BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0068011717:

DIANNE LANGKIL,	)	Case No. 2181-2006
	)	
Charging Party,	)	
	)	**SEALING ORDER AND**
vs.	)	**FINAL AGENCY DECISION**
	)	
TOWN AND COUNTRY LOUNGE, INC.,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Dianne Langkil filed a complaint with the Department of Labor and Industry on September 16, 2005. She alleged that Town and Country Lounge, Inc., (T&C) retaliated against her for filing a discrimination complaint on March 8, 2005. On April 28, 2006, the department gave notice Langkil's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing convened in Missoula, Montana, November 14-16 and December 11-12, 2006. Langkil attended with counsel, Stacey Weldele-Wade, Antonioli and Wade, P.C. T&C attended through its designated representative, David Nash, with its counsel, T. K. Botsford.

Meg Manthie, James R. Frolich, Elizabeth Ries-Simpson, Dianne Langkil, Zane K. Sullivan, Angela Zielinski, Bradley A. Colberg, Alice Whiteman, Kyla Fraser, Carol A. Jaeger, James Sheppard, John Zavarelli, Rhonda Maun, Gisele Estrada, Theresa Anderson, David Nash, Wendy Sue Nash and Lyn Cox testified. The hearing examiner sustained relevance objections and excluded the testimony of expert witnesses James Galipeau and Gordon Campbell, affording each party (Galipeau was T&C's expert, Campbell was Langkil's expert) the opportunity to file written offers of proof of the proposed expert testimony with their respective proposed decisions.

Exhibits 1-8, 10, 12-17, 20-27, 101-105, 112-116, 122-123, 126, 128-129, 131-135, 137-138, 140-141 and 143 were admitted. The last page of Exhibit 15 was sealed at hearing, and subsequently redacted. Exhibits 25 and 26 were admitted provisionally. Exhibit 127 was admitted provisionally subject to a motion to strike. The hearing examiner denies the motion

to strike. Exhibits 108-111 and 124 were offered provisionally in the event that the hearing examiner ultimately struck Exhibit 127; since Exhibit 127 was not strickened, Exhibits 108-111 and 124 were, in effect, withdrawn. Exhibit 117 was admitted for the limited purpose of identification of Langkil's employer. Exhibit 138 was redacted to protect the privacy of non-parties whose unrelated matters would otherwise be in the public record.

Exhibits 107, 118 and 120 were refused on sustained objections. Exhibit 120, having been offered and thereby otherwise being part of the public record, was sealed to protect the privacy of non-parties whose unrelated matters would otherwise be in the public record. Exhibit 139 was refused on a sustained objection and then withdrawn. Exhibit 106 was withdrawn after being identified in the record.

The hearing examiner ruled that the parties, by December 22, 2006, could file redacted versions of exhibits they had offered, to protect the privacy of non-parties whose unrelated matters would otherwise be in the public record or to protect the privacy or confidentiality, in matters unrelated to the issues in this case, of the parties. The parties have filed redacted copies of Exhibits 2, 3, 15 (last page), 20, 21, 26, 118 (last page), 127, 135 (pages 3 and 4) and 141.

The parties filed their post hearing arguments and proposed decisions, the redacted exhibits they elected to file, reply briefs and briefs addressing a motion by T&C to recover expert witness fees, and this matter was submitted for decision. Separate orders accompany this decision, addressing (1) what portions of the record are sealed, (2) the final status of provisionally admitted or offered documents and the motion to strike Exhibit 127, and (3) the motion to recover expert fees. A copy of the hearing examiner's docket accompanies this decision.

II. SEALING ORDER

Original, unredacted pages from admitted and offered exhibits, for which substitute redacted pages have been provided as set forth above, and Exhibit 120 in its entirety, are hereby sealed and excluded from the public record. The parties are prohibited from using or disclosing any information redacted from the redacted exhibits or contained in Exhibit 120, to the extent that the party involved came into possession of the information in the course of this litigation for the purposes of this litigation, unless and until a tribunal exercising jurisdiction over the question modifies or ends the effect of this sealing order. **In the absence of a subsequent order to the contrary, the sealed portions of this file shall be destroyed by the department once the file is closed after the conclusion of the last review of the final agency decision, unless the party who submitted any of the sealed exhibits requests their return in writing within ten calendar days after the issuance of this decision. In that case, the exhibits requested will be returned after conclusion of the last review of the final agency decision.**

III. ISSUES

The issue here is whether Wendy Sue Nash made statements, on behalf of T&C, to Langkil's current employer, alleging that Langkil embezzled from T&C, in retaliation for Langkil's filing of a prior complaint of discrimination against T&C. A full statement of the issues appears in the final prehearing order.

IV. FINDINGS OF FACT

1. Charging Party Dianne Langkil is a resident of Missoula County, Montana.

2. Respondent Town & Country Lounge, Inc., (T&C) is a Montana corporation doing business in Missoula County, Montana. Wendy Sue Nash is the president and sole shareholder of the company. Her husband, David Nash, is the General Manager. The Nashes reside in Polson, Montana.

3. T&C employed Langkil to manage its Missoula casino from May 1988 until September 13, 2004. During her employment, Langkil was an officer of the corporation. The Nashes trusted and relied upon her.

4. Over the years of her employment, Langkil was essentially without on-site supervision in managing the casino. Wendy Nash dealt with her regarding financial reports and records keeping. David Nash, once or twice a month, would visit the business and pick up records, ask Langkil about the status of the "cash bag" maintained on the premises (T&C kept substantial amounts of cash on the premises, to meet the regular cash requirements of the casino business), and otherwise verify how business was being conducted.

5. T&C's accounting, for tax reporting, did not reflect the amount of money in the cash bag, routinely reflecting $20,000.00 to $55,000.00 less than the actual cash in the bag. David Nash considered this to be a proper accounting practice, because the additional cash "was ours" rather than belonging to T&C.

6. Langkil had some serious health problems, which resulted in extensive medical treatment, primarily cancer treatment. In the summer of 2004 she was anticipating that she might need another round of treatment. Wendy Nash had complained to Langkil about the increasing costs of T&C's health insurance, which resulted at least in part from Langkil's increasing age and covered medical problems.

7. In 2002, Wendy Nash had noted a substantial decrease in successful collections of insufficient funds (NSF) checks. CBM Collection, Inc., (CBM) doing business as "Check Rite," had performed such collections for T&C. Wendy Nash contacted CBM and was told that there was a note in the file changing the address to which CBM sent its remittance checks (payments by CBM of T&C's share of the amounts collected for NSF checks) to Langkil's address rather than the Nash's Polson address.

8. Wendy Nash changed the remittance address back to the Nash's Polson address and requested documentation from CBM of the change of address and any remittance payments sent

to Langkil's address. CBM did not provide the requested documentation. The Nashes made subsequent sporadic efforts during the rest of Langkil's employment to obtain the documentation, but failed.

9. Langkil was planning a vacation in the fall of 2004, from which she was due to return on Monday, September 13, 2004. David Nash had counseled Langkil that before she left on her vacation the daily record-keeping for T&C had to be current regarding both daily reports and running totals of the cash bag.

10. Before Langkil's return on September 13, 2004, David Nash came to the casino to check how the business was being conducted. He discovered that the daily reports did not appear current and that the cash bag had substantially less cash in it than he expected.

11. When Langkil returned to work on September 13, 2004, David Nash advised her that her position was eliminated (effective immediately) and that T&C no longer had a job for her. He said that he would be taking a more active role in management of T&C.

12. Before September 13, 2004, the Nashes had some concerns about Langkil. Nonetheless, the decision to end her employment on September 13, 2004, was made that morning by David Nash, with the information he had at that time.

13. After discharging Langkil, David Nash discovered that there was insufficient cash to pay Century Gaming, the company leasing and maintaining the gambling machines in the casino, the amount it was due from the weekly gaming receipts, because T&C had not paid Century its share on the previous Friday. He wrote a personal check to make the payment. He learned that Langkil had requested in June 2003 that T&C keep Century's share of the weekly Friday pickup (drop) until the following Monday, and had continued that practice thereafter.

14. David Nash called and requested a criminal investigation of the missing cash bag money, which he reported was approximately $30,000.00. A police officer came to the casino, took the report from Nash, and requested documentation to establish how much cash should have been in the bag. Nash could not provide such documentation. No charges were filed against Langkil.

15. Over the next six months, the Nashes continued sporadic efforts to find more information about Langkil's management of the casino. They found other situations that they believed indicated that Langkil had been appropriating property of T&C for her personal use. No charges were filed against Langkil.

16. Langkil did not believe that T&C had terminated her employment because it was eliminating her job. David Nash could not assume her management duties while continuing to live in Polson, commuting to Missoula once a month. David Nash had not cited any performance issues to her at the time of her discharge. Langkil reasonably believed that T&C discharged her because of her age and medical conditions.

17. On March 8, 2005, Langkil filed a discrimination claim with the Montana Human Rights Bureau claiming age and disability discrimination in employment by T&C (HR No. 0051011142). T&C received notice of the complaint, and contacted the law firm of Sullivan, Tabaracci & Rhoades, P.C., to defend against it.

18. In late March 2005, Langkil obtained an employment interview with James R. Frolich, president and owner of CBM for 30 years. She was able to bypass CBM's normal practice of obtaining a written, signed application which authorized contact with, among others, the immediate past employer. CBM would routinely use the application to contact the immediate past employer and references given in each application. Frolich did not know Langkil had not signed such an application. Frolich knew T&C was Langkil's prior employer when he hired her. He was unaware that CBM had not contacted T&C about Langkil. He was also unaware of the Nashes' sporadic efforts to get documentation regarding remittance check addresses for T&C in 2002. After the interview with Frolich, CBM hired Langkil on March 24, 2005. Langkil then commenced her on the job training with CBM.

19. T&C was represented by the Sullivan law firm in March 2005. Meeting with their lawyers on March 28, 2005, the Nashes were advised to pursue obtaining documentation of Langkil's conduct of business more vigorously, including getting the documentation of the change in address for remittance checks from CBM. Wendy Nash was advised by T&C's counsel not to make any accusations about Langkil in her contact with T&C.

20. On March 29, 2005, Wendy Nash called CBM and left a voice mail message identifying herself, stating that she knew Langkil was now working at CBM and expressing amazement that CBM would hire Langkil, who, according to Nash, had embezzlement charges currently filed against her. Meg Manthie, Sales Supervisor Support, a 19-year employee of CBM, listened to the voice mail when she was next at work. At first she was confused by the message, because she did not know Langkil and was uncertain about any CBM employee by that name. Verifying that Langkil was a new employee and recognizing the volatile content of the message, Manthie took no action except to bring the voice mail to the attention of Frolich.

21. After listening to the message, Frolich was concerned about whether there were embezzlement charges filed against Langkil. He had just hired her to do collections work for his company. On March 30, 2005, Frolich directed CBM's in-house attorney, Elizabeth Ries-Simpson, to go to the Courthouse and investigate whether or not embezzlement charges were pending against Langkil.

22. Ries-Simpson went to the Missoula County Clerk of Court and Missoula County Attorney's Office to find out whether any civil or criminal embezzlement charges were pending against Langkil. None were.

23. Ries-Simpson reported to Frolich that she could find no such charges against Langkil. Frolich decided not to return Wendy Nash's phone call.

24. In early April 2005, Wendy Nash called CBM again, leaving another voice mail message on the answering machine. Frolich returned this call, in the presence of Ries-Simpson.

25. During the April 2005 telephone discussion between Frolich and Wendy Nash, Frolich asked why Nash was seeking documentation of the remittance check addresses and of remittance checks sent to Langkil's address. Nash stated that she was conducting an investigation of Langkil and that her attorney had advised her to contact CBM to obtain records. Frolich asked Nash who her attorney was and she stated that she had not yet hired one. Frolich also asked Nash whether she had contacted the County Attorney's office to pursue criminal charges and whether criminal charges were filed against Langkil and Nash said, "No."

26. Frolich had discovered that no charges had been filed against Langkil. He now had heard Nash say both that T&C's attorney wanted her to obtain documents regarding Check Rite collections on NSF checks received by T&C and that there was no such attorney. Frolich decided that the conflicting information meant that CBM had no reasonable basis for taking any employment action against Langkil. He also reasonably decided that fairness required that CBM make Langkil aware of the accusations being made against her by T&C. CBM did so.

27. At the time of the telephone messages to and telephone conversation with CBM, Wendy Nash knew that Langkil had filed and was pursuing a discrimination complaint against T&C. She also knew (as she said in the telephone conversation) that CBM had hired Langkil. The Nashes, at that time and since, believed that Langkil had appropriated T&C funds during her employment.

28. In making her statements regarding Langkil's alleged embezzlement charges, Wendy Nash was motivated by two things–her belief that Langkil had stolen money from T&C and her anger that Langkil was charging T&C with illegal discrimination. The business purpose of her calls was to pursue documentation of the remittance check addresses and the sending of actual remittance checks to Langkil's address. The documentation was potentially useful in pursuing any theft charges against Langkil. It was also potentially useful in defending against Langkil's discrimination complaints. Obtaining the documentation of CBM's NSF collection transactions on behalf of T&C did not require assertions by Nash that Langkil had stolen from T&C.

29. But for Langkil's filing of the discrimination complaint and the need for T&C to defend against it, Nash would not have made the telephone calls when she did. But for Langkil's filing of the discrimination complaint against T&C, Nash would not have made the accusations against Langkil that she made during those calls.

30. Langkil did not suffer any pecuniary consequences from the retaliatory accusations made on behalf of T&C by Wendy Nash during the telephone calls to T&C. Langkil did suffer emotional distress as a result of those accusations.

31. Langkil also suffered emotional distress unrelated to those accusations, but instead related to her health problems as well as to the specter of possible criminal charges by T&C, which the Nashes' conduct indicated they were considering filing. The emotional distress resulting from learning of the specific accusations (of which her current employer reasonably advised her), despite the lack of any pecuniary consequences, exacerbated and contributed to the emotional distress she was suffering for unrelated reasons. The reasonable measure necessary to remedy this harm is an award to Langkil of $12,500.00 from T&C.

32. Subsequent to the events surrounding the phone calls and phone conversation, T&C continued to pursue gathering of information to support both a criminal charge against Langkil and its defenses in the original discrimination complaint and (later) this current retaliation complaint. The evidence adduced herein did not establish that it was more likely than not that T&C made other embezzlement allegations against Langkil to disinterested persons out of a retaliatory motive. However, there remains a risk that T&C may choose again to make such accusations against Langkil out of a retaliatory motive.

33. Injunctive relief barring T&C from making any further retaliatory accusations is necessary. The department should enjoin T&C from all statements that Langkil appropriated any money, goods or services from T&C during her employment, unless and until T&C (1) files a criminal or civil complaint against Langkil regarding her alleged misconduct, (2) is defending an action by Langkil against T&C, to which the alleged misconduct is relevant, or (3) is a party to an investigation or action involving its business practices to which allegations of Langkil's misconduct are relevant. It is also appropriate to require Wendy Nash, as a condition of her further work on behalf of T&C, to attend training on the law against illegal retaliation. The injunction against further accusations regarding Langkil's alleged embezzlement, should not apply to bar T&C or its principals from filing and participating in a factually and legally sufficient civil action or criminal complaint advancing the same allegations, from advancing the same allegations if relevant in any investigative or adjudicative proceeding regarding their business practices, or from advancing the same allegations if relevant to any proceeding against them by Langkil. Otherwise making such allegations except in accord with a final determination in an administrative or judicial proceeding would be in violation of the injunction, which would of necessity be evidence of the same retaliatory motive.

V. DISCUSSION[1]

1. LIABILITY

Montana law prohibits a person retaliating by blacklisting or otherwise discriminating against an individual because that individual has opposed or filed a complaint of discriminatory practices as defined in the Montana Human Rights Act. Mont. Code Ann. § 49-2-301. A "person" is defined to include a corporation such as T&C. Mont. Code Ann. § 49-2-101(18).

The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. In cases such as this one, where there is no direct evidence of discrimination, Montana applies the three-tier standard of proof developed in federal discrimination law. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792; *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860; *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813; *Johnson v. Bozeman S. D.* (1987), 226 Mont. 134, 734 P.2d 209; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029; *Martinez v. Yellowstone Co. Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242.

An indirect evidence *prima facie* case of unlawful retaliation in violation of Mont. Code Ann. § 49-2-301 involves three elements: (1) Proof that the individual engaged in activities protected by the Human Rights Act; (2) Proof that the respondent subjected her to significant adverse acts and (3) Proof of a causal connection between the significant adverse acts and her protected activities under the Act. 24.9.603(1) A.R.M.[2] *Foster v. Albertson's, Inc.* (1992), 254 Mont. 117, 835 P.2d 720, ***citing*** *Holien v. Sears, Roebuck and Co.* (Or. 1984), 689 P.2d 1292. ***See also*** *Payne v. Norwest Corp.* (9th Cir.1997), 113 F.3d 1079.

Filing a discrimination complaint with the department is protected activity. Admin. R. Mont. 24.9.603(1). Langkil filed her age and disability discrimination claim against T&C before Wendy Nash's telephone calls and telephone conversation with CBM. Langkil's conclusion that her firing was based upon her age and medical problems, whether or not it was accurate, was reasonable. Even if it had not been reasonable, her action in filing her original discrimination complaint was protected activity. ***See,*** *E.E.O.C. v. Total Systems Serv., Inc.* (11th Cir. 2000), 221 F.3d 1171, 1175-76, ***reh. en banc den.***, 240 F.3d 899; *Vasconcelos v. Meese* (9th Cir. 1990), 907 F.2d 111, 113 ("Accusations made in the context of charges before the Commission are protected by statute"). Proving that her original complaint was filed before the alleged retaliation, established the first element of her *prima facie* case.

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

[2] Sub-chapter 6 of the Commission's rules applies to contested case proceedings before the department, including subsection 603. Admin. R. Mont. 24.9.107(1)(b).

Admin. R. Mont. 24.9.603(2)(a) provides that illegal retaliatory acts include "coercion, intimidation, harassment . . . or other interference with the person or property of an individual." Langkil presented evidence establishing that Wendy Nash told CBM that criminal charges of embezzlement were pending against Langkil and that Langkil had stolen money from T&C. Nash told CBM that she knew CBM had hired Langkil. Making the statements about Langkil to her new employer was a significant adverse action that could have placed Langkil's employment with CBM in jeopardy. This establishes the second element of her *prima facie* case.

Admin. R. Mont. 24.9.603(3) creates a disputable presumption of retaliatory motive for significant adverse acts against a Human Rights Act complainant while the complaint is pending or within six months after its resolution, so long as the alleged retaliator has knowledge of the pendency of the complaint.[3] Wendy Nash knew of the pendency of Langkil's age and disability discrimination complaint against T&C when she made the calls and had the conversation with CBM.

The rule's presumption of retaliatory motive established the causal connection between Langkil's discrimination complaint and Nash's telephone statements to CBM. *Laib v. Long Construction Co.* (Aug. 1984), HRC No. AE80-1252, ***quoting*** *Cohen v. Fred Meyer, Inc.* (Jun. 1992), 686 F.2d 793 (9th Cir. 1982); ***accord***, *Schmasow v. Headstart*, HRC No. 8801003948. ***See also*** *Foster v. Albertson's*, 254 Mont. 117, 835 P.2d 720 (1992), ***citing*** *Holien v. Sears, Roebuck and Co.* (Or. 1984), 689 P.2d 1292. Montana will apply federal discrimination case holdings when the same rationale is appropriate under the Montana Human Rights Act. *Crockett*. The use of federal precedent is proper, although it is not mandatory. *Longan v. Milwaukee Station Restaurant* (Nov. 83), HRC No. AE82-1796. Resort to federal precedent is appropriate here. The federal and state cases cited above are consistent with other federal decisions as well. *Moyo v. Gomez* (9th Cir. 1994), 40 F.3d 982; *Alexander v. Gerhardt Ent., Inc.*, (7th Cir. 1994), 40 F.3d 187.

When Wendy Nash told CBM that criminal charges of embezzlement were pending against Langkil, she knew that statement was untrue. When she told CBM that Langkil had stolen money from T&C, that statement was unnecessary for the express purposes of the telephone conversation. The reason she contacted CBM and made these statements was that Langkil had filed her original age and disability discrimination complaint against T&C. These facts, even without the presumption, established that Wendy Nash took the significant adverse action of making these statements to Langkil's employer because Langkil had filed a discrimination complaint against T&C. These facts and the presumption constituted substantial credible evidence more than sufficient to establish the third element of Langkil's *prima facie* case.

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

Once Langkil established her prima facie case, the burden shifted to T&C to "articulate some legitimate, nondiscriminatory reason" for its adverse action. *McDonnell Douglas* ***at*** 802. T&C had the burden to present competent evidence, that it had a legitimate nondiscriminatory reason. *Crockett*, 761 P.2d ***at*** 817. The company must satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.
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> *Texas Dept. of Comm. Affairs v. Burdine* (1981), 450 U.S. 248, 255-56.

T&C clearly and specifically articulated a legitimate reason for the action Wendy Nash took in making the calls to CBM. *Johnson*, 734 P.2d ***at*** 212. The legitimate reason was T&C's redoubled efforts to obtain documentation of the address change and possible delivery of NSF collection payments to Langkil's address, to defend against the age and disability discrimination complaint as well as to gather information to support a possible criminal charge against Langkil.

T&C also challenged the testimony of Manthie, Frolich and Ries-Simpson regarding what Nash had said in the phone messages and phone conversation, and challenged whether the particular phone calls had been made when the CBM employees stated they were made. This evidence, offered to rebut Langkil's *prima facie* case, is also part of what the hearing examiner considered in undertaking the *McDonnell Douglas* analysis.

Once T&C produced a legitimate reason for its action, Langkil had the burden, in the third tier of the *McDonnell Douglas* indirect evidence analysis, to prove that the reasons were a pretext. *McDonnell Douglas* ***at*** 802; *Martinez*, 626 P.2d ***at*** 246. To meet this third tier burden, Langkil could present either direct or indirect proof of the pretextual nature of T&C's proffered reasons:

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

Burdine ***at*** 256. Ultimately, Langkil always had the burden of persuading the fact-finder that T&C illegally retaliated against her. *Crockett*, 761 P.2d ***at*** 818; *Johnson*, 734 P.2d ***at*** 213. The "third tier" is the stage of analysis at which Langkil's evidence rebutting T&C's legitimate business reason for its action, as well as Langkil's reply evidence to T&C's evidence rebutting her *prima facie* case, is considered.

With regard to the legitimate business reason T&C presented, the business reason for the calls–getting the old records–did not involve either accusing Langkil of theft or falsely stating that criminal charges were pending against her. The legitimate business reason for the calls was no more than a pretextual justification for the accusations.

T&C's challenges to whether the three CBM witnesses were telling the truth about what Wendy Nash said, in the voice mail messages and in the telephone conversation with Frolich and Ries-Simpson, turn on questions of credibility. The simple numbers (three witnesses testifying to the statements versus Wendy Nash denying them) were not determinative of whether the CBM witnesses were telling the truth. The fact-finder can believe the testimony of one witness despite the contrary testimony of several others. ***E.g.***, *State v. Azure* (1979), 181 Mont. 47, 591 P.2d 1125; *State v. Seitzinger* (1979), 180 Mont. 136, 589 P.2d 655; *State v. Radi* (1978), 176 Mont. 451, 578 P.2d 1169; *Davis v. Burton* (1955), 128 Mont. 434, 278 P.2d 213; *Ayers v. Buswell* (1925), 73 Mont. 518, 238 Pac. 591; *O'Langan v. First State Bank of Hilger* (1921), 59 Mont. 190, 196 Pac. 149; *Doane v. Marquisee* (1922), 63 Mont. 166, 206 Pac. 426; *Parchen v. Chessman* (1917), 53 Mont. 430, 164 Pac. 531.

T&C's challenges to the details of the calls–dates of the calls and the specifics about what was said–were likewise not determinative. Difficulties in recollection of the contents of and documentation of the dates upon which the calls were made or received were not persuasive either way on which accounts of the contents of the calls were credible.

What was ultimately determinative was the demeanor and credible content of the testimony of Manthie, Frolich and Ries-Simpson. Had Wendy Nash only made the statements that she testified she made in leaving only one message and in one subsequent telephone call, none of the three CBM witnesses would have known that T&C asserted both that Langkil had stolen money and that charges were pending. Clearly, the CBM witnesses did know, because CBM immediately took action to find out if charges were pending against Langkil. There was no credible explanation of how all three witnesses, in March and April 2005, concluded that T&C was asserting that Langkil had stolen money and that charges were pending, to rebut their testimony that they obtained that information from Wendy Nash's phone messages and one phone conversation with Nash.

T&C's arguments against believing the CBM witnesses rest upon a rather large leap to a conclusion. There was no evidence, for example, that CBM had actively resisted providing documentation about NSF check handling, before the telephone calls in March and April 2005. Neither evidence nor reason supplied any explanation of why CBM would have withheld documents at all during that time-frame. From the evidence adduced, Langkil, the business contact with CBM for T&C, apparently changed the address to which CBM sent NSF check collection payments. CBM had no reason to conceal that transaction, which it had no reason to consider improper, and no reason to "take sides" with Langkil in any continuing dispute about her prior employment. Thus, the evidence in this case could only support a finding, if it were even relevant, that any failure by CBM to provide the documentation before the phone calls in March and April 2005 was at worse an innocent oversight, if there even was such a "failure" in response to what likely was no more than sporadic inquiry from T&C. The conclusion articulated in T&C's attacks upon the witnesses' credibility, that CBM was hostile to T&C for other reasons, was not proved.

That being the case, how could phone contact with Wendy Nash, solely addressing obtaining the NSF check documents, have led CBM to conclude that T&C believed Langkil had embezzled? Had Wendy Nash not made the statements that the CBM witnesses testified under oath that she made, CBM would have had no reason to check court records about charges filed against Langkil. CBM would have had no reason to tell Langkil that T&C was saying she was a thief. Not only were Manthie, Frolich and Ries-Simpson credible in testifying, but also the explicit argument that all three lied under oath to support Langkil's claims was incredible.

Nash did not testify that she had explained on the phone that the records sought might contain information relevant to a current proceeding against T&C, or relevant to an effort to answer questions about the bookkeeping of T&C. Such statements, if made, might have led CBM to wonder about whether T&C suspected irregularities in Langkil's handling of T&C business. But even if Nash had testified to this effect, it would still have been incredible that such statements would have led CBM to check court records and to tell Langkil that T&C was accusing her of embezzlement. The record would still be bereft of any evidence explaining why the CBM witnesses would lie under oath to support Langkil's retaliation claims.

T&C's counsel was a strong advocate for distrusting the CBM witnesses. Ultimately, despite that advocacy, the demeanor and content of the CBM witnesses ultimately deserved and received more weight than the argument that Langkil was able to mesmerize them into testifying to falsities despite their lack of any proven animosity, or reason for animosity, toward T&C.

The hearing officer denied T&C the opportunity it sought to try the accusations of embezzlement in this forum.[4] Wendy Nash's accusations against Langkil on the telephone were neither necessary nor appropriate to the business justification T&C gave for the calls. T&C's lawyers had cautioned Wendy Nash, virtually immediately before the first call, not to make accusations against Langkil when talking to CBM. Whether the accusations themselves are true is not relevant to whether Nash made those accusations to Langkil's new employer in retaliation for the pending Human Rights claim against T&C, and is not appropriate in defense of the retaliation claims in this forum. Even if the accusations are true, which has not been proved, venting them over the phone to the new employer while trying to obtain old business records was retaliatory.

There is a related side issue here that requires comment. If T&C reasonably believed Langkil had stolen money from the business, could animus over the theft have prompted Wendy Nash's telephonic accusations, rather than retaliatory animus over the pending Human Rights complaint? The diffidence of T&C's pursuit of information (including the NSF check documentation) prior to Langkil's first Human Rights complaint militates against such a possibility. There is simply no evidence that T&C vigorously pursued its investigation of the

[4] Truth is defense to a defamation complaint. Mont. Code Ann. § 27-1-801 et. seq. Making a true and unprivileged accusation in an inappropriate context, without a legitimate business reason, can nonetheless constitute a significant adverse action in retaliation for protected activity pursuant to Mont. Code Ann. § 49-2-301, because that statute does not make truth a statutory defense to such a claim.

possible theft until after it received notice that Langkil had filed her first Human Rights complaint. The efforts to investigate–insistent contacts with CBM, other contacts to get information, hiring an accountant to undertake a forensic analysis of cash handling during Langkil's employment, etc.–all transpired after Langkil filed the discrimination claims against T&C. David and Wendy Sue Nash may well have had a subjective belief that Langkil had stolen from T&C, but the case they were not permitted to present–the case of alleged embezzlement–was not developed until after T&C became embroiled in Human Rights cases. Thus, it is more likely than not that, even if T&C did reasonably believe Langkil had stolen money, the reason Wendy Nash made the accusatory comments to CBM was not that belief, but instead retaliatory animus toward Langkil for filing her first Human Rights complaint against T&C.

Montana law also follows federal precedent in holding that a respondent can prove that it would have taken the same adverse action irrespective of any unlawful discriminatory motive. *Crockett*, 761 P.2d ***at*** 819; *Muntin v. Cal. P. & R. Dept.* (9th Cir. 1984), 738 F.2d 1054, 1056. However, this affirmative defense bears the rubric of a "mixed motive" case, and arises when a claimant proves with direct evidence that there was illegal discrimination. *Laudert v. Richland Cnty. Sher. Off.*, 218 MT 2000, 301 Mont. 114, 125, 7 P.3d 386. Montana law is not clear about whether a mixed motive defense can be interposed in an indirect evidence case. If such a defense were available here, as it should be as a matter of law, it would require T&C to prove that even without the retaliatory motive, Wendy Nash would have made the same accusatory statements to CBM.

T&C did not prove this, and logically could not have proved this. As already noted, the proffered business reason for the calls was a pretextual justification for the accusations. T&C on this record would not have taken the retaliatory action but for the pending Human Rights complaint. Thus, the mixed motive defense, if it were available, would necessarily fail.

2. DAMAGES

The relief the department may award to a charging party subjected to illegal retaliation include any reasonable measure to rectify any resulting harm she suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in a discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405. The only harm that Langkil proved resulted from the retaliation was her emotional distress. She has not been harmed in her current employment. The statements to CBM did not harm her standing in her community. She has not suffered physical harm.

The reasonable measure to rectify emotional distress because of retaliation is a monetary award. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836; *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596. The evidence supports an award of $12,500.00. The freedom from unlawful discrimination is a fundamental human right.

Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; ***cited in*** *Vortex* ***at*** ¶33 ***and*** *Vainio*; ***see also*** *Campbell v. Choteau Bar & Steak Hse.* (1993), HR No. 8901003828. The violation involved here, accusations of theft made to the current employer for whom Langkil worked in a capacity that involved collecting and accounting for money, was egregious. Langkil's testimony established that she did suffer severe emotional distress as a direct result of CBM taking the reasonable action of informing her of the accusations made by T&C.

In both her relief requests and her requests for affirmative relief, Langkil also cited reports that T&C had made similar comments to others. The evidence of such statements is insufficient to establish that such statements both were made and were made with retaliatory animus. Therefore, while the affirmative relief (discussed below) extends to an injunction against making further accusations outside of specific proceedings, there is no basis for either a monetary award or further affirmative relief based upon past alleged similar comments to entities other than T&C.

3. AFFIRMATIVE RELIEF

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondents' future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1). There is a risk that T&C will again make accusations regarding the alleged theft, outside of formal investigative or legal proceedings or before any definitive decision establishing such theft, out of a retaliatory animus toward Langkil. At this point, because T&C has already done so once, the risk is present and real. Therefore, it is appropriate to enjoin T&C from such statements, except within appropriate investigative and legal proceedings or in accord with a final decision through such proceedings, require that T&C adopt appropriate business policies against such conduct, and require that T&C obtain training for Wendy Nash.

VI. CONCLUSIONS OF LAW

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

2. Town and Country Lounge, Inc., illegally retaliated against Dianne Langkil by making statements on the telephone to her current employer that it had filed embezzlement charges against her and that she had embezzled from Town and Country during her employment there, all because she filed a Human Rights complaint alleging that Town and County discriminated against her in employment because of age and disability. Mont. Code Ann. § 49-2-301.

3. The harm Langkil suffered as a result of the unlawful retaliation, for which she is entitled to recover from Town and Country in this proceeding, is emotional distress valued at $12,500.00. Mont. Code Ann. § 49-2-506(1)(b).

4. The department must order Town and County not to make such retaliatory statements, prescribe conditions on its future conduct relevant to this discriminatory practice, require adoption and publication of appropriate policies, and require training for Wendy Sue Nash, the person who made the statements on behalf of Town and Country. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

VII. ORDER

1. Judgment is found for charging party **Dianne Langkil** and against respondent **Town and Country Lounge, Inc.** on the charge that Town and Country retaliated against Langkil for filing a discrimination complaint on March 8, 2005.

2. The department orders respondent **Town and Country Lounge, Inc.** to make immediate payment to charging party **Dianne Langkil** of the sum of $12,500.00, to compensate her for her emotional distress resulting from the illegal retaliation. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondent **Town and Country Lounge, Inc.** from illegally retaliating against charging party **Dianne Langkil**, prohibiting all statements that Langkil appropriated any money, goods or services from T&C during her employment, unless and until, and thereafter only within and subsequently in accord with any final decision from (1) any criminal or civil complaint filed against Langkil by T&C, regarding her alleged misconduct, (2) any civil or administrative action by Langkil against T&C, to which the alleged misconduct is relevant. This permanent injunction does not bar T&C from such statements if made within an investigation or action to which T&C is a party, which involve its business practices, should allegations of Langkil's misconduct be relevant.

4. The department orders respondent **Town and Country Lounge, Inc.**, within 60 days after this decision becomes final, complying throughout with the directions of the Human Rights Bureau regarding how to implement these requirements:

> (A) to submit to the Human Rights Bureau a proposed employment policy that expressly states that Town and Country will not engage in the specific conduct prohibited by the permanent injunction; to adopt a written non-retaliation employment policy regarding employees, past, present and future, who have filed or may file discrimination complaints against the company; to adopt a policy of publication of these policies to present and future employees; and to adopt and to implement the policies, with changes mandated by the Bureau, immediately upon Bureau approval of them, and
>
> (B) to require and to finance Wendy Sue Nash undertaking and successfully completing training of 4-6 hours regarding Montana law against retaliation as a

condition to her further activity as employee, officer and/or principal in the corporation, with the prior approval of the Human Rights Bureau for the particular training, and to document to the Bureau the successful completion of the training.

Dated: May 18, 2007.

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

Dianne Langkil FAD tsp