BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0063011928 and 0079012064:

MURAT KALINYAPRAK, Charging Party, vs. POLSON COUNTRY CLUB AND CITY OF POLSON, Respondents.	) Case Nos. 695-2007 & 1369-2007	**DECISION**

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I. PROCEDURE AND PRELIMINARY MATTERS

On March 27, 2006, Murat Kalinyaprak filed a Human Rights complaint against the city of Polson and the Polson Country Club (hereinafter golf course) alleging marital status discrimination in providing slightly discounted season pass fees for married couples. On July 28, 2006, he filed an additional complaint against the respondents alleging retaliation. The matters were consolidated for hearing and the parties stipulated to permitting the administrative proceedings to extend for more than 12 months after the filing of the discrimination complaint.

Prior to trial, the respondents filed a motion for summary judgment on the discrimination claim asserting as a matter of law the couple's discount was not violative of Montana Code Annotated §49-2-304. Kalinyaprak responded and opposed the motion and filed a cross motion for summary judgment alleging that as a matter of law the couple's discount violated Montana Code Annotated §49-2-304. Each of these motions was denied.

Thereafter, Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on May 31, 2007, June 1, 2007 and June 6, 2007. Kalinyaprak represented himself. Jack Jenks, attorney at law, represented the city and the golf course. Kalinyaprak, Wilma Mixon-Hall, Rory Hornung, Elsa Dufford, Rich Bell, Margie Hendricks, Matt Olson, Mike Humphrey, Ronald Rogers, Jr., Aggie Loesser, Former Mayor Randy Ingram, Beth Smith, Ron Melvin, Bruce Agrilla, Jan Myers, Bonnie Manicke, James Raymond, Tom Corse, Bob McClellan, Dave Rumsvold, Marti Corse, and Roger Wallace all testified under oath. The parties stipulated to the admission of Charging Party's exhibits 1, 2, 5-9, 14-19, 21-33, 35, 37-45, 47, 50, 53, 55, 56,

62, and 91and Respondent's Exhibits 101, 102, 105, 107, 108, 110-125, 127, and 128. In addition, at hearing the following exhibits were admitted: Charging Party's exhibits 12, 13, 51, 52, 58, 61, 63, 64, 68, 70, 80, 90, 92, 93 and Respondent's 103, 126, 129, 130, and 131.

Each party requested time for post-hearing briefing. These requests were granted and the parties final briefs were timely filed at which time the record closed. In addition, the respondents requested that Kalinyaprak's post hearing pleading which contains proposed findings of fact be stricken. While the hearing officer does not adopt Kalinyaprak's proposed findings of fact, the hearing officer declines to strike the pleading. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing officer makes the following findings of fact, conclusions of law, and decision.

II. ISSUES

1. Should Kalinyaprak be permitted to amend his complaint to allege religious discrimination?

2. Does the golf course's practice of issuing a couple's pass discount violate Montana's prohibition against marital status discrimination?

3. Did the city of Polson or the golf course retaliate against Kalinyaprak for engaging in protected conduct?

III. FINDINGS OF FACT

1. The city of Polson, Montana is a governmental entity which owns a municipal golf course known as the Polson Country Club. At all times material to this matter, Roger Wallace has been the head professional golfer and has managed the golf course.

2. The golf course's long range planning and affairs is run by the Polson Golf Board. The board is comprised of Polson citizens and one councilman. At all times material to this case, Councilman Tom Corse served as the representative to the golf board.

3. The Polson Golf Association is a non-profit association separate and apart from the city of Polson and the golf course.

4. Kalinyaprak took up the sport of golf in 1999. He has been an avid player, buying both single's season passes and on one occasion a couple's season pass (during the 2005 golf season) at the golf course.

5. The golf course does not have applications for membership, it only provides annual passes which the public can purchase. Each year the golf course sends notices to its prior customers, as well as to anyone who requests such a notice. The notice contains the pricing

structure for the year. The pricing structure is developed by the golf board, then approved by the city council.

6. Prior to 2006, the pricing structure allowed for various discounts. Those discounts were for couples, city residents, juniors and college students. Also included were discounts for city employees, golf course maintenance employees and members of the city fire department.

7. Before 2006, the golf course did not define "couple." People who held themselves out as couples, although not legally married, were allowed to purchase a couple's pass. Kalinyaprak and his female friend, Wilma Mixon Hall, purchased a couple's pass during the 2005 season.

8. Kalinyaprak became upset with the way that the golf course was being run by Wallace and the rising cost of season passes. Throughout 2005, 2006 and 2007, Kalinyaprak has criticized Roger Wallace, the golf board and the city council about their business management of the golf course. His ire was highlighted by his appearance before the Polson City Council at a council meeting held on February 22, 2005. At the council meeting, he presented a one hour diatribe about why he thought the golf course was being improperly run. Kalinyaprak continued to assail Wallace's management throughout 2006 and 2007, suggesting at different city council meetings that the golf course is going to the dumps, that the course would be more profitable if it were leased out as pasture land (to highlight how he felt the golf course was losing money because of Wallace's management) and that Wallace should be fired.

9. Kalinyaprak's anger over the golf course's management and the rising cost of playing also spilled over to his relationship with other golf course employees. Prior to 2005, Kalinyaprak was on good terms with Matt Olsen, the golf shop manager. As prices started to go up, their relationship deteriorated.

10. On May 12, 2005, Kalinyaprak decided to play an evening round on the "Old Nine" at the golf course. Season pass holders are required by club rules to sign in before they play a round of golf. Kalinyaprak failed to sign in. Olsen saw Kalinyaprak going to play and looked at the sign in book. Olsen noticed that Kalinyaprak had not signed in. As he does with all persons who do not sign in, Olsen then approached Kalinyaprak to ask him if he had signed in. Kalinyaprak indicated he had, but Olsen knew he had not. Kalinyaprak claimed he did not realize that Olsen was referring to Kalinyaprak's playing on this particular night. Olsen then responded to Kalinyaprak "What night did you think I was referring to, you rock star."

11. Olsen uses the term "rock star" with several people, not just Kalinyaprak. For example, he has referred to Wallace (his boss) as a rock star on occasion. In referring to Kalinyaprak as a rock star on May 12, 2005, Olsen meant no harm and only intended to inject some levity into his conversation with Kalinyaprak.

12. For legitimate business reasons and in part because of Kalinyaprak's urging, in 2006 the golf course defined "couple" as "a solemnized married couple to include common law." This new definition was included in the 2006 notice sent out to golfers.

13. The rationale for offering a couple's pass is straightforward, legitimate and obviously not based on any desire to discriminate. As the 2006 notice indicates (and the hearing officer finds), the "rationale for offering a couple's pass was to make it more economically attractive (especially when also considering junior pass rates) for families to enjoy the recreational opportunity Polson Country Club has to offer." In addition, as Wallace testified, and the hearing officer finds, offering a couple's pass entices two person to join, resulting in more potential income for the golf course (somewhat like the principles behind a volume discount). These are wholly legitimate reasons for implementing a couple's discount.

14. The 2006 rates set an in-city couple's pass at $700.00, and an in-city single pass at $395.00. Each of these passes is identical in that each permits the holder to play the course as often as he or she wants to. The only difference is that a player playing on a couple's pass pays $45.00 per year less than a single person.

15. The $395.00 single's pass amount is not oppressive and in fact represents a good value for the person who has a single season pass. Indeed, the $395.00 rate presents a significantly reduced price to a single player over the per round (18 holes) price of $39.00.

16. Prior to 2006, the golf course did not require that a couple only purchase a pass if they were part of a solemnized or common law marriage. The golf course does not police its members.

17. Once the golf course made known its definition of "couple" to its members, it received such applications in good faith. The golf course issued couple's passes to only those individuals who represented themselves as "couples."

18. Since the adoption of the definition of "couple" in 2006, the golf course has never, to its knowledge, provided a couple's pass to a couple that did not fall within that definition.

19. Prior to adopting the definition of "couple," Wallace surveyed other Montana municipal and private courses to determine if they offered couple's passes. Wallace discovered that out of 13 golf courses, either city or county-owned, 12 offered couple's passes. Likewise of the 31 golf courses responding to his inquiry within the boundaries of the Western Montana Chapter of the Professional Golfer's Association (there are a total of 34 in that association), only 6 do not utilize couple's passes. Respondent's Exhibits 103 and 130. 25 courses (or roughly 80% of those courses responding to Wallace's inquiry) utilize couple's pass discounts. A sample of those responding revealed the following price structure for couple's passes during the 2006 golf season:

- Cabinet View Country Club, Libby, Montana (privately owned course)

$360.00 single pass / $660.00 married couple

- Mission Mountain Country Club, Ronan, Montana (privately owned)
  $495.00 single pass / $875.00 couples pass

- Anaconda Country Club, Anaconda, Montana (privately owned)
  $300.00 single pass / $400.00 spouse pass

- River's Bend Golf Course, Thompson Falls, Montana (privately owned)
  200.00 single pass / $260.00 couple's pass

- Bill Roberts Golf Course, Helena, Montana (publicly owned)
  $525.00 single pass / $790.00 couple's pass / $750.00 senior married couple's pass

- University of Montana Golf Course, Missoula, Montana (publicly owned)
  $480.00 single pass / $720.00 individual and spouse pass

- City of Great Falls Golf Course, Great Falls, Montana (publicly owned)
  $400.00 single pass / $750.00 couple's pass

- Phantom Hills Golf Club, Missoula, Montana (privately owned)
  $1,750.00 single pass / $2,700.00 married couple & children under 23

- Signal Point Golf Club, Fort Benton, Montana (privately owned)
  $318.00 single pass / $523.00 designated spouse and child of member pass

- Marias Valley Golf and Country Club, Shelby, Montana (city leased course)
  $460.00 single pass / $640.00 couple (man and wife)

- Old Works Golf Course, Anaconda, Montana (city leased course)
  $650.00 single pass / $900.00 couple's pass

- King Ranch Golf Course, Frenchtown, Montana (privately owned)
  $440.00 single pass / $725.00 couple's pass

20. After learning that offering a discounted couple's pass is standard practice for both publicly and privately-owned golf courses, the Golf Board recommended that the definition be added to the Country club's policy and procedures handbook.

21. Given this definition of "couple," Kalinyaprak was not eligible to purchase a couple's pass in 2006. Kalinyaprak was given the choice of purchasing a full single pass or a 9-hole pass.

22. All singles who purchased a single pass did so because either they could not meet the definition of "couple" or their spouse or common law partner chose not to participate.

23. Discovering he would no longer qualify for the couple's pass, on February 17, 2006, Kalinyaprak sent a letter to Mr. Wallace advising that he was still going to pay for only half of a couple's pass, even though he was purchasing an in-city single pass. Kalinyaprak included a check for $350.00.

24. Wallace responded to Kalinyaprak in correspondence dated February 24, 2006. Wallace returned Kalinyaprak's check and advised he must pay the full amount for an in-city single, $395.00.

25. At no point in that letter did Wallace discourage Kalinyaprak from purchasing a single pass or from using the golf course.

26. Wallace allowed Kalinyaprak an extension of the general discount period, so that Kalinyaprak would not have to pay a late fee.

27. At no point did either Wallace or any representative of the golf course, attempt to withhold, deprive, or discourage Kalinyaprak from using the golf course.

28. From 1996 through May 31, 2007, the golf course experienced a general decline in usage (usage by all players). Notably, however, there was very little decline in the usage of the course between 2005 and 2006 even though the golf course implemented the new couple's pass definition in 2006 form the 2005 usage. Testimony of Roger Wallace. After the implementation of the new couple's pass, several couples signed up for the pass.

29. The golf course hired Kalinyaprak in approximately December 2003, to assist in developing and maintaining its website. Kalinyaprak's services included yearly renewal of the golf course domain registration as well as monthly web hosting services.

30. By email correspondence dated September 29, 2005, Kalinyaprak notified Wallace the golf course needed to renew its domain registration.

31. By email correspondence dated October 27, 2005, Wallace requested Kalinyaprak provide the golf course password and user name so the golf course could complete the registration process.

32. On October 28, 2005, Kalinyaprak submitted an itemized bill to the golf course in the amount of $135.00. This included a domain name registration fee of $15.00 for the 2006 billable year, as well as a domain hosting fee of $120.00 for the 2006 year, for a monthly charge of $11.25.

33. Wallace decided in November, 2005 not to renew Kalinyaprak's services. He had three reasons for doing so. First, the website itself, while adequate, did not have all the "bells and whistles" that the golf course was looking for to make the website attractive to users. Second, it was important to the golf course that the website be user friendly for golf course employees to enable them to easily and quickly post information to the website. Instead, Wallace got complaints that the website was very time consuming and that it was difficult to go into the website and make changes.

34. Wallace's third reason for terminating Kalinyaprak's service was that Wallace felt that Kalinyaprak was unresponsive as a website administrator. This stemmed from Kalinyaprak's failure to respond to Wallace's October 27, 2005 e-mail requesting Kalinyaprak to provide the password needed to renew the domain name registration. Kalinyaprak never responded to this e-mail.

35. The city of Polson terminated Kalinyaprak's services by letter dated February 6, 2006.

36. On February 7, 2006, the city of Polson paid Kalinyaprak, $48.75, which was the pro-rated payment for his services provided for December, January and February plus the $15.00 domain name registration fee.

37. On February 24, 2006, Kalinyaprak submitted an unitemized bill in the amount of $86.25 to the golf course. This unitemized bill reflected the $48.75 pro-rated portion paid by the city for domain registry and hosting for the 2006 year.

38. The city declined to pay the $86.25 to Kalinyaprak, as it had already provided a prorated payment for the 2006 year.

39. By letter dated March 9, 2006, Kalinyaprak again requested the golf course pay the remainder of the 2006 bill in the amount of $86.25.

40. Kalinyaprak filed a claim with the Montana Human Rights Commission on March 27, 2006, alleging the golf course discriminated against him based on his marital status.

41. Kalinyaprak's filed a claim in Small Claims Court dated May 8, 2006, to recover $86.25 from the golf course.

42. On May 19, 2006, Polson City Attorney, James Raymond, pursuant to statutory right, removed Kalinyaprak's claim from Small Claims Court to Justice Court because a city could not be a party to a lawsuit in small claims court and to allow Raymond, a licensed

Montana attorney, to provide legal representation for the city.[1] Kalinyaprak did not appear for the June 1, 2006 pretrial hearing in that court. Because of his failure to appear, the Justice of the Peace dismissed his claim.

43. With the concurrence of the city of Polson, the Justice of the Peace allowed Mr. Kalinyaprak to re-instate his claim.

44. The pretrial hearing was ultimately re-scheduled for August 9, 2006.

45. On Aug. 8, 2006, City Attorney Raymond filed a *Notice Allowing Judgment* for $106.25 ($86.25 + $20.00 filing fee).

46. On August 9, 2006, City Attorney Raymond attended the pretrial conference with City Mayor Randy Ingram and Roger Wallace as they had ultimate authority to settle the claim or to enter into stipulations and make admissions regarding Kalinyaprak's claim. As a result of that conference, City Attorney Raymond gave Kalinyaprak a check for $106.25 on August 9, 2006.

47. On May 15, 2006, Kalinyaprak attended a Polson City Council Meeting. During that meeting Kalinyaprak was advised that, based on advice of the city attorney, the city council could not discuss his pending complaint filed with the Human Rights Commission.

48. On June 29, 2006, Kalinyaprak attended a public hearing regarding the Super Wal-Mart. The hearing was extremely crowded and many persons wished to speak on the issue. In order to ensure each person who wished to speak could do so, the city council imposed a two minute speaking limit on each person who spoke. During Kalinyaprak's second presentation, one of the council members, Bruce Agrilla, walked over to him. Agrilla said nothing to him and never touched him. Agrilla did not approach Kalinyaprak until one minute and 57 seconds of Kalinyaprak's two minute speaking time had elapsed. Later, Kalinyaprak got up for a third time and addressed the council. He joked with the council about the fact that Agrilla had earlier approached him.

49. On August 2, 2006, Kalinyaprak filed a Charge of Discrimination with the Montana Human Rights Commission alleging that the city and golf course engaged in retaliatory actions against him.

50. Kalinyaprak's anger over what he perceived to be mismanagement of the golf course preceded any concern he might have had about a couple's pass. For example, Kalinyaprak's March 27, 2006 letter to Randy Wallace noted Kalinyaprak's complaints for the previous two years over the rising costs of playing golf. He then goes on to state that he hopes "that the

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[1]Montana Code Annotated § 25-35-505(1) and (2) prohibits the state or any agency of the state form appearing in small claims court and prohibits parties from being represented by attorneys in small claims court.

'long-going' mismanagement of the public golf course and possible mishandling of public assets, by everyone involved, will be identified and rectified in an open manner allowing public input and participation." In addition, Kalinyaprak has threatened to file additional claims against the city about policies such as the three minute rule implemented by the city council. See Exhibit 55, February 21, 2007. The purpose of the rule, which limits a person's time to speak to three minutes, (though it does not limit the number of times they can speak) was implemented to ensure that more interested persons would be able to speak at city council meetings.

51. Retaliation played no role in any action taken by the city or the golf course.

52. At the conclusion of the hearing, Kalinyaprak moved to amend his complaint to further allege religious discrimination. The basis for his motion was the testimony of Marty Corse, Tom Corse's spouse. On May 13, 2006, Mrs. Corse, the secretary/treasurer of the Polson Golf Association (PGA), authored a letter from the PGA to Kalinyaprak which terminated Kalinyaprak's service to the PGA as its website provider. During her testimony, Mrs. Corse stated that she found Kalinyaprak's website to be offensive to her religious beliefs. Kalinyaprak provided no evidence from which a trier of fact could find that his religious beliefs had caused anyone to discriminate against him.

IV. OPINION[2]

Kalinyaprak alleges that the city has discriminated against him based on his marital status by not permitting him to have an additional $45.00 per year discount on a season pass which already saves him hundreds of dollars in greens fees. He further alleges that several acts by the city constituted retaliation, even though some of these acts occurred long before he filed a human rights claim. Most prominent among these allegedly retaliatory acts were (1) terminating Kalinyaprak's services as a website provider for the golf course, (2) removing his contract suit against the city from small claims court to justice court, and (3) not permitting him to speak for a full two minutes when he began speaking for the third time at a public meeting regarding the building of a Super Wal-Mart. Kalinyaprak also asks to amend his complaint to allege religious discrimination based on testimony at the hearing.

Kalinyaprak cannot be permitted to amend his complaint to allege conduct which has never been the subject of any complaint by Kalinyaprak and which occurred over one year earlier against an entity that is not a party to this proceeding. The city has not unlawfully discriminated against Kalinyaprak in limiting couple's passes to those who are recognized as married under state law. The discount is not aimed at discriminating against Kalinyaprak at all. Finally, there simply is factual basis for concluding that any city action directed toward Kalinyaprak was undertaken in retaliation for his pursuing protected activity.

A. *The Motion to Amend Is Untimely*.

Kalinyaprak has asked to amend his complaint to allege religious discrimination, asserting that Mrs. Corse's testimony provides the basis for finding that the city of Polson discriminated against him on the basis of his religion. Kalinyaprak does nothing to link the alleged discrimination to the defendants in this case. Indeed, he never filed a complaint alleging religious discrimination in this case or mentioned anything about religious discrimination until the last day of hearing. Accordingly, there is no legal basis upon which the complaint can be amended.

It is axiomatic that an amendment to a complaint can occur only where the evidence is or can be made relevant to the proceedings. *See, e.g.* Rule 15. MR Civ. Pro. The evidence upon which Kalinyaprak moves to amend could do no more than show that he might have a claim of cation against the Polson Golf Association, an entity not involved in this law suit. Moreover, as the respondent correctly notes, the only evidence presented here is that Mrs. Corse's religious beliefs were offended by Kalinyaprak. Kalinyaprak has made no effort to show that he was subjected to discrimination based upon his religious beliefs. He cannot, therefore, make a threshold showing of the religious discrimination which is proscribed by the Mont. Code Ann. §49-2-304(1) and granting the amendment under these circumstances would be futile.

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[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.

On this basis alone, the motion should be denied . *See, e.g.*, *Hobble Diamond Cattle Co. v. Triangle Irrigation* Co., (1991), 249 Mont. 322, 325, 815 P.2d 1153, 1155 (A tribunal acts appropriately in denying a motion to amend where the amendment would be futile).

Finally, as the respondent also points out, Kalinyaprak's motion to amend is untimely under the Montana Human Right's Act. To permit the amendment would deny the respondents the process they are due. *Centech v. Sprow*, 2006 MT 27, 331 Mont. 98, 128 P.3d 1036 . In *Centech*, the Montana Supreme Court affirmed a district court determination that the respondent had been denied due process at the hearing stage because the hearing officer *sua sponte* amended the complaint to conform to the evidence presented at hearing when that evidence had not been pled in the complaint. Recognizing that the Montana Human Rights Act did not permit the commission to consider claims filed more than 180 days after the occurrence or discovery of conduct violating the Act, the supreme court concluded that the hearing officer erred in amending the complaint to include a factual basis for recovery which had not been pled in the complaint. 2006 MT ¶24, ¶25.

Kalinyaprak has not alleged that he was not or could not reasonably have been aware of the facts upon which he now moves to amend the complaint either at the time the complaint was filed or at least after the completion of discovery in this case. Yet despite the passage of several months and his ability to undertake thorough discovery, he never raised or disclosed any of the facts upon which he now relies to amend his complaint. Under this circumstance, for the hearing officer to permit such an amendment would be to effectively engage in the same conduct that the supreme court condemned as violative of due process in *Sprow*. Accordingly, under no circumstance in this case could the hearing officer permit Kalinyaprak's untimely amendment.

B. *Implementation of the Couple's Discount Does Not Violate The Public Accommodation Statute*

Montana Code Annotated §49-2-304, the Montana Public Accommodation statute, states :

"Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner . . . of a public accommodation :
(1) (a) to refuse , withhold from, or deny any of its services, goods, facilities, advantages, or privileges because of . . .marital status . . .
(3) Nothing in this section prohibits public accommodations from giving or providing special benefits, incentives, discounts, or promotions for the benefit of individuals based on age.

The purpose behind this statute is to prevent invidious discrimination against persons because of their marital status. This statute prohibits conduct which is intended to make persons feel unwelcome, unaccepted, undesired or unsolicited because of their marital status. That statute was not enacted nor should it be interpreted to prohibit conduct which is not intended to and does not in fact create such a result.

While the Montana Supreme Court has not ruled on the issue of whether discounting of admissions constitutes marital status discrimination, other states have found no discrimination in the context of alleged sex and age discrimination in the discounting of admission to play tennis, discounting of tickets at sports events, discounting of drinks at "ladies' nights," and the discounting of memberships for women to a racquetball club. *See, e.g., Kahn v. Thompson*, 185 Ariz. 408, 916 P.2d 1124 (App. 1995)(discounting tennis fees for minors and seniors); *MacLean v. First Northwest Industries of America*, 96 Wn 2d.338, 635 P.2d 683, 685 (1981)(Utter, J., dissenting)(discounting ticket prices for women during ladies night at basketball games); *Dock Club v. Liquor Control Commission*, (1981), 101 Ill. App. 3d 673, 428 N.E. 2d 735 (giving women discounted drink prices during ladies' night); *Magid v. Oak Park Racquet Club Associates, Ltd.*, (1978), 84 Mich. App. 522, 269 N.W. 2d 661(allowing discounted memberships for women as a promotion to attract more females). While there is a split in the authority[3], it appears to the hearing officer that the better reasoned cases have held that discounts similar to the one in the case at bar(but related to age and sex, not marital status) do not violate the prohibitions against discrimination because they do not entail the invidious discrimination that the statutes are designed to prevent. Far from excluding persons by making them feel unwelcome, unaccepted, or unsolicited, these discounts are designed to encourage access to the broadest range of persons possible, something which any interpretation of the discrimination statutes should welcome, not discourage.

In *Kahn*, the plaintiff alleged that the city of Tucson engaged in unlawful age discrimination by charging adults between the ages of 18 and 60 admission fees of $1.50, while charging senior and juniors only $1.00. The Court disagreed and explained that, "it is readily apparent that prohibiting age-related discounts is not an intended objective or construction of the [anti-discrimination] legislation . . . such practice is not the invidious discrimination which the [anti-discrimination] ordinance seeks to prevent." 185 Ariz. at 412-13, 916 P.2d at 1128-29. Rather, such discounts are a "reflection of widely accepted public policy." *Id.*

In *MacLean*, the Washington Supreme Court, construing a public accommodation statute which is very similar to Montana's statute, found that a "ladies' night" ticket price discount for women at basketball games held in a city coliseum did not violate Washington's public accommodation statute. The Washington public accommodation statute in question in that case provided people "a right to be free from discrimination because of sex, in the full enjoyment of any accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage , or amusement." RCW 49.60.030(1)(b). The *MacLean*

[3] Other jurisdictions, notably California (*Koire v. Metro Car Wash*, 40 Cal. 3d 24, 707 P.2d 195 (1985)) and Iowa (*Ladd v. Iowa West Racing Ass'n.*, 438 N.W. 2d 600 (Iowa, 1989)) have disagreed with the reasoning of cases such as *MacLean* and have found that such discounts constitute impermissible discrimination under their states' public accommodation statutes. The most recent compilation of the varying cases which the hearing officer could find is contained in the law review article *Comment: Is Ladies' Night Really Sex Discrimination? Public Accommodation Laws, De Minimus Exceptions, and Stigmatic Injury*, 36 Seton Hall L. Rev. 223 (2005). In that article, the author very cogently (and the hearing officer believes correctly) argues that gender based differential pricing, particularly ladies' nights, is not the type of conduct that anti-discrimination statutes are designed to combat.

Court reasoned that the language of Washington's public accommodation statute revealed the legislature's concern that "no person should be treated as not welcome, accepted, desired, or solicited . . . [t]his provision reflects a perception of the evil which characterizes discrimination in places of public accommodation." *Id.*, at 686. Based on this understanding of the statute, the *MacLean* Court found that "the discount on ticket prices for women was not calculated to cause the respondent to feel unwelcome, unaccepted, undesired or unsolicited." *Id.* The Court further stated that the forbidden discrimination must be damaging in its effect and in that instance it was not, as no one was denied entrance to the basketball game. *Id.*

In *Dock Club*, the Illinois Court of Appeals considered whether a bar's ladies' night wherein only women were given discounted drink prices violated a public accommodation statute. The public accommodations statute there prohibited liquor licensees from denying "any person the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of any premises" in which liquor was sold. Ill. Rev. Stat. 1979, ch. 43, ¶133. In finding that the ladies' night discount pricing did not violate the statute, the court reasoned:

> The crucial question is whether the price differential denies persons, not able to obtain the lower price, the "equal enjoyment" of the facilities. Clearly, if the higher price was exacted for the purpose of discouraging those charged the higher price from patronizing the establishment, or if it had that effect, it would deny them of the equal enjoyment. Here, however, the price charged males on ladies night was the regular established price and obviously not a price established for the purpose of discouraging their patronage. That charged females was a price reduced to a nominal sum and one obviously set for the purpose of encouraging their patronage.

101 Ill. App. 3d at 676, 428 N.E. 2d at 738.

The logic of these cases is straightforward and their force is compelling. Where the discount is not designed to discourage participation and does not in fact discourage participation of a protected class, the discounting is not the type of invidious discrimination that public accommodations statutes are designed to prevent. There is absolutely no evidence that either the couple's pass price or the single's pass price in the case at bar was designed to exclude or limit patronage of golfers based on their marital status. There is no evidence that Kalinyaprak was treated by the golf course as unwelcome, unaccepted, undesired or unsolicited . To the contrary, the golf course has provided him and all singles with their own means for receiving a discount over the regular greens fees structure ($39.00 per 18 hole round) by permitting them to purchase a season pass which permits unlimited play during the golf season for only $395.00, a program that saves singles potentially thousands of dollars each summer over the regular greens fees.

Our public accommodation statute, like the statutes at issue in *Kahn*, *MacLean* and *Dock Club* requires proof that the golf course either withheld from or denied Kalinyaprak any of its goods or services. The golf course has ***never*** refused or denied Kalinyaprak the use of its services

or facilities nor has it denied him the ability to take advantage of the highly discounted single's pass. In addition, the golf course voluntarily extended its fee deadline in 2006 so that Kalinyaprak would not incur a late registration fee. *See* Exhibit 105, Feb. 24, 2006 letter from Roger Wallace. As the evidence in this case plainly shows, the intent behind the golf course's discount prices was to make the activity affordable for families and encourage family involvement. The definition of "couple" was simply a means to carry out that legitimate intent. There is no evidence that the implementation of the couple's discount was intended as a means to exclude unmarried persons from enjoying the use of the golf course.

The utilization of couple's pass discounts appears to be widespread among both public and private golf courses in Montana. Such a discount serves the salutary purpose of not only making golf more affordable, but it also serves the legitimate business interest of attracting more players to the golf course. Far from being designed to stigmatize and exclude a protected class of persons, the couple's pass in this case is designed to broaden the availability of golf to persons in the Polson area. It would indeed be ironic that a legitimate business program which is not intended to exclude persons but rather to encourage the participation of more people would be found to be illegal under a statute that is designed to do the very same thing.

The hearing officer can find no basis in the policy of the statute that would require a finding that utilization of a couple's pass amounts to discrimination under the statute. Prior to 1991, the public accommodations statute did not contain a reference to marital status. During the 1991 legislative session, HB 596 amended Mont. Code Anno. 49-2-304 to include a reference to marital status. The legislative history of HB 596 plainly shows that the only real concern behind that amendment was to ensure that couples would not be discriminated in housing on the basis of marital status. There is no history that indicates there was any desire on the part of the legislators or those who testified in favor of the amendment to end discounts like couple's passes which are not intended to discriminate.

The legislative history behind subsection 3, which explicitly permits discounting on the basis of age, further demonstrates that the legislature had no intention to end legitimate traditions of discounting designed to promote participation by adopting the public accommodations statute. The exception was engrafted onto the statute during the 1989 legislative session (HB 16), prior to the 1991 amendment to the statute which inserted the prohibition against discrimination based on marital status. The minutes of the Committee on Business & Economic Development show that the sponsor of the bill (Representative Driscoll), introduced the bill "to protect businesses from unintentional violation of laws proscribing discrimination against senior citizens and minors." Minutes of the Committee on Business and Economic Development, January 6, 1989). No persons spoke against the amendment and it passed through the legislative committee with a unanimous "do pass" recommendation. Anne MacIntyre, who appeared on behalf of the Montana Human Rights Division, appeared before the committee and spoke in favor of enacting the amendment. In doing so, Ms. MacIntyre insightfully noted that

> "Providing special benefits for our honored [senior] citizens and for children is not the type of invidious discrimination the civil rights laws were designed to prohibit. We should change our law to make sure that the good faith efforts of businesses to provide these benefits are not illegal."

Id.

The hearing officer is cognizant that statutory rules of construction prohibit the hearing officer from either inserting something in the statue which is not found there or omitting something that is found within the statute. Mont. Code Ann. §1-2-201. The hearing officer is also aware that application of the canon of statutory construction *"expresio unius est exclusio alterius"*(the expression of the one is the exclusion of the other) to this case could result in a conclusion that couple's passes violate the public accommodations statute because that type of discount is not specifically mentioned in the statute. However, in construing a statute the overriding principal is to ascertain and give effect to the intent of the legislative body and a statue should not be interpreted in a fashion that leads to absurd results or an interpretation that is at odds with the legislature's intent. *Kahn, supra*, 916 P.2d at 1128. Here, reaching a conclusion that the public accommodations statute outlaws couple's price discounting would ignore that the legislature's intent, as demonstrated by the legislative history, was to eradicate invidious discrimination, not to end practices designed to encourage greater participation which do not invidiously discriminate. Indeed, there appears to be no logical or rationale way to uphold the intent of the statute as evinced in both the plain language and the legislative history of subsection 3 and at the same time hold that a couple's pass which provides a de minimus golf discount amounts to unlawful discrimination.

In addition, the hearing officer cannot ignore the fact that both before and after the implementation of the marital status amendment to the public accommodations statute in 1991, the legislature in other areas has unequivocally embraced distinctions between married and unmarried couples. For example:

Mont. Code Ann. §§ 15-30-112, -122 and -134 (standard deductions and exemptions for married couples and determination of marital status);

Mont. Code Ann. § 19-6-505 (retirement benefits payable to surviving spouses of deceased highway patrol officers);

Mont. Code Ann. § 19-17-405 (volunteer firefighter pension benefits payable to surviving spouse);

Mont. Code Ann. § 20-25-421 (authorizes regents to waive tuition and fees for spouses of residents declared to be prisoners of war or missing in action, spouses of National Guard members killed in the line of duty, spouses of firefighters or peace officers killed in the line of duty);

Mont. Code Ann. § 33-22-136 (surviving spouses of peace officers, game wardens, firefighters entitled to renewal of group disability insurance);

Mont. Code Ann. § 33-22-2006 (tax credit for small business employer paying health insurance for employee's spouse);

Mont. Code Ann. § 39-30-201 (public employee hiring preference for spouse of disabled person);

Mont. Code Ann. § 39-51-204 (exemption from unemployment insurance for spouse of sole proprietor);

Mont. Code Ann. § 39-73-109 (surviving spouse entitled to receive decedent's silicosis payments until remarriage);

Mont. Code Ann. § 46-16-212 (spousal privilege regarding communications during marriage);

Mont. Code Ann. § 53-6-182 (spouse has limited exemption from Medicaid lien on spouse's home);

Mont. Code Ann. § 53-9-128 (surviving spouse entitled to decedent's worker's compensation benefits);

Mont. Code Ann. § 61-3-458 (veterans' surviving spouses eligible for special license plates);

Mont. Code Ann. § 72-2-112 (intestate share of decedent's surviving spouse);

Mont. Code Ann. § 72-2-223 (right of election to elective share personal to surviving spouse);

Mont. Code Ann. § 72-2-331 (right of surviving spouse to intestate share under pre-marital will); and

Mont. Code Ann. § 72-2-412 (surviving spouse's homestead allowance has priority over all claims against the estate).

In the face of these other statutory distinctions, which show a strong legislative policy supporting marriage, it is incongruous to find that the legislature considers a couple's discount that exists in this case to be the type of invidious discrimination that should be outlawed.

Kalinyaprak cites two California cases for the proposition that the couple's pass at issue in this case constitutes discrimination. These cases are distinguishable because of the different considerations that underlie the policies of the California statutes. California's Unruh Act (Cal Civ. Code § 51 (b)) provides

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

There is no exception to this statute at all, unlike the Montana public accommodations statute. The court in *Koire v. Metro Car Wash*, (1985), 40 Cal. 3d 24, 707 P.2d 195, and (interpreting a version of the Unruh act which did not contain a prohibition against marital status discrimination) ultimately fell back on public policy as demonstrated through California statutes to find that California legislative policy behind the Unruh act made any distinction unlawful discrimination whether or not it amounted to invidious discrimination. *Id.* at 24, 707 P.2d at 202-03. Such a legislative intention has not been manifested in the Montana statutes, particularly in light of the exception contained in subpart 3. The court in *Koebke v. Bernardo Heights Country Club*, 36 Cal' Rptr 3rd 565, 115 P.3d 1212 (2005), reached its conclusion on the basis of the California Domestic Partner Act, not the Unruh Act, and found that a lesbian couple's complaint based on discrimination might be sustainable and was therefore not susceptible to a motion for summary judgment. *Id.* at 568, 115 P.3d at 1214.[4]

The parties have not directed the hearing officer to any case which has held that couple's discounts constitute invidious discrimination. Common sense and the discount's wide spread use, combined with the fact that the discount does not and is not intended to discriminate against anyone but instead is designed to encourage more participation, militate against finding that such discounts violate the public accommodation statute. Accordingly, the hearing officer concludes that the practice of utilizing a couple's pass to attract more persons to play golf does not violate the public accommodations statute.

C. *There Has Been No Retaliation.*[5]

Kalinyaprak also asserts that several instances of conduct by various city officials and others constituted retaliation for engaging in protected conduct. Having carefully reviewed the credibility of the witnesses as well as the facts and context in which the alleged acts of retaliation occurred, it is clear that all of Kalinyaprak's evidence of retaliation fails either because the alleged act does not demonstrate a prima facie case or he has failed to carry his

[4] That case also found that the country club's provision of unlimited play to a "member's legal spouse and unmarried sons or daughters under the age of twenty two" while denying unlimited play to persons who were not spouses did not on its face constitute marital discrimination against unmarried persons under the Unruh Act prior to the California legislature's enactment of the Domestic Partner's Act. *Id.* at 851, 115 P. 3d at 1227. Subsequent to the *Koebke* decision, however, the California legislature amended the Unruh act to specifically include marital status as a prohibited basis for discrimination.

[5] As respondent correctly notes, a retaliation claim is separate from a claim of discrimination. In this case, even had the hearing officer found that the couple's pass violated the public accommodation statute, there would be no factual basis for concluding that any respondent retaliated against Kalinyaprak in any exercise of a protected activity.

burden of persuasion to prove by a preponderance of the evidence that the alleged act was retaliatory.

The Montana Human Rights Act prohibits retaliation against an individual who has "opposed any practices forbidden under this chapter . . ." Mont. Code Ann. §49-2-301. Where the only evidence of retaliation is circumstantial, the burden shifting protocol of *McDonnell - Douglas v. Green*, 411 U.S. 792 (1973) applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. Kalinyaprak relies exclusively on circumstantial evidence of retaliation. Hence, the indirect evidence analysis of *McDonnell -Douglas* and *Heiat* applies.

A charging party presents a prima facie case of retaliation when he shows that (1) he engaged in statutorily protected activity, (2) he was subjected to adverse action, and (3) that a causal link exists between the protected activity and the adverse action. *Beaver v. Dpt. of Natural Resources and Cons.*, 2003 MT 287, ¶ 71, 318 Mont. 35, ¶ 71, 78 P.3d 857, ¶ 71; *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). Protected activity includes opposing any act or practice made unlawful by the Montana Human Rights Act. Admin. R. Mont. 24.9.603 (1)(b).

To make out a prima facie case, a charging party must present evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a *prima facie* case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005). If the charging party succeeds in making a *prima facie* case, the burden of production shifts to the respondent to show a legitimate, non-retaliatory reason for the action. *Id.* at 754-55. If the respondent meets its burden, the presumption of discrimination created by the *prima facie* case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* Kalinyaprak at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of retaliation. *St. Mary's Honor Center at* 507; *Heiat,* 912 P.2d at792.

"[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown <u>both</u> that the reason was false, <u>and</u> that discrimination was the real reason" for the adverse action. *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 Sys, Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15. "[T]o establish pretext [Kalinyaprak] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the city's] proffered legitimate reasons for its actions 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 (1999)).

Kalinyaprak's prima facie case fails in both the second and third elements of the prima facie case. And in any event, Kalinyaprak has failed to carry his burden of persuasion to show any causal link between the alleged conduct and protected conduct.

Kalinyaprak contends that Councilman Corse's visit to Wilma Mixon Hall and Corse's comment to Kalinyaprak at a golf board meeting demonstrates retaliation. These acts are not adverse. Furthermore, it is clear from Corse's testimony that his actions had nothing to do with retaliation.

Kalinyaprak has failed to show any legal precedent or logical rationale for considering Olsen's "rock star" comment to be "adverse." Even if such conduct could be considered adverse, no causal link has been suggested much less proven. The comment was made almost one year before Kalinyaprak filed his claim. In addition, Kalinyaprak has failed in his burden of proof to show that Olsen's explanation was pretext. The hearing officer finds Olsen's testimony to be credible that he merely made the statement to inject levity into the situation. Indeed, Kalinyaprak himself had signed in as "rock star" a few days later, which only further bolsters Olsen's testimony that the reference was made in jest. There is no rational basis for finding that Olsen's comment was retaliatory.

Kalinyaprak asserts that he had a conversation with Ron Melvin about the couple's pass discount. The alleged conversation with Ron Melvin never occurred. Mayor Ingram's request to Kalinyaprak that he not sit at Ingram's table at a local restaurant is not adverse action. *C.f., McAlindin v. County of San Diego*, 192 F.3d 1226, 1238 (9th Cir. 1999)(co-workers ignoring a charging party is not adverse action that would establish a prima facie showing of retaliation). Moreover, by the time of the incident at the restaurant, Kalinyaprak had appeared and so repeatedly and vociferously criticized city council that it is not surprising Ingham did not like Kalinyaprak. But Ingham's refusal to let Kalinyaprak sit at his table was not borne of a desire to retaliate against Kalinyaprak .

Assuming that Kalinyaprak has made a prima facie showing with respect to the termination of his web hosting services, the hearing officer is persuaded that the decision to terminate Kalinyaprak's website hosting was not retaliatory. It was a legitimate business decision, borne both Wallace's concern about the service which Kalinyaprak was providing (golf course employees could not easily access the website to post things) was a perfectly permissible basis for terminating the agreement. Kalinyaprak contends that Wallace's statement to him in the February 24, 2006 letter "is proof enough in itself that the city terminated Kalinyaprak's services in retaliation to his opposing policies of the country club." Kalinyaprak's opening brief, page 13. The hearing officer does not find Wallace's statement demonstrates any such fact. At most, it shows that Wallace was aware that Kalinyaprak was generally unhappy and openly and vocally critical of the way the golf course was being run (higher prices each year, under utilization of resources) and that Wallace felt that he could no longer continue in a business relationship with Kalinyaprak under such vocal and directed criticism. It does not show that Wallace was retaliating against Kalinyaprak for speaking out about the couple's pass.

The decision to fight Kalinyaprak's small claims law suit can hardly be considered to be retaliatory. The city had a right to defend against Kalinyaprak's claim. The decision to remove

the case from small claims court was not unreasonable. In all likelihood, the city had no ability to appear and defend itself in small claims and it certainly had no right to be represented by an attorney in that forum. The city had the absolute statutory right to remove the matter from small claims. Kalinyaprak has presented no authority that a party exercising a legal right in defending against a claim of breach of contract commits an adverse action such that a prima facie case of retaliation is made out. Even if the conduct presented a prima facie case, the hearing officer is persuaded by the testimony of City Attorney Raymond that the reasons were legitimate and not borne of a desire to retaliate against Kalinyaprak.

Beyond this, Kalinyaprak's argument that the city's conduct in the lawsuit was retaliatory borders on the paranoid. It is abundantly clear that the city attorney did not undertake any action as part of some larger conspiracy to get back at Kalinyaprak. Indeed, the city acceded to setting aside Kalinyaprak's default and ultimately settled the suit by capitulating to Kalinyaprak's demand. There is no rationale way for the hearing officer to find that the city's conduct was retaliatory.

Kalinyaprak's arguments relating to the way he was treated at various city meetings does not show retaliation. At the May 15, 2006, Councilman Corse, fresh out of a training meeting with the city attorney, declined to permit Kalinyaprak to talk about his law suit at the city meeting, although he was permitted to speak at the meeting about other topics. Corse's conduct, in light of the pending suit and the training was reasonable and certainly was not retaliatory. Kalinyaprak has failed to persuade the hearing officer that Corse's conduct was either adverse or pretext.

Kalinyaprak's not being placed on the October 16, 2006 city council meeting was certainly not retaliatory, in light of the fact that both before and after that date he has been permitted to speak repeatedly at city council meetings on the subject of his belief that the city council has acted improperly with respect to the golf course (such as his February 5, 2007 excoriating of Roger Wallace and the city in its management of the golf course for the preceding 19 years). Rather, as the respondent argues, and the hearing officer finds, the council simply did not want to hear Kalinyaprak "question and comment on the ethics of certain acts of the mayor and council" during the meeting at which Mayor Ingham would be submitting his resignation. Under the facts of this case, Kalinyaprak has failed to carry his burden of proof to show that retaliation played any part in the city council's or mayor's conduct at the October 16, 2006 city council meeting.

Lastly, Kalinyaprak is just wrong and indeed is unreasonable in his contention that his treatment at the meeting on the Super Walmart shows retaliation. He was allowed to speak three times. During his second speech, Councilman Agrilla approached him very near the time his two minutes expired but did nothing to him and did not speak to him. Kalinyaprak then got up and spoke a third times where he made light of Agrilla. There simply is no adverse action in Agrilla's conduct nor is there any conceivable link between Agrilla's action and any protected conduct that Kalinyaprak engaged in.

In the hearing officer's opinion, Kalinyaprak's credibility as a witness has been severely undercut by his efforts to argue that Olsen's' "rock star" comment, the city's conduct in removing his contract claim to small claims court and the city's conduct during the Super Wal-Mart were retaliatory. They obviously were not. Kalinyaprak's insistence that these acts were retaliatory when they obviously were not calls in to question his credibility as a witness. There is no factual basis in this matter for finding that either the golf course or the city of Polson retaliated against Kalinyaprak.

V. CONCLUSIONS OF LAW

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

2. Kalinyaprak's motion to amend his complaint to allege religious discrimination is untimely and unfounded and is therefore denied.

3. Nether the city of Polson nor the Polson Country Club has discriminated against Kalinyaprak in utilizing a couple's pass in order to attract more people to golf.

4. Nether the city of Polson nor the Polson Country Club has retaliated against Kalinyaprak for engaging in activity protected by the Montana Human Rights Act.

5. Because Kalinyaprak has failed to prove that either the city or the country club discriminated or retaliated against him, the issue of damages is moot and his case must be dismissed.

VI. ORDER

Judgment is found in favor of the city of Polson and the Polson Country Club and Kalinyaprak's case is dismissed.

Dated: November 16, 2007

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