

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013708:

SANDY KOEPKE,	)	Case No. 944-2010
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
GATEWAY COMMUNITY SERVICES,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Charging Party Sandy Koepke brought this complaint alleging that Gateway Community Services (hereinafter Gateway) discriminated against her on the basis of age when it eliminated her position of case manager and failed to hire her for one of two newly created positions of Youth and Family Resource Specialist positions.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Great Falls, Montana on April 6 and 7, 2010. Patrick Flaherty, attorney at law, represented Koepke. David M. McLean, attorney at law, and Erica R. Grinde, attorney at law, represented Gateway.

Charging Party’s Exhibits C through W and Z and Respondent’s Exhibits 1 through 11, 14, 15 and 17 were admitted into evidence at hearing. Koepke, Lori Ashton, Tammy Hatch, Linda Blankenship, Roger Curtis, Corrine Fish, Sandy Pepos, Julie Messerly, Michelle Koppány, and Donita Robinette (a.k.a Donita Morris) all testified under oath.

The parties filed post-hearing briefs and the last brief was timely filed on June 21, 2010 at which time the record in this matter closed.<sup>1</sup> Based on the evidence

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<sup>1</sup>The respondent provided an unofficial transcript which the parties did not specifically stipulate to using in lieu of the official record in this matter (the recording is at present the official

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 April 2, 2010 final pre-hearing order issued in this case. Those issues are incorporated into this decision by this reference.

## III. FINDINGS OF FACT

1. Gateway Community Services is a nonprofit organization that provides counseling and outreach services for persons afflicted with chemical dependency issues. Long term planning and strategic decisions are made by a Board of Directors.

2. Gateway is housed in a building known as the Gateway Center. In 2008, Gateway opened up a service entity known as the Blue Thunder Home. Until March 2009, Gateway also operated a home for single mothers facing chemical dependency issues. This home was known as the Grace Home.

3. Koepke initially worked as an intern at Gateway for 1 ½ years. She left after completing her internship but returned to Gateway's employment in 2003 to work as a case manager at the Grace Home. Eventually, she was transferred to the Center and continued in her capacity as a case manager. Koepke has an Associate of Arts degree in chemical dependency and a Bachelor of Science degree in psychology. Koepke's job reviews during her employment as case manager were very good and she performed her job competently.

4. Roger Curtis served as the director of Gateway until 2007 when he resigned. Thereafter, Lori Ashton and Linda Blankenship took over as clinical managers. Tammy Hatch served as the office manager for Gateway.

5. In late 2008 and early 2009, Gateway faced financial difficulties as its grant sources were drying up. The cost of running Grace Home was also problematic. Its

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record). However, both parties relied upon that transcript during their post hearing briefing and the hearings officer presumes, therefore, that the parties intend to rely on that unofficial transcript in any appeal to the Human Rights Commission. Based on this assumption, the hearings officer has incorporated appeal rights into this decision that presume the presence of a transcript and do not advise the parties of the need for any appealing party to pay for the preparation of a transcript.

funding revenues did not match the costs and it was a financial drain on Gateway. In addition, at that time the Grace Home was serving no more than six persons which made it an inefficient program. The loss of funding necessitated a review of the entire program structure and program cuts, including reducing its labor force.

6. As a result of the financial difficulties Gateway was experiencing, the Board of Directors brought in a consultant experienced in managing and developing turnaround plans for chemical dependency centers like Gateway. For this assignment, they hired Rod Robinson of Cornerstone Consultants to complete a program review of Gateway. Robinson completed his review (Exhibit V) and proposed areas for change in the program. Among the changes he recommended to the board was "analyze and decide on the continued financial viability of the Grace Home."

7. After the completion of the review, the Board hired Robinson to act as interim director to begin implementing his proposed changes. Robinson proposed several changes which the Board approved. Robinson changed, for example, the two co-clinical directors to five positions, residential treatment manager, outpatient treatment manager, family service manager, and the office manager.

8. At the time these changes were being implemented, a key orientation for treatment, critical to obtaining federal grants, was changing. Obtaining grants became more centered on orienting treatment toward involving the whole family of the client, not just the client. It also involved a more hands on and structured approach to assisting the client in the community. This made it necessary for Gateway employees to be willing to work with juveniles as well as adults.

9. Among the proposals that Robinson made to the board was a proposal that the Grace Home be discontinued. Another material change to the structuring of the program was the elimination of certain positions and the creation of certain new positions in order to handle one or more functions of previous positions.

10. Among the proposed changes was the cutting of the case manager position that Koepke had occupied. The position was to be replaced by two new case management positions known as a Youth and Family Resource Specialist. The Youth and Family Resource Specialist Position required the employee to work forty (40) hours per week.

11. Robinson prepared the job description for the new position (Exhibit 2). The position description of the newly created Youth and Family Resource Specialist

is similar to the earlier position descriptions for case management positions such as the one that Koepke occupied. Orientation toward youth and greater willingness to engage in resource linkage (ensuring by all means necessary and possible that clients could link up with community resources they needed) to facilitate a “whole family” approach to treating clients was an important part of the new position.

12. The position description contains minimum qualifications for the position. The education requirement states: “Prefer minimum of a bachelor’s degree in a human services field. Require minimum of Associates degree in same field. May consider a combination of secondary degree education and work experience.” The experience requirement indicates that the position requires “[a] minimum of one year of full time experience serving adults, youth and families who have been affected by substance abuse or dependency.”

13. With respect to hiring, Gateway is an equal opportunity employer and, per its policies, it “shall use Equal Opportunity hiring practice guidelines in filling vacancies.” Exhibit 5, page 1. It is also Gateway’s intent “to be consistent with all fair labor practice guidelines as they pertain to hiring employees.” *Id.*

14. Because the case manager position was being eliminated, Koepke was advised she would need to apply for one of the newly created positions. At this time, Koepke was working thirty-two (32) hours per week for Gateway.

15. At the end of February, 2009, all employees of the Grace Home were advised that the Grace Home would be closing its doors. The employees were also apprised that their employment at Grace Home would be terminated. All employees of Gateway were advised of the reorganization on March 2, 2009.

16. Also on March 2, 2009, the two Youth and Family Resource Specialist positions were advertised to all employees, including Koepke and those employees working in the Grace Home, through an e-mail. The job announcement (Exhibit 1) was opened only to in-house applicants. It encouraged all employees to apply for the positions. The e-mail also contained the complete position description.

17. Gateway employees encouraged Koepke to apply for the new position. Gateway advised Koepke to take the application process seriously. Koepke initially indicated she was not going to apply for the new position, but ultimately did submit an application.

18. Gateway formed an interview team of Tammy Hatch, Linda Blankenship, and Lori Ashton to conduct the interviews. Hatch and Blankenship were both 53 years old at the time the interviews were conducted. Ashton was 48 years of age at the time the interviews were conducted. These three managers were delegated the task of developing interview questions, interviewing applicants, and selecting the most qualified applicants to fill the positions. Once the interview process was complete, they would recommend to Robinson which applicants should be selected for the positions. Robinson had no input into the applicants chosen for interview, the interview process, the interview committee's decision on the selections for the two positions, or the names of the applicants forwarded to him for hiring. Indeed, Robinson was out of state at the time the interviews were conducted.

19. Utilizing Hatch, Blankenship and Ashton for the interview committee was not unusual. They were selected for the interview committee because of the positions they held. That would have been standard operating procedure for other interviews as well. Testimony of Julie Messerly.

20. Hatch, Blankenship and Ashton worked together to compile the list of questions used at the interview . (Exhibit 3). The interview questions clearly demonstrate Gateway's concern that the applicant fulfill the new goal of orientation toward youth and willingness to engage in resource linkage to further the goal of ensuring a whole family approach to treatment. In this regard, one of the questions asked the applicants:

“Would you be willing to do the following for patients:

- Go into their homes for a family meeting, etc.
- Interacting with community resource agencies in behalf of the patient of the agency.
- Transporting patients to appointments, etc.

Another question asked: “How would you go about encouraging a teen [to] continue his high school education if he has dropped out of school?” Other questions asked how the applicant would go about engaging families in the patient's treatment process and the resources the applicant would use to re-engage a patient with a child that had not been previously living with them. Exhibit 3.

21. Interviews for the new position occurred on March 5 and March 6, 2009, with four internal candidates being interviewed: Koepke, Michelle Koppany, Donita Robinette and Carolyn Dowdy. The interviewers determined that each of the

candidates met the minimum requirements for experience and education. At the time of the hiring process, Koppany was 41 years old and Robinette was 31 years old.

22. Each of the applicants had sufficient preliminary qualifications to hold the position (such as education and experience). Robinette had an associate of science and general education degree with a focus on prenursing. She also had an associate of arts with a focus in psychology. Exhibit 9, Robinette resume, page 1. At the time she applied, she was already working as a case manager at Gateway (and had been for approximately 3 months). She had also served for over one year as a resident aide and certified medication specialist working with Alzheimer's patients. She also had experience in the chemical dependency treatment process due to assisting a family member in the recovery process.

23. As Robinette had been recently hired by Blankenship (within three months time), the experience that Robinette had noted in her resume was fresh in Blankenship's mind. In particular, Blankenship was aware that Robinette's reference from the assisted living facility had noted that Robinette had gone above and beyond what anyone else had done in helping patients get the resources they needed. Blankenship was also aware that in general working with Alzheimer's patients was complicated and necessarily involved planning and working with the families of the Alzheimer's patients.

24. Koppany had the equivalent of a four year college degree through a program offered by the University of Maryland which she took at the University of London while she was living in England. For the approximately four years immediately preceding her application for the position involved in this case, she had worked for Gateway in the Grace Home as the family services specialist and parent educator. In this position, she assisted families with "addressing their needs and finding appropriate community resources and social services agencies designed to best fit the needs of each individual family." Exhibit 11, page 2, Koppany resume.

25. Before she began her employment with Grace Home, Koppany contracted with Gateway through Healthy Mothers/Healthy Babies as a home visitation specialist from 2002 to 2005. She is certified through Healthy Mothers/Healthy Babies as a home visitation specialist and as a supervisor for the "Parents as Teachers" program. She is required to show proof of continuing education units in order to maintain her certification for the "Parents as Teachers" program.

26. During the interview process, Koppany, Robinette and Dowdy were interviewed by Hatch, Blankenship and Ashton. Koepke was interviewed by Hatch

and Ashton only as Blankenship was not in the office on the day that Koepke was interviewed. All three interviewers, however, participated in evaluating Koepke's answers before reaching a decision on which two of the four applicants would be selected. Hatch and Ashton talked with Blankenship about Koepke's interview and Hatch provided Blankenship with the notes Hatch had taken during Koepke's interview.

27. As demonstrated by Tammy Hatch's notes which were compiled at the time of the interviews, the applicants' responses show marked differences between the applicants. These differences were of critical and legitimate importance to the managers' consideration of the applicants' abilities to do the job.

28. Koppány's responses clearly showed a level of enthusiasm and willingness to undertake the position's enhanced responsibilities for community linkage. As Hatch noted, Koppány stated that she "prefers to work w[ith]/ families and/or teens" and that she had "no problem entering homes or working w[ith]/patients outside of agency." Exhibit 4, page 3. Koppány also told the interviewers that she felt the position needed to "make the first contact and move forward until they [the clients] are confident to do things on their own." Exhibit 4, page 4. Hatch further noted that during the interview, Koppány was "very enthusiastic & wishing to do what it takes to get this new family/ADOR area off the ground." (Emphasis in original). Hatch went on to note that Koppány was very willing to work w/patients to connect with needed resources and that there had been no need to prompt Koppány for answers as she gave 'extensive answers to all questions asked.'

29. Like Koppány, Robinette demonstrated a level of enthusiasm that showed a real interest and desire to undertake the resource linkage that the employer was looking for in the successful applicants. She was very enthusiastic about the new positions and the "Department for Family and Youth." Exhibit 4, page 6. She exhibited a good knowledge of community resources and was very willing to answer all questions with full answers and to expound on her abilities. Id. She answered the situation specific questions very well and in conformity with the expectations of the interviewers. For example, when asked about the youth needing a GED, she indicated that she would first explore why the teen was against getting a GED. She further indicated that she would "do what it takes to have the teen see the benefits of getting their GED and walking them through the process." Id.

30. During Koepke's interview, she voiced no objection to transporting clients, but she indicated that she would rather work with adults. Exhibit 4, page 1. She also indicated that she did not see a difference from the job she had been performing and

the job for which she was interviewing. She indicated that she would engage the family of the client by making phone contact and that if the family came in she would deal with them and their needs face to face. She also indicated, however, that some clients would prefer not to have their families involved. From this response, Hatch concluded that Koepke would not go much further toward engaging the client's family.

31. Koepke also indicated that with respect to teen educational needs, she would have them call the school to get started. Hatch concluded from this response that Koepke would take no extra effort to go outside of Gateway offices to help teens secure educational needs. During the interview, the interviewers had to prompt Koepke to get her to say that she would go with the patient to sign the patient up for resources if the patient needed it. Koepke also indicated that she had no problems with any boundary issues.

32. After comparing the interviews of all four applicants, Heath, Ashton and Blankenship unanimously chose Koppány and Robinette for the two positions.

33. Just after the completion of the interview process (April, 2009), in a manner which corroborates Gateway's position that its reorganization was becoming more oriented toward a whole family approach to client service, Gateway applied for two grants that would provide substantial sources of income for Gateway. One grant was the "Recovery Oriented System of Care(ROSC) grant and the other was the Substance Abuse Treatment for Family and Youth grant. These grants would have provided Gateway with approximately \$400,000.00 per year in income to Gateway for 3 years. Gateway was not successful in getting these grants.

34. Koppány and Robinette's work since the time of their selection has validated their qualifications for the two positions. As Blankenship testified, in her 17 years in the field, she has never seen case resource specialists "go to the lengths that they go to help clients and have increased even billing wise how much case management that we provide for clients significantly." Blankenship testimony, pp. 235-36, transcript.

35. On March 25, 2009, after offering Koppány and Robinette the open positions, Hatch communicated with Sandy Pepos at Pepos Insurance Agency (Gateway's insurance agent) by e-mail (Exhibit6) to inquire about canceling Koepke's insurance with Gateway. Pepos responded back to Hatch and, in accordance with Pepos' instruction, Hatch forwarded a letter to Pepos advising that Koepke would be laid off effective March 31, 2009. Exhibit 7.



36. Beginning in February, 2009 and through the date of the hearing, Gateway laid off several employees, the youngest being 24 years old and the oldest being 57 years old. These employees included licensed clinical addiction counselors, a licensed clinical psychology counselor, and a development coordinator Exhibit 8. Gateway hired only three employees, the oldest being 55 years old and the youngest being 35 years old. The 55 year old serves as a resident manager. Id.

#### IV. OPINION<sup>2</sup>

##### A. There Is No Competent Evidence of Prior Acts of Rod Robinson.

During the hearing, the charging party attempted to bring in evidence regarding Rod Robinson's alleged prior conduct of sexual harassment in order to shore up the charging party's theory that ending Koepke's position and creating two new positions of youth and family resource specialist was simply a ruse to permit Robinson to hire younger women. The charging party attempted to bring in such conduct through the testimony of Julie Messerly and Roger Curtis. Messerly was asked whether she was aware of any prior instances of sexual harassment by Robinson and she answered "no." Curtis was asked essentially the same question over objection and testified only there was some allegation of sexual harassment against Robinson in a newspaper in Wyoming and that Robinson denied any such conduct. During the hearing, the hearing officer invited the parties to brief the issue of whether such conduct was inadmissible character evidence and reserved ruling on the admission of the conduct to permit the parties to brief the issue in their post hearing briefs. The respondent briefed the issue but the charging party did not.

The respondent is absolutely correct in its argument that the testimony is inadmissible character evidence. Evidence of other acts is admissible only where (1) the other acts are similar, (2) are not too remote in time, (3) and are being offered for purposes permitted by rule 404(b). *Cartwright v Equitable Life Assurance*, 276 Mont. 1, 21, 914 P.2d 976, 989 (1996). See also, *Benjamin v. Torgerson*, 1999 MT 216, 295 Mont. 528, 985 P.2d 734. There is no evidence of what the earlier act involved and, therefore, proof of similarity is impossible on the record before this hearing officer.

Moreover, there is no competent evidence that any such conduct occurred. Curtis's knowledge of the act came from a newspaper article in Wyoming and from

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

Robinson's denial that any such conduct had occurred. Whether or not such conduct would otherwise be admissible under 404(b), it is not competent in any event because Curtis' testimony regarding such conduct was rank hearsay. Therefore, there is no basis to admit such evidence and there is no proof of any improper intent on the part of Robinson in the hiring process.

**B. Koepke Has Failed to Carry Her Burden of Proof Because The Evidence Fails to Demonstrate Pretext.**

Koepke contends that she was not hired for one of the positions of youth and family resource specialist because of age discrimination. Gateway has conceded that Koepke has demonstrated a prima facie case of age discrimination at least with respect to the hiring of Robinette. Koepke argues that the elimination of Koepke's case manager position, the questionable (in Koepke's opinion) financial difficulties claimed by Gateway, the alleged waiving of minimum experience requirements in Robinette's case and the alleged waiving of minimum education requirements in Koppany's case demonstrate pretext. Gateway argues that no pretext has been proven in this case and that all financial and hiring considerations were undertaken for legitimate business purposes.

Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of age commits an unlawful discriminatory practice. When there is no direct evidence of discrimination, the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996). *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, et seq., mirrors the Montana Human Rights Act prohibitions against discrimination. E.g., *Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Gateway has conceded that Koepke has made out a prima facie case. As such, under the *McDonnell-Douglas* standard, the burden shifts to Gateway which must then offer evidence that is sufficient, if believed, to support a finding that its failure to appoint Koepke was based on a factor other than age. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07, (1993); *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *Texas. Dept. Of Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)).

If Gateway carries that burden, Koepke must then “prove by a preponderance of the evidence that the legitimate reasons offered by [Gateway] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont. 24.9.610(3). Koepke, however, at all times retains the burden of persuading the trier of fact that she has been the victim of discrimination. *St. Mary’s Honor Center*, 509 U.S. at 507; *Heiat*, 912 P.2d at 792.

Gateway has demonstrated legitimate business reasons for its actions in this case as the proffered reasons for selecting Koppány and Robinette over Koepke are legitimate. Gateway, because of a desire to attract additional federal funding, sought to change its emphasis to providing resource specialists who could interact much more completely with a client and a client’s family in order to provide a broader solution to addressing client issues, which includes addressing issues of client’s family members as well as the client. Gateway utilized a panel of interviewers who on their own, without input from Robinson, designed questions aimed at ascertaining the applicants’ knowledge of community resources and, more importantly, their willingness to go to a greater extent to provide resource linkage for clients and their families. While there was no numerical grading or point system, the interviewer’s criterion—the individual applicant’s enthusiasm and willingness to provide the extensive resource linkage for not only the client but also the client’s family—was an objective, non-discriminatory hiring criterion that demonstrates a legitimate basis for the action taken.

The interviewers evaluated the applicants on the basis of how they performed in the interviews without regard to the age of the applicants. The interviewers then discussed all four applicants’ interviews and came to the unanimous decision that Koppány and Robinette were the most desirable applicants for the position because of their enthusiasm and expressed and demonstrated intent to undertake the resource linkage that the interviewers felt the job required. Koepke did not perform as well in the interviews as Koppány and Robinette did. Once the interviewers decided upon Koppány and Robinette, they then forwarded their names to Robinson who merely “rubber stamped” the interviewer’s recommendations without question and offered the jobs to Koppány and Robinette. Gateway has proffered legitimate, non-discriminatory reasons for its hiring decisions.

As Gateway has met its burden of proof, the pendulum swings back to Koepke to show that Gateway’s proffered reasons are mere pretext. “[A] reason cannot be proved to be a ‘pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason.” *Heiat* at 328, 912 P.2d at 791 (quoting *St. Mary’s Honor Center* at 515) (emphasis added). See also *Vortex Fishing*

*Sys, Inc. v. Foss*, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. “The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has ‘use[d] the factor reasonably in light of the employer’s stated purpose as well as its other practices.’” *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9<sup>th</sup> Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9<sup>th</sup> Cir. 1982)). “An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action.” *Cellini v. Harcourt Brace & Co.*, 51 F. Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing *Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7<sup>th</sup> Cir. 1991)). See also, *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7<sup>th</sup> Cir. 1987) (noting that a reason honestly described but poorly founded is not pretext that shows discrimination and that no matter how medieval a firm’s practices, no matter how high-handed its decisional process, no matter how mistaken the firm’s managers, Title VII and 1981 do not interfere unless the employment decision emanates from discrimination). Where a charging party’s evidence of pretense is strictly circumstantial, he or she “must produce ‘specific, substantial evidence of pretext’” in order to prevail. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9<sup>th</sup> Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9<sup>th</sup> Cir. 1983)). See also *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9<sup>th</sup> Cir. 2004).

Koepke’s overarching theme in her case is that Robinson desired to hire younger women and this desire was the genesis of the hiring process in this case. Koepke, however (as discussed above in Paragraph A of this Opinion section), has presented no competent evidence of that assertion and it cannot serve as a basis for evaluating the existence of age discrimination in this case. Moreover, the evidence demonstrates that Robinson had no input in the hiring process, other than to rubber stamp Blankenship’s, Ashton’s and Hatch’s hiring decision. Thus, the entirety of Koepke’s case rests on the fact that she was older than the persons selected and that fact, taken in conjunction with her assertion of evidence of pretext, demonstrates discrimination. The evidence of pretext that Koepke advances is (1) that Gateway made her reapply for a position that she already held, (2) that Gateway failed to follow its own hiring procedures by ignoring Robinette’s lack of qualified experience and Koppany’s lack of a degree, (3) that the change from case manager to the new Youth and Resource Specialist was in reality no change at all, (4) that if Gateway was truly in financial hard times it would not have effectively taken a single position and turned it into two positions, (5) that Koepke was so much more qualified than the other two applicants that the failure to hire her must have been based on age discrimination, and (6) an assertion that Hatch sought information about discontinuing Koepke’s health insurance either just before or right at the time of the interviews. These factors, taken in conjunction with Koepke’s prima facie case, may

be considered in order to ascertain whether Koepke has met her burden. Pollard, supra., 824 F.2d at 559 (an employer's efforts to hide discrimination, coupled with the evidence making up the employee's prima facie case, may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory).

The alleged factors of pretext, taken either individually or collectively, do not persuade the hearing officer that age discrimination was the basis for any of Gateway's conduct here. Koepke has asserted that she was vastly more qualified than either Koppány or Robinette. Koepke also asserts that Koppány did not have the requisite education and Robinette did not have the requisite experience which Koepke contends shows that Gateway did not follow its own hiring practices. While it may be true that Koepke's experience on paper was greater than that of either Koppány or Robinette, it is clear that both Koppány and Robinette had adequate qualifications for the position. Contrary to Koepke's argument, Koppány had a four year degree as her testimony demonstrates and the interviewers were aware that she had a four year degree. As for Robinette, her experience at the Alzheimer's treatment center, as demonstrated by Blankenship's testimony, obviously satisfied the requirements of the position. While Koppány's experience working with Alzheimer's patients might not have been identical to Koepke's, it was sufficient to meet the needs of the position. Further, Koepke has not seriously disputed that she did not perform as well in her interview as the other two applicants. Koepke has cited no case law that says an employer must disregard or give less weight to the results of an oral interview when deciding which person to hire. It is not at all clear that Gateway failed to follow its own hiring practices as Koepke asserts.

As for the legitimacy of the restructuring and cutting Koepke's position, Gateway was facing not only a funding shortage but also a clear need to create case manager positions that were far more interactive with clients and their families in order to obtain funding. This is proven not only by the testimony of Hatch, Ashton and Blankenship but also by the fact Gateway cut other positions, not just Koepke's. When the Youth and Family Resource Specialist positions were created, Gateway had already eliminated all of the positions from the Grace Home. Furthermore, replacing Koepke's case manager position with two positions does not point to employer subterfuge in this case. Clearly, Gateway was reducing its work force to cope with the financial difficulties it faced in 2008 and 2009. Moreover, it was not unprecedented to create two positions where there had previously only been one. For example, when Gateway restructured its management positions, it created five clinical management positions when there had previously been only two. It is as likely that the creation of the two positions was simply to support the new direction in which

Gateway was headed in order to attract funding as it was that the creation of two positions was simply a ruse to get away with age discrimination.

Koepke also points to the fact that the case manager position and the youth and family resource position descriptions were virtually identical. While this is true, it does not change the fact that Gateway was clearly and legitimately headed in the direction of having a position that interacted far more with the client and the client's family than had previously been the case. This direction was consistently pursued throughout the hiring process. Gateway was faced with a new direction in funding requirements that required greater interaction between case managers, client and family. It sought to remake the position of case manager into a position that placed greater emphasis on extended interaction between case manager, client and family. It interviewed applicants with a goal toward hiring persons with a strong interest in pursuing a higher level of interaction between case manager, client and family. It utilized objective questioning during the interview process that reflected a desire to hire applicants willing to go to great lengths to undertake the extended interaction between case manager, client and family. Finally, it hired two applicants who demonstrated the qualifications to undertake and demonstrated a desire to undertake extended interaction between case manager, client and family. The fact that the two positions might have been similar on paper does not detract from the legitimacy of Gateway's conduct in light of its stated goals and the consistency of its actions with achieving those goals during the hiring process.

Koepke also relies on the testimony of Sandy Pepos that Hatch sought information about discontinuing Koepke's health insurance either before or during the time of the interviews. Pepos' testimony is not credible in light of the documentary evidence in this case. Hatch did not seek any information about discontinuing Koepke's health insurance until March 25, 2009, the date that Hatch sent her e-mail to Pepos seeking that information. Moreover, Pepos obviously has an ax to grind with Gateway in light of Gateway's decision to discontinue using Pepos as an insurance agent.

Considering all of the evidence in this case and the inferences from the evidence, Gateway has proven that it used the factors for discontinuing Koepke's position and hiring Koppány and Robinette reasonably in light of the employer's stated purpose as well as its other practices. Koepke has failed to carry her burden of persuasion to show that these reasons were pretext.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Gateway's decision to eliminate Koepke's position of case manager and to hire two other persons for the new positions of youth and family resource specialist was not undertaken to discriminate against Koepke on the basis of age.
3. As Koepke has not proven discrimination, her claim for damages is moot.
4. Because Koepke has failed to prevail in her claim of discrimination, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. ORDER

Based upon the foregoing, judgment is entered in favor of Gateway and Sandy Koepke's complaint is dismissed.

DATED: September 17, 2010

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer  
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Sandy Koepke, Charging Party, and her attorney, Patrick F. Flaherty; and Gateway Community Services, Respondent, and its attorneys, David M. McLean and Erica R. Grinde::

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 Kountz  
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).



The respondent prepared an unofficial transcript of the hearing which both parties relied upon in their closing briefs and which is included in the contested case file but which is not at this time the official record of the proceeding. IF YOU WANT THE COMMISSION TO REVIEW THAT TRANSCRIPT, include that request in your notice of appeal. Otherwise, the appealing party must arrange for the preparation of the transcript from the hearing recordings at the party's expense. Contact Kimberly Howell, (406) 444-4341 immediately to arrange for transcription of the record.