BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0009009180:

MARK ALAN DENKE, P.R. of the Estate of Kathlyn N. Denke, Deceased,	)	Case No. 426-2001
Charging Party,	)	
vs.	)	HEARING OFFICER DECISION ON REMAND AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION
CITY OF THOMPSON FALLS,	)	
Respondents.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

On November 16, 2001, the Hearing Officer issued a final agency decision on Kathlyn N. Denke's Human Rights complaint against the City of Thompson Falls and Maurice Shoemaker, a city councilman (HR Complaints 0009009180-81, Hearings Bureau Case No. 426-2001). After prolonged proceedings before the Human Rights Commission, multiple district courts and the Montana Supreme Court, the case was returned to the Hearings Bureau on a remand order from the Human Rights Commission, ordering that the Hearing Officer "must determine whether the City of Thompson Falls' conduct of the discussion of the Denke-related agenda item at the February 14, 2000 city council meeting constituted unlawful retaliation as alleged by Denke." *Mark Alan Denke, PR, Estate of Kathlyn N. Denke, v. Maurice Shoemaker and City of Thompson Falls*, (#0009009180 & 0009009181), "Order," February 2009.

The parties briefed various procedural matters, and on May 29, 2009, the Hearing Officer issued his "Order on Issues and Scope of Evidence with Amendment of Caption to Reflect Shoemaker's Dismissal," removing Shoemaker, who as a result of discharge in Bankruptcy Court, was no longer a party to the proceeding on remand. By that same order, the Hearing Officer stated the issues to be determined on remand as:

1. Did the city's conduct of the February 14, 2000, council meeting (including the conduct of Shoemaker during that meeting) constitute unlawful retaliation against Kathy Denke?

2. If so, what damages resulted and what affirmative relief is appropriate?

The Hearing Officer also ordered that the scope of evidence upon which the issues would be determined would be the transcript of the December 20-21, 2000, contested case hearing in this case and the exhibits offered and admitted into evidence during that hearing and not thereafter withdrawn.
Subsequently counsel for the City authorized the Hearings Bureau to have electronic copies made (on CD format) of Exhibit 10 (two audio tapes of the February 14, 2000, council meeting). The CDs were of better quality than the original recordings, although the quality still was not very good. On July 31, 2009, at the time that copies of the CD were sent to counsel for the parties, the Hearing Officer set a submission schedule for the parties, who had agreed to submit the case on briefs. On October 19, 2009, the last brief was filed and the case was submitted for decision on remand.

II. AMENDED AND ADDITIONAL FINDINGS OF FACT ON REMAND

The Hearing Officer incorporates by reference Findings of Fact Nos. 1-34 from the decision herein, *Kathy Denke v. City of Thompson Falls and Maurice Shoemaker* HR. Nos. 0009009180-81 (Nov. 16, 2001), to the extent that those findings are necessary for the following additional findings on remand. Particular original findings (retaining their original numbers) are also amended herein. To the extent that any portions of the original findings not specifically amended herein are inconsistent with any of these additional findings, they are hereby amended to conform to these additional findings.

II.a. AMENDED FINDINGS OF FACT

28. At the commencement of the [February 14, 2000] council meeting the mayor, who presided over council meetings, resigned and left the meeting. There is no evidence that the mayor gave any advance notice to the members of the council that he would be resigning. Eggensperger, who had been on the council for over 12 years, ordinarily would have presided, but he was absent. McKahn, as the senior council member present, assumed the duty of chairing the meeting. She was not experienced in chairing such a council meeting. There is no evidence that she had either expected or prepared to chair the meeting. There is no evidence that she had considered, obtained legal advice or otherwise prepared to limit or control the discussion of the first item on the agenda for the council meeting, "Human Rights

Complaint, Maurice Shoemaker/Laurie Brass." Limits upon the length of each comment would not have appreciably altered the scope or content of the comments. Limits upon the total time to be spent upon the item, or the number of times individuals could speak, might have substantially diminished the entirety of the discussion.

29. Shoemaker began, because he was identified with the first agenda item. After remarks about the Ledger's censorship and the mayor's refusal to put him on the previous agenda, he discussed the rumors about the amount of the settlement, which were inconsistent with his understanding of the settlement, and the absence of any confirmation during a council meeting that the settlement had been accepted. He repeatedly talked about council members "sweeping it under the rug [or carpet]" and "keeping it behind closed doors." He also commented that he had not heard an apology to date from either the mayor or Denke. He told the assembly that Denke had agreed with his account of what happened between the mayor and Denke. He turned to Denke and asked her to acknowledge her agreement with him. Denke said, "No." McKahn did not attempt to limit Shoemaker's wide ranging comments. Her failure to do so was not motivated by any retaliatory animus toward Denke. After Shoemaker, numerous citizens, members of the council and the city attorney spoke, in a free-ranging discussion.

30. During the course of discussion, the city attorney and members of the council pointed out that there was a confidentiality agreement. Laurie Brass told the assembly that she had obtained copies of documents from the investigative file from the Human Rights Bureau. She passed some of the copies around the room. Shoemaker commented that Denke had elected to have the October discussion of the settlement in an open rather than a closed council session, and therefore the matter was open for discussion. The discussion was prolonged. McKahn did not attempt to determine whether discussion or circulation of the documents should be limited. Her failure to consider such a limitation was not motivated by any retaliatory animus toward Denke. Many of the citizen comments were not per se attacks upon Denke, but were instead critical and suspicious comments regarding the conduct of council and government business. Some citizens made comments suggesting that Denke had been a willing participant in the sexual harassment of which she had complained. A smaller number of the comments insinuated or directly asserted that Denke had voluntarily engaged in sexual activity with the mayor at work during working hours. Again, McKahn's failure to interrupt, limit or control the comments was not based upon any retaliatory animus toward Denke. When the discussion lagged, council members asked if there were any other comments, prefatory to closing the discussion

and moving to the next agenda item. That question, asked to conclude the discussion of the item and move on to other business, repeatedly prompted additional comments. McKahn's failure to take a more aggressive approach to concluding discussion on the agenda item was not based on any retaliatory animus toward Denke.

II.b. ADDITIONAL FINDINGS OF FACT

35. During the discussion of agenda item one in the February 2000 city council meeting, the city could have imposed reasonable and viewpoint neutral time, place, and manner restrictions on speech, but failed to do so. The city's failure to impose such restrictions more likely than not contributed to the number of hostile comments that Denke endured during the council meeting. However, the city's failure was not the result ("because") of Denke's protected activities in filing and pursuing her Human Rights Complaint of sexual harassment by the mayor.

36. The City was not responsible for Shoemaker's retaliatory comments during the council meeting, when he acted as an independent city council member, elected by his constituents, rather than acting within the scope of his authority as a city employee. Since its failure to impose reasonable and viewpoint neutral time, place, and manner restrictions on speech was not the result of Denke's protected activities in filing and pursuing her Human Rights Complaint of sexual harassment by the mayor, that failure does not make the city responsible for Shoemaker's conduct during the meeting.

III. ADDITIONAL DISCUSSION ON REMAND[1]

The discussion portion of the original decision is amended with the following addition. Any and all statements in the original discussion contrary to this addition are hereby amended to conform to this addition. The balance of the original discussion is incorporated herein by reference.

The Montana Supreme Court determined that the city was responsible, on a respondeat superior basis, for Shoemaker's illegal retaliation against Denke arising out of his conduct before the February 14 council meeting. *Denke v. Shoemaker*, ¶90, 2008 MT 418, 347 Mont. 322, 198 P.3d 284. That determination is not revisited in

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

this order. The district court has already been directed to enter judgment against the city for the amount awarded.

A question arose regarding whether new findings of fact were proper under the remand directions. The remand order, as already noted on page 1 of this decision on remand, required the Hearing Officer to determine whether the City of Thompson Falls' conduct of the discussion of the first agenda item at the February 14, 2000, city council meeting constituted unlawful retaliation as alleged by Denke. The Hearing Officer believes this order on remand is consistent with the Montana Supreme Court's decision on appeal, which correctly noted that the Hearing Officer never reached that issue in the original decision. Obviously, new findings are proper and necessary to determine on remand whether there was such unlawful retaliation.

The determination that the city did not illegally retaliate against Denke by failing to impose reasonable and viewpoint-neutral time, place, and manner restrictions on speech during the council meeting is new to the decision on remand. The determination that the city is not responsible for Shoemaker's retaliatory conduct during that council meeting is also new, albeit purely ancillary to the more general determination regarding its liability of its conduct of the meeting.

No affirmative relief is imposed against the city, because the decision on appeal that the city is responsible for Shoemaker's conduct prior to the council meeting at issue is not within the scope of the remand, and therefore there is no authority for the Hearing Officer to revisit that issue and impose affirmative relief.

1. The City Did Not Illegally Retaliate Against Denke by Failing to Impose Reasonable and Viewpoint-neutral Time, Place, and Manner Restrictions on Speech During the February 14, 2000, City Council Meeting.

As Denke's counsel has forcefully and correctly pointed out, Kathy Denke established her prima facie case of retaliation regarding unlawful retaliation during the council meeting. She proved that she had engaged in activities protected by the Human Rights Act (filing and pursuing her sexual harassment complaint). She proved that the City, by failing to impose permissible restrictions upon the discussion of the first agenda item at the council meeting, subjected her to significant adverse acts during that meeting. She also presented evidence of a causal connection between the significant adverse acts and her protected activities, thus satisfying all three elements of her prima facie case. Admin. R. Mont. 24.9.603(a).

Denke's causal connection evidence was that the council meeting occurred within six months of the settlement of her Human Rights complaint against the city. By the express terms of Admin. R. Mont. 24.9.603(3), there is a disputable presumption that significant adverse action taken against a charging party by the

respondent while or within six months after the charging party's discrimination complaint is pending with the department was in retaliation for protected activity. Denke is entitled to this disputable presumption of retaliatory motive.

A disputable presumption is an assumption of fact that the law requires to be made from other facts found in the case, which can be overcome by a preponderance of evidence contrary to the presumption. Mont. R. Ev. 301(b)(2). Unless the preponderance of the evidence is contrary to the presumption, it prevails. ***Id.*** The Commission Comment regarding Rule 301(b)(2) is very clear:

> If evidence is introduced which gives rise to a presumption, and the presumption is not controverted or disputed, the trier of fact must find in accordance with the presumption. In order to avoid this and overcome a presumption, the rule necessarily requires that the burden of persuasion shift to the party against whom the presumption operates. ***See*** *Holen v. Phelps*, 131 Mont. 146, 152, 308 P.2d 624 (1957) ***and cases cited therein***. If evidence contrary to the presumption is introduced, the presumption is given the weight and effect of evidence and a question is raised for the trier of fact who may give the presumption such weight in the face of the contrary evidence as it thinks the presumption should have. ***See*** *Lewis v. N.Y. Life Ins. Co.*, [113 Mont. 151, 162, 124 P.2d 579 (1942)]; *Williams v. Swords*, 129 Mont. 165, 173, 284 P.2d 674 (1955); *Roseneau Foods Inc. v. Kohlman*, 140 Mont. 572, 577, 374 P.2d 87 (1962); *Crissey v. State Highway Comm'n.*, 147 Mont. 374, 379, 413 P.2d 308 (1966).

Regarding the conduct of the meeting, Shoemaker's retaliatory animus cannot be imputed to the city. There is no evidence, aside from the presumption, that putting the item on the agenda (after resisting Shoemaker's efforts to do so) and then allowing unlimited discussion of the item stemmed from any retaliatory animus on the part of anyone acting on behalf of the city.[2] Thus, as regards the council meeting, the fact that the meeting occurred less than six months after settlement of Denke's harassment complaint, invoking the presumption, stands alone as evidence of retaliatory animus on the city's part.

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[2] The city did have immunity for calling the meeting, which may include putting the item on the agenda, under Mont. Code § 2-9-114. *Denke v. Shoemaker*, ¶57, 2008 MT 418, 347 Mont. 322, 198 P.3d 284. There is no evidence that the city, after fighting Shoemaker's efforts to do so, ultimately put it on the agenda out of any retaliatory animus.

The Hearing Officer has "given the presumption such weight in the face of the contrary evidence as . . . the presumption should have." Commission Comment (and cases cited therein). Evidence contrary to the disputable presumption is in the record. There is no evidence that the mayor quit and walked out or that the next senior council member was absent out of retaliatory animus toward Denke. There is no evidence that McKahn allowed the discussion on the first agenda item to go on as it did out of any retaliatory animus. This evidence overcame the presumption. It was more likely than not that the loose conduct of the meeting and the reception of multiple chaotic rounds of comment on the Human Rights settlement resulted from confusion and inexperience, not retaliatory animus.

Since the city's failure to impose reasonable and viewpoint neutral time, place and manner restrictions on speech during the council meeting resulted from these peculiar circumstances, that failure was not motivated by retaliatory animus. This does not change what Kathy Denke endured during that meeting. It does defeat Denke's prima facie case against the city by subtracting the necessary element of causation. Retaliation is adverse action against a person <u>because</u> that person had pursued legal remedies for illegal discrimination. Mont. Code Ann. §49-2-301. Denke offered no evidence that the confusion resulting from the circumstances that arose at the beginning of that meeting was simply a pretext for the city, acting through the most senior council member present, who unexpectedly was chairing the meeting, to act out of retaliatory animus toward Denke. The city's poor handling of the meeting was not because of Denke's Human Rights complaint.

2. The City Is Not Responsible for Shoemaker's Retaliatory Conduct During the February 2000 Council Meeting.

The remand order tasks the Hearing Officer with deciding the responsibility of the city for retaliatory conduct during the council meeting, which at the very least includes that of Shoemaker. That is a more confined issue than the one the Supreme Court reserved for the district court:

> If and when the bankruptcy stay is lifted, the District Court may then revisit the issue of whether Shoemaker's comments at the February 14 council meeting were privileged and, if necessary, the issue of whether the City is liable for those comments.

Denke v. Shoemaker, ¶68, 2008 MT 418, 347 Mont. 322, 198 P.3d 284.

The remand issue of the city's responsibility for the conduct of the council meeting includes consideration of whether the city is responsible for Shoemaker's actions and statements during that meeting, if the city failed to control the meeting

out of retaliatory animus. Shoemaker's retaliatory animus was certainly evident during the February 2000 council meeting, whether or not his comments were privileged. However, despite the city's responsibility for Shoemaker's prior conduct, based upon both the evidence and the city's admissions that Shoemaker acted within his authority as an employee of the city, the decision on appeal and the remand order did not direct that any higher standard be applied to the city's failure to limit the participation of Shoemaker in particular during that meeting.[3]

The city's failure to regulate Shoemaker's comments, just as its failure to regulate the comments of others, was not based upon any retaliatory animus. As the Hearing Officer reads the decision on appeal and applies the facts and law (see sec. 1, above), the city's lack of retaliatory animus absolves it of any legal liability for what Shoemaker or any other participant said or did during the council meeting.

3. No Affirmative Relief Against the City Would Be Proper on this Remand.

If the city's liability for Shoemaker's conduct prior to the meeting was before the department on remand, the Hearing Officer would order the city to refrain from the discriminatory to control the conduct found, and might, in its discretion, prescribe conditions on the city's future conduct relevant to the type of discriminatory practice found, pursuant to Mont. Code Ann. §49-2-506(1) and (1)(a). In this instance, the city's responsibility for Shoemaker's conduct outside of the meeting was only remanded to the district court, for entry of judgment against the city on that claim. *Denke v. Shoemaker*, ¶90, 2008 MT 418, 347 Mont. 322, 198 P.3d 284. Within the scope of the issue remanded to the Hearing Officer, the city was not motivated by retaliatory animus when it failed to restrict comment on agenda item one during the council meeting. Thus, no affirmative relief is included in this order on remand.

Nonetheless, it would be wise for the city to obtain advice from its legal counsel about how and when it can and should properly impose reasonable and viewpoint neutral time, place and manner restrictions on speech during council meetings, particularly (although not exclusively) when personnel issues are likely to be topics of discussion. It might also be useful to train all of its council members to chair counsel meetings.

IV. CONCLUSIONS OF LAW ON REMAND

The Hearing Officer now issues the following new Conclusions of Law, in accord with the directions on remand.

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[3] It would be peculiar if the city had greater power and duty to limit participation in a council meeting by a council member, elected to represent his constituents, than to limit public participation.

1. The department has jurisdiction. Mont. Code Ann. §49-2-509(7).

2. The city did not illegally retaliate against Denke by its conduct of the city council meeting at issue on this remand. Other liability of the city for the conduct of one of its council members before that meeting has been determined on appeal from original Hearing Officer Decision, *Denke v. Shoemaker et al.*, 2008 MT 418, 347 Mont. 322, 198 P.3d 284. Since that liability is not part of this remand proceeding, no further conclusions of law are proper.

V. ORDER ON REMAND

The Hearing Officer now issues this Order, in accord with the remand order.

1. The department enters judgment in favor of the City of Thompson Falls and against Mark Alan Denke, P.R. of the Estate of Kathlyn N. Denke, Deceased, on the charge that the city's conduct of the February 14, 2000, city council meeting was motivated by retaliatory animus toward her because she had filed, pursued and settled her previous Human Rights Act complaint against the city. Denke's recovery from the City for the conduct of one of its council members prior to the city council meeting is not before the department on remand.

Dated: November 19, 2009.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Ann Moderie and James A. Manley, Manley Law Firm, attorneys for Mark Alan Denke, P.R. of the Estate of Kathlyn N. Denke, Deceased; and Ted Hess-Homeier, attorney for the City of Thompson Falls:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c). TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kuntz

Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.