

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0041010637

STACY WIRTZ,)	Case No. 2109-2004
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
WESTERN WIRELESS CORPORATION,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

On August 28, 2003, Stacy Wirtz filed a complaint with the department alleging that Western Wireless Corporation discriminated against her on the basis of sex (pregnant female) when it reduced her salary by \$11,000.00 per year and doubled her workload. On November 18, 2003, Wirtz amended her complaint, alleging that her resignation on October 22, 2003, was a constructive discharge resulting from the reduction in her salary and the increase in her workload before she went on maternity leave. On April 20, 2004, the department gave notice that the charges would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on April 6, 2005, in Helena, Montana. Wirtz attended with her attorneys, Jennifer L. Scheinz, Attorney at Law, and Linda Deola, Reynolds, Motl & Sherwood, PLLP. The company attended through its designated representative, John Patterson, director of sales, and its attorney, Thomas E. Hattersley III, Gough, Shanahan, Johnson & Waterman.

Stacy Wirtz, John Patterson and Sherri Kaufmann testified in person. Two expert witnesses did not testify, because the parties agreed to the admission of exhibits containing their conclusions. The hearing examiner admitted exhibits 1-17, 19, 21-22 and 101-121 by stipulation, and admitted exhibits 18 and 20 over objections. The parties agreed to designate deposition excerpts for inclusion in the evidentiary record during their post-hearing submissions.

During the presentation of evidence at hearing, the hearing examiner reserved ruling on the company's objection to the presentation of evidence regarding emotional distress. The hearing examiner permitted Wirtz to present that evidence, subject to a ruling in this final agency decision after the parties had a full opportunity to brief the issue in their post-hearing submissions.

After receipt of copies of the hearing transcript, the parties submitted their proposed decisions, briefs and designations of portions of deposition testimony for inclusion in the record, and submitted the matter for final agency decision.

II. FINDINGS OF FACT

1. Stacy Wirtz was a resident of Helena, Montana at all times relevant to this case.

2. Western Wireless Corporation d/b/a Cellular One, was a Washington limited liability company registered in the State of Montana. The company markets cellular phone service and equipment through retail stores, outside sales personnel, and through indirect (non-employee) dealers. The basic unit of sale is known as "activation" of a line of service through purchase of a rate plan.

3. The company employed Wirtz from May 29, 1996 through October 2003 in Helena, Montana. She began as a retail sales representative, advanced to senior retail sales representative, then to Major Account Executive and finally to Major Account Manager as project manager for the company's State of Montana accounts.

4. Wirtz received numerous awards and acknowledgments for a job well done during her tenure with the company, including a personal card from Darren Yager, the company's Executive Director of Sales in early 2003, congratulating her on being a 2002 top achiever.

5. Wirtz received regular performance reviews during her years at the company, all of which were favorable. There are no reprimands, for job performance or other causes, in Wirtz' personnel file with the company.

6. Wirtz' personnel file contains a November 1996 letter giving notice that she was not meeting her minimum expectations with the company. This was the only time Wirtz ever received notice she was not meeting minimum expectations.

7. The company's sales positions were competitive. Each sales position held by Wirtz over the years had a quota for monthly sales.

8. Wirtz' sales performance was also subject to a written "Minimum Sales Expectations Policy" requiring her to meet at least 80% of her quota over a "rolling" 3 month average. In other words, after the end of each month, Wirtz' sales numbers for that month would be added to her sales numbers for the two previous months to generate a new three month average. The company expected that average to equal or exceed 80% of her monthly quota. A low sales month would thus impact her rolling average for 3 months, before it was dropped from the rolling average.

9. The company required its sales associates to sign a Minimum Expectation acknowledgment form upon hire and again each time they changed sales position or compensation. The employee's signature on the form was a condition of employment with the company. By signing the form, the employee acknowledged reading and understanding the Minimum Expectations Policy requiring achievement of quota during each rolling 3 month period.

10. The minimum expectations policy acted as a mechanism through which the company could identify sales associates whose performance needed improvement. Over 3 months, failure to make sales sufficient to average 80% of the quota was an indication of a problem and barely meeting the quota was a minimum performance standard. Falling below the 80% rolling average meant the sales associate either had sales well below the quota for at least two of the three months, or had one month with sales well below half the quota ($100\% + 100\% + 40\%$ divided by $3 = 80\%$).

11. As a sales associate, Wirtz signed a Minimum Sales Expectation Policy Acknowledgment form on June 3, 1996 when she began working at the company. She signed 3 subsequent Minimum Expectation Acknowledgment forms over the course of her employment, the last on April 18, 2001.

12. In June 2002, the company received a non-exclusive contract with the State of Montana to provide cellular service to state agencies and their employees. This contract was awarded through the state's "Request for Proposal" (RFP) process and was one of the largest contracts the company had received in Montana.

13. Through an application and interview process, the company selected Wirtz as the "Contractor's Contract Manager" or project manager for the State of Montana accounts in July 2002. John Patterson, the company's director of sales, interviewed and hired Wirtz as project manager, becoming her supervisor.

14. Patterson had been actively involved in the company's proposal to the state. Prior to the bidding process, Verizon Wireless had an exclusive contract to provide cellular service to state agencies. Patterson had worked for Verizon (as

“Comnet,” which later became part of Verizon) and had been involved in the exclusive contract with the state. When he came to work for the company in 2002, Patterson immediately took the lead in the bid proposal to the state.

15. Patterson saw the state contract as a huge business opportunity. The company could compete with Verizon to secure as many as 4,500 potential lines of service within state government. He viewed Wirtz’ “sole job” to be to “track those phones and try to take the activations away from our competitor.” He estimated that the company might secure half of the potential state lines.

16. When Wirtz interviewed for the project manager job, Patterson did not speak of any sales requirements for the position. He told Wirtz that the position was focused on service and not sales.

17. In its contract with the state, the company agreed to dedicate a single “team” that would handle all activations and service problems regarding state cell phone service. As project manager, Wirtz was the head of this team. She had the exclusive right, within the company, to sell service and equipment to the state. Sherri Kaufmann was the service half of that team, as customer service representative, with Wirtz handling sales calls, meetings and visits. Kaufmann was a “dedicated customer service provider,” providing all service to the state. Customer support for sales by the company’s other outside sales personnel was provided by the other customer support personnel on an unassigned, rotating and non-exclusive basis. Patterson marketed the team to the state as the company’s “single point of contact” for all state cell phone service.¹

18. The company designated Wirtz, in her new position as project manager, as a “Major Account Manager.” Prior to her promotion, she had been working as a “Major Account Executive.”

19. Patterson provided Wirtz with a copy of state’s RFP and the company’s responses, calling it her “job description.” Section 6.1.1 of the RFP and the company’s responses dealt with Wirtz’ job. The company’s responses included the statement that “Stacy Wirtz has been selected as [project manager],” based in Helena and responsible solely for the state account. The company also stated, in the same section, that Wirtz’ compensation would “be structured around the level of service offered to the State Agencies and not for sales performance. This will ensure that the emphasis is based upon customer service versus sales volume.”

¹ Curiously, Patterson had both Wirtz and Kaufmann reporting directly to him, so that the “project manager” designation for Wirtz did not make her Kaufmann’s supervisor.

20. Wirtz was neither asked nor required to sign a minimum expectations acknowledgment form when she was promoted to “Major Account Manager” as the project manager for the contract with the State of Montana.

21. Wirtz’ compensation package in her new position included an increase in her base annual salary from \$17,000 to \$30,000, a \$500 per month car allowance, a \$1,500 quarterly bonus based upon meeting her quota and the potential for up to \$18,000 per year in commissions based upon \$10 per activation commission.² Patterson set her initial quota for monthly activations (sales) at 60 per month,³ which was one-third higher than (133% of) the quota at that time for major account executives (45 per month). Patterson set the quota higher because of his projections for sales and because of the exclusive nature of Wirtz’ sales to the state. Major account executives competed with one another for sales to customers. Consistent with the RFP responses and Patterson’s explanations, Wirtz thought that the quota was a target goal only, as opposed to a quota that would be measured by the minimum sales expectation policy.

22. Both Patterson and Wirtz understood the primary importance of sales to the company, however, neither Patterson nor Wirtz focused upon sales quotas at the onset of the project. Wirtz understood, from Patterson, that the sales opportunities were enormous. They both expected large sales to flow from the new relationship with the state. Based upon her discussions with Patterson, Wirtz believed that the company expected the sales to come from the “single point of contact” service that she and Kaufmann would provide to the state.

23. On October 1, 2002, the company adopted a new Sales Compensation Policy requiring all sales persons subject to the new policies once again to review and sign an acknowledgment of their acceptance of the policies. The policies included, as former policies had, the company’s minimum expectations policy, requiring sales associates to meet a minimum of 80% of their quota over a rolling 3 month average.

24. Wirtz’ major account manager job was not one of the identified positions to which this new sales policy applied. The company neither provided Wirtz with a

² As sole company salesperson authorized to deal with the state, she received that fee on every state activation. Other company salespeople were not authorized to contact state personnel to solicit sales. State sales that came to any other company employees were referred to and credited to Wirtz. Even if Kaufmann initiated phone activations, Wirtz received her commission.

³ Patterson based this quota upon his expectations of the number of lines the company could secure from Verizon’s existing service to the state. On August 26, 2002, he notified Wirtz of her quota, in an e-mail reciting most of the other terms of her compensation, as set forth in this finding.

copy of this new sales policy nor asked her to sign an acknowledgment that it applied to her position as project manager for the state contract.

25. Initial sales (after a beginning of 5 sales in the later part of July 2002, when the contract began) were consistent with the company's expectations. In August through December 2002, the company sold 615 activations to the state—205% of Wirtz' quota (60 activations per month for 5 months equals 300 activations). In August 2002, Wirtz received credit for 92 activations, over 153% of her quota. In September 2002, she received credit for 279 activations, 465% of her quota. In October 2002, she received credit for 102 activations, 170% of her quota. In November 2002, she received credit for 34 activations, less than 57% of her quota. In December 2002, she received credit for 108 activations, 180% of her quota.⁴

26. By the end of December 2002, Wirtz had received credit for 13.6% of the 4,500 activations Patterson saw as potential lines of service within state government for which the company was now competing with Verizon. In less than half a year, the company had advanced more than a quarter of the way (615=27.3% of 2,250) toward meeting Patterson's original projection of winning half the potential lines of service from the competition.

27. In December 2002, Governor Martz directed the executive branch of state government to cease purchasing new cellular phone service and to cut existing service in half. The company had not expected this event in bidding for and implementing its contract with the state.

28. With the legislature coming in January, some state agencies were also delaying making financial decisions (including changing or buying cell phone services) until after finalization of their budgets. Some state agencies were also delaying decisions about switching cell phone service from Verizon to Western Wireless because of the lack of number portability between service providers at that time.

29. For all these reasons, the sales of activations to the state began to decline sharply in January 2003. In January and February 2003, Wirtz received credit for 38 and 43 activations, respectively.

30. In mid-January 2003, Wirtz told Patterson that she was pregnant.

⁴ The activation numbers in these findings are drawn from Exhibit 113. The parties, in their proposed findings, provided slightly different numbers.

31. In preparing Wirtz to take this new job, Patterson had attempted to motivate her. He had emphasized that by focusing on customer service and personal contact with the various agencies at locations across the state, increasing sales would come. Patterson sincerely believed this would happen, in large part because of his prior experience working with Comnet. He never anticipated the decline in sales that actually occurred in 2003, and thus had not told Wirtz that excellent customer service and personal contact without the anticipated level of sales would not be satisfactory performance.

32. Patterson reviewed sales activations on a daily basis, including activations for the state contract, in which he had a particular interest. He saw that state activations were continuing to decline in January and February 2003, dipping below his projections.

33. In February 2003, Patterson and Wirtz discussed the drop in her sales during 2003 to date. Patterson told her not to worry about the number of sales and to continue to focus on customer service—that the numbers would come. Still seeking to motivate her with encouragement, he did not say that her 2003 job performance was, to date, unsatisfactory.

34. In February 2003, Wirtz requested maternity leave and received the necessary paperwork from the company.

35. At the beginning of March 2003, even viewing Wirtz' sales production exactly as the company viewed the sales production of a major account executive, her overall job performance was satisfactory. Her rolling 3-month average for activations in November, December and January had been exactly 60 activations per month ($\frac{1}{3}$ of 34 + 108+38). Her rolling 3-month average in December, January and February was exactly 63 activations per month ($\frac{1}{3}$ of 108+38+43).

36. At the beginning of March 2003, Wirtz had met her quota, based on the 3-month rolling average analysis, throughout her tenure as project manager for the state contract. From the onset of the contract (again, disregarding late July 2002, to deal only with whole months), Wirtz' sales production over her first 7 full months as project manager exceeded her quota of 420 activations (60 times 7 for August 2002 through February 2003), with 696 activations. In February 2003, Wirtz also received letters of satisfaction from state agencies regarding her performance in dealings with them.

37. On March 7, 2003, Wirtz submitted her written application for maternity leave. The company gave Wirtz written approval to her request on March 17, 2003,

identifying the commencement date for her maternity leave as July 31, 2003, and noting that she had almost 9 ⅔ weeks of paid leave accrued (sick leave, paid time off and vacation combined for 386.14 hours, or 9.6535 weeks), after use of which her maternity leave would be unpaid.

38. By mid-March 2003, it was clear that Wirtz' 3-month rolling average for January, February and March would not meet her quota, or even 80% of her quota (48 average activations), unless the company rate of activations in late March greatly accelerated. Without such an acceleration, Wirtz' sales for the entire first quarter of 2003 would be below quota no matter how the numbers were analyzed. At the end of March, Wirtz received credit for 16 activations.

39. The marked drop in sales for the state contract reduced the revenue from which the company expected to pay Wirtz her higher base salary, as well as her source for commission and bonus income. Patterson discussed the downward trend with Darren Yager, Executive Director of Sales.⁵ Management considered a strategy to "coach Stacy to execute upon" and develop a plan to boost the state sales. They discussed the company's business interest in developing and maintaining the state contract, which was the company's largest account in Montana. They planned to have Wirtz continue to handle the account, discussing how best to help her meet their goals.

40. Ultimately, Patterson primarily decided the changes to be made to Wirtz' position. Other members of the management team had proposed opening state sales to all outside sales executives, leaving Wirtz' quota at 60 activations per month, pushing her to increase her sales activities's decision (one proposal involved "getting into each decision making group/agency and convincing them that they should switch") and providing her with "Territory Management" training. The focus of management was entirely upon more aggressive sales.

41. In reaching the decision about how to restructure Wirtz' job, management noted her pregnancy and impending maternity leave. There was discussion that "there needs to be a plan in place to keep the growth of this account moving forward" while Wirtz was on maternity leave.

42. The company decided that effective April 1, 2003, Wirtz's project manager position was conformed, in several significant respects, with the major account executive positions in Montana. She was now authorized to sell to business customers outside of the state contract, in competition with the other outside sales

⁵ Yager was also identified as "corporate manager."

personnel. Her commission was increased significantly from \$10 per activation on the state account to an average of between \$45 and \$50 per activation. Her base salary was reduced from \$30,000 to \$19,000, consistent with the company's other Montana outside sales account executives. Wirtz now had the same quota as the major account executives (45 activations per month).⁶ Her quarterly bonuses of \$1,500 were discontinued. She kept her \$500 per month car allowance.

43. The company did not change everything. Wirtz retained exclusive rights to sell service and equipment to the state, and Kaufman remained exclusive support specialist for the state contract (although the company moved her from Helena to Missoula). The state's representatives on the contract did not object to the changes, which did retain the "single point of contact" approach.

44. On April 2, 2003, Patterson informed Wirtz of the changes to her duties and compensation. Wirtz viewed the changes as expanding her workload to, in effect 2 full-time positions—project manager and major account executive—at the same time, while cutting her base salary by almost 37%.

45. Patterson also told Wirtz that she would now report to Jay Bair as her supervisor. Bair required Wirtz to contact 10 new businesses per day, in addition to her work on the state contract. Although he viewed Bair as Wirtz' direct supervisor, Patterson continued to ask her for regular reports and information about the status of the state contact, in which he had a "vested interest." Since Patterson was director of sales, Wirtz reasonably interpreted this to mean she now had 2 direct supervisors.

46. No other company outside sales personnel had similar changes made to their positions at the beginning of April 2003.

47. Wirtz objected to the reduction in her salary and bonus package and the additional job duties. She voiced her objections to Patterson, to Susan Gulinson in the company's Human Resources Division, and to Yager, to no avail.

48. The company had moved their Helena offices in early 2003. Wirtz was originally promised her own office at the new location. In April 2003, the company decided that she didn't need one.

49. On April 28, 2003, Patterson and Bair told Wirtz that the company was reassigning some of the state accounts in Kalispell and Bozeman to other outside account executives, as a result of concerns about Wirtz' pregnancy. Wirtz neither

⁶ A month later, her quota and those of the major account executives fell to 35 activations.

sought nor agreed with this decision.⁷ After the April 28 meeting, Wirtz believed she had no authority to work on the state accounts reassigned to others. She did not work further on those accounts. In May, June and July, Wirtz did not travel out of the Helena area for her work.

50. The slower sales of activations to the state continued. In April, May and June 2003, Wirtz received credit for 12, 25 and 50 activations, respectively.

51. Wirtz' rolling 3-month average for activations in January, February and March fell to slightly more than 32 activations per month ($\frac{1}{3}$ of 38+43+16). Her rolling 3-month average in February, March and April was almost 24 activations per month ($\frac{1}{3}$ of 41 + 18+12). Her rolling 3-month average in March, April and May was slightly more than 18 activations per month ($\frac{1}{3}$ of 18+12+25). Her rolling 3-month average in April, May and June was exactly 29 activations per month ($\frac{1}{3}$ of 12+25+50).

52. In June 2003, Bair warned Wirtz that unless she obtained 73 activations that month, she could be terminated. Had she reached this goal, her 3-month average for April, May and June would have been almost 37 activations ($\frac{1}{3}$ of 12+25+73).⁸ The company did not terminate Wirtz for failure to meet this goal.

53. In July 2003, Wirtz exchanged e-mails with Patterson and Melissa Isler (the company employee who handled commissions for Wirtz) regarding whether she would receive commissions for state activations she was working on that might close after she went on maternity leave. Patterson replied that she might receive 40% of the commission where another outside sales person "closes the deal, programs and delivers the phones." Wirtz forwarded the e-mails to Isler.

54. Wirtz went out on maternity leave at the end of July 2003. Western Wireless held Wirtz's position open for her while she was on maternity leave. The company did not replace her, planning for her return to work after the conclusion of her leave. Kaufmann and Bair covered the state contract⁹ while she was on leave.

⁷ The company did not directly controvert Wirtz' testimony regarding this meeting. Patterson generally denied that the company made any decisions because of Wirtz' pregnancy and testified (in his deposition) that this was a "proposal" that was never implemented. He did not deny that the statement was made during the meeting. Curiously, his hearing testimony at least suggested that the state had not objected to this reassignment, even though he denied, in his deposition, that the company ever consulted the state about it, since it never progressed beyond the "proposal" stage.

⁸ Wirtz' quota at this time was 35 activations a month, effective in May 2003.

⁹ Wirtz' wage and hour determination (see Finding 60, *infra*) suggests that other outside sales persons were still working on parts of the state contract during Wirtz' maternity leave.

55. Slower sales predominated for the rest of 2003. In July 2003, Wirtz received credit for 25 activations. Her rolling 3-month average for activations in May, June and July was 33.3 ($\frac{1}{3}$ of 25+50+25).

56. Wirtz exceeded her original quota of 720 activations for the first 12 full months of the state contract (August 2002 through July 2003), with 824, with the largest numbers of activations appearing in the initial months of the contract.

57. On August 28, 2003, Wirtz filed her human rights complaint of discrimination.

58. On September 11, 2003, Kaufmann called Wirtz and said Patterson had directed her to pick up Wirtz' company laptop computer. Wirtz provided the computer to Kaufmann, after questioning why she could not retain it for when she returned to work. She suspected it was a reaction to her discrimination complaint.

59. On September 15, 2003, Wirtz sent an e-mail inquiry to the company regarding her commission payment. The company responded that Wirtz had no commissions due her. The company did not pay Wirtz for any commissions while she was on maternity leave.¹⁰

60. Wirtz believed she was due \$521.24 in commissions in August, \$33.57 in commissions in September and \$25.59 in commissions in October (40% of the activation commissions for her portion of the state contract in each of those months). She ultimately pursued a wage and hour claim for those commissions with the department, and received a determination that the amounts she claimed were due, in a total of \$580.40. The company did not appeal that determination.

61. Wirtz considered the company's refusal to pay commissions the "final straw." She believed the company had reduced her salary, required her to work on sales outside the state contract, eliminated her quarterly bonuses, reassigned parts of the state contract, limited her sales to the Helena area and reneged on a promise to provide her with a new office when the Helena operation relocated in a concerted effort to subject her to a hostile work environment because of her pregnancy. On October 15, 2003, she resigned her job, effective October 29, 2003.

62. In January 2004, the company assigned Jim Dixon, another outside sales executive, to Wirtz's vacant position. He received the same salary and commission

¹⁰ The \$11,000 reduction in Wirtz' salary significantly reduced her income during her maternity leave because her salary was essentially all she received for her weeks of paid leave.

for performing the same job duties as Wirtz, including the same exclusive rights to sell to the state while competing with other outside sales executives for outside sales. Dixon was one of the highest compensated members of the sales force in 2004. This was largely due to his sales to accounts other than the state. State activations remained “flat” after Wirtz’ departure.

III. OPINION¹¹

Montana law prohibits discrimination in compensation or in other terms and conditions of employment based upon sex. Mont. Code Ann. § 49-2-303(1)(a).¹² Discrimination against an employee because she is pregnant is discrimination based on sex. *Cf.*, *Barnett v. Bankers Life & Casualty Co.* (4/20/1992), HRC#9107004331 (exclusion of maternity benefits from comprehensive health policy is discrimination because of sex), *aff’d sub nom. Bankers Life & Casualty Co. v. Peterson* (1993), 263 Mont. 156, 866 P.2d 241; *Miller-Wohl Co., Inc. v. Comm. of Labor* (1984), 214 Mont. 238, 692 P.2d 1243, 1251; *Mountain States Tel. v. Comm. of Labor* (1980), 187 Mont. 22, 608 P.2d 1047, 1056 (distinctions based on pregnancy are sex-linked classifications).

A. Liability

Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof of a *prima facie* case articulated by the United States Supreme Court in *McDonnell Douglas v. Green* (1973), 411 U.S. 792. *E.g.*, *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett, op. cit.*, 761 P.2d at 816; *Martinez v. Yellowstone County Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246. When the charging party presents direct evidence of discrimination, Montana applies a different standard of proof to the case. *Laudert v. Richland Cty. Sheriff’s Dept.*, ¶¶27-29, 218 MT 2000, 301 Mont. 114, 7 P.3d 386; *Reeves v. Dairy Queen Inc.*, 1998 MT 13, 287 Mont. 196, 953 P.2d 703.

The difference between the two standards requires separate analysis for each standard.

A. Indirect Evidence

¹¹ 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.

¹² The subsection includes an exception, strictly construed, when the reasonable demands of the position require a sex distinction. Mont. Code Ann. § 49-2-303(1)(a) and (2). The company did not raise the exception, denying that Wirtz’ pregnancy motivated any of its decisions.

A *McDonnell Douglas* prima facie case of disparate impact in employment normally involves proof that the charging party (i) was a member of a protected class, (ii) was performing her job satisfactorily and (iii) was subjected to adverse action by the employer in circumstances raising a reasonable inference that she was treated differently because of protected class membership. Admin. R. Mont. 24.9.610(2)(a).

Wirtz proved that the company, after learning she was pregnant and despite her performance of the requirements of the RFP, substantially reduced her salary, required her to work on sales outside the state contract, eliminated her quarterly bonuses, reassigned parts of the state contract to others, limited her sales to the Helena area, reneged on a promise to provide her with a new office when the Helena operation relocated and refused to pay her promised commissions during her maternity leave. She also proved that no other outside sales person was subjected to the same changes in terms and conditions of employment.

As a pregnant female, Wirtz clearly had protected class status, of which the company was aware. She was performing her job satisfactorily, in accord with her “job description” (the state contract and the company’s responses in the RFP), which emphasized service rather than sales. Nevertheless, the company subjected her to unique adverse treatment. Wirtz established her *prima facie* case.

The company argued that Wirtz’s position “was modified to be *consistent with* all other Major Account Executive positions.” Indeed, the company did change Wirtz’ salary, activation quota and commissions to conform with those of other outside sales executives. In addition, immediately after the “reconfiguration,” there were two differences between Wirtz and the other outside sales executives, both advantageous to her. Initially she did retain the exclusive right to market the company’s services to its largest single account, the State of Montana and she did have Kaufman as an exclusive customer service specialist for the state contract.

The company’s argument ignored two key differences between Wirtz and the other outside sales executives. The first difference was historical, the second practical. Together these differences made the “reconfiguration” adverse as to Wirtz.

Historically, Wirtz descended to the level of the other outside sales executives, enduring an enormous decrease in her pay¹³ and a sudden express emphasis on sales. The company had led her to believe that sales to the state (which were expected to be very large) were secondary to service. Patterson and the management team certainly

¹³ Wirtz’ annual salary after the “reconfiguration” was \$2,000.00 higher than her base salary before she got the project manager position, but \$13,000.00 below her project manager salary.

understood that absent the expected huge sales Wirtz' compensation package was not going to work. They may even have assumed that she also understood this unstated caveat. The evidence did not establish that she did know, or reasonably should have known, that the focus upon service, and the salary and bonus package that went with it, would only exist so long as sales stayed high. That was not what the company had told the state and it was not what the company had told Wirtz. Unlike her "peers," after the "reconfiguration" Wirtz clearly was worse off than she was before it.

Practically, immediately after the early April 2003 modification, Wirtz had the thankless marketing imperative to salvage the state contract sales level.¹⁴ At the same time, she had a new supervisor (Bair) who was demanding that she spend substantial efforts on outside sales to customers other than the state. The "advantage" of still having exclusive sales rights to the state was heavily outweighed by the increased burden of trying to meet both demands—market more to the state and sell lots of phones to other customers.

Within a month after this initial adverse action, the company took part of the state contract away from Wirtz and limited her to the Helena area for all of her sales work. Even without considering the stated reason for this change (discussed in the "direct evidence" section of this opinion), giving Wirtz this "opportunity" to work harder on fewer state prospects while competing with other outside sales executives for other sales was facially an adverse act.

The last two alleged adverse acts—refusing to provide Wirtz with a new office when the Helena operation relocated and refusing to pay her commissions during her maternity leave—were clearly not done for Wirtz' benefit. Refusal to provide the new office was of far less consequence than cutting Wirtz' salary by almost 37%; however, it nevertheless was unhelpful to her. Refusing to pay commissions to her during her maternity leave until Wirtz obtained a department determination that she was due the commissions was yet an additional adverse act.

At the first tier of *McDonnell Douglas*, Wirtz established all three elements of her *prima facie* case, giving rise to the inference of discrimination. That inference then shifted the burden, at the second tier, to the company to "articulate some legitimate, nondiscriminatory reason for the [adverse action]." *McDonnell Douglas, op. cit. at* 802. This second tier burden is imposed on the company for two reasons:

¹⁴ Near the end of the hearing, Patterson agreed that the state contract was a "death valley" account as the primary source of revenue for any outside sales executive. Patterson also testified that Wirtz' successor as project manager (who also had responsibility for other outside sales accounts) was very successful, largely because of large sales to customers other than the state.

[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. of Community Affairs v. Burdine (1981), 450 U.S. 248, 255-56.

The company met this burden by showing, through competent evidence, that it did have a legitimate nondiscriminatory reason at the beginning of April 2003 to change Wirtz' compensation and some of the other terms of her employment. *See Crockett, op. cit.*, 761 P.2d at 817. The company simply was not making the money it had expected to make from the state contract.

The company had structured both the state contract and Wirtz' project manager position based upon the assumption that it would be able to wrest a substantial share of state cell phone service away from Verizon. Patterson and the management team had been so certain of this assumption that they had not required Wirtz to sign another acknowledgment of the "Minimum Sales Expectations Policy"—they had not expected the policy to come into play. When the initial high sales dropped (Patterson at hearing referred to Wirtz' substantial initial sales as the "low-hanging fruit"), the company began to seek a new way to deal with the contract that (a) eliminated Wirtz' substantially higher salary than those of the other outside sales executives, (b) heightened the incentive (or, stated negatively, the pressure) to market more aggressively to the state and (c) took into account her impending maternity leave.¹⁵ No other company outside sales personnel had similar changes made to their positions at the beginning of April 2003, but then, no other outside sales personnel had sole and exclusive responsibility for an account substantially similar to the state contract.

Having made the initial changes at the beginning of April for legitimate nondiscriminatory reasons, the company proceeded to make further changes, beginning with the reassignment of part of the state contract to other outside sales executives. This adverse action was consistent with one of the company's stated purposes for the "reconfiguration" (to improve Wirtz' chances of success), because it might have increased her opportunities to market phone services to other customers in the Helena area now that she was no longer traveling on the state contract.

¹⁵ The company did take her impending maternity leave into account. Had she been planning an approved absence for reasons that did not involve protected class status, the company would have taken that into account in the same fashion with regard to its decisions about changing her job. The impending absence of the project manager, for any reason, was relevant in deciding how to improve marketing to the state.

Allowing other outside sales executives to sell to the state was also a marketing strategy the company discussed by e-mail prior to the initial “reconfiguration.” The declining state sales presented a legitimate business reason to try this strategy, which the company adopted only partially on April 28, 2003. The change did reduce Wirtz’ marketing duties on the state contract, preserving exclusive marketing right on the rest of the state contract and allowing her to direct more energy to outside sales to other customers. The company articulated legitimate nondiscriminatory reasons for this change.

With regard to the refusal to provide Wirtz with a new office when the Helena operation relocated, the company, in essence, offered a defense of “no harm, no foul,” which can be a legitimate business reason. Wirtz testified to the difficulties created by the lack of a new office, but there was also testimony from both Patterson and Kaufmann suggesting the absence of any need for the new office. The company did address Wirtz’ *prima facie* case with an adequate legitimate business reason for this adverse action—that it did not at the time perceive the action as having any significant adverse consequences for Wirtz.

Finally, the company justified its refusal to pay commissions during Wirtz’ maternity leave by asserting that she failed to earn the commissions, supporting the assertion with Patterson’s testimony and some exhibits. This was a legitimate business reason for the refusal.

Once the company produced its legitimate reasons for its adverse employment action, Wirtz had the burden to prove that the company's reasons were in fact a pretext. *McDonnell Douglas at 802; Martinez, op. cit., 626 P.2d at 246.* To meet this third tier burden, Wirtz could present either direct or indirect proof of the pretextual nature of the company's proffered reasons:

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, op. cit. at 256.

Wirtz’ primary basis for arguing that the company’s explanations for the changes to her job at the beginning of April 2003 were pretexts arose out of the “job description” Patterson gave her when promoting her to the project manager position. Wirtz was performing her job in accord with the company’s focus on service rather than sales, expressed in the company’s RFP responses. She was no longer meeting her monthly activation goals and sales were declining, but she did not believe either that

sales were a primary concern or that those “goals” were subject to the company’s written minimum sales expectations policy. Wirtz felt that the company had reneged on a binding employment contract when it changed her job to shift the focus to sales.

For Wirtz to prevail on this basis, she still had to establish that the company changed her job because it learned she was pregnant, rather than because the sales fell far below expectations starting in early 2003.¹⁶

In management discussions about how to change the marketing approach to the state contract, Wirtz’ pregnancy was mentioned. However, the context was the need to include in the new marketing approach a plan to address Wirtz’ absence. The comment did not indicate, directly or indirectly, any animus toward Wirtz because she was pregnant. It indicated a legitimate concern about how to adjust the marketing approach to take into account Wirtz’ impending absence. There was no direct evidence that Wirtz’ pregnancy rather than the drop in sales motivated the changes. There was also no indirect evidence that Wirtz’ pregnancy rather than the drop in sales motivated the changes. The company’s explanation—that decreased sales made some change in Wirtz’ job a business necessity—was worthy of credence. The particular changes made were reasonable choices, among a number of possibilities management considered, to attempt to improve sales to the state. Wirtz failed to establish that the legitimate business reason for “reconfiguration” of her job in early April 2003 was pretextual.

The company’s reassignment of part of the state contract to other outside sales executives in late April also arose in the context of continued falling sales.¹⁷ This reduction of Wirtz’ responsibility for state contract sales did increase her opportunity to market phone services to other customers in the Helena area, because she was no longer traveling for the state contract. It was consistent with a marketing strategy the company considered prior to the “reconfiguration” on April 2—opening the state contract to other outside sales executives. Assigning part of the state contract to other sales personnel while leaving Wirtz exclusively responsible for the rest of that contact was a less extreme form of the strategy. The continued falling sales presented a legitimate business reason to try the strategy.

Wirtz testified that either Patterson or Bair told her that the reason for the reassignment of part of the state contract was her pregnancy. She did not quote the

¹⁶ The department’s jurisdiction extends only to deciding whether illegal discrimination occurred, and not to whether the company violated other employment laws. The issue is not whether the company could change Wirtz’ job, but whether it did change her job out of discriminatory malice.

¹⁷ For all of April 2003, Wirtz had 12 activations for the state, down from 16 in March 2003.

exact words said, but did elaborate her understanding that this meant the company had concerns, which she considered unfounded, about her ability to travel safely. If this statement meant that the company had decided, without medical substantiation, that for Wirtz' own good she could no longer travel, it would clearly have been illegal discrimination. *E.g., Reeves, op. cit.* On the other hand, it could equally have meant that the company was preparing for her maternity leave by reassigning some of the state contact to other sales personnel. In the context of prior management e-mails about possible changes, Bair's efforts to increase Wirtz' marketing contacts with other customers and the attempts to plan for Wirtz' absence, this statement did not prove that it was more likely than not that the company reassigned the accounts to treat her less favorably because of her pregnancy.

Reassigning part of the state contract was not the only possible choice the company could have made. It may not have been the best choice the company could have made. It was, nonetheless, a reasonable choice to attempt both to improve sales to the state and to improve Wirtz' other outside sales. Wirtz did not establish that it was a pretext for discriminatory action.

The company's decision not to provide Wirtz with a new office when the Helena operation relocated was based upon its conclusion that the new office was not necessary at that time. Wirtz' testimony regarding her difficulties working without the office suggested that the company was wrong. Even if it was wrong, being wrong in reaching a conclusion based upon legitimate business reasons does not itself prove a discriminatory motive. Since there was no evidence either that the decision was based upon Wirtz' pregnancy or that the company knew or should have known that the new office was necessary, pretext was not proven.

The department's wage and hour determination found that the company did owe Wirtz commissions unpaid during her maternity leave. The determination noted that the company had not submitted documentation to rebut Wirtz' proof that those commissions were due to her. The determination did not establish that the company intentionally withheld commissions it knew were due, because of discriminatory animus toward Wirtz. Again, being wrong about a business decision is not the same as making the decision for discriminatory reasons.

B. Direct Evidence

When a charging party presents proof of decision-maker statements that both relate to the challenged decisions and reflect an illegal discriminatory motive, the direct evidence standard applies to the case. *Laudert, op. cit.* Wirtz presented direct evidence that her pregnancy was considered in both the April 2 "reconfiguration" of

her job and the April 28 reassignment of part of the state contract to other outside sales personnel. In neither instance did her direct evidence satisfy the second *Laudert* requirement and reflect a discriminatory motive.

Wirtz proved that the company expressly considered her pregnancy in deciding to reduce her salary, eliminate her quarterly bonuses and require her to work on sales outside the state contract. However, considering her pregnancy in deciding how to change the marketing approach did not reflect an illegal discriminatory motive. As already discussed, management considered her pregnancy because she would be taking a maternity leave. Had she been taking leave for any other reason, her absence still required a marketing plan including how her absence would be handled. There is no evidence that any of the possibilities raised in the management e-mails were prompted by discriminatory animus caused by her pregnancy. Thus, the company's consideration of her pregnancy in deciding how to modify her job did not reflect an illegal discriminatory motive.

Wirtz also proved that either Patterson or Bair told her that the company was or would be reassigning parts of the state contract to others because of her pregnancy. Taken in the context of all of the evidence, the statement meant that the company was preparing for her maternity leave, not penalizing her because she was pregnant.

C. Conclusion

Wirtz at all times had the ultimate burden of proving her discrimination claims. *Rasmussen op. cit.*; *Crockett, op. cit.*, 761 P.2d at 818; *Johnson, op. cit.*, 734 P.2d at 213; *European Health Spa, op. cit.*; *Martinez, op. cit.* Although it is a close case in many respects, Wirtz failed to carry that ultimate burden. Because she failed to prove her discrimination claims, she was not subjected to a discriminatory constructive discharge when she quit because of the company's acts.

IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over the complaint. Mont. Code Ann. § 49-2-509(7).

2. Western Wireless Corporation did not discriminate illegally against Stacy Wirtz because of sex (pregnant female) when it modified her job in April 2003 (on two occasions), subsequently denied her a new office and finally refused to pay her commissions during her maternity leave. Mont. Code Ann. § 49-2-303(1)(a).

V. ORDER

1. Judgment is found in favor of Western Wireless Corporation and against Stacy Wirtz on the charge that the company illegally discriminated against her because of sex.

2. The complaint is dismissed.

Dated: September 9, 2005

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

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