

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0048011160 &
0048011161:

JOHN LASKY,)	Case Nos. 1237-2005 & 1275-2005
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
BUTTE-SILVER BOW GOVERNMENT)	
AND BUTTE-SILVER BOW FIRE)	
DEPARTMENT,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

John Lasky filed a human rights complaint alleging that Butte Silver Bow County Fire Department (BSBFD) both retaliated and discriminated against him because of his marital status in not hiring him as the BSBFD Fire Chief. He asserts that he was not hired because of his marriage to Kathy Lasky who, at the time of the hiring process, was engaged in a human rights complaint against Butte Silver Bow County (BSB). 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 28 and 29, 2005 in Butte, Montana. Lasky, his wife Kathy Lasky, BSB Chief Executive Officer Judy Jacobson, BSB Personnel Director Tim Clark, John Sesso, BSB Planning Director, and final interview panel member, Revonda Stordahl, Public Housing Authority of Butte and final interview panel member, Bud Walker, vice chairman for BSB, and Lynda Brown, Ph.D., all testified under oath in this matter. Charging Party's exhibits 101 through 112, 114, 115, 117, 121 and 122 were admitted into the record. Respondent's exhibits 1 through 5, 7 through 9, 12 through 17, and 22 through 24 were also admitted into the record. In addition, the parties stipulated to

the admission of the deposition transcript of James Kiser, chief administrative officer of St. James Healthcare and final interview panel member. Over the respondent's objection, the deposition of George Schramm, economist, was also admitted into evidence.

Counsel for each party requested time to submit post-hearing briefs. These requests were granted and the last brief was submitted on February 1, 2006, 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. Butte Silver Bow County (BSB) and Butte Silver Bow County Fire Department (BSBFD) are governmental agencies within the meaning of Mont. Code Ann. § 49-3-201.

2. Sometime during the late 1970's, BSB decided to merge the paid fire departments and volunteer fire departments (VFD) under one administration, the BSBFD. Since the time of the merger, problems have arisen between the paid firefighters and the VFD over adherence to regulations, funding, and other administrative issues. This apparently has created a schism between the paid firefighters and the VFD and created administrative difficulties for the BSBFD.

3. Lasky joined the BSBFD as a paid firefighter in December, 1976. Lasky was promoted to BSBFD Assistant Chief in 1992. In the position of assistant chief, Lasky was primarily responsible for fire prevention programs and activities, arson investigation, and building fire code enforcement. Lasky did not have any staff working under him and did not on a day to day basis supervise any persons in the BSBFD. Indeed, Lasky rarely "managed" any fire department personnel at all.

4. On February 16, 2003, Lasky's wife, Kathy Lasky, filed a human rights complaint against BSB and BSB Law Enforcement Division (LED) alleging that she

had been discriminated against on the basis of sex. She later amended the claim to allege that she had been retaliated against for filing the human rights complaint.¹

5. Bob Armstrong, BSB Fire Chief decided to retire and during September, 2003, BSB advertised for a replacement in the position. Several persons applied for the position, including Lasky and BSB LED Captain Jeff Miller.

6. BSB employed a two stage process to complete the selection for the fire chief position. The first stage, which took place on November 6 and November 7, 2003, encompassed the review of applications and interviews of candidates by the BSB Fire Commission. The members of the commission had the technical training and knowledge to be able to evaluate whether the 19 plus candidates had sufficient technical experience and background to fulfill the fire chief position. From this narrowing process, Lasky, Miller, and five other candidates emerged as finalists.

7. The second stage of the process involved interviews and evaluations of the final seven candidates by an interview committee. This took place on November 17, 2003. The interviewing panel was comprised of CEO Judy Jacobson, HR head Tim Clark, BSB Fire Commission member Hugh Dougherty (who had also participated in the November 6 and 7, 2003 initial review process), BSB Fire Commission member Revonda Stordahl (who had also participated in the November 6 and 7, 2003 initial review process), BSB planning director Jon Sesso, and the chief executive officer of St. James Hospital, James Kaiser.

8. All persons sitting on the final interview, with the exception of Clark, were selected by CEO Judy Jacobson. Because he is the BSB Personnel Director, Clark sits on all final interview committees. Jacobson selected persons who had the least connection with any firemen so as to keep the selection committee impartial. The reason for taking this tack was straightforward: utilizing persons from the VFD to sit on the final panel would upset the paid firefighters because of the long and not infrequently contentious history between the paid and volunteer firefighters. Likewise, utilizing paid firefighters or members from the firefighters union could be perceived as favoritism against the VFD. Either approach would cause one or the

¹In its closing brief, BSBFD notes that this hearing examiner found no discrimination or retaliation in the case of *Kathy Lasky v. Butte Silver Bow County*, HRB Case No. 0031010430; and suggests that it makes no sense to believe that BSBFD would have treated John Lasky any less fairly than Kathy Lasky. Respondent's Post-Hearing Brief, Page 9. The hearing examiner's decision in Kathy Lasky's case that no discrimination or retaliation occurred had no bearing on the discrimination and retaliation complaint in John Lasky's case, and the hearing examiner has not considered at all the decision in the Kathy Lasky case in arriving at his determination in John Lasky's case.

other of the organizations to question the legitimacy of the process. Jacobson decided that the best course was to utilize persons who had as little to do with either the paid or volunteer firefighters as possible.

9. CEO Jacobson rejected a request from the firefighter's union to permit a union representative or representatives to sit on the final interview committee. Jacobson's rationale was plainly and cogently expressed in her November 13, 2003 letter to the union's representative. Respondent's Exhibit 7. In that letter, Jacobson explained that permitting the union to participate in the interview level could lead to speculation as to the objectivity and fairness of the panel in light of the fact that several of the candidates were associated with volunteer fire departments. Only paid firefighters were members of the union and Jacobson feared that the union's presence might be perceived by the VFD as tilting the application and interview process in favor of the paid firefighter candidates.

10. John Sesso helped to draft the questions that were utilized in the final interviewing process. These questions were then reviewed by the entire committee for inclusion/exclusion in the interview portion of the process. Sesso also helped to develop the scoring process that would be used by the interviewers to evaluate the applicants' responses to the interview questions. There were a total of eleven questions that the committee used. See, e.g., Exhibit 42. In conformity with BSB policy, all of the questions, the scoring, and the methodology of the interview process were completed prior to accepting any applications for the position.

11. In seeking a new fire chief, BSB sought someone who would be a good administrator. The outgoing fire services director (Armstrong) did not have a good relationship with the VFD and BSB wanted someone in the position who could overcome this problem.

12. BSB was also very concerned with finding someone who could unite the paid firefighters and the VFD. Both paid and VFD departments had been consolidated under one fire commission several years earlier. During that time, the paid departments and the VFD were at odds over many issues, causing serious administrative problems for the fire district. BSB sought to hire a person who had more than just adequate expertise; they were looking for a strong administrator, someone who could unify the paid firefighters and the VFD to create a more cohesive and responsive fire district.

13. Jacobson and Clark were aware of Kathy Lasky's pending human rights claims at the time of the interview and selection of the new fire chief. Sesso,

Stordahl, Kaiser, and Dougherty were not. At no time during the interview process did anyone on the committee discuss or even hint that Kathy Lasky's pending human rights claim should impact the fire chief selection. No one on the selection committee attempted to improperly influence any other committee member's selection by suggesting that any candidate be given preference over any other candidate.

14. The class specification for the position (Exhibit 15) established the framework for developing the criteria for the position. In significant part, the class specification provides "The nature of the work to be performed by the Fire Department requires that an employee in this class establish and maintain close cooperative working relationships with representatives of other public safety and law enforcement agencies at the local, state and federal levels, local business and industry representatives, all department employees and the general public."

15. The interview process itself consisted of asking the same 11 predetermined questions of each of the candidates, the interviewers then individually rating each of the candidates so that each interviewer came up with a top selection, discussing each candidate immediately after that candidate's interview, and then the entire panel discussing the strengths and weaknesses of the candidates after all of the interviews had been completed to reach a consensus. The substantive questions of the interview were very much geared toward the overarching concern for selecting someone who could unite the VFD and the paid firefighters and who would also be a good administrator. Right up front, the interview focused on the candidate's experience in dealing with the "needs and problems of a combined paid/volunteer department." Exhibit 24, Question 3. Another question also asked the candidate to share his vision for the BSBFD. Exhibit 24, Question 5

16. Nothing in Lasky's experience (as demonstrated either in his application, his interview responses to the first panel, or his interview responses to the final interview panel) clearly defined him as necessarily superior to the other seven candidates. When measured against the hiring committee's demonstrated concern to have a person in the position who would unify the department and make a good administrator, Lasky, on paper and in the interview, could certainly have been construed to have been less qualified than some of the other candidates.

17. By way of example of the above, Miller's interview answers with respect to Question Number 5 certainly show that he was in tune with BSB's preeminent concerns over the paid firefighter/VFD schism and ways of narrowing that gap. His interview responses as recorded by Kiser (Exhibit 38, Miller interview responses),

Stordahl (Exhibit 39, Miller interview responses), Sesso (Exhibit 41, Miller interview responses), Dougherty (Exhibit 42, Miller interview responses) and Jacobson (Exhibit 43, Miller interview responses) demonstrate this. In the interview, Miller stated that if he were selected, his vision for BSBFD was to have the best trained and equipped fire department in the state and that part of reaching this goal was not only through training but also improving the relationship between the paid firefighters and the VFD. In several other facets of his interview, Miller repeated this vision of reducing the differences between the paid and volunteer firefighters and thus effecting a better BSBFD. Miller also demonstrated that he had significant experience in handling personnel problems. See, e.g., Exhibit 42, Miller interview responses. These were key points that legitimately swayed the final interview panel to choose Miller for the position.

18. Lasky answers to the interview questions were not clearly better than Miller's answers, and in some respects were not as good as those of Miller. For example, in explaining his experience with handling personnel problems, Lasky conceded that his experience was "minor." (Exhibit 42, Lasky interview response to Question 2.

19. Each final interview committee member scored each candidate and independently came to a conclusion about each candidate's ranking in comparison to the other candidates. As noted above, after all candidates had interviewed and each panel member had an opportunity to score each of the candidates, the committee engaged in a round robin to select the candidate to whom the job would be offered. Miller was the committee's unanimous choice for the position.

20. Stordahl works for Butte Public Housing. At one time, Stordahl and Kathy Lasky had a discussion over permitting Butte Silver Bow Housing Authority to gain access to National Criminal Information Center (NCIC) records of certain applicants for housing. Stordahl wanted the housing authority to be able to access those records to determine whether the applicants had criminal backgrounds. Those records could be accessed through BSB LED's 911 Center. Kathy Lasky, as head of the BSB LED's 911 center, refused to permit such access, citing NCIC rules which she believed prohibited such disclosures. Stordahl was able to obtain the same information from the State of Montana.

21. Neither Stordahl nor Kathy Lasky acted unprofessionally during the discussions over access to the NCIC records and their encounter. Their discussions had no impact on Stordahl's impartiality with respect to John Lasky's interview and

application. Even John Lasky himself characterized this as merely a disagreement between Kathy and Stordahl.

22. Sesso and Kathy Lasky had earlier had a professional disagreement over the use of 911 Funds to fund some county road signs. Sesso felt that rural addressing was imperative and that it would assist emergency responders in finding locations. Sesso had been informed that 911 Funds might be available to assist in this project. Sesso approached Kathy Lasky about obtaining the funds from the 911 monies that came into the county. Kathy Lasky felt that spending 911 monies for rural street signage was inappropriate. This upset Sesso, who was passionate in his belief that the rural road signage was critical. He did not, however, hold any grudge against Kathy Lasky for refusing his request for funds and this disagreement with Kathy did not affect his ability to fairly evaluate all of the candidates for the BSB Fire Chief position.

23. No one on the interview panel acted improperly in evaluating Lasky or any of the other candidates of the position. Jacobson and Clark, although being aware of Kathy Lasky's human rights complaint, did not permit that knowledge to improperly influence their selections. Nor did any of the other interview panel members engage in any improper evaluation of any of the candidates. Rather, all of the interview panel members were guided by legitimate concerns regarding filling the position with a strong administrator who could both handle personnel issues and bring the VFD and paid firefighters closer together.

24. The decision to hire Miller was a legitimate business decision that he was the best candidate to resolve legitimate concerns-bringing the paid firefighters and the VFD closer together and the need for strong administrative skills. The decision was not based upon a desire to discriminate against Lasky because he was married to Kathy Lasky nor was there any desire to retaliate against Lasky because he was married to Kathy Lasky.

IV. Opinion²

Lasky contends that BSBFD did not appoint him to the position of Director of Fire Services because he is married to Kathy Lasky who had filed a human rights complaint against BSB. Lasky contends that this conduct was both discrimination based on marital status and retaliation. BSBFD counters that there was no

² 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.

discrimination against Lasky because of his marriage to Kathy Lasky. BSB contends that the hiring of another candidate had nothing to do with any sort of effort to discriminate or retaliate against Lasky because of his relationship to Kathy Lasky. Rather, it was simply a legitimate hiring process that resulted in another candidate being chosen. BSB further contends that a retaliation claim cannot lie in this case under the facts put forth by Lasky. For the reasons stated below, none of Lasky's contentions have merit and his claim cannot be sustained.³

A. BSB Did Not Discriminate Against Lasky In Not Appointing Him to The Director Position.

Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of marital status commits an unlawful discriminatory practice when the reasonable demands of the position do not require a marital status 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 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). He must show (1) that he is a member of a protected class; (2) that he was qualified for the Fire Director Position which he was denied; and (3) that he was denied the appointment to the position in circumstances "which give rise to a reasonable inference that [he] was treated differently because of [his] membership in the protected class." *Id.*; Admin. R. Mont.

³ In reaching the factual and legal conclusions in this case, 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 questioning and interview process was not biased. The lack of bias or any discriminatory or retaliatory motive, and in particular the propriety of the questions and the hiring process in light of the applicable county policies, is a fact determination that needs no expert explication.

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 failure to appoint Lasky was based on a factor other than marital status. *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 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). Lasky, however, at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *St. Mary's Honor Center*, 509 U.S. at 507; *Heiat*, 912 P.2d at 792.

“[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)).

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 recognize that a claim of discrimination does not authorize 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 question here is whether BSB’s decision was based on marital status discrimination.

While it is true that Lasky was a member of a protected class (marriage to Kathy Lasky), it is not at all clear that he was the most qualified or that he was denied the promotion to Director of Fire Services in circumstances that give rise to reasonable inference that his marriage to Kathy Lasky was the basis for the denial, and thus his prima facie case is doubtful. Even if, however, he made out his prima facie case, he has failed in his ultimate burden of persuasion to demonstrate that the proffered legitimate reasons for the appointment of someone beside Lasky were not legitimate but mere pretext. To the contrary, BSBFD has proffered legitimate business reasons for hiring someone other than Lasky and, as demonstrated by the substantial evidence adduced at the hearing, those reasons were not mere pretext for perpetrating discrimination.

Lasky relies heavily on his assertion that he was the only candidate that clearly possessed the “Required Knowledge, Skill and Abilities,” as expressly set forth in the job posting and class specification for the [Director of Fire Services] position in question” in order to make both his prima facie case and to rebut BSBFD’s proffered legitimate basis for rejecting Lasky for the position. Lasky’s Reply Brief, page 11. The hearing examiner does not agree with Lasky’s assessment of his skills and abilities. Lasky clearly possessed outstanding technical skills regarding fire suppression and prevention. Very importantly, however, the class specification itself required the incumbent to also “establish and maintain close working relationships with representatives of other public safety and law enforcement agencies . . . , local businesses and industry representatives, all department employees and the general public.” Respondent’s Exhibit 15, p. 1. Lasky himself stated during the interview process that he had only “minor” participation in the obviously important personnel management of the job. While he stated at the hearing that he had all sorts of interaction with the union and in personnel situations, the critical time to make that comment was during the interview. He did not, and thus his suggestion that he was “obviously” the most qualified candidate at the times critical to this case-the time of the interview and decision process-is unfounded.

In addition, this same description of class specification dispels Lasky's contention that the job criteria changed as the candidates proceeded through the process. The criteria - including the need for strong administrative and personnel skills - was part of the consideration throughout the development and implementation of the hiring process as demonstrated by the class specification. Thus, contrary to Lasky's assertion, the hearing examiner does not find that the selection criteria changed during the interview process.

Lasky's technical skills in fire suppression and prevention, while important, were not the only skills, nor even the most important skills of the position. Lasky cannot assert that BSBFD could not legitimately premise employment on the administrative and personnel skills of the candidates once a minimal level of technical competence in the field had been established. That is what occurred in this case and Lasky's argument that he was obviously the best candidate does nothing to either strengthen his *prima facie* case nor to rebut the legitimacy of the reasons proffered by BSBFD for not hiring Lasky into the Fire Services Director position.

Nor does a close review of BSB's Policy 125 (Exhibit 101) advance Lasky's position as he suggests. Lasky takes issue with the fact that the hiring process relied so heavily on the candidates' personnel skills and ability to assuage the differences between the paid firefighters and the VFD. He argues, in essence, that the emphasis on these two criteria violated the requirements of Policy 125. A fair reading of Policy 125, however, clearly permits such a consideration to be made, as it plainly states that the hiring authority can make the hiring recommendation based on a selection procedure *that meets the hiring authority's needs*, so long as (1) the procedure is developed by persons familiar with the position and (2) is developed in advance of review of the applicant qualifications. Exhibit 101, Policy 125, 125-5. Lasky has presented no evidence to show that these two considerations were not followed and in fact, they were. Each of these things was done in this process and there is absolutely nothing in Policy 125 that suggests the hiring process in this case was improper.

Moreover, the hearing examiner is convinced, based on the testimony of Jacobson, Clark, Sesso, Stordahl, and the deposition testimony of Kiser, that there was no discriminatory nor retaliatory animus behind the decision to hire Miller . All of the seven candidates possessed adequate skills to understand the technical aspects of the job. This was ensured through the initial screening process conducted by the Fire Commission. Miller demonstrated, both through his interview and on paper, that he had administrative and personnel skills that were arguably superior to those of Lasky. Lasky conceded during his interview that his experience in handling personnel matters was "minor" and Lasky did not, in his position as assistant fire chief, directly

supervise any staff. BSBFD's basis for not hiring Lasky were not pretextual, they were legitimate. Lasky has thus failed to demonstrate by a preponderance of the evidence that BSBFD discriminated against him on the basis of his marital status.⁴

B. BSBFD Did Not Retaliate Against Lasky.

Lasky also contends that he was denied appointment to the Director position in retaliation because he supported his wife Kathy Lasky's human rights complaint against BSB. 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. A significant adverse employment action against a person because that person is associated or related to a person who has engaged in protected activity is illegal retaliation. Admin. R. Mont. 24.9.603 (1). A charging party can prove his retaliation claim under the Human Rights Act by proving that (1) he is associated or related to a person in a protected class or who has engaged in protected activity engaged in a protected practice, (2) that his employer took an adverse employment action against him, and (3) that a causal link existed between protected activities and the employer's actions. Admin. R. Mont. 24.9.610 (2).⁵

As is true of a discrimination claim, circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. And, like a discrimination claim, 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

⁴ Because the hearing examiner has found that none of the interviewers had a discriminatory motive in choosing Miller over Lasky, it is unnecessary to address BSBFD's further contention that even if Clark and Jacobson were improperly biased against Lasky, no discrimination would exist because the other interviewers were not biased against Lasky.

⁵ The respondent appears to suggest in its closing brief that it is not possible to state a cognizable claim of retaliation in circumstances where a party claims that he or she has been retaliated against due to being associated with or related to a person who has engaged in protected activity. Admin. R. Mont. 24.9.610 (2) clearly states that such a claim is a cognizable basis for recovery under the Montana Human Rights Act. In this case, as will be shortly explained, there was no retaliation because the BSBFD was motivated solely by legitimate concerns when it chose not to hire Lasky for the Fire Services Director position.

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). Again, however, Lasky bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by retaliatory animus. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632.

As was also true of the discrimination claim, Lasky's retaliation claim fails because of the inescapable conclusion that BSBFD acted on legitimate grounds in not hiring Lasky into the Fire Services Director position. The credible evidence in this matter does not preponderantly support Lasky's position that the imposition of employment discipline was motivated by retaliation. The lynch pin of Lasky's argument-that he was clearly the superior candidate-is not in place to hold his argument together. As stated above, all of the seven finalists possessed adequate skills to understand the technical aspects of the job as ensured through the initial screening process conducted by the Fire Commission. Miller demonstrated that he had administrative and personnel skills that were arguably superior to those of Lasky. Lasky conceded during his interview that his experience in handling personnel matters was "minor" and Lasky did not, in his position as assistant fire chief, directly supervise any staff. BSBFD's basis for not hiring Lasky were not pretextual, they were legitimate. Lasky has thus failed to demonstrate by a preponderance of the evidence that BSBFD retaliated against him in not hiring him for the Fire Services Director position.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. BSBFD's decision to not hire Lasky for the Fire Services Director position was not based on discrimination due to marital status.
3. BSBFD did not retaliate against Lasky because of his marriage to Kathy Lasky who was pursuing a human rights complaint against BSB.
4. Because there has been no showing that BSBFD discriminated or retaliated against John Lasky, there has been no showing that BSBFD violated either the Montana Human Rights Act or the Governmental Code of Fair Practices Act.
5. Because Lasky has failed to prevail in any of his 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 BSBFD and John Lasky's complaint is dismissed.

Dated: March 17, 2006.

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