to respond and an opportunity to have the matter investigated by independent counsel. Male lawyers working for the county who had inserted explicit sexual pictures in case files received notice of complaints and a direction to stop, without any adverse employment action against them. A male deputy county attorney had a sexual relationship (known in the office) with the widow of a homicide victim in a case he was prosecuting. The county made no inquiry about the relationship and took no adverse action. The county had never taken adverse employment action against attorneys in either the public defender's office or the county attorney's office in sole reliance upon the belief, without an adequate and fair investigation, that they had engaged in improper conduct. Drew received differential treatment from that the county accorded to males similarly situated when Reno and Kennedy considered her alleged sexual relationship with Selvey in deciding to hire Bevolden.

79. Reno and Kennedy would have decided to hire Bevolden even without considering the alleged sexual relationship between Selvey and Drew.

80. In hiring Bevolden the county did not follow its normal procedures and practices for hiring either temporary employees or new department heads. However, the county's normal procedures and practices for such positions were not designed for selection of a temporary department head pending a full recruitment and selection process for a new department head.

81. On November 8, 2002, Bevolden formally accepted the interim chief public defender position. Drew learned that day of Bevolden's hiring. She concluded that Reno and Kennedy had acted without any rational bases in rejecting her and hiring Bevolden. She immediately expressed that conclusion to the rest of the public defender's office, to whom she displayed her hurt and humiliation as well as her outrage.

82. On November 8, 2002, Reno introduced Bevolden to the public defender's office staff as the interim chief public defender. Bevolden made some short remarks about himself and his philosophy. He said that he considered the public defender's office a part of law enforcement. During the course of Bevolden's initial remarks to the public defender's office staff, Drew made critical remarks that the public defender's office was now being run by a prosecutor. Bevolden overheard these comments.

83. Drew and Bevolden introduced themselves after his initial remarks to the staff. It was the first time they had met. Their first conversation was superficial and brief. Bevolden generally received a cold reception from the staff after his remarks.

84. At the introductory meeting, Bevolden passed out a form for the staff to complete regarding any thoughts or suggestions. One staff attorney and one clerical employee returned the completed form to Bevolden. Bevolden sought no other information from Drew or other staff members about office operations or other pertinent matters.

85. After meeting him, Drew intensified her criticism within the office of Bevolden and of the decision to hire him.

86. Bevolden met with the county attorney's office and the district judges to solicit suggestions about improvements in the operation of the public defender's office. Several of the judges urged him to keep the six major felony cases in the office, and at least three judges expressed reservations about Drew. Judge Watters recounted to Bevolden two instances (in a single case) in which Drew was inappropriately absent when her client's case was called, so that the judge had no choice but to grant continuances upon the request of another attorney in the public defender's office. Bevolden made no attempt to discuss any of the judges' comments with Drew, who thus had no opportunity to respond to the negative comments. He also began talking with the prosecutors about pending cases, without including the attorneys on his staff who represented the defendants and probably without consulting with the defendants in the particular cases.

87. The county furnished to each employee an "employee handbook" that contained key personnel policies and procedures. The handbook contained most county personnel policies and procedures. Bevolden received the handbook on or about November 8, 2002. The handbook advised that a complete set of county policies and procedures was available from each department head, the human resources department or the county clerk. What little knowledge Bevolden had about policies or procedures came from prior employment with the county in a non-management position. He did not attempt to familiarize himself with his duties as a department head under the county's personnel policies or procedures. The county did not train Bevolden in personnel policies or procedures while he served as interim chief public defender.

88. On November 8, 2002, the county posted a notice and placed an advertisement for publication, inviting applications for the permanent position of chief public defender of Yellowstone County. The closing date for submitting applications was December 13, 2002. Drew and Bevolden both submitted timely applications for the chief public defender position.

89. On November 12, 2002, Drew called Vigness about the appointment of Bevolden. She asked why the county had departed from its usual policies in making the selection and what criteria were used in selecting Bevolden. Vigness said he thought the commissioners had considered trial and administrative or supervisory experience. She advised him that her information was that Bevolden had no supervisory experience. Vigness told her to speak to the commissioners. By the time Drew called him, Vigness was already aware that she and others in the public defender office were very upset about the Bevolden selection and the fact that the office was now being run by a prosecutor. The county personnel director understood from the phone call that Drew opposed Bevolden's selection and might challenge it.

90. After talking with Vigness, Drew called the commissioners to ask why they had selected Bevolden. Neither Kennedy nor Reno returned her phone calls.

91. During November 2002, Selvey was absent from the public defender's office more than three-fourths of the time. He did some work on the six felony cases during that time. He made no attempt to share information about the cases with other attorneys in the office, except for Drew. His goal remained to keep the six cases after he left.

92. During November 2002, Bevolden worked two-thirds of the time as a deputy county attorney in Big Horn County (Hardin) actively prosecuting criminal cases. During the same time he was in the public defender's office in Billings less than one-third of the time as interim chief public defender. Bevolden was aware of Drew's hostility although he was not aware of most of her conduct with the staff. He did notice that the public defender's office staff members, now under his supervision, were both distant and passively uncooperative. He took no action to address either situation. He made no serious attempt to familiarize himself with the six major felony cases.

93. During November 2002, Bevolden and Selvey met once, at a local restaurant. Selvey explained his assessment of staff at the prosecutor's office, what cases were assigned to attorneys in the public defender office, and the status and scheduling of the six major felony cases. Selvey said that it was in the best interests of the defendants in the six major felonies cases that he continue to represent them. Bevolden replied that he would review the files and meet with all of the defendants in the six cases, and then get back to Selvey about representation. Later in November, Bevolden called Selvey. Bevolden said that he would assume representation of the defendants in the six major felony cases, in the best interests of the county. The telephone conversation ended after it had degenerated into an argument about which man could better try the cases.

94. Drew was still the chief deputy public defender in November 2002. She avoided Bevolden as much as possible. She took no effective action to assure that

any of the attorneys who would remain in the office in December, and thereafter would be ready to try the six major felony cases. Her belief and intention were that Selvey should and would stay on those cases as counsel of record after November.

95. The agreement reached between Selvey and the county was reduced to writing in late November 2002. The agreement provided that Selvey's continued assistance on particular cases would be at the discretion of his successor and subject to confirmation by the courts. Selvey signed the agreement on November 22 and Reno signed it for the county on November 27, 2002.

96. In the last week of November 2002, Drew heard Bevolden tell Sue Moss, a member of the clerical staff in the public defender's office, that he would assign all the conflict cases. Bevolden knew that Drew had been regularly performing this management duty. Bevolden was leaving that week for his wedding and honeymoon. Drew entered the conversation between Moss and Bevolden. She stated that the office policy was to process and assign conflict cases as quickly as possible, if possible within a few days. She asked Bevolden specifically if he would now be assigning conflict cases. He confirmed it. In keeping with their mutual avoidance of any prolonged contact or interaction, Drew and Bevolden did not discuss the policy in any detail. Drew took a stack of four or five conflict case files pending processing from her office and brought them to Bevolden, placing them on his desk.

97. Bevolden was absent from the office for his wedding and honeymoon beginning November 28, 2002. He did not take any action on any of the conflict cases on his desk before he left. Bevolden left reasonably believing that he had made it clear to Drew that he alone would assign conflict cases.

98. After Bevolden's departure, Drew confirmed that he had taken no action on any of the pending conflict cases. In Bevolden's absence she decided she had the power to make conflict assignments as acting chief. She retrieved all the conflict files and began confirming assignments and signing standard conflict substitution motions, which the staff had prepared and subsequently filed at her direction.

99. On December 3, 2002, Drew had a telephone conversation with Reno about the decision to hire Bevolden. Reno said Bevolden had impressed him with his knowledge of the "big picture," his experience as a prosecutor, and his work on several cases in Big Horn County. He said other factors might be noted in his files. Drew asked if he would refer to those records to explain the decision. Reno advised her to make the request in writing. She sent him an e-mail the same day. Reno, aware that Drew might challenge the selection of Bevolden, never responded.

100. By early December, the dispute between Selvey and Bevolden over representation in the six major felony cases was a matter of public record.[5] Even if Drew acted in reliance upon her job description, despite Bevolden's directions to her, she could not reasonably have believed that Bevolden intended the office to assign any conflict cases to Selvey. Nonetheless, before Bevolden's return, Drew assigned around a dozen conflict cases, nearly half of them to Selvey.[6] Many of the cases she assigned to Selvey had come into the public defender's office before the effective date of his resignation. He had the same conflicts of interest as did the attorneys still with the public defender's office.

101. Judge Watters was presiding over a case in which one of Drew's conflict substitution motions, seeking to substitute Selvey, was filed on December 3, 2002.[7] The judge sent a memo, with a copy of the motion, to the other Yellowstone County district judges. She noted in her memo that Drew signed the motion to substitute Selvey and that Bevolden was out of the office and probably unaware of the motion. She wrote, "I think some mischief is afoot." She suggested that the judges require that all substitution motions be signed by Bevolden and subsequently by the permanent chief when hired.[8]

102. On December 9, 2002, Bevolden returned to the office and commenced his first full work day as interim chief public defender. That morning, District Judge Russell Fagg held a hearing in *State v. Fields* (one of the six major felony cases) on Field's motion that Selvey continue as his counsel. Bevolden, on behalf of the public defender's office, opposed the motion. Selvey appeared in support of the motion. Drew also participated.

103. On December 9, 2002, Bevolden also spoke with Judge Watters, who told him about the Drew conflict substitution motions. Judge Watters also told Bevolden that the judges believed the motions should come from Bevolden only. Bevolden asked for a letter from the judges stating that they wanted him to sign conflict substitution orders.

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[5] Once Bevolden told Selvey he was assigning the six major felony cases to himself, Selvey immediately began the formal process of moving for orders removing the public defender's office and substituting Selvey as outside counsel at the county's expense. Before he left for his wedding and honeymoon, Bevolden appeared before Judge Barz to oppose Selvey's request to be assigned as court appointed counsel in substitution for the public defender's office in the six major felony cases. Judge Barz referred the decision on each case to the judge presiding over that case.

[6] An exhibit the hearing examiner refused listed approximately a dozen cases. The evidence of record did not establish the exact number of cases or the exact percentage Drew assigned to Selvey.

[7] *State v. Powers*, Cause No. DC 02-852.

[8] Watters knew of the dispute about Selvey replacing the public defender's office on the six major felony cases. *State v. Powers* was unrelated to that dispute, but her memo suggested that she saw any conflict substitutions for Selvey as requiring Bevolden's express consent. Ex. 142.

104. After his conversation with Judge Watters, Bevolden saw Drew at the courthouse with another employee of the office. He stopped and thanked her for assigning the conflict cases in his absence and told her again that he would handle conflict assignments. Bevolden thanked Drew to elicit an admission in front of a witness that she had knowingly assigned the cases. He did not ask her why she had done this in his absence. Drew treated his remarks as sincere and did not explain her reasons, simply acknowledging his thanks.

105. Also on December 9, 2002, District Judge Diane G. Barz' clerk called the public defender's office twice seeking to reach Drew, who was unavailable both times. The district judges expected the county attorney's office and the public defender's office to confirm in advance which criminal cases set for jury trials would proceed and which would not. The judges' express concern was avoiding the expense to the county of calling prospective jurors when there would actually be no case requiring a jury. Drew, as liaison with the courts, had sometimes incurred the ire of some judges, including Judge Barz, for failure to provide the expected advance notice. Judge Barz wanted to know the status of *State v. Holland*, one of Drew's pending cases, which was scheduled for a jury trial on December 16, 2002. Drew did not return the calls on December 9, spending most of that day in court or otherwise out of the office.

106. On December 10, 2002, Drew was ill. About 8:00 a.m., she called the office and said she would not be coming to work that day. She went back to sleep after the phone call. Just before noon that same day, she checked her phone messages. Tom Taggert, chief investigator at the public defender office, had called about an interview scheduled with a prosecution expert witness, Dr. Bennett, in the Fields case. Neither Taggert nor Drew yet knew that Judge Fagg was denying the motion to substitute Selvey for the public defender's office in the Fields case. As far as they were aware, the issue was undecided. The interview had been scheduled, before Selvey's departure, for Selvey, Drew and Taggert, and no one had advised Bevolden of the interview. Taggert had not been able to contact Selvey. Drew tried and failed to reach Selvey by phone. She called Taggert back and said that she would attend the 1:30 p.m. interview. Drew dressed for the appointment and left the house around 1:00 p.m. No one advised Bevolden that day of the interview.

107. As she was leaving for the interview, Drew called the office and retrieved her messages. She learned that Judge Barz's clerk had called again, asking that she return the call. Drew called the judge's chambers and spoke to the judge. Drew told Judge Barz that she had been sick in bed. Judge Barz thought Drew meant that she was still sick in bed. Judge Barz still wanted to know the status of one of Drew's pending cases, *State v. Holland*. Drew told Judge Barz that Holland would be changing his plea "the next day" at law and motion before Judge Watters.

108. Holland had authorized Drew to offer a guilty plea if the prosecution would reduce the charge from a felony to a misdemeanor. The deputy county attorney prosecuting Holland had agreed to the offer the previous week. Holland was scheduled to see Drew on Wednesday, December 11, 2002, to discuss and confirm the terms and effect of the agreement and the guilty plea. The office had scheduled Holland for a change of plea appearance in front of Judge Watters on Thursday, December 12, 2002. Drew would not be working that day, but with the reduction to a misdemeanor and the plea agreement, Drew expected to complete her consultations with Holland on December 11, 2002, and have another public defender's office attorney appear with him for his change of plea appearance on December 12, 2002.

109. Drew did not go into the details surrounding the Holland plea. The county attorney's office was filing that same day, unknown to Judge Barz, a motion to transfer the Holland case to justice court. Drew had not yet met with her client to confirm the agreement. She was hurrying to the appointment with Dr. Bennett.

110. Drew arrived at Dr. Bennett's office for the interview at about the same time as Taggert. Selvey arrived a few minutes later. The interview lasted about an hour. Drew returned home, still ill.

111. On December 10, 2002, Judge Fagg ordered that the chief public defender, Bevolden, assign the Fields case, because the original assignment of counsel identified the public defender's office, rather than Selvey individually. Judge Fagg found no basis for removing the public defender's office, and rejected Field's claim of a right to keep a particular attorney on the defense when that attorney left the public defender's office. The primary basis for rejecting Field's claim was the cost to the county if indigent criminal defendants could keep individual lawyers of their choice when those lawyers left the public defender's office for private practice. Noting the frequent turnover in the public defender's office, Judge Fagg found the potential expense to the county for multiple reassignments based upon the individual defendants' trust in their original attorneys to be prohibitive. Judge Fagg went on to criticize Selvey for his precipitous departure from the public defender's office and his failure to prepare other counsel to take over the defense during his last month at the public defender's office, when he knew he would be leaving. Judge Fagg also noted that Selvey had agreed in writing that his successor would make the decisions about representation in the six major felony cases, then two weeks later challenged that decision when it appeared Bevolden would not retain Selvey on the cases.

112. On December 11, 2002, the public defender's office received Judge Fagg's order in *State v. Fields*.

113. On December 11, 2002, Drew filed a complaint with the Human Rights Bureau of the Montana Department of Labor and Industry, naming Reno and the

county and alleging that the county had discriminated against her because of her sex and political beliefs in rejecting her in favor of Bevolden for interim public defender.

114. On December 11, 2002, Holland did not come to the public defender's office to meet with Drew. The office was unable to contact him. Drew did not expect there to be a jury trial, but was unwilling to advise the court that she did not know if her client was still willing to plead until she located her client and talked with him. Drew considered it unethical to volunteer that kind of information to the presiding judge. Drew took no action to advise either judge that Holland would not be entering a plea until some later date, if at all.

115. On December 11, 2002, Bevolden contacted Vigness to discuss the possibility of disciplining or firing Drew. Bevolden was furious with Drew for assigning the conflict cases, particularly the many assignments to Selvey. He had been embarrassed to find out what Drew had done from one of the judges and to discover that all of the judges knew that his chief deputy (about whom several judges had expressed reservations) was acting behind his back. He also knew that Drew and Selvey had met with Dr. Bennett, after Drew told the office she was out sick. Bevolden intended to fire her.

116. At 4:18 p.m. on December 11, 2002, Vigness sent Bevolden an e-mail responding to Bevolden's inquiry about disciplining or firing Drew. Vigness outlined seven factors that had to be considered in deciding whether there was just cause to take disciplinary action against an employee. He told Bevolden to determine (1) whether Drew had received a warning; (2) what the relationship was between the rule violated and the operation of the public defender's office; (3) whether Drew actually violated the rule or disobeyed the order; (4) whether his investigation into Drew's improper conduct was conducted "fairly and objectively," (noting, "we need to investigate"); (5) whether the investigation produced "substantial evidence or proof" of a violation; (6) whether Bevolden applied the appropriate rules and policies "evenhandedly without discrimination" and (7) whether the "level of discipline fit the violation or problem." Vigness pointed out that Bevolden had to determine whether "the other party" (Taggert, who also attended the Bennett interview) would be subject to discipline. Vigness made clear to Bevolden that "prior to taking official action," he had to give Drew the right to respond, either orally "or if he/she chooses a written response." Vigness also suggested that "we need to determine or at least think about what, if any level of discipline will happen." He noted that "we need to verbally inform [Drew] of the reason(s) for disciplinary action, [Yellowstone County's] intent and offer [Drew] an opportunity to respond." Vigness concluded that after the oral or written response from Drew, Bevolden could then make a decision about discipline.

117. Vigness knew that Bevolden had no experience imposing discipline as the supervisor of Yellowstone County employees. Vigness' response to Bevolden was consistent with prior practice about possible discipline of employees in the public defender's office.

118. At 9:09 a.m. on December 12, 2002, Bevolden e-mailed a reply to Vigness' e-mail of December 11. He summed up Drew's conduct as insubordination (the conflict assignments) and lying about being sick when she was actually working with Selvey on the Fields' case. Bevolden also noted that working with Selvey on a case under advisement with Judge Fagg regarding possible substitution was another "transgression." He concluded that violations of these "rules," which he stated as, "no disobedience to reasonable requests of the Chief and no lying," were reasonably related to the office's "orderly, efficient and safe operation." He answered all the rest of Vigness' questions with a single "yes." Vigness did not ask more questions to ascertain what Bevolden had actually done to address the questions.

119. The only "investigation" conducted to this point consisted of Bevolden's verification that Drew had called in sick, his discovery that Drew and Selvey had met with Dr. Bennett, and his conversations with Drew and Judge Watters. Bevolden had no authority to support his conclusion that Drew had been insubordinate in assigning the conflict cases. Bevolden knew that it was entirely proper for her to get up out of a sick bed and go to a witness interview on a major case she was working. He had no evidence that Drew had lied when she called in sick earlier and later went to the Bennett interview.

120. On December 12, 2002, Judge Barz wrote a letter to Bevolden about her clerk's efforts to contact Drew on December 9 and 10, and her own telephone conversation with Drew on December 10. Judge Barz concluded her letter, which clearly had an angry tone, with the statement that Judge Watters had just told her that neither Drew nor Holland had appeared to enter a change of plea that day.[9]

121. December 12 was Drew's birthday, and she did not work. She also took a vacation day and did not work on Friday, December 13, 2002, instead driving the Chico Hot Springs (as did several others in the public defender's office) to attend a farewell gathering for Selvey and Moss (who was retiring).

122. On December 13, 2002, Bevolden received Judge Barz' letter. He spoke with Judge Barz, and made sure she knew that Drew had not been home sick in bed when she called and spoke with the judge on December 10.

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[9] Holland appeared the following Monday, December 16, 2002 and entered his change of plea the following day.

123. Bevolden wanted to meet with Drew and Vigness on December 13, 2002, in what he hoped would be the final step before firing Drew. He discovered that Drew was absent, along with most of the rest of the office, attending the goodbye party for Selvey and Moss. He e-mailed Vigness and rescheduled the meeting for Monday, December 16, 2002.

124. As of December 16, 2002, the County had taken no adverse employment action against Drew during her eight years as a county employee. At 11:00 a.m. that Monday morning, Bevolden and Vigness met with Drew. Vigness envisioned this meeting as the informal hearing required under county policies before imposition of discipline. Drew expressed surprise that Vigness was present. He replied that he was attending because Bevolden had some concerns that could lead to possible discipline. Bevolden then told Drew she had disobeyed his orders regarding conflict assignments, had called in sick to go work with Selvey on the Fields' case, and had lied to Judge Barz. Bevolden had the letter from Judge Barz, which Drew had not seen or known about prior to the meeting.

125. Drew replied that she thought the meeting was to discuss the conflict cases and the trial calendar, as well as her duties. She asked for a chance to respond. She also asked for a copy of Judge Barz' letter. She stated that she thought she was authorized to make conflict assignments while the chief was absent. She explained that she had been sick on the morning of December 10 when she called the office, but got up to go the meeting with Dr. Bennett, returning Judge Barz' call before arriving at the meeting. Drew also asked for clarification on what would be done with conflict cases when Bevolden was out of the office, whether her job description was being changed, and what role she would play in the six major felony cases. Bevolden made a copy of Judge Barz' letter for Drew at the end of the meeting.

126. Drew was not warned of any specific proposed disciplinary action, but only that there might be disciplinary action. When the meeting ended, Bevolden and Vigness left expecting that Drew would provide them with a specific written response to Bevolden's stated concerns. Drew left the meeting expecting to receive a written statement from Bevolden regarding the concerns he had expressed that morning, to which she would then submit a written response.

127. Immediately after the meeting, Drew called her lawyer and obtained a faxed copy of her Human Rights complaint. She delivered it to Vigness at noon on December 16, 2002, and insisted that he date and time stamp it. She did so to put the county on notice that her complaint was pending and to make a record of that notice before the county took any disciplinary action against her. She hoped to delay any such disciplinary action.

128. Vigness believed Drew delivered a copy of her complaint to him to forestall disciplinary action and "set up" additional claims against the county.

129. Drew also prepared and delivered a memo to Bevolden addressing conflict assignments and her actions in assigning the pending conflict cases during his absence. She concluded the memo by noting that it was "not a response to any disciplinary action" Bevolden might contemplate as a result of the morning meeting.

130. After the lunch hour on December 16, 2002, Bevolden met with Vigness and said that he wanted to fire Drew unless she agreed to resign. Vigness questioned Bevolden in a cursory fashion about whether Bevolden had followed county disciplinary procedure. Bevolden's knowledge of county disciplinary procedure was limited to Vigness' earlier e-mail, and he had not met the conditions Vigness had outlined. Nevertheless, Bevolden assured Vigness that he had followed the correct procedure.

131. Vigness suggested other actions to Bevolden, including a suspension or demotion. Vigness did not review the county's progressive discipline policy with Bevolden, reiterate that Drew had a right under county policy to respond in writing or tell Bevolden about Drew's human rights complaint. Bevolden rejected the other disciplinary options. Vigness then told Bevolden that Drew had delivered the copy of the discrimination complaint to him that day. Vigness made notes of the discussion, specifically pointing out that he did not show Bevolden the human rights charge until after Bevolden stated his decision to fire Drew. The two men then met with Reno and advised him of the plan to fire Drew. Reno instructed them to be sure they followed the correct procedure.

132. Reno had no reason to believe that Vigness would fail to make sure any disciplinary action against Drew followed proper procedure. However, he had been a commissioner long enough to understand that the decision to fire Drew was unusually rapid. He asked if the "i's had been dotted" and the "t's crossed," but made no further inquiry about the haste of the decision. Vigness and Bevolden assured him proper procedure had been followed. Bevolden knew he had not followed the procedure Vigness had outlined. Vigness reasonably should have known, had he made thorough inquiry, that proper procedure had not been followed. Reno gave his approval to the decision to fire Drew, and then Vigness showed him Drew's human rights complaint.

133. During his tenure as chief public defender, Selvey had fired an employee of the office. The county immediately investigated the procedure Selvey followed (since he had fired the employee without involving the Human Resources office), found it defective, and required that Selvey rescind the discharge. Vigness did not pursue any such rigorous inquiry to verify that Bevolden had taken all the requisite steps to follow correct procedure in firing Drew. Had he done so, he would have discovered that Bevolden had not taken the necessary steps to support disciplinary action and could not justify his decision to fire Drew as the first level of discipline

imposed. Vigness relied upon a new supervisor with no experience or training in county disciplinary procedures because he was upset by Drew's presentation of her human rights claim immediately after the "informal hearing" Vigness had attended on the morning of December 16, 2002.

134. At 4:05 p.m. on December 16, 2002, Bevolden delivered a memo to Drew advising her to resign or be fired. She had not yet responded to accusations in the morning meeting. The reasons stated in the memo were overblown, not completely accurate, unsupported by an adequate investigation, and generated (in a single but significant part) by Bevolden's communications with Judge Barz that led her to believe Drew had lied to her.

135. On the morning of December 17, 2002, Drew delivered her written response (dated December 16) to the Bevolden memo. She refused to resign. She cited her pending human rights complaint, and threatened to name Bevolden personally in that proceeding if any retaliation occurred. She asked that any future communications be addressed to her attorney.

136. In the afternoon of December 17, 2002, Bevolden delivered to Drew a notice of termination of employment with the County, effective immediately. The notice requested return of Drew's keys and vacation of her office that day. Drew was stunned. She asked if she could remove her personal items from her office later. She was told that she had to have a representative of the county present to observe her if she wanted to pick up her personal items later.

137. On December 17, 2002, Drew represented 70-80 clients of the public defender's office. She had some of those clients waiting in the office to meet with her that afternoon. She was not permitted to meet with her clients. Her keys were taken from her, and she was shown off the premises.

138. Bevolden made no effort to determine what Drew's clients needed for proper representation for their cases. Drew voluntarily provided that information to other public defenders in the days immediately after her firing, although the effort renewed and aggravated her anger and humiliation at her treatment by the county.

139. Drew was the first county employee ever discharged without prior written warning, without use of the progressive discipline policy, without prior notice of the reasons for her termination and without an opportunity to respond. The process of discharging her was the shortest firing process in the county's history.

140. Male management level employees of the county accused of illegal drug use, sexual harassment, theft of county property, assault with a deadly weapon, abuse of county equipment or resources and double dipping were all given notice of the complaints, a right to respond and an opportunity to have the matter investigated by

independent counsel. Male lawyers or legal staff of the county who tampered with public records by inserting explicit sexual pictures in case files, passed bad checks (a potential felony), refused to follow office policy, lied repeatedly to clients and judges on the record and one instance threatened a co-worker with physical violence, were all given notice of the complaints, a right to respond, and application of the county's progressive discipline policy.

141. Prior to the discharge of Drew, the county (though Vigness or his predecessors) insisted that the public defender's office adhere to county policies whenever possible discipline of a male attorney was at issue.

142. The county had not immediately discharged attorneys in either the public defender's office or the county attorney's office in sole reliance upon the opinion of the immediate supervisor, without an adequate and fair investigation, that the attorneys had engaged in improper conduct for which discharge was the proper disciplinary action. The county had not immediately discharged attorneys in either the public defender's office or the county attorney's office who had not been subject to prior disciplinary actions for other similarly serious offenses. The county had not taken disciplinary action against such attorneys without either proper investigation or allowing them opportunity to respond. Drew received different treatment from that the county accorded to others similarly situated but for the filing of her human rights complaint.

143. Bevolden signed the personnel action report (PAR) confirming the firing. Vigness signed and approved the PAR on December 18, 2002.

144. Reno and Kennedy met between December 17 and December 24, 2002, to discuss Drew's firing – whether proper procedure had been followed and whether the county should ratify the firing. They did so in private, without notice to Drew or anyone else. They kept no minutes.

145. The meeting between Kennedy and Reno to discuss the termination of Drew's employment was the only instance known to Vigness when a quorum of the county commissioners met to discuss a firing or other disciplinary action without giving any notice of the meeting. The County posted notice that the position of chief deputy public defender was vacant on December 23, 2002. Before the open commission meeting on December 24, 2002, Reno and Kennedy had decided, at their private meeting, to ratify the termination of Drew. They formally voted to approve the firing during the December 24, 2002, commission meeting.

146. The county fired Drew because she had filed a human rights complaint against the county.

147. On December 20, 2002, Drew filed a first amended complaint of discrimination with the Human Rights Bureau, adding claims of discrimination in the termination of her employment and adding Bevolden and Vigness as respondents.

148. On December 20, 2002, Drew filed a grievance over her firing. She included a copy of her first amended discrimination complaint and requested that copies of all communications regarding the grievance be sent to her attorney. Bevolden first saw the grievance the following Monday, December 23, 2002. He faxed a copy to county counsel, Stacey, without any request that counsel respond. Bevolden took no other action.

149. "Level I" of the county grievance procedure required the "responsible supervisor," Bevolden, to meet with Drew within 7 working days and then provide a written answer to the grievance within 5 working days. No one took any action on behalf of the county to meet the Level I requirements.

150. The county's grievance procedure provided next that an unsatisfied grievant could appeal the immediate supervisor's answer to the department head (Bevolden) for a "Level II" meeting within 10 days after the appeal and a written answer to the grievant within 5 days after that meeting. Since Drew never received a Level I meeting or answer, she had nothing to appeal to Level II. The county took no action at that level either.

151. On December 27, 2002, the County responded to Drew's first amended charge of discrimination.

152. On December 31, 2002, the county received Drew's statement to the Unemployment Insurance Division of the Department of Labor and Industry. In her statement, Drew stated that she was challenging her discharge through the county's grievance procedure and with the Human Rights Bureau. The county did not deny or otherwise respond to Drew's statements, answering on January 6, 2003, that "Roberta Drew was involuntarily terminated."

153. On January 23, 2003, after expiration of the combined time for Level I and Level II proceedings on Drew's grievance, her attorney, Timothy C. Kelly, contacted the county's attorney, Stacey, about the failure timely to process the grievance. The two attorneys began to negotiate how to address the grievance.

154. In January 2003, the county evaluated Drew as an applicant for the permanent position of chief public defender and selected her for an interview as one of four finalists. Bevolden was also one of the four applicants selected for an interview, but he withdrew his application at the end of January.

155. On January 30, 2003, Drew filed a second amended complaint of discrimination with the Human Rights Bureau, adding claims of discrimination because the county had not provided her with Level I and Level II grievance reviews.

156. On February 4, 2003, the county selected Penny Strong as its chief public defender from among the three finalists, who were all women. On April 1, 2003, Strong assumed her position as chief.

157. In late February 2003, the county, Reno, Kennedy, Vigness, Bevolden and Drew all signed an agreement to process Drew's grievance. The parties agreed that the grievance proceedings pursuant to the agreement were binding upon them, but that Drew's agreement did not limit, impair or waive her rights to pursue legal actions regarding alleged denial of her rights. The agreement spelled out in detail the procedure for addressing Drew's grievance at each successive level, modifying the normal county grievance procedure. Pursuant to that process, Level I and Level II proceedings (modified and made more formal by the agreement) took place. At each of the two levels, the county had actual knowledge that firing of Drew had been improper. The county denied Drew's grievance without explanation at both levels.

158. The grievance processing agreement allowed Drew and the county, at Level III, each to select one of the three ultimate deciders of the grievance (named jointly the Yellowstone County Grievance Commission), with the third grievance commissioner selected by those two grievance commissioners. This method of grievance resolution was more favorable to Drew than the county's normal policy, under which Drew, Bevolden and the county would each have selected one of the three ultimate deciders. The grievance ultimately came to a formal hearing before the Yellowstone County Grievance Commission. On September 26, 2003, they issued their decision in favor of Drew, finding that her firing was not proper and had not followed the county's disciplinary policies and procedures.

159. The county offered to reinstate Drew effective October 1, 2003. Drew, by that time, was engaged in private practice, attempting to generate income to support herself and her family, and could not reasonably close that practice within a week. Also, Drew did not trust the county after the treatment she had received.

160. On October 8, 2003, Drew met with chief public defender Strong and discussed whether Drew's reinstatement was feasible. They talked about Drew's pending state and federal civil rights claims, the need for Drew to close out her private practice, and the time and emotional demands resulting from the serious medical conditions of Drew's mother (her mother died after a long-term terminal illness in October 2003) and her husband. Drew decided that she could trust Strong as her new supervisor. Strong and Drew agreed that reinstatement would be feasible by January 2004.

161. The county reinstated Drew to her position effective January 1, 2004. Pursuant to the order of the Yellowstone County Grievance Commission, the county paid Drew back pay for the period of December 17, 2002 to September 30, 2003, plus interest and certain reinstatement benefits. The county refused to pay Drew for any losses in October through December 2003, because of the offer to reinstate her effective October 1, 2003.

162. Drew lost income and benefits in October through December 2003 as a result of the county's discriminatory decision to fire her, for which she was not paid when the county reinstated her. She lost her gross wages of $5,441.13 per month, plus statutory employer contributions for Social Security and Medicare, plus contributions to the public employee retirement system (PERS) on her behalf. She would also have accrued vacation and sick leave, but the family health problems that contributed to her inability to return to her job prior to January 2004, would also have caused her to use up those hours to maintain her gross wage rate. Her lost wages were $16,323.39. Interest on the monthly lost earnings to date is $5,441.13 per month times .1 per year divided by 12 times 33 months (12 plus 11 plus 10 months of interest) for a total of $1,496.31. It is also reasonable to require the county to calculate and to make retroactive contributions to Drew's Social Security, Medicare and PERS accounts for October through December 2003.

163. The county paid health insurance premiums monthly for each employee. The county did not pay any amounts for health insurance premiums on behalf of Drew during 2003. But for its illegal firing of Drew, the county would have paid the same amounts for Drew as it did for other employees in 2003. However, Drew has not established what pecuniary losses, if any, resulted from that failure.

164. Drew incurred attorney fees and costs because the county illegally failed to handle her grievance in accord with its policies and procedures and refused without reason to admit the improper firing at the ultimate Level I and Level II proceedings.

165. Drew suffered emotional distress from December 16, 2002 through December 31, 2003, because the county illegally fired her, failed to handle her grievance in accord with its policies and procedures, and refused without reason to admit the improper firing at the ultimate Level I and Level II proceedings. She also had to deal, at the same time, with personal and family health problems, without the benefits of health insurance or a regular and secure income. She endured the economic as well as emotional shock of losing her job (and her benefits) without warning in the middle of December before the year-end holidays. She experienced stress of finding an office and starting a practice, while she was filled with self-doubt, depression and emotional pain of being rejected and cast aside by an office to which she had devoted her professional energies for eight years. She felt outrage and

disbelief that the county public defender's office could and would fire her illegally and ignore her grievance rights.

166. During the same time, Drew also suffered emotional distress due to the serious medical conditions of Drew's husband and the terminal illness and death of her mother. The respondents did not cause and were not responsible for the emotional distress resulting from the family health problems. During the same time, Drew suffered emotional distress because of publicity and public comment regarding her firing and her claims arising out of her firing, and the publicity and public comment about some of the accusations against her (such as Schopfer's assertion that Drew and Selvey were having a sexual relationship). The respondents did not cause and were not responsible for the emotional distress resulting from the publicity and public comment. During the same time, Drew also suffered emotional distress because at least one of the district judges (Judge Barz) refused to appoint her as outside counsel on public defender conflict cases because of her pending claims against the county. The respondents did not cause and were not responsible for the emotional distress resulting from the judge's actions.

167. The amount reasonably necessary to rectify the harm of the emotional distress which resulted from the illegal firing, the failure properly to handle the grievance and the unreasonable refusal to admit the illegal firing at the ultimate Level I and II proceedings (but not the emotional distress from other sources) is $50,000.00.

168. The acts and omissions of the county – (a) considering Drew's sex in making a hiring decision, and (b) failing to orient, train and supervise an employee at the highest level of county department management in fair employment practices or county policies and procedures, failing timely to recognize or respect employee grievance rights and failing to acknowledge the illegal firing during the first two stages of the ultimate grievance proceeding (all because Drew filed a human rights complaint) – warrant the imposition of injunctive and affirmative relief to minimize the likelihood of future violations of state's anti-discrimination laws.

IV. Opinion[10]

The Montana Governmental Code of Fair Practices Act (GCFPA) requires state and local government officials and supervisory personnel to recruit, appoint, assign, evaluate and promote an employee based on merit and qualifications without regard to the employee's political ideas. Mont. Code Ann. § 49-3-201(1). The Montana Human Rights Act (HRA) prohibits the state or any of its political subdivisions from

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[10] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

rejecting a person for employment or discriminating against a person in a term, condition, or privilege of employment because of that person's political beliefs. Mont. Code Ann. § 49-2-308(c). Both Acts also prohibit any employer and Montana governmental entities from rejecting a person for employment or discriminating against a person in a term, condition, or privilege of employment because of that person's sex. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-3-201(1).

Both Acts also prohibit retaliation by any government entity because the individual has filed a complaint under that law:

It is an unlawful discriminatory practice for a . . . governmental entity or agency to discharge . . . an individual . . . because he has filed a complaint . . . under this chapter.

Mont. Code Ann. § 49-2-301.

It is an unlawful discriminatory practice for a state or local governmental agency to discharge . . . an individual . . . because he has filed a complaint . . . under this chapter.

Mont. Code Ann. § 49-3-209.

The department has jurisdiction to hear complaints under both the GCFPA and the HRA. Mont. Code Ann. Title 49, Chapter 2, Part 5 and Chapter 3, Part 3.

The county did not violate either the HRA or the GCFP in creating the interim chief position instead of making Drew acting chief. The county did violate both Acts when it subjected Drew to disparate treatment because of her sex when choosing Bevolden instead of Drew to serve as interim chief. The county also violated both Acts when it failed, for retaliatory reasons, to stop Bevolden from firing Drew. It also violated both Acts when it retaliated against Drew by failing adequately to supervise Bevolden's initial handling of her grievance and by failing subsequently to admit the absence of a valid basis for firing her at the first two levels of her ultimate grievance proceeding.

<u>A. Creation of the Interim Chief Position</u>

Drew's first claim alleged the county violated the GCPFA and the HRA by creating the interim chief public defender position instead of relying upon her to serve as acting chief because of her political beliefs and sex.

The government cannot discriminate against employees or prospective employees because of their political ideas or political beliefs. *Taliaferro v. State*

(1988), 235 Mont. 23, 764 P.2d 860, 862. As already noted, no employer can take any adverse employment action against an employee because of that employee's sex. Mont. Code Ann. § 49-2-303(1).

Taliaferro involved political belief discrimination claims under both the GCFPA and the HRA. ***Id. at*** 862-63. *Taliaferro* applied the three-tier evidentiary test Montana adopted from *McDonnell Douglas Corporation v. Green* (1973), 411 U.S. 792; ***e.g.***, *European Health Spa v. Human Rights Commission* (1984), 212 Mont. 319, 687 P.2d 1029, 1032, ***quoting*** *Martinez v. Yellowstone County Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242. The *McDonnell Douglas* evidentiary analysis applies to cases when the charging party has presented indirect evidence of discriminatory motive. Drew did not present direct evidence that the county created the interim chief position because of either her sex or her political beliefs. Thus *McDonnell Douglas* provides the proper analysis of the claims that creating the interim job was illegal discrimination. In summary, *McDonnell Douglas* requires the establishment of a *prima facie* case, articulation of a legitimate non-discriminatory motive and a showing that the non-discriminatory motive is either untrue or a pretext for discrimination.

Taliaferro held that a *prima facie* case of political idea or belief discrimination required three elements: "(1) the employer received an application or equivalent from a qualified protected-class person; (2) a job vacancy or employment opportunity existed at the time of the application; and (3) the person was not selected." ***Id. at*** 863-64. This test can be readily adapted to fit the issues in this case. For Drew's claim of political belief discrimination in the creation of the interim chief position, she had to prove that (1) she was available and qualified to serve as acting chief and expressed political ideas and beliefs in opposition to those of Reno and Kennedy; (2) using her as acting chief was consistent with existing practice; and (3) Reno and Kennedy nevertheless created the interim chief position.

For her claim of discrimination because of sex in creating the interim chief position, Drew had to prove (1) that she was a woman available and qualified to serve as acting chief; (2) that using her as acting chief was consistent with existing practice and (3) that Reno and Kennedy nevertheless created the interim chief position.

To respond to Drew's *prima facie* case, the respondents had the burden to "articulate some legitimate, non-discriminatory reason for [her] rejection." *McDonnell Douglas* ***at*** 802; ***see also*** *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 817. The respondents could also meet their burden by showing, through competent evidence, that they had legitimate non-discriminatory reasons for their conduct. *Crockett*. The respondents had to satisfy this second tier of proof for two reasons:

> "[It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Texas Dept. Comm. Aff. v. Burdine*, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981). A defendant thus only need raise a genuine issue of fact by clearly and specifically articulating a legitimate reason for the rejection of an applicant. *Johnson*, ***op. cit.***, 734 P.2d at 212.[11]
>
> *Crockett*.

If the respondents rebutted Drew's *prima facie* case by producing legitimate reasons for their adverse actions, she then had the burden to prove that the reasons shown were pretexts for illegal action. *McDonnell Douglas* ***at*** 802; *Taliaferro* ***at*** 863-64; *Crockett* ***at*** 817-18; *Martinez* ***at*** 246. To establish pretext:

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.
>
> *Burdine* ***at*** 256.

Throughout the burden-shifting required by *McDonnell Douglas*, Drew always had the ultimate burden to persuade the hearing examiner that the respondents illegally discriminated against her. *Taliaferro* ***at*** 864; *Crockett* ***at*** 818; *Johnson* ***at*** 213.

Drew proved the first element of the indirect evidence test for both sex and political belief claims. She was a woman who was available and qualified to serve as acting chief. When Reno and Kennedy made the decision to create the interim chief job, they considered her qualified and available. She had expressed her political ideas and beliefs to them about privatization and state assumption of the public defender function. She and Reno disagreed about privatization and she and Kennedy disagreed about state assumption. She had resisted Reno's challenge to conflict substitution motions based on case loads.

Drew proved the second element of her *prima facie* case for both claims. Using the second in command as acting department head, for appointed rather than elected positions, was consistent with the county's existing practice, although it was not required by any policy or procedure. The existing practice met the need for an

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[11] *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209.

immediate acting department head and avoided the uncertainty and delay involved in going through an application process before the appointment. The need for an immediate acting chief existed in the public defender's office when Reno and Kennedy elected to create the interim chief public defender job. Uncertainty and delay could (and did) result from their decision not to use Drew as acting chief. Reno and Kennedy believed the chief public defender job could not remain empty. They did not know whom they might recruit and had virtually no time to engage in a thorough recruitment effort. The normal response to the situation would have been to appoint the chief deputy as acting chief.

Drew proved the third element of her *prima facie* case for both claims by showing that the county in fact created the interim chief job.

Since Drew proved her *prima facie* case, the respondents had the burden to controvert her case or show a legitimate non-discriminatory business reason for the action taken. They attempted to controvert her case by presenting evidence that they contended impeached Drew's sincerity with regard to her expressed political ideas and beliefs. They presented testimony that Drew was wrong in insisting that the ABA Standards had to be followed. They also argued that although the county had utilized "acting" department heads in some prior instances, there was no legal requirement that they utilize Drew. They also articulated a legitimate business reason to seek another temporary chief – they believed that they could not rely on Drew to implement a complete break between the public defender's office and Selvey.[12]

The sincerity of Drew's political beliefs is irrelevant, as advanced by the respondents. She had expressed her beliefs in opposition to proposals Reno and Kennedy advanced regarding the public defender's office. The sincerity of beliefs is relevant to cases alleging failure to accommodate religious beliefs, since the beliefs themselves are the basis for the accommodation sought.[13] But Drew's political belief discrimination claim arose because adverse action resulted from her <u>expression</u> of beliefs opposing the commissioners. Drew expressed political ideas and beliefs when she disagreed with Reno about privatization and about conflict motions based upon case load and when she disagreed with Kennedy about state assumption. It was irrelevant whether she always acted consistently with those ideas and beliefs in her work. She took adversarial positions on proposals by Reno and Kennedy, on the express basis of political ideas and beliefs. Reno and Kennedy then took adverse

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[12] The county's more general statement of this reason – that they wanted to seek the best qualified candidates – boiled down, in testimony, to this more concrete reason.

[13] ***E.g.***, *Goldmeier v. Allstate Ins. Co.* (9th Cir. 2003), 337 F.3d 629, ***cert. den.*** (2004), 157 L.Ed.2d 891; ***quoting*** *Cooper v. Oak Rubber Co.* (6th Cir. 1994), 15 F.3d 1375, 1378.

actions regarding her. An inference of discriminatory motive arises from this evidence and establishes a *prima facie* case.

Respondents' evidence of Drew's alleged insincerity did not prove that her agreements with Selvey on privatization, state assumption and conflict substitution motions based upon case loads were matters of personal interest rather political ideas and beliefs. Based on her credible testimony, Drew's agreements with Selvey on these matters were in fact based upon her political ideas and beliefs, rather than being matters of personal interest.

The question of whether Drew was correct that the ABA Standards had to be followed is, itself, both a political question and a legal question. The parties offered conflicting testimony about the beliefs of various witnesses as to whether the ABA Standards were binding on the county in deciding how to provide public representation of indigent criminal defendants. Neither side presented applicable Montana authority resolving whether the standards were binding as a matter of law. Ultimately, that issue is far beyond the scope of this proceeding. The only important fact for this proceeding is the parties disagreed about a political question (application of the ABA Standards). That fact bolsters Drew's *prima facie* case, rather than controverting it.

There is certainly no existing case law requiring that every policy or funding decision involving public defense of indigents accused of crimes be made in exact conformity to the ABA Standards. The standards themselves are an attempt to articulate factors necessary to consider in making such policy and funding decisions, many of which can be political questions. Of course, after a governmental body (executive or legislative) makes a particular policy or funding choice, the courts may ultimately decide legal questions about whether that particular choice meets constitutional muster as applicable in a particular situation. With the issues and evidence in this case, the department need not (and indeed cannot) decide whether in Yellowstone County in 2002: (1) privatization, state assumption of public defense and never utilizing conflict substitution motions because of high case loads would have been in conflict with the ABA Standards; (2) privatization would have been a better option than the public defender's office; (3) state assumption of public defense would have been a viable alternative to the public defender's office; or (4) conflict substitution motions based on case loads were necessary or proper.

There remain today unanswered questions (and pending litigation) about the sufficiency of the county public defender systems in Montana. There will likewise be questions about the sufficiency of any new system that may be adopted to replace them in the future. This is not the proper forum to decide whether Drew, Reno or Kennedy was right about any of those questions. Clearly, that involves political questions to which the public, various interest groups, courts, legislative and executive

officers and candidates for offices spoke and continue to speak. It is not an issue within the department's jurisdiction in this case. Thus, the respondents' argument that Drew was wrong about the standards is not relevant to the issue of whether they took adverse action because she disagreed with them about how best to structure and fund the provision of public defenses.

Although the county was not required to appoint Drew as the acting chief, once Drew established her *prima facie* case the absence of a requirement to appoint her was insufficient to rebut that *prima facie* case.

The respondents' controversion evidence did not meet and rebut the merits of Drew's *prima facie* case regarding political ideas and belief. Therefore, the county had an affirmative burden to produce a legitimate reason to depart from the existing practice, which would have been to appoint her. That legitimate business reason was their concern that Drew would not support and implement a complete break with Selvey. Reno and Kennedy did not want to place Drew in the acting chief position because of Drew's affiliation with Selvey, which they feared would lead her to support his efforts to take the six cases with him when he left the office, continue to assign conflict cases to him and continue to involve him in the office.

Given the problems the county had with Selvey in 2002, it was reasonable for the commissioners to seek a complete break with him as soon as he left the office. If Selvey could have substituted for the public defender's office in the six major felony cases when he left, the break would have been far from complete and the county would have faced a significant additional financial expense.

This was a persuasive non-discriminatory reasons for Reno and Kennedy to look for an alternative to Drew as acting chief. Drew's long tenure under Selvey certainly militated against her willingly ending the office's working relationship with him. Selvey's consistent support for Drew was instrumental in making her chief deputy, and that might also have influenced her to maintain professional connections between the office and Selvey. Drew's support for Selvey, on all of the issues over the years (whether or not particular issues involved political beliefs), also suggested that she would have had difficulty opposing Selvey's substitution in the six major felony cases at the time when he was losing his job.

The substantial and credible evidence of record did not support a finding that Reno and Kennedy wanted to deny indigent criminal defendants their due process rights to a proper public defense. Reno and Kennedy were seeking to discharge their responsibilities as elected county commissioners. They sought the least burdensome method of providing those defenses, consistent with the requirements of due process. They did not create the interim chief job because Drew disagreed with them about the proper application of the standards with regard to such policy and funding

questions as privatization, state assumption and conflict substitution motions based on case load. The evidence ultimately established that Reno and Kennedy did not create the interim chief job because of Drew's political ideas and beliefs, but instead because of their concern that she would not, as acting chief, implement a complete break between the office and Selvey.

In the same fashion, the substantial and credible evidence of record did not support a finding that Drew's gender prompted the creation of the interim chief job. The same non-discriminatory reason – the concern that Drew would not support and implement a complete break with Selvey – was unrelated to her gender.[14]

Drew failed to show that the county's concern that she would not support and implement a complete break with Selvey was a pretext for either political belief or sex discrimination. Drew at all times had the ultimate burden of persuading the hearing examiner that the respondents' motivation for creating the interim chief position was to discriminate against her for manifesting her political beliefs (opposing their various proposals) or because she was a woman. *Taliaferro* ***at*** 864. Ultimately, she failed to carry that burden.

Thus, the hearing examiner concludes that the decision to create the interim chief position instead of appointing Drew as acting chief was not made because of Drew's sex or because of her political ideas and beliefs.

B. Selecting Bevolden Rather than Drew as the Interim Chief

Drew claimed that the county hired Bevolden as the interim chief instead of her because of her political beliefs and ideas and sex. For the claims of political belief and idea discrimination, the same initial analytical framework applies, based on the same statutes and case law, particularly *Taliaferro*, ***op. cit. at*** 863-64. To prove that the county hired Bevolden and rejected her because of her political beliefs, Drew had to prove that (1) when she applied for the interim chief job she was qualified for it and had expressed political ideas and beliefs opposing those of Reno and Kennedy (protected class membership); (2) the job was open and available and (3) the county rejected her despite her qualifications, in favor of another comparably qualified applicant.

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[14] The evidence was unclear about when Reno and Kennedy heard the second-hand report that Drew and Selvey had a sexual relationship. Neither Reno nor Kennedy admitted knowing of this allegation or considering it when they decided to create the interim chief position. Drew failed to prove that the report was known by Reno and Kennedy at the time. These claims therefore involve appreciably different facts than the subsequent claims of illegal selection of Bevolden instead of Drew.

Drew proved her *prima facie* case of political idea and belief discrimination. She was qualified for the interim chief job when she applied. She had expressed political ideas and beliefs opposing those of Reno and Kennedy. The county selected a comparably qualified applicant (Bevolden) for the open and available interim chief position.

The respondents articulated a legitimate business reason for their selection of Bevolden, with stronger evidence than for the issue of the creation of the interim chief job. In addition to their concern that Drew would not support and implement a complete break with Selvey, Reno and Kennedy knew when they selected Bevolden that they needed an interim chief who could try to six major felony cases.

Although Drew did not know of the creation of the interim chief job, it was a *fait accompli* on October 30, 2002, when she met with Vigness, Reno and Kennedy. Her declaration that the public defender's office could not adequately defend the six major felony cases without Selvey reinforced the decision to find someone else to be interim chief. Drew clearly would not oppose Selvey's efforts to substitute on the six cases, because she believed the office could not try those cases without Selvey.

Drew's statements persuaded Reno and Kennedy that they must find an interim chief with sufficient trial experience to replace Selvey in all six cases or they would be unable to effectuate a complete break between Selvey and the public defender's office. They came to the interview process with a critical reason, unrelated to Drew's political beliefs, to find someone other than Drew to hire.

Drew's pretext evidence in response to this legitimate non-discriminatory business reason centered on Bevolden's "puffing" assertion that he could try the six cases. On the facts, Bevolden had insufficient information to make his assertion. Indeed, he had no facts about the six cases. Bevolden simply told Reno and Kennedy what he sensed they wanted to hear – that he could try the six major felony cases as scheduled. The commissioners asked him no questions about his conclusion. Drew had given them, on October 30, a number of reasons why the cases required Selvey's participation. They did not discuss any of those reasons with Bevolden.

Two days later, O'Connor gave the commissioners honest answers about whether the six major felony cases would be a problem without Selvey. She pointed out the likelihood that the six cases would not all go to trial as scheduled. She assured the commissioners that she could, as interim chief, make certain the office provided a competent and thorough defense in all of those cases, however the schedule might change. She admitted it would involve extra work under pressure, but noted she had done that before and could do it again. O'Connor gave a measured response, weighing the variables and concluding that as interim chief she could vindicate the due process rights of the defendants in the six major felony cases.

By the time the commissioners selected Bevolden, they had heard O'Connor's answers to their questions about replacing Selvey. They had the opportunity to consider the differences between O'Connor's analysis and Drew's flat statement that Selvey had to remain on the six cases. They had the opportunity to consider whether Drew knew or should have known about the variables O'Connor cited, yet had not disclosed those variables to them in her conclusion. By the time they made the decision, it was reasonable for the commissioners to hire Bevolden, relying in large part upon O'Connor's comments.

The respondents did not present testimony that the thought processes of Reno and Kennedy actually included weighing O'Connor's responses in choosing Bevolden. Reno wanted to hire O'Connor. Kennedy favored Bevolden even before O'Connor's candidacy was eliminated. The absence of credible direct evidence of their thought processes is not fatal to their defense. It is typical that decision-makers' thought processes are less than clear from any direct evidence.[15] *McDonnell Douglas*, as adopted by the Montana Supreme Court, typically requires that the fact-finder infer the decision-makers' motives from the actual evidence, rather than simply from their testimony of what they thought. O'Connor's responses supported the decision to hire Bevolden.

Reno and Kennedy had a valid, non-pretextual, reason to ignore management and administrative experience. Drew was an experienced chief deputy. In theory, Drew could have offered or Bevolden could have sought aid in providing management and administrative supervision.

Reno and Kennedy had heard the new interim chief and the chief deputy indicate in their interviews that they were each committed to the mission of the public defender's office. Reno and Kennedy could not have reasonably expected that the two would be mutually hostile from the start, instead of cooperating to achieve the office's mission.

Setting aside her view of who could and should defend the six major felony cases, Drew was at least as qualified as Bevolden. In terms of familiarity with the public defender's office and its needs, procedures, personnel and problems, she was vastly more qualified than Bevolden. Drew's felony trial experience was actually less extensive than Bevolden's, but her experience was entirely in the defense of indigent criminals, while most of his overall experience and all of his recent experience was in

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[15] The *McDonnell Douglas* inquiry is necessary in most cases because explicit proof that a challenged employment action was motivated by an illegal purpose is unlikely to be available. *Ramseur v. Chase Manhattan Bank* (2nd Cir. 1989), 865 F.2d 460 ("Employers are rarely so cooperative as to include a notation in the personnel files that their decisions were expressly forbidden by law"), quoting *Thornbough v. Columbus and Greenville R. R. Co.* (5th Cir. 1985), 760 F.2d 633, 638.

the prosecution of criminal cases. Bevolden had better relations with the local district judges than Drew. Overall, they were both comparably qualified.

In making their hiring decision, the commissioners knew very little about any of these differences and did not consider what they may have known. They ignored all of these factors and concentrated entirely on Bevolden's express certainty that he could try the cases (*i.e.*, keep the cases in the public defender's office).

Hindsight suggests that the single-minded approach of Reno and Kennedy to hiring an interim chief may have been ill-advised and hasty. Bevolden's inexperience in management probably contributed to his inability to address the hostility of his staff in the public defender's office. His lack of management experience and unfamiliarity with the personnel policies of the county resulted in his unjustified discharge of Drew. However, the approach of Reno and Kennedy to hiring an interim chief was not motivated by bias against Drew because of her political beliefs.

By the time Reno and Kennedy made the hiring decision, they had sufficient information (thanks to O'Connor) to conclude that Selvey's participation in the defense of the six felony cases was not required, even though Drew insisted that it was. Since their focus was upon cutting all connections with Selvey as soon as his resignation was effective, they had a legitimate non-discriminatory reason to hire Bevolden instead of Drew. With Bevolden to try the six major felony cases, the county could completely sever connections with Selvey.[16]

Drew's evidence of pretext (with regard to hiring Bevolden because he could try the six major felony cases) was not persuasive. With O'Connor's input, the county chose a qualified applicant who represented that he could defend the six major felony cases without Selvey and rejected a qualified applicant who represented that she could not. A commission that had already decided that the six cases should stay in the public defender's office was not discriminating because of political ideas and beliefs by selecting an interim chief ready to implement that decision. Elected officials do not discriminate by hiring a qualified applicant for a management job who is willing and able to take specific action the officials want, in lieu of another qualified applicant expressly unwilling and professedly unable to take that action, so long as the action itself is not illegal.

Taliaferro involved an adverse employment decision against Lenore Taliaferro by the Montana Department of Social and Rehabilitative Services. Taliaferro, who performed services as an outside contractor, supported proposed legislation (as a matter of public concern) that would transfer supervision of her work from SRS to

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[16] Respondents' agreement to be bound by the Yellowstone County Grievance Commission Decision ultimately made no difference. The commission's holding that Bevolden's statements during his interview were "little more than puffing," is consistent with this decision.

the governor's office. She supported the legislation because she believed SRS had a conflict of interest. SRS opposed the legislation. After the defeat of the legislation, SRS converted the contract work to employment and chose not to hire Taliaferro for one of the positions, even though she was qualified. *Taliaferro* ***at*** 862-65.

Reno and Kennedy hired Bevolden instead of Drew because Drew told them, in substance, that she would not and indeed could not sever all contact with Selvey, while Bevolden told them he would and could. *Taliaferro* involved a distinguishable principle. In *Taliaferro*, the basis of SRS's adverse employment decision was Taliaferro's support of the legislation while it had been pending, despite SRS's opposition to the legislation.

If Reno and Kennedy had hired Bevolden because Drew had opposed privatization, state assumption or conflict substitution motions based on case loads, *Taliaferro* would be controlling. The substantial and credible evidence did not support such a finding. Ultimately, Reno and Kennedy picked the candidate who was qualified and available and would keep the six major felony cases in the public defender's office. They did not illegally discriminate because of Drew's political ideas and beliefs in making that choice.

Some of both sides' evidence related to events that occurred after the hiring decision. An employer cannot use after-acquired evidence to support an employment action. *Jarvenpaa v. Glacier Electric Coop., Inc.*, 1998 MT 306, ¶ 41, 292 Mont. 118, 970 P.2d 84; *Galbreath v. Golden Sunlight Mines, Inc.* (1995), 270 Mont. 19, 890 P.2d 382, 385; *Flanigan v. Prudential Federal S&L*, (1986), 221 Mont. 419, 720 P.2d 257, 264; *Swanson v. St. John's Lutheran Hospital* (1979), 182 Mont. 414, 597 P.2d 702, 706; ***see also*** *Chapman v. A.I. Trans.* (11th Cir. 2000), 229 F.3d 1012, 1068 (footnote 101); *McKennon v. Nashville Banner* (1995), 513 U.S. 352, 359-60. An employer can use after-acquired evidence to rebut evidence presented by the charging party. *Jarvenpaa* ***at*** ¶ 40; ***see also*** *McKennon* ***at*** 361-62. Logically, such evidence is also admissible to consider pretext (Drew's rebuttal to the respondents' legitimate business reason). For this reason, the hearing examiner considered subsequent events in some of the findings deciding Drew's claims regarding hiring Bevolden. Ultimately, Drew's attempt to show pretext by establishing that Bevolden acted in a manner contrary to her political beliefs failed because she did not establish a factual nexus between what Bevolden did as interim chief and the prior decision to hire him. Drew failed to show that Reno and Kennedy's legitimate business reason for hiring Bevolden (severing connections with Selvey and keeping the six felony cases in the office) was a pretext.

Drew's claim that the county hired Bevolden instead of her because of her sex is a direct evidence claim. She established that Reno and Kennedy knew of the allegation of her sexual relationship with Selvey and considered it when they made

the hiring decision. She proved that similar conduct by male attorneys did not result in adverse employment action. *McDonnell Douglas* applies to cases where the charging party has presented indirect evidence of discriminatory motive. Drew's claim of sex discrimination was a direct evidence claim. *Reeves v. Dairy Queen, Inc.*, ¶¶ 17-18, 1998 MT 13, 287 Mont. 196, 953 P.2d 703, ***applying*** Admin. R. Mont. 24.9.610(5). Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" thereby proving the facts at issue without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979); *Laudert v. Richland County Sheriff's Dept.*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386.

The Montana Supreme Court clearly stated the burden the respondents had to sustain to defeat Drew's direct evidence case:

> At trial, if [Drew] has established a prima facie case of unlawful discrimination with direct evidence, the [respondents] must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. *See E.E.O.C.,* 901 F.2d at 925; Rule 24.9.610 ARM.
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> *Reeves* ***at*** ¶ 17.

Drew proved a direct evidence case of sex discrimination. The respondents had the burden of proving by a preponderance of the evidence that this unlawful motive played no role in the challenged action or that the direct evidence of discrimination was not credible and was unworthy of belief. They failed.[17]

However, in defense against the direct evidence case, the respondents proved that they would have hired Bevolden even without the illicit discriminatory motive. As the foregoing discussion of the respondents' successful rebuttal of Drew's political idea and belief claim illustrates, the respondents met this burden. They proved that even without their consideration of the alleged sexual relationship between Selvey and Drew, they would still have chosen Bevolden because he, unlike Drew, would

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[17] The Grievance Commission finding that Drew failed to prove discriminatory selection of Bevolden is not binding here. Respondents did not dispute Drew's contention that the "binding" nature of the grievance procedure did not and could not limit, impair or waive any rights she had under state and federal law. Ex. 177. Also, the Grievance Commission applied the *McDonnell Douglas* test rather than the direct evidence test. Ex. 47. Finally, the effect of the grievance procedure agreement upon her discrimination claims rests upon contract principles. *Patton v. Madison County* (1994), 265 Mont. 362, 877 P.2d 993***; and*** *Heatherington v. Ford Motor Co.* (1992), 257 Mont. 395, 849 P.2d 1039. The parties reduced that agreement to writing and their intent is found, if possible, in the writing alone. Mont. Code Ann. § 28-3-303. Their intent at the time of contracting is the issue. Mont. Code Ann. § 28-3-301. By its express terms, the grievance procedure agreement left Drew free to pursue claims for alleged violations of her rights under the HRA and GCFPA.

keep the six major felony cases in the public defender's office. This does not negate the finding that they also chose Bevolden because of Drew's sex. It does alter the remedies applicable upon this finding of discriminatory motive.[18]

C. Firing of Drew

Drew claimed that the county fired her in retaliation for her human rights complaint, violating both the GCFPA and the HRA. To prove unlawful retaliation for opposition to illegal discrimination Drew had to prove that (1) she filed a complaint about such activities; (2) the respondents subjected her to an adverse employment decision (3) because she filed the complaint. *Foster v. Albertson's, Inc.* (1992), 254 Mont. 117, 835 P.2d 720, 727; *Schmasow v. Headstart* (June 26, 1992), HRC Case #8801003948 ; ***accord***, *Laib v. Long Construction Co.* (August 1984), HRC Case #ReAE80-1252, ***quoting*** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793. ***See also*** *Payne v. Norwest Corp.* (9th Cir.1997), 113 F.3d 1079; *Moyo v. Gomez* (9th Cir. 1994), 40 F.3d 982, 984 ***and*** *Alexander v. Gerhardt Enter., Inc.* (7th Cir. 1994), 40 F.3d 187, 195.

Bevolden made the initial decision to fire Drew. He was not retaliating for her discrimination complaint, of which he was not aware when he decided to fire her. He could not have been motivated by her discrimination complaint. Drew did not prove a *prima facie* case against Bevolden.

Bevolden was angry with Drew for not stepping in line and marching to his beat. Drew had spoken to Bevolden as little as possible and far less than necessary for the office to make the transition from Selvey's leadership without serious internal problems. What contacts she did have with Bevolden were distant and hostile.

Encountering a hostile work force from the time of his introduction to them, Bevolden fell back upon a dictatorial and punitive management style. The conduct of Drew, his chief deputy, made her his first target of opportunity. He fired her to prove he was the boss, attempting to intimidate the remaining staff into showing him respect and courtesy. Bevolden's management style was horrific, but Drew did not prove that he had an illegal retaliatory motive for firing her.

Bevolden did not have the power to fire Drew by himself. But for the county's failure to ensure that Bevolden followed its employment policies, Drew would not have lost her job. Her conduct probably justified disciplinary action, at the level of a warning or reprimand. But going from zero to termination of employment without

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[18] Successful proof of this "mixed motive" defense bars recovery for pecuniary losses due to the discriminatory action. *Laudert*, ***supra***.

taking any intermediate disciplinary steps and without following the procedure Vigness outlined to Bevolden is clearly improper.

Vigness was involved in the firing process from the beginning. When Bevolden first approached Vigness and expressed his intention to discipline Drew, Vigness began to do exactly what the county Human Resources specialists had done with Selvey in the past – Vigness began to make sure Bevolden followed the proper procedures. Vigness outlined the process, counseled Bevolden to follow it, asked some questions and made some suggestions.

When Vigness found out that Drew had filed a human rights complaint, he was offended and decided that she was trying to "set up" the county. He stopped making meaningful inquiries of Bevolden, accepted an extremely dubious assurance that all of the necessary steps had been taken and withheld information about the filing of the human rights complaint until after Bevolden articulated his final intent to fire Drew. Vigness then went through a shorter but otherwise very similar process of presenting, with Bevolden, the plan of firing Drew to Reno, the commission liaison. Vigness again withheld information about the human rights complaint until after Reno, with no detailed inquiry, approved the plan. Vigness testified that he withheld information about the complaint until after Bevolden and Reno made their respective decisions because he wanted to protect the county from being "set up."

Admin. R. Mont. 24 .9.603(3) defines a disputable presumption that arises when a respondent takes adverse action with knowledge of a pending human rights complaint:

> (3) When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity.

Here, the presumption is superfluous, given Vigness' testimony and conduct. He quit working with Bevolden to be sure the proper procedure was being followed as soon as he saw the human rights complaint. From the time he saw the complaint, he took Bevolden's subsequent assurances about following procedure at face value, even though those assurances were, on their face, incredible.

Reno and Kennedy had been commissioners long enough to recognize a departure from normal procedure, yet they asked no probing questions and ratified the discharge without any meaningful inquiry. Vigness shielded them, as well as

Bevolden, from knowledge of the pending human rights complaint as long as possible. Ultimately, the two commissioners ratified the discharge after they knew of the complaint, still without asking questions.

The commissioners had no non-discriminatory reason for ratifying the discharge of Drew. They could not have reasonably relied upon Vigness in this rush to fire a longtime management employee, after he chose initially to conceal the complaint filing from them. Even if they could have relied upon Vigness, that reliance still leaves the county responsible for the discriminatory animus behind Vigness' sudden relaxation of his prior efforts to make sure Bevolden followed the proper procedure. Drew proved with direct evidence that her discharge without proper process resulted from retaliatory animus.

There were no valid reasons to fire Drew. The county offered no justification for her firing, let alone providing credible evidence that the human rights complaint filing played no part in the decision. Yet three levels of county government all agreed to fire her anyway. Bevolden paid no attention to the proper procedure. The two levels above him, both of whom had been receiving inquiries from Drew that made it clear she was looking for a way to challenge the Bevolden hiring, paid no attention to whether Bevolden, the untrained new interim chief, had actually followed the proper procedure. By malign neglect, the county permitted Bevolden to fire his chief deputy without sufficient cause and without following proper procedure. Bevolden's lack of a discriminatory motive does not explain the conduct of the other three men. The county is responsible for the action all four took, which could not have happened but for retaliatory animus.

Drew always had the ultimate burden of proving her case. *HAI v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett*; *Johnson*; *European Health Spa*; *Martinez*. Considering the process in its entirety, Drew proved retaliation in her discharge.[19]

D. Delaying and Ultimately Denying Drew's Grievance at Levels I and II

The same Montana law prohibiting retaliation applies to the county's failure timely to process her grievance. Bevolden failed to take the appropriate action to respond to the grievance and nobody checked to see that he was doing what was required. The county is responsible for that failure. Drew's request that the county send copies of its grievance responses to her attorney did not waive the time

[19] The Grievance Commission made no findings about whether the discharge or any subsequent events were discriminatory, only that the discharge was, as the county ultimately conceded, not in accord with county policy and procedure. Ex. 47.

requirements. Simple inadvertence is no justification for the inaction. The only credible explanation for the inaction is retaliatory animus toward Drew.

The same analysis applies to the county's denial of Drew's grievance at Levels I and II, when the attorneys finally reached an agreement about how to proceed after the county initially failed timely to respond at Level I. The county had no valid basis for its denials of the grievance at Levels I and II, and admitted, after the Level III proceeding, that the firing had not followed proper procedure. The only credible reason for the denials at Levels I and II is retaliatory animus toward Drew. Clearly, these denials constituted adverse action, requiring Drew to pursue the process further, incurring expense (attorney costs) and emotional distress as well as further delay in her ultimate reinstatement.

E. Damages and Affirmative Relief

Finding that the county[20] illegally discriminated against Drew, the department may order any reasonable measure to rectify the resulting harm that Drew suffered. Mont. Code Ann. § 49-2-506(1)(b). Damages are awarded in discrimination cases to assure that the victim is made whole. *Vortex Fishing Sys., Inc. v. Foss*, 2001 MT 312, ¶ 27, 308 Mont. 8, 38 P.3d 836; *P.W. Berry, Inc. v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. Sch. Dist. No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***see***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

By proving discrimination, Drew established a presumptive right to recover lost wages. *Albermarle Paper Company*, ***supra at*** 417-23. She proved with reasonable accuracy the amount of wages she lost because of the county's adverse actions. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Sys. Co.* (3rd Cir. 1984), 747 F.2d 885, 889.

The county argued that since it offered Drew reinstatement in October 2003, and paid her back wages from her discharge through the end of September 2003, it was not liable for any losses she suffered in October through December 2003.[21] Drew had to make reasonable efforts to mitigate her damages from the discrimination by seeking comparable alternative employment. *Ford Motor Co. v. E.E.O.C.* (1982), 458 U.S. 219, 231. The county had the burden of proof by a preponderance of the evidence that Drew failed to exercise reasonable diligence to mitigate her damages. *P. W. Berry, Inc.*, ***supra***; *Hullett v. Bozeman School District No. 7* (1987), 228 Mont. 71, 740 P.2d 1132. Drew did not need to seek all possible employment opportunities.

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[20] The acts of the individual respondents, like those of the non-party county employees, Kennedy and Bevolden, are imputed to the county for damage award purposes.

[21] At hearing, Drew limited her damage claims, seeking damages only for harm occurring until December 31, 2003. The hearing examiner did not consider any harm after the end of 2003.

She could and did exercise reasonable discretion in pursuing work. She did the best she could to develop her private practice, given her experience, comparable available opportunities to the career she lost as a result of the county's discrimination, and the economic feasibility of other options in her actual circumstances. *Ford Motor Co.*, ***supra***; ***accord***, *Hullett*, ***supra***. It was reasonable for Drew to take three months to conclude her private practice and deal with her family situation before returning to the public defender's office.

The Department is authorized to order interest paid at the rate of 10% per annum on the amount of back pay due to Drew. *P.W. Berry, Inc.*, ***supra at*** 523; *European Health Spa v. Human Rights Comm.* (1984), 212 Mont. 319, 687 P.2d 1029, 1033; *Foss v. J.B. Junk*, HRC No. SE84-2345 (1987).

Drew also lost statutory Social Security, Medicare and PERS employer contributions. To the extent the county has not made those retroactive contributions, it is reasonable to require the county to calculate and to make those retroactive contributions now.

Drew also incurred attorneys' fees and costs in the Level I and II grievance proceedings. The grievance decision awarded her fees and costs for the Level III proceeding, but the absence of a valid basis for resisting her grievance, as manifested in the decision at Level III, renders those earlier fees and costs a further harm the department should reasonably rectify. The district courts rather than the department have the power to award a prevailing party attorney's fees and costs incurred in prosecuting or defending a Human Rights claim.[22] In this instance, by contrast, Drew incurred attorneys' fees and costs in another proceeding that resulted from illegal discrimination, the grievance she pursued with the county. That cost did constitute "harm, pecuniary or otherwise" that the department has the power to rectify. Mont. Code Ann. § 49-2-506(1)(b).

Drew presented some evidence of the amounts incurred for those grievance proceedings. However, the parties suggested and the hearing examiner agreed that the time and expense of presenting expert testimony supported or challenging the amounts would be best deferred until a liability decision. Therefore, the department will include a liability award of an undetermined amount for fees and costs. Should there be no appeal to the Commission, the parties can agree upon a fee and cost award, to be added by supplemental order, or Drew can request a hearing to set the amount if there is no agreement. If the matter is appealed, determination of the fee and costs award can be addressed in the tribunals hearing appeals, for remand (or evidentiary hearing) before the Human Rights Commission, District Court or Supreme Court.

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[22] Mont. Code Ann. § 49-2-505(7).

Drew also suffered emotional distress as a result of the county's unlawful discrimination. The department can award emotional distress damages as established by the evidence or inferred from the circumstances of the illegal discrimination. ***E.g.***, *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836. In this case, there were a number of outside causes of emotional distress. However, as the findings reflect, there clearly was severe emotional distress that Drew suffered, beginning with her discharge, as a result of her treatment by the county from December 16, 2002, through December 31, 2003. The reasonable value of the emotional distress that resulted from the illegal discrimination and not from the other stresses in Drew's life is $50,000.00.

The hearing examiner found that the county unlawfully considered the alleged sexual relationship and it played a motivating role in the rejection of Drew and selection of Bevolden. That proved that the county had engaged in a discriminatory practice. *Laudert*, ***op. cit. at*** ¶ 38; ***citing*** *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 241-42.

The statutory authority to award compensatory damages is discretionary. "The order [to refrain from engaging in the discriminatory conduct] <u>may</u>: . . . (b) require any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against." Mont. Code Ann. § 49-2-506(1)(b) (emphasis added). The use of the word "may" indicates that the department has the discretion rather than the absolute duty to award compensatory damages upon a finding of discrimination. *Laudert*, ***supra***; ***citing*** *Matter of Invest. Records of City of Columbus P.D.* (1995), 272 Mont. 486, 901 P.2d 565, 567 (observing that "may" is permissive and grants discretion).

The applicable administrative rule addressing exercise of this discretion is Admin. R. Mont. 24.9.611:

> When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation, but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case . . . the commission will not issue an order awarding compensation . . . .

This rule applies to department proceedings under the Human Rights Act. Admin. R. Mont. 24.9.107(1)(b)(ii). The rule exercises the department's statutory discretion, consistent with federal and state case law, by denying awards to rectify harm which did not result from discrimination, since the respondent would have taken the same action without the discriminatory motive. *Laudert* ***at*** ¶¶ 40-42, ***citing*** *Price Waterhouse* ***at*** 244-45. That is exactly the circumstance in this case, since the county would have selected Bevolden and rejected Drew even if Reno and Kennedy

had not considered the rumor of a sexual relationship between Drew and Selvey. Therefore, the department cannot order any recovery for Drew because the county considered her sex (disparate treatment because of the alleged sexual relationship with Selvey) in deciding to hire Bevolden as the interim chief.

The statutory authority to enjoin further discrimination is mandatory, with discretion to place appropriate conditions on the respondent's future conduct. "[T]he commission or the department shall order the party to refrain from engaging in the discriminatory conduct. The order may . . . prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found." Mont. Code Ann. § 49-2-506(1)(a).

The county rejected Drew as interim chief (improperly considering her sex), permitted her firing despite both lack of justification and irregular procedure and then steadfastly refused to reconsider her firing while first ignoring the grievance and then responding through the subsequent formalized grievance procedure (all because of her human rights complaint). Affirmative relief and injunctive relief are proper.

F. Other Issues

The parties filled the record with issues that ultimately were not determinative regarding the discrimination claims. The sincerity of Drew's political beliefs about zealous and competent representation of indigent criminal defendants was one such issue. Drew's beliefs were not always the basis for her choices. Sometimes she paid attention to other priorities in her life rather than the needs of her clients. The respondents offered evidence in this regard, much of it involving events either after the adverse actions at issue in this case or unknown to the respondents at the times of those actions. The stated purpose of the evidence was to impeach Drew. It is not persuasive with regard to the discriminatory motives of the county. It does call into question Drew's credibility on some peripheral issues, but is not ultimately useful in deciding the claims.

The respondents also presented some evidence, and wanted to present more, regarding whether Drew and Selvey had a sexual relationship, offered again for the stated purpose of impeaching Drew. Whether there was such a relationship is irrelevant to the discrimination claims. The impropriety of considering the possible relationship in taking adverse employment action, contrary to the county's usual practice and procedure as applied to male attorneys, is directly relevant.

Drew claimed that Judge Barz refused to allow her to substitute as defense counsel in conflict cases because Drew had sued the county (***cf.*** Ex. 46, as well as Judge Barz' testimony at hearing). The hearing examiner granted summary judgment in favor of respondents on the claim that the county had an obligation to oppose Judge Barz' refusal to allow appointments of Drew, in pertinent part because of the

lack of evidence that respondents caused or contributed to Judge Barz' animus. After hearing, there is still no evidence that the respondents influenced, encouraged or caused the judge to order that in cases before her, an attorney who sued the county for discrimination (as well as for wrongful discharge, in federal court) could not make money from the county by representing indigent criminal defendants in conflict cases. The summary judgment order stands. In any event, the time frame during which Judge Barz' order affected Drew may or may not include the limited time for which Drew sought damages in this proceeding. The question may also be moot.

Finally, the hearing examiner has concluded that the portions of the record that were sealed during the hearing should remain sealed, for the reasons stated in the record at the times of the sealings. The sealed evidence related to conduct of other county employees who were not fired. There may be strong public policy reasons for exposing public employees' misconduct related to their work. However, the employees were neither parties to this proceeding nor involved in the events related to Drew's claims. The conduct of Selvey, Schopfer and Bevolden and allegations about that conduct are part of the public record. The other employees and former employees are not involved in any aspect of this case. Their conduct was offered as comparative evidence, to show that they received better treatment than Drew. Under these circumstances, the other employees or former employees have subjective or actual expectations of privacy which society recognizes as reasonable and the demands of their individual privacy clearly exceed the merits of public disclosure. Art. II, §§ 9 and 10, 1972 Mont. Const.; ***see*** *Great Falls Tribune v. Cascade County Sheriff* (1989), 238 Mont. 103, 775 P.2d 1267.

V. Conclusions of Law

1. The Department has jurisdiction over the claims asserted in this case. Mont. Code Ann.§ 49-2-509(7).

2. Respondent Yellowstone County, acting through its authorized elected officers and management employees (acting within the scopes of their respective authorities, including but not limited to respondents Jim Reno and Dwight Vigness), illegally discriminated against charging party Roberta Drew in violation of the Montana Human Rights Act and the Governmental Code of Fair Practices by:

a. Hiring Curtis Bevolden instead of Drew as the interim chief public defender, in part because of her sex;

b. Discharging Drew on December 17, 2002, without complying with the county's practice and procedure and without having an adequate basis for the discharge, in retaliation for her filing of complaints under both Acts;

c. Failing timely to respond to Drew's grievance about her discharge at the initial levels of the grievance procedure, in retaliation for her filing of complaints under both Acts;

d. Failing and refusing to acknowledge the merit of her grievance at the subsequent formal Level I and Level II grievance proceedings, despite the absence of an adequate basis for her discharge, in retaliation for her filing of complaints under both Acts;

Mont. Code Ann. §§ 49-2-301, 49-2-303(1)(a), 49-3-201(1) and 49-3-209.

3. Respondents did not otherwise illegally discriminate against Drew, and all other claims not included in Conclusion of Law No. 2 should be dismissed. Mont. Code Ann. § 49-2-507.

4. Yellowstone County owes Drew $16,323.39 for lost wages, retroactive contributions to Drew's Social Security, Medicare and PERS accounts for October through December 2003, the amounts incurred for her attorney's fees and costs during the formal Level I and Level II grievance proceedings, $50,000.00 for emotional distress, and interest of $1,496.39 on the monthly lost earnings to the date of this final decision. Mont. Code Ann. § 49-2-506(1)(b).

5. The law requires affirmative injunctive relief against the county to refrain from the discriminatory conduct, and to conform its future conduct to the requirements of the law. Mont. Code Ann. § 49-2-506(1)(a).

VI. Order

1. Judgment is found in favor of charging party **Roberta Drew** and against respondents **Yellowstone County, Jim Reno and Dwight Vigness** on the charges that they violated both the Montana Human Rights Act and the Governmental Code of Fair Practices (1) when the county and Reno hired Curtis Bevolden instead of Drew as the interim chief public defender, because of her sex; (2) when the county, Reno and Vigness discharged Drew, when the county failed timely to process Drew's grievance about her discharge and when the county denied Drew's grievance after the Level I and II meetings in March and April 2003, all because Drew had filed complaints under both Acts.

2. Judgment is found in favor of the respondents and against Drew on the further claims that they violated both Acts when they created an interim chief public defender position instead of allowing Drew to serve as acting chief public defender until the county selected a replacement for its departing chief public defender, when they considered Drew's political ideas and beliefs in hiring Curtis Bevolden instead of

Drew as the interim chief public defender, when they discharged Drew because of her sex and political beliefs and ideas, when they did not timely process Drew's grievance about her discharge because of her sex and political beliefs and ideas and when they denied Drew's grievance after the Level I and II meetings in March and April 2003, because of her sex and political beliefs and ideas. Those claims are dismissed.

3. The department orders the county to pay to Drew $16,323.39 for lost wages, $1,496.39 as prejudgment interest on those lost wages and $50,000.00 for her emotional distress because of the illegal discrimination, immediately to calculate and make retroactive contributions to Drew's Social Security, Medicare and PERS accounts for October through December 2003. These sums are due immediately. The department further orders the county to pay to Drew the amount of her attorneys' fees and costs for prosecuting the Level I and Level II formal grievance meetings. Interest accrues on this final order as it would on a district court judgment, as a matter of law. If respondents do not appeal this final order Drew shall by November 30, 2004, file with the department a statement of the amount she seeks for attorneys' fees and costs incurred in the Level I and II grievance proceedings and the respondents shall by December 17, 2004, file a response, stating either their agreement with the amount sought by Drew or in the alternative the reasons they dispute the amount; the hearing examiner will either issue a further order for payment of the agreed amount, or convene a telephone conference regarding possible evidentiary proceedings to set the amount. If respondents do appeal this final order, further proceedings regarding the attorneys' fees and costs portion of the damages can be addressed by the tribunal exercising appellate jurisdiction.

4. The department enjoins and orders the county and its officers and agents to cease and desist from considering sex in making hiring decisions for management positions in which there is no bona fide occupational requirement that sex be considered and to cease and desist from retaliating against employees who file complaints of discrimination in employment under either the Montana Human Rights Act or the Governmental Code of Fair Practices, against the county or its elected officers or management employees. The department further orders that the county, within 60 days after this decision becomes final:

(a) Submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing them to present and future employees and applicants for employment, and of adopting and implementing those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them. The policies must, within the discretion of the Bureau, include appropriate prohibitions against the enjoined discrimination and retaliation and procedures and responsible management persons for investigations of internal complaints of violations of the policies and imposition of discipline for violations of the policies found.

(b) Obtain training in sex discrimination and retaliation under Montana law for its management employees, including the current commissioners, the current personnel or human resources director and current department heads, elected or appointed. The duration and specifics of the training are subject to the approval of the Human Rights Bureau. Within the prescribed time the county must submit to the Bureau a plan for the training and implement that plan, with any changes mandated by the Bureau, immediately upon Bureau approval of it.

Dated: November 5, 2004

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

Roberta Drew FAD