

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0071012548 &
0088012646:

ANGELA WOLFE,)	Case Nos. 1402-2008 & 1815-2008
)	
Charging Party,)	
)	
vs.)	HEARING OFFICER DECISION
)	
JBWM, LLC,)	
)	
Respondent.)	

I. PROCEDURE AND PRELIMINARY MATTERS

Charging Party Angela Wolfe brought this complaint alleging that JBWM, LLC., discriminated against her on the basis of sex by discharging her from employment because she was pregnant and by retaliating against her for filing a human rights complaint.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Libby, Montana on September 25 and 26, 2008. Angela Zielinski, attorney at law, represented Wolfe. Amy Guth, attorney at law, represented JBWM.

Wolfe, Alice Harris, Brenda Ellis (Wolfe's sister), Dr. Jana Hall (Wolfe's doctor), former Montana Department of Corrections Probation Officer Shawn Suda, Nancy Erhard, Bud Chewing, Montana Department of Corrections Probation Officer George Clough, Montana Department of Corrections Probation Officer Steve Watson, Russell Wolfe (Angela's husband), Perry Harris, Den Steinke, Brandi Kraft, Midge Graves, Mike Munroe(part owner JBWM), Don Brown(part owner JBWM), Ron Johnson (part owner JBWM), and George Wood (part owner JBWM) all testified under oath. Charging Party's Exhibits 1, 3, 4, 5, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 23, and 24 and Respondent's G, H, I, J, K, L, M, N, O, P, Q, and R were admitted into evidence.

The parties requested an opportunity to file post-hearing briefs and the last brief was timely filed on December 31, 2008 at which time the record in this matter closed. Based on the evidence adduced at hearing and the arguments provided in closing briefing, the following findings of fact, conclusions of law, and hearing officer decision are made.

II. ISSUES

A complete statement of the issues in this case is set forth in the September 15, 2008 final prehearing order issued in this case. Those issues are incorporated into this decision by this reference.

III. FINDINGS OF FACT

1. JBWM, LLC., is a limited liability company organized and doing business in Montana. The members of JBWM are Ron Johnson, Don Brown, Mike Munroe, and Ron Wood. Mike Munroe has substantial experience in running a restaurant which he has gained from being the owner of Treasure Mountain, a bar, restaurant and casino located in Libby, Montana.

2. In 2006, JBWM purchased Happy's Inn (Happy's). Happy's is comprised of a restaurant, bar and casino and is located about 40 miles south of Libby. JBWM bought Happy's as part of a real estate package which also included other land parcels around Happy's. JBWM's sole purpose in buying Happy's was to obtain and develop these other parcels around Happy's. The members of JBWM had no intention of keeping Happy's nor did they wish to get involved in running it. They decided right after the purchase that they would sell off Happy's and develop the other parcels that had been part of the package.

3. Alice Harris, who is Wolfe's mother, has owned and operated restaurants in the Libby area for a number of years. Harris owned Alice's Restaurant in Libby until it closed prior to the spring of 2006.

4. Just after purchasing Happy's, Mike Munroe and George Wood became aware that Harris had closed her restaurant. They approached her to talk about managing Happy's. From the outset, Munroe and Wood told Harris that JBWM's intention was to sell Happy's. They also assured Harris that they would take a "hands off" approach and would let her manage the restaurant. As Harris herself testified at hearing, Munroe and Wood told her that there would be no micro-managing on their part at Happy's.

5. Harris, Munroe and Wood entered into an agreement for Harris to manage the restaurant. The agreement provided for Harris to receive an annual salary based on working 40 hours per week and also provided that JBWM would pay to have Harris' trailer moved from Libby out to Happy's. Of greater consequence to this proceeding is the proviso in the agreement that provided the method in which Harris would be compensated in the event that Happy's was sold within two years of the implementation of the agreement. Under the agreement, if Happy's sold within the first year of Harris' employment and Harris lost her job as a result of the sale, she would be given a bonus of \$10,000.00. The agreement further provided that if Happy's sold within the second year of Harris' employment and Harris lost her job as a result of the sale, she would be given a bonus of \$5,000.00.

6. Harris began managing Happy's in September, 2006. She had the authority to hire and fire employees. She had responsibility for scheduling the employees, ordering food, and, generally, to do everything necessary to properly manage Happy's. About the only thing that she did not consistently do was make bank deposits.

7. Harris made the work schedules on a weekly basis. She did not make them on a bi-weekly basis. Harris told employees to check their schedules on a daily basis to ensure that they were at work on the days they were supposed to be at work.

8. Deb Steinke and Midge Graves who had been employed by Happy's prior to its sale to JBWM continued to work after the sale. Harris then hired her daughter Brenda Ellis as a cook.

9. Graves works as a busser in the dining room at Happy's. When working, she is highly visible to Happy's patrons. Graves is poor and does not make much money at her job at Happy's. When she is at work, she appears very unkempt and her personal hygiene is sometimes lacking. Throughout all relevant time frames in this matter, Wood and all the members of JBWM have been aware of the problems with Graves' appearance and personal hygiene. Despite these shortcomings, neither Woods nor any member of JBWM objected to Grave's working as a busser at Happy's.

10. Munroe sent another potential employee, Brandi Kraft, to Harris to see if she could be hired. Munroe had previously employed Kraft at Treasure Mountain and felt Kraft would be a good employee. Harris agreed and hired Kraft.

11. Harris also hired Leigh McKeon. Sometime in November, 2006, Harris hired Wolfe to cook in the kitchen. After clearing it with Wood, Harris decided to pay Wolfe \$12.00 per hour.

12. Wolfe worked approximately 17 hours per week at Happy's until the end of hunting season in 2006. At that time, due to reduced patronage, Wolfe was laid off. She remained job attached to Happy's throughout the winter of 2006/2007.

13. Between November 14 and November 20, 2006, Wolfe cashed checks at Happy's that her husband had written and signed. Five of these checks, totaling \$500.00, were returned for insufficient funds. Wolfe found out that the checks had not cleared. She contacted Wood to apprise him that the checks had not cleared and that she wanted to make the checks good. Wood indicated that was fine.

14. Wolfe immediately paid back \$300.00 of the \$500.00. She was unable to pay the last \$200.00 back right away. Wood agreed that Wolfe could pay back the amounts when she was able.

15. Harris was very covetous of her authority position as manager. She resented anything she considered to be an incursion into that authority. On occasion, Munroe, who had experience running Treasure Mountain, would make suggestions as to how things at Happy's might be better run. Harris took huge offense to Munroe's suggestions. She told Steinke on more than one occasion that she resented Munroe's suggestions.

16. Wolfe was rehired at Happy's on April 30, 2007. At that time, Wolfe was six months pregnant and she was showing. Due to her pregnancy, Harris instructed the Happy's employees to help Wolfe in her duties if necessary to ensure that she did not injure herself. In addition, Harris informed the Happy's employees that Wolfe could not complete certain duties because of her pregnancy. Among these duties were mopping and scrubbing the grill.

17. The employees heeded Harris' admonition. For example, on one occasion, Harris instructed Steinke to pick up a box of tomatoes that Wolfe was about to lift and place the box in the kitchen cooler in order to make sure that Wolfe did not injure herself.

18. Harris had good reason to instruct the employees to assist Wolfe if she needed assistance. In her preceding pregnancy (some two years earlier), Wolfe had to go on bed rest in order to prevent a miscarriage of the child she was carrying.

19. Sometime during the month of May, 2007, JBWM decided to sell Happy's to member Don Brown and Maxine Daumgard. Brown and Daumgard also decided that they would become the on-site managers of the restaurant. As a result of this decision, Daumgard was placed on the schedule.

20. Upon learning that Daumgard would be put on the schedule, Harris called Wood to tell him that she did not want Daumgard. She also told the employees at Happy's that they should quit.

21. In mid May, 2007, Munroe and Wood met with Harris and her husband, Perry, at the Harris' trailer to discuss the fact that JBWM was selling Happy's to Brown. Upon learning that the business would be sold, Harris immediately began asking for the \$10,000.00 she felt she was due under the contract because of the sale of the business. Munroe and Wood explained to her that she would be retained as the kitchen manager at Happy's at her current salary and, therefore, in their opinion she was not entitled to the \$10,000.00. This angered Harris and Perry. They told Munroe and Wood that they would be retaining a lawyer. Realizing that the conversation was not going to be productive, Wood suggested that they terminate the meeting and meet at a later date.

22. On May 17, 2007, Steinke, Harris and Wolfe were in Happy's working. Woods came into the restaurant. At that time, he saw Angela come out of the kitchen area. She looked like she was not feeling well and she was holding her back. Woods commented that

Angela did not look like she was feeling well. Woods then instructed Harris to make sure that if Wolfe needed any help, she got it. Harris replied that all of the employees were helping Wolfe.

23. Wolfe's name stayed on the schedule throughout the weeks of May 27 through June 3. The schedule, which Harris made up weekly, showed that Wolfe was "off." Harris did not modify the schedule to take Wolfe's name off the schedule as she had with other employees who had left their employment at Happy's.

24. On May 27, 2007, one of Harris' employees called in sick. Harris then asked Wolfe to come into work. Wolfe did so.

25. Wood did not come into Happy's on May 27, 2007. He stayed at home hosting a party.

26. Munroe, Wood, Harris and her husband Perry met in the restaurant at Happy's on June 6, 2007 to again discuss the sale of Happy's to Brown. They began discussing Harris' contract. Harris reiterated that JBWM owed her \$10,000.00 pursuant to the employment contract. Munroe and Wood disagreed, pointing out that Harris was being offered the kitchen manager position at the restaurant and her present salary and, therefore, she was not losing her job as a result of the sale of Happy's. The argument became heated. During the argument, Harris mentioned Wolfe's name and something about an employee problem with her. Wood stated that the purpose of the meeting was to discuss Harris' contract.

27. Harris became so upset at the meeting that Perry had to calm her down. The meeting ended and Munroe and Wood left the restaurant.

28. On June 9, 2007, Harris went on a medical leave due to a problem with her shoulder. At the urging of Wood, she ended up filing a worker's compensation claim. The claim was upheld. Harris never returned to work at Happy's.

29. After Harris left, Deb Steinke took over as kitchen manager. Wolfe could have returned to work at anytime while Steinke was acting as manager.

30. On August 8, 2007, Wolfe filed this discrimination complaint with the Montana Human Rights Bureau. The complaint was served on Wood sometime around September 30, 2007.

31. At all times pertinent to this case, Wolfe was on felony probation for issuing bad checks. Wolfe's first probation officer was Montana Department of Corrections Officer Shawn Suda. After Suda resigned from his position, Montana Department of Corrections Officer George Clough took over as Wolfe's probation officer. In February, 2007, Montana Department of Corrections Officer Steve Watson became Wolfe's probation officer.

32. As part of her probation, Wolfe was required to inform her probation officer of any new job she took. Though not required to do so, the probation officer could send a letter to the employer advising the employer of the fact that the probationer was on probation. Officer Suda may have sent such a letter to Happy's. If such a letter was sent to Happy's, it would not have advised the employer of the basis for the imposition of the probation. If Officer Suda sent a letter to Happy's, it is unclear where the probation letter in this matter was sent. It is apparent, however, that the members of JBWM were never made aware of Wolfe's probation at that time.

33. On September 30, 2007, after receiving Wolfe's discrimination complaint, Wood telephoned Clough to inquire as to whether Wolfe was on probation. Wood had been a friend of Clough's for many years. Wood's purpose in calling Clough was to ascertain whether Wolfe was on probation in the event he (Wood) would need to know that information for purposes of transferring Happy's liquor license to Brown. Wood knew that Wolfe had cashed insufficient fund checks while at work. The sale of Happy's was underway and Wood was concerned that if Wolfe had violated her probation while working at Happy's this might affect the ability to transfer the license. Clough testified, and the hearing officer so finds, that if a probationer has violated the terms of his or her probation while at work in an establishment having a liquor license, the employer can lose the liquor license.

34. Wood started off the conversation by saying he did not want to get Wolfe in trouble, but he wanted to know if she was on probation because she had cashed some insufficient fund checks at Happy's. Wood also told Clough that Wolfe had been gambling at Happy's. Clough informed Wood that Wolfe was on probation and that her probation officer was Steve Watson. Wood did not ask Clough to take any action against Wolfe nor did he ask Clough to inform Watson about what he (Wood) had observed.

35. On his own accord, Clough went by Watson's office and relayed to Watson the information that had been provided to him by Wood. He also told Watson that Wood had specifically told him that he did not want to get Wolfe in trouble.

36. Watson decided that he must contact Wolfe and find out if she had in fact violated her probation. On September 4, 2007, Watson called Wolfe and advised her that he wanted her to come into his office to discuss her probation. Wolfe and her husband Russell Wolfe drove down to Watson's office and Wolfe went in to talk with Watson while Russell waited outside in his truck. Watson did not search Wolfe, but he did search her purse. Watson went out to talk to Russell about the checks that had been cashed with insufficient funds. After speaking to both Wolfe and Russell, Watson determined that there was no reason to take any action against Wolfe.

IV. DISCUSSION AND ANALYSIS¹

Wolfe alleges both unlawful discrimination and retaliation in this case. She contends that JBWM owner Wood ordered her discharge because she was “too big and pregnant and she would get hurt.” Wolfe’s opening brief, page 21. She further argues that JBWM is in any event liable for Harris’ conduct which was unlawful. Wolfe also complains that Wood retaliated against her by contacting the probation department just days after finding out about Wolfe’s human rights complaint to inquire as to whether Wolfe had been on probation while working at Happy’s.

Happy’s denies that Wood ever discharged Wolfe and further insists that it has no vicarious liability for any unlawful conduct on the part of Harris. JBWM also denies that it retaliated against Wolfe in contacting the probation department to inquire as to whether Wolfe had been on probation while working at Happy’s. In addition, Happy’s asserts that even if it discriminated against Wolfe, Wolfe cannot obtain damages because Happy’s had a mixed motive in carrying out action against Wolfe and, in any event, Wolfe failed to mitigate her damages.

The preponderant evidence in this matter fails to show that Wood ordered Wolfe’s discharge because she was pregnant. Likewise, Wood’s conduct in contacting Clough after the filing of Wolfe’s human rights complaint was not retaliatory. The basis for these two conclusion are supported below and each claim will be considered separately.

A. *The discrimination claim.*

Montana law prohibits discrimination by an employer against an employee because of sex. Mont. Code Ann. §49-2-303(1)(a). Employment discrimination because of pregnancy is discrimination based on sex. *Bankers Life & Casualty Co. v. Peterson* (1993), 263 Mont. 156, 866 P.2d 241; *Miller-Wohl Co., Inc. v. Commissioner* (1984), 214 Mont. 238; 692 P.2d 1243; *Mountain States Te&T Co. v. Commissioner* (1980), 187 Mont. 22, 608 P.2d 1047. In addition, the Montana Maternity Leave Act, part of the Montana Human Rights Act, expressly provides protection of the employment rights of pregnant workers. Pursuant to Mont. Code Ann. §§ 49-2-310 and 49-2-311, it is an unlawful practice for an employer or its agent to terminate a woman's employment due to pregnancy.

Discrimination can be proved by either direct or circumstantial evidence. Where, as here, the charging party presents evidence of statements of a decision maker which in themselves reflect unlawful discrimination and which are related to the challenged action, then the case is a “direct evidence” case. *Laudert v. Richland County Sheriff's Department*, 2000 MT 218, ¶29, 301 Mont. 114, ¶29, 7 P.3d 386, ¶29. Where a prima facie claim is made out by

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

direct evidence, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(5); *Reeves v. Dairy Queen*, 1998 MT 13, ¶17, 287 Mont. 196, ¶17, 953 P. 2d 703, ¶17. However, Wolfe at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. *Heiat v. Eastern Montana College*, (1996), 275 Mont. 322, 912 P.2d 787, 792, citing *St. Mary's Honor Center v. Hicks*, (1993), 509 U.S. 502.

Harris' testimony, if believed, provided direct evidence of unlawful discrimination on the part of Happy's. Harris testified that on May 17, 2007, Wood, after seeing Wolfe at work, told Harris that he did not want Wolfe on the schedule because she was too big and pregnant and she might get hurt. Harris also testified that on May 27, 2007, after Harris had called back Wolfe to fill in for an absent employee (Ellis), Wood again approached Harris about Wolfe working there. After explaining to Wood that Wolfe was filling in for an absent employee, Wood told Harris that was okay, but after that Wood did not want to see Wolfe on the schedule. This testimony is sufficient to establish the charging party's prima facie case and cause the burden to switch to Happy's to prove by a preponderance of the evidence that either an unlawful motive played no role in the challenged action or that the evidence supporting the prima facie case is not credible.

Harris is the lynch pin of this discrimination claim. Wood's alleged comments were made only to Harris and not to Wolfe. Having carefully considered all of the evidence including the impeaching evidence presented by both parties, the hearing officer concludes that Harris' testimony is not credible and that it is not likely that Wood made any comment to Harris about discharging Wolfe. Rather, it is more likely that if Wood said anything at all on May 17, 2007, all he said was that Wolfe did not look well and that the employees should make sure that Wolfe received all the help that she needed. Several points support the conclusion that Harris' testimony is not credible.

Important among the factors in arriving at this conclusion is the undisputed evidence that Midge Graves, who presents as unkempt and sometimes lacking in personal hygiene while at work, has been permitted to work for years at Happy's out among the customers. It is inconceivable that Wood, who permits Graves to work around customers even when she appears unkempt, would object to Wolfe showing as pregnant when Wolfe only worked in the kitchen.

Harris' testimony is also lacking in several respects. If Wood had actually discharged Wolfe on May 17, 2007, it is improbable that Harris' who claims that Wood and Munroe micro-managed Happy's, would defy Wood's directive and nonetheless call Wolfe back into work ten days later without first clearing it with one of the JBWM owners. Harris' testimony that she made out the schedule two weeks in advance is not credible in the face of the overwhelming evidence to the contrary. Even Ellis, Harris' other daughter, testified that Harris made out the work schedule on a weekly basis. Despite this, Harris kept Wolfe on the work schedule for the

week following her alleged discharge on May 17. The fact that the schedule was made out weekly, taken in conjunction with the fact that Harris called back Wolfe to work even after she was allegedly terminated on May 17, supports the conclusion that Wood never ordered Wolfe's discharge. In addition, this evidence undermines Harris' credibility.

Likewise, the letter of discharge which Harris prepared on June 7, 2007 and allegedly provided to Wolfe looks more like an after the fact attempt to manufacture a problem than an effort to simply document illegal conduct on the part of the JBWM owners. That letter was never provided to the JBWM owners. Had it been prepared at their behest or even simply to provide a paper trail of conduct they had taken, it most certainly would have been provided to the owners.

Also damaging to Harris' credibility is the very credible testimony of Deb Steinke and Brandi Kraft. Steinke, for example, was never told by either Harris or Wolfe that Wolfe had been terminated. Had this in fact occurred, Steinke would have been told immediately. Steinke was present when Wood made his comments on May 17, 2007 and only heard Wood state that he was concerned about Wolfe's health. She never heard Wood say anything about Wolfe being too fat and pregnant. It is also clear from Steinke's testimony that Harris had a huge axe to grind with JBWM over its management of her and their decision to make Daumgard the general manager. In light of all of this evidence, Harris's testimony is not credible.

Even taking the totality of the evidence in this case in a light most favorable to Wolfe, the most that can be said is that the evidence is equally weighted for both sides. Thus, even if the hearing officer found some truth in Harris' testimony, neither it nor any of the charging party's evidence could be considered to present preponderant evidence of discrimination that would carry Wolfe's ultimate burden of persuasion.

Wolfe has also posited that even if Harris acted on her own, she was acting as an agent of Happy's and that JBWM has vicarious liability for her actions. This argument is misplaced since vicarious liability hinges on the finding of some type of illegal discrimination in the first place. Wolfe was never discharged from her duties because of her pregnancy. As both the schedule and Steinke's testimony show, Wolfe could have come back to work. Harris' June 7, 2007 letter was simply an attempt to manufacture an event that never occurred. If Wolfe was let go from her duties, it was only because of the change in ownership and Harris' leaving her manager position at Happy's. Her failure or inability to return to work was not due to discrimination. Accordingly, there can be no vicarious liability for Harris' conduct since no unlawful conduct occurred in this case. Wolfe's discrimination claim thus fails because it has not been proven by preponderant evidence.

B. *The Retaliation Claim.*

Montana law prohibits retaliation in employment practices for protected conduct. Taking a **significant adverse** action against a person because the person engages in protected

activity is illegal retaliation. Admin. R. Mont. 24.9.603 (1). Significant adverse action can include “the filing of a factually or legally baseless civil or criminal complaint.” Admin. R. Mont. 24.9.603 (2)(a).

A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in protected activity, (2) thereafter her employer took an adverse action against her and (3) a causal link existed between her protected activities and the employer’s actions. *Beaver v. D.N.R.C.*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. *See also*, Admin. R. Mont. 24.9.610 (2). When significant adverse actions are taken against a charging party during the pendency of a Human Rights proceeding by an employer who has actual or constructive knowledge of the proceeding, a rebuttable presumption arises that the action was in retaliation for engaging in protected conduct. Admin. R. Mont. 24.9.603 (3).

Circumstantial or direct evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent’s acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9th Cir. 1996).

The parties do not dispute that Wood was on notice that Wolfe had filed her claim at the time that he contacted Clough. Nor do the parties dispute that Wolfe had cashed insufficient fund checks at Happy’s which in theory (though, according to Watson’s testimony, not in practice) could be a basis for initiating a complaint to revoke Wolfe’s probation. The parties strenuously disagree, however, on whether Wood’s conduct constituted adverse action and whether or not there is any causal link between Wolfe’s filing of the complaint and Wood’s action. Wolfe argues that Wood’s waiting for a period of over seven months after Wolfe cashed the bad checks and then, within a matter of a few short days after learning of the complaint, talking to the probation department demonstrates the causal link requirement and further demonstrates pretext. Happy’s counters that the only purpose in Wood’s call was to make sure that Wolfe’s conduct of being on probation and cashing bad checks at Happy’s would not affect the sale of Happy’s and especially the transfer of the liquor license to Brown and Daumgard.

Wolfe’s evidence, along with the inferences from that evidence, establishes a prima facie case of retaliation. After learning of the human rights complaint, Wood called Clough while Wolfe’s case was pending. A fact finder could find (although this fact finder does not so find) under the facts advanced by Wolfe that Wood’s conduct was cleverly designed to subtly pique law enforcement’s interest in pursuing probation revocation. Because Wolfe has made out a prima facie case, the burden shifts to Happy’s to show legitimate, non-discriminatory reasons for the action.

Happy's has convincingly met its burden of proof in this regard. Wood clearly did not call Clough seeking to get Wolfe in trouble. He specifically prefaced his phone call with the statement that he did **not** want to get Wolfe in trouble, but he needed to know whether she was on probation. Wood never suggested that Clough mention to Watson what Wood had told Clough. Clough on his own initiative did so.

It is true that timing can be a factor in determining the validity of a retaliation claim. In this case, however, the timing of Wood's call to Clough does nothing to undermine the strength of the evidence presented by the respondent. While Wood's call to Clough came right after receiving the human rights complaint, JBWM was in the process of transferring its license to Brown and Daumgard. No party disputed that a liquor establishment could lose its liquor license if a probationer employed at the establishment violated probation while at work. Moreover, Wood's prefatory comment to Clough that he did not want to get Wolfe in trouble substantially bolsters Wood's position that the call was made merely to ascertain if Wolfe was on probation to see if that might affect the transfer of the Happy's liquor license.

Because Happy's has met its burden, the burden now shifts back to Wolfe to demonstrate that the proffered explanations were mere pretext. Wolfe has failed to do this. Wolfe has suggested that the actual transfer of Happy's to Brown and Daumgard did not occur until months after Wood's call to Clough. Wolfe is effectively arguing that this shows that Wood's call was not at all motivated by a concern about transferring the license. The inference cannot withstand the force of the substantial evidence that Happy's was in the process of being sold at the time Wood called Clough and that Wood was legitimately concerned about the impact on the liquor license of Wolfe's conduct at work. And the inference does not lessen the force of Wood's prefatory comment to Clough and the utter absence of any request on Wood's part that action be taken against Wolfe. Again, it is not realistic under the facts of this case to find that Wood's conduct was part of a carefully concocted scheme to subtly inform law enforcement of Wolfe's possible probation violation. Wood's motives in calling Clough were wholly legitimate and were not adverse action as contemplated by the rules and statutes. Accordingly, the hearing officer can find no basis in fact for Wolfe's retaliation claim.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. §§49-2-501, 49-2-505(1).
2. JBWM did not discriminate against Wolfe by discharging her from employment due to her pregnancy. Wolfe was not discharged from her employment.
3. JBWM did not retaliate against Wolfe for engaging in protected activity.

VI. ORDER

Judgment is found in favor of JBWM, LLC., and Angela Wolfe's case is dismissed.

DATED this 15th day of January, 2009.

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer

Wolfe HOD ghp

Hearings Bureau