

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0031010430:

KATHY LASKY,)	Case No. 656-2004
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
BUTTE-SILVER BOW COUNTY)	
SHERIFF'S OFFICE,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Kathy Lasky filed a human rights complaint against Butte Silver Bow County (BSB) Law Enforcement Division (LED) alleging both sex discrimination and retaliation. At the joint request and stipulation of the parties, jurisdiction in this matter was extended to permit the hearing to be held beyond the 12 month jurisdictional limit prescribed in Mont. Code Ann. § 49-2-509.

The contested case hearing in this matter was held on November 9-12, 2004, January 24-26 and 28, 2005, and March 2-4, 2005 in Butte, Montana. Lasky, Elizabeth Zaluski, Ph.D., Chris Monroe, P.A.C., John Lasky, Wilma Puich, Disaster Emergency Services Coordinator for BSB, Carolyn Hooper, former BSB LED employee, BSB Sheriff John Walsh, BSB Captain George Skuletich, BSB Captain Doug Conway, BSB Undersheriff Mark Driscoll, BSB Captain Jeff Miller, Genita Bishop, BSB LED employee, Tim Clark, BSB Human Resources Director, Larry Sheldon, Qwest Employee, and Lynda Brown, Ph.D., all testified under oath in this matter. Charging Party's exhibits 4 through 8, 10(a), 11 through 15, 17 through 19, 20(a), 21 through 23, 25, 26(a), 26(b), 26(c), 27, 28, 29, 32, 33, 34(a), 36, 39(a), 39(c), 40, 42, 43(a), 43(b), 43(c), 43(d), 44 through 46, 52(a) through 52(k), 53, 54(a), 54(b), 56, 57, 58(a), 58(b), 59, 62 through 65, 68, 70, 72, 75, 77 through 79, 84, 88(a) and 88(b), 98, 101 through 104, 106, 108, 109 (admitted only for the purpose of showing that Clark was on notice to complete a grievance procedure), 110,

111, and 112 (for demonstrative purposes only) were admitted into the record. In addition, Respondent's overtime record exhibits WW (OT00001 through OT00151) were admitted into evidence.

Exhibits 58(a), 58(b), 59, 101 through 104, 106 and 110, personnel records of nonparties to this proceeding, were sealed in order to protect those persons' privacy rights which outweighed the public's right to know. In addition, certain portions of the hearing record dealing with those nonparties' personnel records were sealed where appropriate to protect privacy rights. Counsel for each party requested extended time for post-hearing briefing due to the voluminous testimony and exhibits presented in the case. These requests were granted and the charging party's final brief was submitted on September 27, 2005, at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law, and final agency decision.

II. Issues

A complete statement of issues appears in the final pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. Findings of Fact

1. BSB employed Lasky as a 911 operator beginning in October 1998.
2. Walsh was elected sheriff of BSB County in January 2000. Prior to Walsh's election to the position, Undersheriff Driscoll had been appointed to fill the position of BSB sheriff for a time.
3. During 2000, BSB decided to create a 911 supervisor position for the LED.
4. In December 2000, Walsh asked Tim Clark, BSB personnel director, to advertise for the 911 supervisor position. Clark advertised for the position and Lasky responded with a cover letter and resume.
5. A hiring committee interviewed Lasky and the other applicants and selected Lasky for the position. Walsh supported Lasky's appointment as the 911 supervisor. Lasky began her position as the 911 supervisor on March 5, 2001.

6. Lasky took the position knowing that she would occasionally be called out after hours to attend to problems at the 911 center. During her tenure and prior to January 15, 2003, she responded when called out after hours and was compensated at her usual overtime rate.

7. The 911 supervisor position description indicated that the position “is a responsible management and administrative position involving planning, discretion, and supervision of the operations and activities of the 911 program. The work is performed under the general direction and supervision of the Butte-Silver Bow County Sheriff.” Lasky Exhibit 6. Walsh supervised Lasky until January 23, 2003. Among other things, the BSB chain of command documentation shows Lasky directly under the supervision of Walsh. Exhibit 23.

8. In transferring to the position of 911 supervisor, Lasky took a pay cut from her 911 employee job and her salary was reduced to approximately \$28,000.00 per year. Lasky subsequently learned that another employee, Rod Timmerer, would not be taking a pay cut even though he was moving from a dispatcher position into the jail. She filed a grievance with respect to the difference between her treatment and the treatment of Timmerer. Clark suggested that Lasky’s grievance be processed as a reclassification. Lasky agreed and implemented a request for reclassification of her position to Grade 28, a pay grade that would place her in the same pay grade as the administrative captains.

9. Walsh, too, was concerned about Lasky’s low pay in the supervisor position despite the responsibilities of that position. Walsh wrote to BSB Chief Executive Officer Judy Jacobson on November 30, 2001, supporting Lasky in her request for reclassification to Grade 28. He also wrote a letter to Clark on January 2, 2002, requesting that Lasky’s position be upgraded to pay grade 28. Lasky’s request for the upgrade to Grade 28 was approved effective January 2002. Her annual salary was raised to \$35,938.00.

10. From the time Walsh assumed the duties of BSB sheriff, the LED had three captain positions in place, one for Administration, one for Operations, and one for Investigations. In addition, BSB had an undersheriff position. During Lasky’s tenure, each of these positions was filled by a male officer. Each of these positions could only be filled by a certified law enforcement officer, also known as a sworn officer. In addition to their regular supervisory duties, the incumbent in each of these four positions was required to be on call during times that Sheriff Walsh was unavailable to be on duty. This was because, in the absence of the sheriff, only a sworn law enforcement officer would be qualified essentially to hold and wield the

sheriff's authority. That authority included making decisions about investigations at crime scenes and about other proper law enforcement procedures to follow, decisions that only a sworn law enforcement officer had the training and experience to make. Unlike the incumbents in the captain positions and undersheriff position, Lasky, not being a sworn law enforcement official, lacked the authority and expertise to run the LED in the absence of the sheriff.

11. The on call compensation system had been in effect long before Sheriff Walsh took office. Any person holding one of the five positions described in Paragraph 9, whether male or female, was entitled to on call pay because of duties required while on call.

12. In order to provide appropriate coverage during the sheriff's absence, the LED developed a rotation. Each of the captains and the undersheriff rotated, on a weekly basis, the responsibilities for wielding the sheriff's authority while the sheriff was not on duty. During these times, the on call captain could not leave the county and had to be available to report immediately to duty and actually to take charge of the LED.

13. The captains and the undersheriff were paid for an additional 20 hours of work each time they were "on call." This resulted in approximately an additional \$4,000.00 to \$5,000.00 annual pay for each of the captains and the undersheriff. The undersheriff and captains received "on call" compensation because of their law enforcement qualifications and because they were required to be in the on call rotation, available at all times during their rotation to assume command of the LED. The on call pay was not provided to the undersheriff and captains simply because they were division heads in the LED nor was it provided with any improper discriminatory intent.

14. In her position as 911 supervisor, Lasky was expected to respond *if she was available* in the event an issue arose that needed her attention in the 911 center. This was also true of the sheriff's other administrative staff outside of the captains and the undersheriff. Lasky was not qualified to run the LED as were the captains and undersheriff. She was not required to remain in county and drop everything in order to respond. When called to the LED outside of regular hours, Lasky was compensated at her normal overtime rate. She was not compensated with on call pay.

15. On November 6, 2002, during a conversation with Captain Skuletich, Lasky learned that the administrative captains and the undersheriff were receiving on

call pay. Lasky very soon thereafter approached Walsh and asked that she be given the same on call pay. Walsh's initial response was that he would look into it.

16. On January 15, 2003, Walsh informed Lasky, by letter and in person, that she was not in the same on call position occupied by the captains because "the purpose for the on call status . . . is specific to sworn officer duties." Exhibit 19. He further told Lasky that he had never placed Lasky in the position of having to be constantly available but that she had placed herself in that position "wanting to be contacted at anytime anything occurs within the dispatch center so that you [Lasky] could be aware of those issues . . ." *Id.*

17. Upon learning of Walsh's decision in respect to her request for on call pay, Lasky unilaterally decided that she would no longer respond if called out after hours. She told the sheriff that because of his decision she would no longer respond if called out after hours.

18. On January 19, 2003, Lasky grieved Walsh's decision not to include her in the on call pay given to the captains and undersheriff. On February 5, 2003, CEO Jacobson denied the grievance, stating that Jacobson had "found nothing in the record to indicate that you are required to be on call." Exhibit 20B. Jacobson also noted that Lasky did not deliver her grievance to him until January 21, 2003. *Id.*

19. During the next few days, problems developed at the 911 call center which needed Lasky's attention as the 911 supervisor. LED personnel attempted to contact Lasky at her home by telephone to have her come in to the LED, but she could not be reached.

20. On January 24, 2003, Walsh called Lasky into a meeting with himself, the undersheriff and the captains. Undersheriff Driscoll advised Lasky that she was expected to be professional and to answer her phone and respond to work if she was available when her help was needed with a problem in the 911 center. At this meeting, Walsh advised Lasky that she would now report to Captain Skuletich. In addition, because Lasky was now reporting to Skuletich, her scheduling, which had been previously recorded on the administrative schedule, was now recorded on the clerical schedule. The meeting upset Lasky, although neither the sheriff nor the captains acted in an unprofessional or threatening manner toward Lasky.

21. Lasky had been the president of the Red Mountain Association, a group comprised of both citizens and law enforcement personnel charged with ensuring the maintenance of the BSB law enforcement communications equipment located on Red

Mountain. On January 24, after her meeting with Walsh, the undersheriffs, and the captains, Lasky came into Walsh's office and told him that she was resigning as the president of the association.

22. Lasky continued to exercise her supervisory powers over the 911 center even though she was now reporting to Skuletich. For example, she continued to create budgets for the center and continued to schedule dispatchers both for shifts and for training that they needed.

23. Lasky filed the instant human rights complaint on February 16, 2003, alleging gender discrimination based on the failure to pay her on call pay as was paid to the captains and undersheriff. On March 23, 2003, she amended the complaint to allege retaliation against her for engaging in a protected activity.

24. Prior to filing her human rights complaint, Lasky had attended weekly staff meetings of the administrative staff, including the sheriff, undersheriff, and captains, and had provided information about the 911 center. She usually gave her report on any issues affecting the 911 center and she was then permitted to leave if she wished to do so. Sometimes she elected to stay throughout the entire meeting.

25. Soon after Lasky filed her amended complaint, the procedure for staff meetings formally changed, as evidenced by Undersheriff Driscoll's March 27, 2003, memo to all LED employees. Exhibit 63. Under the new procedure, it appears that Lasky was no longer permitted to attend either to provide information about the 911 center or throughout the meeting, as she had in the past. Instead, Lasky was relegated to appearing at the meeting only to engage in "dialogue concerning the overall operations" of the LED. Exhibit 63. In addition, unlike previous meetings, Lasky (like all other employees relegated to this open discussion session), would not be compensated for her attendance. *Id.*

26. After Lasky's request for on call pay was denied, Lasky also began to distance herself from the sheriff, the undersheriff, the captains, and other BSB personnel. She was very upset that she was not receiving on call pay. Her anger over this situation began to manifest itself in her withdrawal from her work relationships with fellow employees.

27. Lasky, Skuletich, Bishop, and Linda Sajer-Joyce (also a BSB employee) attended a two part training seminar in Missoula, Montana, during June 2003. During the first session of the training, Skuletich sat with Lasky for part of the time and even had lunch with Lasky and her family when Lasky invited him along. During

the second session, Lasky was unable to sit with Skuletich and the other attendees because of limitations imposed by the training station, not because of any overt effort on the part of the other attendees to exclude her.

28. At all times relevant to this matter, Walsh, Wilma Puich, Disaster and Emergency Services Coordinator for BSB, Lasky and several citizen members were part of the BSB 911 advisory board. In an effort to enhance 911 back up services for a portion of the 911 area served by the 911 center, Walsh wanted to establish a law enforcement substation at the Wal-Mart store located in Butte. This was accomplished. After Lasky had become 911 supervisor, a 911 substation was established in the Wal-Mart law enforcement substation.

29. In July 2003, negotiations between Wal-Mart and BSB to renew the lease of the Wal-Mart substation broke down. On July 10, 2003, Wal-Mart asked LED to vacate the substation space immediately. Lasky was not advised of the situation or its potential impact on the 911 portion of the substation.

30. Lasky learned on July 11, 2003, that the substation had been vacated. She believed that the loss of the substation presented a potential hazard to the residents of the south part of BSB county. Lasky became upset because she had not been “kept in the loop” with respect to the closure of the station. On July 11, 2003, Lasky sent an e-mail directed at Walsh to both Walsh and all members of the 911 Advisory Committee. In that e-mail, Lasky complained that she had not been informed of the closure of the 911 substation at Wal-Mart. She also told Walsh:

In a recent written statement you stated that my job performance has markedly declined. This is not true, I continue to perform my job in an exemplary manner. However, your decision to exclude me from everything here at the LED has caused several operational problems for the 9-1-1 Center, for this Dept. and for Butte-Silver Bow County, and this is a perfect example. (Emphasis in original).

31. In response to this, Walsh on August 6, 2003 wrote an official letter of reprimand to Lasky because of the tone of the e-mail and her decision to disseminate the e-mail to the entire 911 advisory board. Walsh went on to tell Lasky:

Please be advised that my expectation is that a professional manner will be maintained at all times. If personal issues

are impacting your work performance, I would urge you to consider the confidential resources of the Employees Assistance Program. I will no longer tolerate anything other than information in reference to the issues that are occurring in 911 Dispatch. I urge you to refrain from any future personal comments in reference to how you are left out of the loop in this department. You should be aware that additional incidents of this kind will be cause for more severe disciplinary action. This conduct may also be reflected in a less than good evaluation with specific reference to cooperation, attitude, behavior, respect and responsibility.

Exhibit 43.

32. On September 10, 2003, Lasky and Skuletich had a somewhat agitated exchange of words that precipitated Walsh imposing a three day suspension without pay upon Lasky. One of Lasky's subordinate dispatchers had bypassed Lasky and had informed Skuletich that she would not be in to work. Skuletich in person informed Lasky that he had approved the time off request and that Lasky would have to find a replacement for the dispatcher. Lasky did not respond to Skuletich. He raised his voice in an effort to get her to respond. Lasky finally responded to Skuletich by telling him, "You're pathetic." Skuletich retorted to Lasky, "No, Kathy, you're pathetic."

33. Skuletich was upset about the exchange, believing it to be an incident of insubordination, and reported it to Walsh. On September 16, 2003, Walsh, Clark, Robyn Clark (a BSB employee who is not related to Tim Clark) and Lasky met to discuss the incident involving Lasky and Skuletich. During the meeting, Walsh asked Lasky about her version of the incident. Lasky admitted that she had called Skuletich pathetic, but also indicated that Skuletich had been yelling at her for no apparent reason.

34. Walsh prepared a letter of reprimand for Lasky as a result of her "pathetic" comment to Skuletich. In the letter, Walsh informed Lasky that he was imposing a three day suspension without pay upon her. He reminded her that her conduct was "a totally inappropriate way to respond to a Captain." Exhibit 39(a). Walsh then stated that because of this incident and the existence of the recent written reprimand which resulted from the 911 closure incident (described in Paragraph 26, above), he had no choice but to impose the suspension.

35. Walsh had the letter delivered by two uniformed officers to Lasky while she was at home on September 26, 2003. Although this was unusual, this was not the first instance of an officer serving a written reprimand on an employee of the LED. Captain Skuletich had himself been served with a ten day suspension for misconduct under an earlier administration.

36. As she had with both the denial of on call status pay and the reprimand over the 911 closure, Lasky grieved the imposition of the reprimand resulting from the “pathetic” comment. That grievance was denied by CEO Jacobson in a letter dated November 26, 2003. Exhibit 39(c). The denial was not made within the 15 day working time frame as required by BSB Policy Directive 403 which requires that a grievance which goes to Step 2 requires the CEO to investigate and respond within 15 working days of receipt of the grievance. Exhibit 28, p. 403-2.

37. BSB policy on discipline is contained in Policy Directive 401 (Exhibit 77). That policy provides that discipline and discharge are the responsibility of the supervisor or department head and the disciplinary action taken is to be “fair, just and in proportion to the seriousness of the violation.” Exhibit 77, p. 401-1. That policy encompasses a spirit of progressive discipline, but specifically states that “the appropriateness of using progressive discipline in each case lies within the discretion of the supervisor.” It further provides that the supervisor imposing discipline “may begin disciplinary action at any step of the process, depending on the reasonableness of the rules, communication and understanding of the rules, seriousness of the offense, previous record of the employee, etc.” Exhibit 77, p. 401-4.

38. On November 19, 2003, Lasky learned that Captain Jeff Miller of the LED, who apparently had considerable experience as a volunteer fire fighter, had been selected by a hiring committee comprised of both men and women to fill the vacant BSB fire chief position. Lasky’s husband, John Lasky, had also applied for the position. Lasky believed that her husband’s failure to get the appointment was the result of her filing a human rights complaint and that Miller’s appointment was government politics.

39. Lasky went into Miller’s office later in the morning on November 19 and told Miller that she felt his appointment was the poorest decision that BSB had ever made. She also told him that the appointment process was just politics and that was the only reason that Miller had been appointed. Lasky indicated to Miller that she was in possession of a tape and a letter showing other persons would be moved up in the LED as a result of Miller’s appointment to the fire chief position. Finally, Lasky also compared Miller to a former BSB sheriff, Bob Butorovich, who had obtained his

position having no law enforcement background, and was perceived by some to lack the skills necessary for the sheriff's position. Lasky crystalized the meaning of analogizing Miller to Butorovich by telling Miller that it was a joke around the LED that Butorovich had been appointed sheriff having no law enforcement background.

40. Soon after this discussion, Lasky met with CEO Jacobson about Miller's appointment to the fire chief position. She was very angry when she walked into Jacobson's office. She told Jacobson that she felt her husband and not Miller was far more qualified for the job of fire chief and that the county had no right to give that job to Miller.

41. On November 20, 2003, shortly after coming into the office, Lasky stepped out of her office so that she was facing Miller who was in his office. Lasky stared at Miller for a while and then told him "I don't know how you can look at yourself in the mirror in the morning." A few minutes later, Lasky passed by Miller's office and exclaimed "The Bob Butorovich of the Fire Service" and looked into Miller's office as she made the comment. Miller documented the incident immediately after it occurred.

42. Captain Conway also heard Lasky's comment to Miller. He documented the incident (Exhibit 27) and then sought out Sheriff Walsh to report what he had just heard.

43. Walsh read Miller's and Conway's written statements and immediately sought out Lasky. Walsh tersely informed Lasky that she was being immediately suspended because of the comments she had made to Miller which had been overheard by Conway. Walsh had already been made aware of the comments Lasky made the previous day to Miller. Walsh did not ask Lasky about her version of the facts. After permitting Lasky to gather her things, Walsh and Conway immediately escorted Lasky out of the LED through a side entrance. Lasky was shocked at Walsh's behavior.

44. On the same day of Lasky's ejection from the LED, Walsh wrote her a letter indicating that she was suspended with pay from her 911 supervisor position until further notice. Walsh cited Lasky's conduct on November 19 and 20, 2003, as the basis for the suspension. Exhibit 26(a). Walsh had this letter served on Lasky by a police officer.

45. Later that same day, a group of deputies, including Captain Miller, went to CEO Jacobson to discuss concerns about Lasky and her possible attendance at an

upcoming press conference announcing Miller's appointment to the fire chief position. The deputies and Jacobson discussed whether Lasky might try to disrupt the news conference in some manner and what action should be taken in the event that occurred.

46. On November 21, 2003, Walsh had Lasky's LED issued cell phone turned off and had her office voice mail and her office Internet access deactivated. In addition, Walsh determined that Lasky would not be allowed back into the LED "until otherwise notified." Exhibit 27.

47. On November 23, 2003, Lasky grieved her November 20, 2003, suspension to CEO Jacobson. Exhibit 26 (b). A certified letter prepared by Jacobson and delivered to Lasky on November 28, 2003 denied both her October 17, 2003 grievance and her November 23, 2003 grievance. Exhibit 26(c). Jacobson denied the October 17, 2003 grievance, finding that Walsh's imposition of a suspension without pay was justified. Jacobson denied the November 23, 2003 grievance on the basis that Jacobson did not perceive the suspension with pay to constitute discipline.

48. Lasky was not permitted to return to work. On January 16, 2004, Walsh and CEO Jacobson formally advised Lasky that she was discharged from her position as 911 Coordinator. Exhibit 78. The letter discharging Lasky cited as the bases for discharge Lasky's conduct in writing and disseminating her 911 related e-mail on July 11, 2003, her September 10, 2003, comment to Captain Skuletich and her November 19 and 20, 2003, comments to Captain Miller.

49. In the spring of 2004, the vacant 911 supervisor position was filled by a male. He was offered the position after being selected by a hiring committee in the same manner as Lasky was hired.

50. Prior to Lasky's discharge, no one from BSB undertook any investigation to ascertain Lasky's version of the facts surrounding the incidents that occurred on November 19 and 20, 2003. Lasky was not provided copies of Conway's and Miller's statements related to the incidents until after she had filed her November 23, 2003, grievance regarding her suspension with pay.

51. The LED has taken disciplinary action against other LED personnel in somewhat similar circumstances and has failed to take such action in other circumstances. In one incident, Captain Driscoll failed to impose any discipline against an officer and dispatcher who criticized Driscoll and used obscene language

against him on an open 911 line. Driscoll was not a party to the conversation and only learned of it later.

52. In another instance, Driscoll imposed a one day suspension without pay against an employee who directly told a shift commander “fuck you” while involved in a face to face meeting with that shift commander and Captain Skuletich. Immediately prior to that meeting, the employee had been warned that any unprofessional conduct during the meeting would not be tolerated. In another incident, that same employee had been suspended for 20 days for failing to follow an order. (Testimony of Officer Skuletich).

53. During another incident, a deputy who spoke in a demeaning manner to a district court bailiff received a written reprimand. Two officers who received citations for violating game regulations while off duty each received a one day suspension without pay. BSB also discharged a deputy for violating the law while off-duty.

54. BSB LED management received some training on preventing and/or identifying either discrimination or retaliation between the time of Lasky’s appointment to the 911 supervisor position and the time of Lasky’s termination in January 2004. The evidence does not reliably indicate the amount of that training.

55. Lasky filed a grievance with BSB on February 2, 2004, regarding her discharge. Clark contacted Lasky and set up a meeting to begin the process of the final step of her grievance. Lasky attended with her husband as her employment representative. Clark, Kathy Fassio, and Bud Walker attended the meeting. At that meeting, all the parties reviewed the grievance and agreed to set a subsequent meeting to determine the procedure to be used at the grievance. That meeting was never set. In subsequent correspondence, Clark advised Lasky that because of the on-going human rights complaint, BSB could not complete the grievance process until the conclusion of the human rights case. Thus, Lasky’s grievance with the county has not been resolved as of the time of the hearing in this matter.

IV. Opinion¹

Lasky contends that BSB’s failure to give her on call pay amounted to illegal disparate treatment based on sex under both federal and Montana law. She further contends that her treatment following the denial of her request for on call pay

¹ 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.

constituted both gender discrimination and retaliation. BSB counters that the refusal to give Lasky on call pay was justified and her claim is in any event time barred. BSB also argues that the work environment at the LED after Lasky sought on call pay was not hostile and her treatment by LED personnel after that time was neither discriminatory nor retaliatory.

Each of Lasky's contentions will be considered in turn, but only with regard to claims of illegal discrimination under Montana law. The department's jurisdiction covers statutory discrimination claims under the Human Rights Act (Title 49 Chapter 2) and the Governmental Code of Fair Practices (Title 49 Chapter 3). Quasi-judicial administrative proceedings before the department cannot adjudicate other discrimination claims. Mont. Code Ann. § 49-2-501(1).²

A. Lasky's Claim Regarding On Call Pay Is Timely.

BSB argues that Lasky's claim regarding on call pay is barred because her complaint was not filed within 180 days after the violation, as required pursuant to Mont. Code Ann. § 49-2-501(4)(a). BSB contends that the on call pay which the undersheriff and the captains received was a matter of public record from at least the time Lasky took her position as 911 supervisor in March 2001, well over six months prior to the time she filed her complaint in February 2003. BSB further postulates that because the pay of the undersheriff and the captains was a matter of public record, Lasky had the opportunity from the date of her appointment to become aware of the perceived pay differential and act on it. In essence, BSB is arguing that Lasky had constructive knowledge of her claim about on call pay before she actually knew of the difference.

BSB's argument is not persuasive. Lasky did not become aware of the pay differential until November 2002, when she learned of it in a conversation with Captain Skuletich. BSB continued to pay the captains and undersheriff (but not Lasky) on call pay in each pay period. This would at least give rise to a timely cause of action for all such conduct occurring within 180 days of the complaint. Lasky has not sought pay for any violation occurring prior to the date that she first sought on call pay in November 2002. This date is well within the 180 day time limit.

² That statute provides that a complaint may be filed with the commission by a party "claiming to be aggrieved by a discriminatory practice prohibited *by this chapter.*" (Emphasis added). The Governmental Code of Fair Practices applies the Human Rights Act enforcement procedures. Mont. Code Ann. § 49-3-315.

The two cases cited by BSB, *Schneider v. Leaphart* (1987), 228 Mont. 483, 743 P.2d 613 and *Peschel v. Jones* (1988), 232 Mont. 516, 760 P.2d 51, are inapposite. Neither of those cases dealt with alleged violations (legal malpractice, in both cases) which were clearly continuing up to the time of complaint filing.³ Lasky's on call pay claim is timely, since the alleged discrimination reoccurred each payday within the 180 day statutory time limit for filing.

B. *BSB Did Not Discriminate Against Lasky In Refusing To Give Her On Call Pay.*

Mont. Code Ann. § 49-2-303(1) provides that an employer who discriminates against a person in compensation or in a term, condition, or privilege of employment because of sex commits an unlawful discriminatory practice when the reasonable demands of the position do not require a sex distinction. When there is no direct evidence of discrimination, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) standard applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, ¶ 22, 7 P.3d 386, ¶ 22. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. *E.g., Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Lasky must first must produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a *prima facie* case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). She must show (1) that she is a member of a protected class; (2) that she was qualified for the on call pay differential she was denied; and (3) that she was denied the on call pay differential in circumstances "which give rise to a reasonable inference that [she] was treated differently because of [her] membership in the protected class." *Id.*; Admin. R. Mont. 24.9.610(2)(a). If Lasky proves a *prima facie* case of discrimination by a preponderance of the evidence, the burden shifts to BSB, who must then offer evidence that is sufficient, if believed, to support a finding that its pay differential was based on a factor other than sex. *St. Mary's Honor Center*, 509 U.S. at 506-07; *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *Tx. Dpt. Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)). Should BSB carry that burden, Lasky must then "prove by a

³ Both cases involved defenses of constructive notice or lack of reasonable diligence in discovering the alleged wrong-doing, but neither case involved repeated commission of the alleged wrong-doing, even within the statute of limitations period preceding complaint filing.

preponderance of the evidence that the legitimate reasons offered by [BSB] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont.

24.9.610(3). “[A] reason cannot be proved to be a ‘pretext for discrimination’ unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.” *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *St. Mary’s Honor Center*, 509 U.S. at 515) (emphasis added). See also *Vortex Fishing Systems, Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15.

“The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has ‘use[d] the factor reasonably in light of the employer’s stated purpose as well as its other practices.’” *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). “[T]o establish pretext [Charging Party] ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [BSB’s] proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence.’” *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642, (9th Cir. 2000) (quoting *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (Cal. App. 1999)). “An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action.” *Cellini v. Harcourt Brace & Co.*, 51 F.Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing *Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991)). Where a charging party’s evidence of pretense is strictly circumstantial, he or she “must produce ‘specific, substantial evidence of pretext’” in order to prevail. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). See also *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004) (in order to avoid summary judgment in absence of direct evidence of pretext, claimant must produce specific, substantial circumstantial evidence of pretext).

When the same actor is responsible for both hiring and firing (or other adverse employment action), and both acts occur within a short time, “a strong inference arises that there was no discriminatory motive.” *Bradley v. Harcourt Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996). See also *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995) (“An individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class.”) That is particularly true when the individual discharging the complaining party took the prior favorable action within a year or so of the alleged adverse action, as happened here. *Coghlan v. American Seafoods Co., LLC*, 2005 WL 1579514 (9th Cir. 2005).

Lasky has not produced any substantial evidence of pretext, much less evidence of “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions” in BSB’s explanation for denying her the on call compensation such that the hearing examiner could find BSB’s explanation unworthy of credence. She provided no evidence that persons other than sworn police officers qualified to run the LED ever received on call compensation, and she provided no evidence even hinting that the decision to deny her the on call compensation was based on discrimination.⁴ First, she was not on call. She admits that she was not required to hang around her home or otherwise to restrict her activities waiting to be called, a

⁴ Lasky tried to establish that Undersheriff Driscoll was not a sworn police officer in an effort to establish pretext in BSB’s explanation. Undersheriff Driscoll was a sworn officer for over 20 years prior to his retirement. Moreover, there was no evidence presented to call into question his law enforcement training and experience which would both qualify him to run the LED and distinguish his abilities from those of Lasky’s in a gender neutral manner. Indeed, as respondent pointed out, BSB’s Council of Commissioners had appointed Driscoll acting sheriff for a period of time prior to Walsh’s election to that position.

requirement to earn on call compensation. Admin. R. Mont. 24.16.1006(7). Second, although she was expected to respond if she was contacted after hours, she was never required to be available 24 hours a day, seven days a week.

The most that Lasky could muster to support her position was her assertion that she oversaw an 'essential division' of the LED and that she was subject to being called out to fix problems in the 911 center if she was otherwise available. BSB, however, never argued that it paid on call pay to the captains and undersheriff because they oversaw various divisions of the LED. Rather, BSB's position is that the need to be available to respond at all times and to have law enforcement experience and training in order to be able to run the LED were the quintessential requirements to qualify for on call pay. Thus, the fact that Lasky was the primary supervisor within the 911 Division is of no significance here and it does not establish that BSB's decision to deny her on call compensation was based on discriminatory animus.

Moreover, as long as a business decision is made for non-discriminatory reasons, employers may make their business decisions as they see fit and not run afoul of anti-discrimination statutes. See *St. Mary's Honor Ctr. v. Hicks*, *supra*. Both the Montana and federal courts acknowledge that a claim of discrimination does not authorize the courts to second-guess an employer's personnel decisions. "It is not the function of the courts to become the arbiter of all relationship decisions between employers and employees." *Finstad v. Montana Power Co.* (1990), 241 Mont. 10, 29, 785 P.2d 1372, 1383. See also, *Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1109 (3rd Cir. 1997) (citing *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination].") The only question here is whether BSB's decision was based on illegal discrimination. The facts in this case do not show any illegal discrimination in refusing to give Lasky on call pay.

In addition, Sheriff Walsh in January 2002 strongly supported her request for a significant salary increase (Exhibit 17). It was less than one year later (November 2002) when Charging Party first raised her claim for on call pay, and only a year later (January 2003) when she claimed that BSB discriminated against her by denying her request for on call compensation and began to retaliate against her for having made it. The respondent correctly asserts that BSB is entitled to the "strong inference" that there was no discrimination or retaliation here because the same actor who denied the on call pay, Sheriff Walsh, recommended hiring Lasky initially and took favorable action in support of her request for increased salary. The "same actor" inference helps strengthen the finding that BSB did not discriminate against Lasky in denying her on call pay.

C. BSB Did Not Discriminate Against Lasky On The Basis Of Sex After She Was Denied On Call Pay.

Lasky further claims that BSB created a hostile work environment on the basis of gender after she was denied on call pay. The facts in this matter, however, do not support this position.

An employer violates the Human Rights Act when discrimination based on sex creates a hostile work environment. To prove that a hostile work environment based on sexual harassment existed, a claimant must show (1) that she was subjected to verbal or physical harassment, (2) that conduct was unwelcome, and (3) the conduct was sufficiently severe so as to alter the condition of the claimant's employment and create an abusive work environment. *Beaver v. Dpt. of Natural Resources and Cons.*, 2003 MT 287, ¶ 30, 318 Mont. 35, ¶ 30, 78 P.3d 857, ¶ 30. *See also, Porter v. Cal. Dpt. Correct.*, 338 F. 3d 1018, 1027 (9th Cir, 2004).

Both the United States Supreme Court and the Montana Supreme Court have recognized that the critical consideration in a hostile claim "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services*, 523 U.S 75, 80 (1998), (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25(1993)); *Campbell v. Garden City Plumbing*, 2004 MT 231, ¶ 17, 322 Mont. 434, ¶ 17, 97 P. 3d 546, ¶ 17(quoting *Oncale, supra.*). The discrimination need not be motivated by any sexual desire; the motivation can simply be a "general hostility to the presence of women in the workplace." *Oncale, supra.*

In order to prevail on a hostile environment sexual harassment claim, a claimant must show that the working environment is one that a reasonable person would find hostile and abusive and one that the claimant in fact perceived as hostile and abusive. *Campbell*, ¶ 19. In making this determination, a finder of fact must "look at all the circumstances, 'including the frequency of discriminatory conduct; its severity, and whether it unreasonably interferes with an employee's work performance.'" *Id.*

Where the prima facie claim is made out by circumstantial evidence, the respondent must then produce evidence of a legitimate, nondiscriminatory reason for the challenged action. If the respondent does this, then the charging party may demonstrate that the reason offered was mere pretext. The charging party can do this by showing that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610(3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9th Cir. 1996). The charging party at all times has the ultimate burden of proving her discrimination claims. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632.

The credible objective evidence in this matter does not support a finding that a sufficiently severe or pervasive hostile work environment existed at LED. There was no repeated abusive language or conduct directed toward Lasky (such as yelling, screaming, or repeated use of vulgarities) which would show a belligerence directed at Lasky due to a "general hostility to the presence of women in the workplace." Sheriff Walsh, the undersheriff and the captains were not always cordial in their interactions with Lasky, but they were professional. Even on the day of her discharge, the sheriff's conduct toward Lasky in escorting her out of the building cannot be characterized as unprofessional under the circumstances and certainly was not abusive. Lasky was not, for example, paraded out the front door for all of her co-workers to see. Instead, she was asked to leave through a side door of the building in as discreet a manner as possible under the circumstances. Under all of the facts adduced at the hearing, the hearing examiner cannot find that BSB's conduct toward Lasky after the denial of her request for on call pay was discrimination based on sex.

Even if, however, Lasky had established her prima facie case, she did not carry her ultimate burden of persuasion to show that the discipline imposed against her was motivated at least in part by a desire to discriminate against women. Rather, even before Lasky filed her human rights complaint, the discipline she received was imposed against her due to her acts of insubordination, starting with her refusal to show up at the office after hours—something which she had agreed to do if she was otherwise available. It is apparent that Lasky felt that she was entitled to the same pay as the undersheriff and the captains. When she did not receive that pay, she became deeply resentful and somewhat recalcitrant. Her anger continued to fester and she let her recalcitrant attitude manifest itself in conduct which reasonably resulted in the disciplinary actions against her. Walsh perceived Lasky's conduct as pure insubordination, something he would not tolerate. Lasky's recalcitrance, combined with Walsh's "zero tolerance" policy toward insubordination, created a

less than cordial atmosphere at LED between the parties and led to the unfortunate series of events that resulted in this case. The evidence does not demonstrate that sex discrimination played any role in the discipline imposed against Lasky.

Lasky was not ostracized in her work relationships at LED because she was a female. Unquestionably, her relationships with her co-workers cooled during her tenure at LED. However, they began to cool before she filed her human rights complaint, at about the time that her request for on call pay was denied. Moreover, the evidence and the inferences to be drawn from the evidence are evenly balanced as to the cause of the breakdown of her relationships with co-workers. It appears equally likely that Lasky withdrew from her co-workers because she was upset that she did not get on call pay, as that her co-workers withdrew from her because she was a female. This is insufficient to carry Lasky's ultimate burden of persuasion and the hearing examiner cannot find that any perceived ostracization was caused by LED employees, much less that it was done to discriminate against Lasky.

Lasky's testimony regarding the terrible treatment she received at the hands of the captains and other employees is almost certainly overstated. The hearing examiner is convinced of this by Lasky's attempt to characterize as retaliation her placement in an internal office without a window and her treatment by other LED personnel at the June 2003 seminar. Lasky asserts that placing her in a windowless office in the new LED building in 2003 (a building which, because of budget constraints, had no air conditioning) was additional evidence of retaliation. Far from being retaliation, her office was logically located next to the 911 center (as was Skuletich's) and could not reasonably be construed as retaliation.

With respect to the training seminar, Lasky essentially asserts that the other BSB LED attendees purposely sat at training tables with limited seating so that they would not have to sit with Lasky and that they avoided having contact with her outside the seminar. In fact, Skuletich sat with Lasky at the first session of the training and had lunch with Lasky and her family when asked. During the second session, Lasky was unable to sit with Skuletich and the other attendees because of limitations imposed by the training station, not because of any overt effort on the part of the other attendees to exclude her. Her overstatements on these two matters call into question her credibility with respect to the other facets of her perceived ostracization at the LED between January 2003 and the time of her suspension in November 2003.

BSB proffered legitimate business reasons for undertaking its disciplinary actions against Lasky. Each adverse act of which Lasky complains was precipitated by an act of insubordination on the part of Lasky. The July e-mail which Lasky broadcast to members of the 911 advisory board clearly contained information that went far beyond that relevant to the effect of the closure of the 911 substation and included her personal issues with the way Walsh was treating her at the office and the way Walsh was running things. There was no need for the advisory board to be told of Lasky's personnel issues at the office in order to evaluate the impact of the closure of the 911 substation. Broadcasting such internal information was improper and merited a written reprimand.

Lasky's suggestion that the advisory board had to be advised of the closure of the substation as a matter of public safety is undercut by her own actions after the substation was disconnected. As Qwest employee Larry Sheldon testified, the line could have been reestablished within a few days had such been requested. Never during her remaining tenure at the LED did Lasky request reestablishment of the line. She never testified, and there is no other evidence showing, that had she proposed reestablishment she would have been overruled or prevented from doing so. Moreover, even if the closure of the substation presented an impediment to 911 service in the southern part of BSB County, there would still have been no reason for Lasky to include in her e-mail her discussion about the sheriff's perception and her denial that her attitude and performance had declined. These were matters that should have remained within the LED and Lasky's unilateral decision to "air them out" to the public merited discipline.

Likewise, the circumstances surrounding Walsh's decision to impose a three day suspension without pay after the "pathetic" comment does not show that LED's employment action was motivated by retaliation against Lasky for pursuing her human rights complaint. The circumstances of the conversation as relayed through Skuletich's testimony convince the hearing examiner that Lasky's comment was reasonable and, indeed, properly perceived as insubordination. Skuletich had advised Lasky that she needed to find a replacement for an absent dispatcher. It was not unreasonable for Skuletich to indicate he expected a response under the circumstances. Lasky's immediate reply of "You're pathetic" was not responsive and cannot be interpreted in any other way except as insubordination.

Lasky argues that the three day suspension without pay was disproportionate to discipline other workers had received in similar circumstances. However, as the respondent points out, the circumstances of this infraction were different than those circumstances surrounding other employees who were disciplined. The one officer

who had blurted out “f--- you” to a superior had done so during a venting session. Lasky’s conduct occurred in otherwise normal business discourse and was in response to an important business matter—securing a replacement 911 dispatcher. Similarly, it was not a comment directed at a third party that was simply overheard by Skuletich. It was made in the face of a direct request and certainly could have been interpreted as a refusal to carry out a request from a superior. In addition, it had come virtually on the heels of an earlier reprimand emanating from a perceived demonstrated disrespect for the “chain of command.” The discipline does not on its face appear to be disproportionate.

Lasky also complains that her suspension with pay and eventual discharge as a result of her conduct on November 19 and 20, 2003 were excessive and were imposed without proper investigation and, therefore, demonstrate retaliation. Setting aside the question of improper investigation, it is not readily apparent to the hearing examiner that the discipline for the November 19 and 29, 2003 incident of insubordination was too severe. This act occurred within just a few months of the three other acts of insubordination, and the July and September incidents which immediately preceded the November conduct were accompanied by adequate warning that more severe discipline would be imposed for any further incidents of insubordination. Walsh could quite reasonably assume that Lasky’s recalcitrant conduct was only becoming worse and had escalated to the point (the episode that resulted in Lasky’s removal from the LED had carried on for two consecutive days, not to mention the earlier incidents) that her conduct was disruptive to the LED operations and required her removal.⁵

Finally, the failure to supply her with business cards (which were not provided to any unsworn personnel at LED), the lack of air conditioning in the new LED building (which affected many other personnel at the LED) and the fact that at one point Lasky’s work schedule was posted on the clerical schedule do not support a finding of retaliation. Lasky was not singled out for any such treatment. There is nothing intrinsically discriminatory in any of these actions. The surrounding

⁵ In reaching the conclusion that none of the discipline was too severe under the circumstances, the hearing examiner does not rely on the expert testimony of Dr. Brown (the expert on human resource law proffered by the respondent) to the effect that the discipline imposed was appropriate. It is sufficient to note that the hearing examiner does not find as a matter of fact that the discipline imposed was too severe in comparison to (1) discipline meted out to other BSB personnel or (2) the limitations prescribed by BSB discipline policy. Lasky presented no expert evidence to counter the impressions of the hearing examiner and, therefore, has failed to persuade the hearing examiner that the discipline imposed in this case shows either a discriminatory or retaliatory intent behind BSB’s actions.

circumstances of each of these actions show that the actions were undertaken for legitimate business reasons and do not demonstrate an intent to discriminate against Lasky.

D. *BSB Did Not Retaliate Against Lasky.*

Lasky finally contends that her treatment by department personnel after the denial of her request for on call pay and her filing of her human rights claim amounted to retaliation against protected conduct. Montana law prohibits retaliation in employment practices for protected conduct. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in a protected practice, (2) that thereafter her employer took an adverse employment action against her, and (3) a causal link existed between protected activities and the employer's actions. *Beaver, op. cit.*, 2003 MT ¶71. *See also*, Admin. R. Mont. 24.9.610 (2). In addition, Admin. R. Mont. 24.9.603 (3) specifically provides that when significant adverse actions are taken against a charging party during the pendency of a human rights proceeding by an employer who has actual or constructive knowledge of the proceeding, a rebuttable presumption arises that the action was in retaliation for engaging in protected conduct.

Circumstantial or direct evidence can provide the basis for making out a prima facie case. Where the prima facie claim is made out by circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, then the charging party may demonstrate that the reason offered was mere pretext. The charging party can do this by showing that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group,* 79 F.3d 859, 868 (9th Cir. 1996).

In this case, Lasky proved a prima facie case of discrimination supported by the rebuttable presumption that the conduct which occurred while Lasky's human rights case was pending was retaliatory. Lasky filed a human rights complaint based on her pay. While that matter was pending, Lasky received a written reprimand, was twice suspended, once without pay, and was ultimately discharged from her employment, all for stated reasons unrelated to her human rights complaint. This prima facie case, based upon circumstantial evidence, shifts the focus of the inquiry to BSB to show a

legitimate non-discriminatory basis for the conduct. If BSB can do this, Lasky may then prove that BSB's reasons for the discipline were merely pretextual. Lasky, however, bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by unlawful discrimination, in this instance, by retaliatory animus. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632.

Lasky has failed to meet her burden of persuasion on this issue. The credible evidence in this matter does not preponderantly support Lasky's position that the imposition of employment discipline was motivated by retaliation for undertaking protected activity. As discussed above, Lasky was disciplined before she filed her human rights claim for her insubordination, starting with her refusal to show up at the office if she was otherwise available. She was not happy about the fact that she was not entitled to on call pay, her anger over this continued to fester, and she let her recalcitrant attitude manifest itself in insubordinate conduct which resulted in reasonable disciplinary actions against her. This, combined with Walsh's "zero tolerance" policy toward insubordination, led ultimately to her discharge. The evidence does not preponderantly demonstrate that retaliation played any role in the discipline imposed against Lasky.

BSB proffered legitimate business reasons for undertaking its disciplinary actions against Lasky. Each employment act of which Lasky complains was precipitated by an act of insubordination on her part. The July e-mail, her insubordination directed at Skuletich and her conduct over a two day period toward Miller showed a pattern of increasing insubordination that Walsh was not going to put up with and did not have to put up with. The discipline meted out to her was not necessarily disproportionate to the conduct which precipitated the discipline. And, even if her suspension with pay and discharge were excessive, it does not lessen the fact that the discipline was imposed for acts of insubordination, not in retaliation against Lasky for pursuing human rights remedies. The additional actions regarding the business cards and posting her schedule on a clerical schedule list were not motivated by retaliation but rather emanated from legitimate business concerns.

Finally, the hearing examiner cannot find that BSB's decision to leave Lasky's grievance regarding her discharge pending until the conclusion of the human rights case was totally or even partially motivated by retaliation. There is no direct or circumstantial evidence that BSB's decision to defer the completion of the grievance until after the completion of the human rights case was undertaken to gain leverage to force Lasky to back off of her human rights case. Rather, the decision to defer the grievance during the pendency of the human rights case resulted from BSB's

perception that it was on the horns of a legal dilemma, namely, that a finding of improper discharge would only serve to bolster Lasky's human rights case. In sum, Lasky has failed in her ultimate burden of persuasion to convince the fact finder that any of BSB's conduct was retaliatory.⁶

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Lasky's claim of discriminatory refusal to provide her with on call pay is timely. Mont. Code Ann. § 49-2-501(4).
3. Payment of the on call pay to the captains and undersheriff did not violate the Montana Human Rights Act. Payment of the on call compensation to the captains and undersheriff was a *bona fide* gender-neutral pay classification system in which the pay differential was based on a legitimate factor other than sex. Lasky was not qualified to run the LEA in the absence of Sheriff Walsh and the requirements of her job as 911 supervisor were not substantially equal to those of the captains and undersheriff while on call.
4. BSB did not discriminate against Lasky on the basis of sex in imposing discipline against her. Lasky failed to carry her burden of proving that the explanations offered by BSB for its disciplinary actions were pretextual and also failed to prove either that the legitimate business reasons BSB gave for the actions taken against her were false or that discrimination was the real reason for BSB's actions.
5. BSB did not retaliate against Lasky for engaging in protected activity. Lasky did not show that the legitimate business reasons proffered for the actions were false or that retaliation was the real reason for imposition of discipline.
6. To the extent that Lasky's Governmental Code of Fair Practices claim under Mont. Code Ann. § 49-3-201 is co-extensive with her discrimination and retaliation claims, it fails because Lasky has failed to demonstrate that any of BSB's conduct was either discriminatory or retaliatory. To the extent that her Governmental Code of Fair Practices claim is distinct from her Human Rights Act claims, she has waived the

⁶ As noted, the hearing examiner cannot properly second-guess the soundness of LED's personnel decisions, but only determine whether the real reason for those decisions was discrimination (*i.e.*, whether they were pretexts). *Finstad; Keller and Carson* (all *op. cit.*, pp. 16-17, above).

claim by failing to offer proof in support of the claim and failing to argue the claim during the hearing or in her closing briefing on the matter.

7. Because Lasky has failed to prevail in any of her claims, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. Order

Based upon the foregoing, judgment is entered in favor of Respondent BSB and Lasky's complaint is dismissed.

Dated: November 18, 2005

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry