BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0099013549:

GUY WAZOUA,	) Case No. 240-2010
	)
Charging Party,	)
	) HEARING OFFICER DECISION
vs.	) AND NOTICE OF ISSUANCE OF
	) ADMINISTRATIVE DECISION
AMES CONSTRUCTION, INC.,	)
	)
Respondent.	)

* * * * * * * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Guy Wazoua brought this complaint alleging that his employer, Ames Construction, Inc., discriminated against him on the basis of his race and national origin when it failed to take action to stop co-workers from using racial epithets in dealing with Wazoua on the job site. Wazoua further alleged that Ames retaliated against him by discharging him from employment after he complained of the discrimination to his supervisors.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on January 12, 2010. Patricia D. Peterman, attorney at law, represented Wazoua. Brooke B. Murphy and Brian D. Bolinder, attorneys at law, represented Ames Construction, Inc.

At hearing, Wazoua, Francisco Garcia, Mike Makousky, Pat Jenner, Casey Harrelson and Andy Anderson testified under oath. The parties stipulated to the admission of Charging Party's Exhibits 1-11 and 13-17 and Respondent's Exhibits 103 through 106, 120, and 122. During the hearing, charging party's Exhibit 12 and Respondent's Exhibits 113 and 128 were admitted into evidence.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Hearings Bureau on March 22, 2010. Based on the evidence adduced at

hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES:

A complete statement of the issues is contained in the Final Prehearing Order issued by this tribunal on January 7, 2010.

III. FINDINGS OF FACT:

1. Wazoua is an African-American who was born in the Central African Republic and moved to the United States approximately 14 years ago. For purposes of the Montana Human Rights Act, he is a member of a protected class.

2. Wazoua settled in Denver, Colorado. He worked various jobs including being the proprietor of his own smoke shop. Eventually, he obtained a commercial drivers license (CDL) and began working for a trucking company in the Denver area.

3. In 2008, the trucking company that employed Wazoua began cutting his hours. As a result, he looked for other work.

4. Ames Construction, Inc., is a nationwide company that, among other things, constructs roads. Wazoua interviewed with Ames and in July, 2008, Ames hired him to drive a water truck at road construction sites.

5. When he was hired, Wazoua signed an acknowledgment form indicating, that if he had concerns "regarding fair treatment, discrimination or harassment," he should contact his immediate supervisor for assistance. Exhibit. 104. He also took a quiz (Exhibit 106) wherein he acknowledged that if a person felt he was being treated unfairly, he must report it to his job foreman and contact Human Resources.

6. Although Wazoua was hired to drive a water truck, at the Wyoming site he worked only as a laborer and did not drive equipment. At the Wyoming site, Wazoua worked for job supervisor Mike Makousky and foreman Pat Jenner. Wazoua also worked with heavy equipment operators Francisco Garcia, Casey Harrelson (aka Big Casey), Joe Drummond and Casey Todoroff (aka Little Casey). Jenner and Wazoua became friends and would occasionally engage in after work activities together (such as working out at the gym). Wazoua also befriended Makousky.

7. While at the Wyoming site, Wazoua and other members of the crew attended a "Employee EEO/Affirmative Action and Sexual Harassment review session. At the session, employees reviewed Ames Construction, Inc.'s equal opportunity policy statement and sexual harassment policy.

8. After working at the Wyoming site for approximately one month, Ames moved the crew described in Paragraph 6 to a job site at Bull Run, Montana. The site was being built for a mining company utilizing private funds.

9. When constructing roads, Ames uses various pieces of large earth moving equipment. Among these pieces of equipment are scrapers, bulldozers, a piece of equipment known as a Push Cat (a type of bulldozer), water trucks and various types of very large dump trucks. Each piece of equipment is very large (weighing several tons) and is very expensive. As an example, the scrapers themselves cost approximately $800,000.00 to purchase new. Each tire and rim assembly on the scraper costs in excess of $25,000.00 to replace.

10. The bulldozers have a blade in the front of the vehicle that is used to push scrapers or to move material. Push cats also have blades but these vehicles are just used for pushing scrapers. Unlike bulldozers, push cat blades are cushioned.

11. In order to prepare a road bed for the paving of a road, the terrain must be made level and must be cut to certain grades. This involves removing large amounts of dirt material from some areas of the road bed and filling in and compacting other areas of the road bed. The removing and filing of dirt requires the somewhat choreographed use of both the scraper and either a bulldozer or a push cat. In essence, while each piece of equipment is moving, the dozer or push cat moves in behind the scraper and pushes the scraper in order to enable the scraper to scoop up a load of material. The scraper then deposits the material at another place on the job site. Without a push from either a bulldozer or a push cat, the scraper could not perform its function of scooping up material.

12. The contact between the scraper and the dozer in the process of pushing material into the scraper can be very rough, resulting in a hard jolt to the operator driving the scraper. Also, the severity of the jolt can be increased depending on the type of soil that is being moved. Rocky soils cause the scraper to occasionally get hung up, enhancing the jolt that occurs when the dozer makes contact to push dirt into the scraper.

13. Employees are trained to drive scrapers while on the job. At first, the trainee rides along with an experienced scraper driver while that driver is working. After gaining some experience in that matter, the trainee is then assigned to complete some simpler grading activities. The employee then joins the choreography described above. There is a rather steep learning curve that the operator goes through. Some employees are never able to become proficient in driving the scrapers.

14. Ames' written policy requires employees to report discriminatory conduct to their immediate supervisor or site supervisor or to Ames' Human Resources Department.

15. Ames has a zero tolerance policy for damage to its grading equipment. Whether an operator is at fault or not for damage to a piece of equipment, the operator is disciplined.

16. At the Bull Mountain site, there were 18 to 20 equipment operators engaged in the cutting, scraping and filling operations. The language at the job site was rough. Cussing was a constant feature of the radio discussions between the operators. The experienced drivers would frequently cuss at the rookie drivers because they did not like the way that the rookies were driving their piece of equipment.

17. Operators and supervisors had to stay in constant contact in order to ensure proper job performance and to ensure the safety of the operators and workers on the ground. Because of this, job site radios were constantly being monitored by both operators and supervisors.

18. At the Bull Mountain site Wazoua started driving a water truck. Afer a short period of time, he began to operate the Volvo dump truck. On September 24, 2008, Wazoua tipped over the Volvo dump truck when he attempted to raise the dump bed while on un-level terrain. Makousky was made aware of the incident, but it was not reported to management despite the requirement that all accidents be reported. Makousky did not report the incident because there was no damage to the truck and because no time was lost on the job due to the accident.

19. Wazoua was also taught how to drive a scraper. He received no formal training classes. Rather, he learned to drive the scraper in the manner described above in Paragraph 13. By December, 2008, Wazoua was in the scraper- dozer rotation helping to build road beds.

20. Wazoua had difficulty operating the scraper. This was undoubtedly due in part to his inexperience. On December 3, 2008, during night time construction, Wazoua was involved in his first accident while driving a scraper. Wazoua was driving too close to a dozer that was being operated by Joe Drummond. Drummond warned Wazoua over the radio that Wazoua was too close to Drummond's dozer, but Wazoua hit the dozer anyway. Wazoua was not reprimanded for this incident despite company policy.

21. Shortly after beginning to operate the scraper, Wazoua encountered racial hostility from other operators. Jim, a dozer operator, became frustrated with the way Wazoua was driving the scraper. He yelled over the radio to Wazoua "fucking nigger, come in front of me." Later during that shift, after the lunch break, Wazoua talked to Makousky and complained about the racial epithets. Wazoua told Makousky to make the other driver's stop. Makousky told him that he would figure out what was going on and get back to him.

22. Despite Wazoua' request, the racial epithets continued. Eventually, Makousky moved Wazoua off of the scraper and had him start operating the dump truck again. After a week and a half, Makousky placed Wazoua back on a scraper, but had him work with a different crew, one headed up by Pat Jenner. Harrelson, Todoroff, Garcia and Joe Drummond operated equipment in Jenner's crew.

23. During the crews' lunch break, when no supervisors were around, some of the crew talk about Wazoua and said to each other "the nigger just don't get it." Garcia heard other equipment operators refer to Wazoua over the radio as a "nigger" or "jungle bunny." Wazoua, however, was only in Garcia's crew for a very short time.

24. Harrelson has a temper and was often impatient with Wazoua when Wazoua was driving a scraper. Harrelson would berate other drivers as well as Wazoua. Harrelson, however, utilized racial epithets toward Wazoua when he became upset with Wazoua's driving. At other times, he would refer to Wazoua over the radio as a "nigger." Todoroff referred to Wazoua as a "jungle bunny." On at least one occasion, Todoroff stated over the radio"God damn jungle bunnies just don't get it."

25. Other workers continued to refer to Wazoua as a "nigger" and this understandably upset Wazoua. Wazoua talked to Drummond and asked him to stop the other workers from using the word "nigger" when talking over the radio and around the job site. Drummond refused to stop using the word nigger or talk to anyone else about stopping the conduct, stating "I can say anything I want."

26. On December 8, 2008, Harrelson became enraged when Wazoua, driving his scraper, came too close to Harrelson in his dozer. When the two stopped their respective pieces of equipment, Harrelson came up to the cab of Wazoua's scraper, pulled open the door, and angrily stated to Wazoua"You fucking nigger! I don't know why these people hired you in this job. You fucking nigger, you need to go back to your country. You can go back to Africa."

27. When the crew parked their vehicles, Wazoua reported Harrelson's conduct to Jenner, telling Jenner that he did not appreciate the racial epithets that were being hurled at him. He asked Jenner to talk to Harrelson. Jenner told him that he would talk to Harrelson and find out what was going on. Garcia was present(only about ten feet away) when Wazoua complained to Jenner about the racial epithets he was encountering.

28. Later on during the December 8, 2008 shift, Wazoua turned his scraper at too sharp of an angle in front of Joe's dozer. This resulted in Wazoua's scraper and the dozer coming into contact with each other. The collision caused scraping damage to the dozer. Exhibit 9. Jenner wrote Wazoua up for this incident and then suspended him for the remainder of that shift.

29. Other than Wazoua, there were no other black workers or supervisors on the job at Bull Mountain.

30. On December 9, 2008, Wazoua called Makousky to tell him that he did not want to come back to the job site because of his co-worker's treatment of him. Wazoua, however, decided that he would come back to work because he was not going to be intimidated by his coworker's conduct.

31. On January 9, 2009, Harrelson banged into Wazoua' scraper and continued to use the word "nigger" when speaking to Wazoua. Wazoua confronted Harrelson and told Harrelson that he was a bad worker. Harrelson told Wazoua "you don't tell me what to do, you fucking nigger."

32. On January 10, 2009, Wazoua was involved in another equipment mishap. During this one, Todoroff passed Wazoua' vehicle on the left side and damaged the fuel pipe above the Wiggin's valve on the scraper and the fuel pipe guard. The accident was not Wazoua's fault. Neither Todoroff nor Wazoua reported the incident to Jenner until the end of the shift. After investigating the situation, Jenner suspended Todoroff for 2 days. The basis for the suspension was Todoroff's failure to be safe and failure to report the incident in a timely fashion.

33. On January 10, 2009, Wazoua again told Jenner that he did not like the way he was being treated by Harrelson. Jenner said he would take Harrelson off the bulldozer. Jenner also offered to let Wazoua move to another crew. Wazoua declined, indicating that he would not run from his co-workers.

34. On January 12, 2009, Wazoua was involved in his third accident in the scraper. During this incident, Wazoua hit a piece of parked equipment resulting in damage to the equipment operated by Wazoua.

35. After the third incident, Jenner talked to Makousky about Wazoua's operation of the equipment. The incidents of tipping over the dump truck as well as the damage to the scraper which Wazoua caused on two occasions convinced Makousky that Wazoua could not handle the heavy equipment jobs safely. Wazoua's accidents caused Jenner to question Wazoua's awareness of his surroundings while operating the heavy equipment. In light of the nature of the job site, which included several pieces of heavy moving equipment as well as grade checkers on the ground setting grade stakes, the concern was very real and legitimate.

36. Based on the three incidents, Makousky decided that he had to let Wazoua go before another accident occurred. Jenner completed Wazoua' separation notice . On the notice, the supervisor filling out the notice has the ability to rate the employee's performance and the supervisor's recommendation for rehiring. Jenner checked that Wazoua's attendance, attitude and conduct were "good." Jenner checked that Wazoua's "quality of work" and "safety" were "fair." Jenner then checked that his recommendation for Wazoua's rehire was "fair."

37. Makousky spoke to Wazoua after the discharge and told him that he would hire Wazoua if another opportunity opened up. Ames has not hired Wazoua back because it has not had an opportunity to do so.

38. Wazoua was not the only worker at Bull Mountain who was discharged for unsafe operation of equipment. Several other employees, most of whom were Caucasian, were discharged from the Bull Mountain job between August, 2008 and March, 2009 for causing damage to the equipment. Exhibit 6.

39. Wazoua suffered emotional distress as a result of his co-worker's discriminatory conduct and his supervisor's failure to do anything about it. $30,000.00 represents a reasonable amount of compensation for the discrimination he suffered.

40. Imposition of affirmative relief which requires Ames to ensure that its supervisors and crews are throughly trained with respect to prohibitions against racial discrimination and appropriate methods of dealing with such discrimination are appropriate.

IV. OPINION[1]

A. Ames Discriminated Against Wazoua By Permitting A Racially Hostile Work Environment to Exist.

Montana law prohibits employment discrimination based on race. Mont. Code Ann. §49-2-303(1). The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. Crockett v. City of Billings, 234 Mont. 87, 761 P.2d 813, 816 (1988).

A charging party establishes a prima facie case of a hostile working environment with proof that he was subject to "conduct which a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." McGinest v. GTE Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004). See also, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The abusive work environment must be both subjectively and objectively hostile. McGinest, supra, 360 F.3d at 1113. "Harassment need not be severe and pervasive to impose liability; one or the other will do." Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted).

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, (1993). The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23; see also Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998). The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81

[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.

(1998). The objective severity of a charging party's claim of a hostile working environment must be assessed from the perspective of a reasonable person belonging to the racial group of the charging party. McGinest, supra at 1114. See also, Ellison, supra at 879.

An employer incurs vicarious liability for its employees' unlawful conduct when it fails to take reasonable steps to protect an employee from a discriminatory hostile working environment created by an employee.. Altmaier v. Haffner, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. Snell v. Montana-Dakota Utilities Co., 198 Mont. 56, 643 P.2d 841 (1982). An employer cannot avoid liability for its employees' harassment when "it utterly fails to take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." Wyninger v. New Venture Gear, Inc., 361 F. 3d 965, 978 (7th Cir. 2004).

Wazoua' testimony convincingly demonstrates that Wazoua's co-worker's conduct in repeatedly employing the racial epithets of "nigger" and "jungle bunny" was subjectively perceived as hostile. Wazoua's complaints to supervisors and co-workers in and of itself demonstrates this. He complained not only to Jenner and Makousky about the conduct, he confronted Joe Drummond to try to stop the conduct. Wazoua's co-workers' conduct clearly upset Wazoua.

The conduct was also objectively offensive. As the charging party correctly notes in his opening brief, "it is beyond question that the use of the word 'nigger' is highly offensive and demeaning , evoking a history of racial violence, brutality and subordination." McGinest, 360 F. 3d at 1116. The use of the term "nigger" is without question under the circumstances of this case objectively offensive. This is shown by both Wazoua's and Garcia's testimony highly credible testimony.

Wazoua testified that the terms "nigger' and "jungle bunny" were being hurled at him on a frequent basis and those words were not directed at other members of the crew. It is obvious that these terms weren't employed with Wazoua's consent nor were they utilized jokingly. Harrelson, Todoroff and Drummond fired these derogatory terms at Wazoua on a repeated basis. They were designed to either humiliate Wazoua for his inability to operate the scraper or to goad him into operating the scraper in a way in which they approved. Under either circumstance, the terms were implemented clearly and unequivocally to discriminate against Wazoua because of his race.

The discriminatory conduct here was severe in that Wazoua had to endure his co-worker's use of the term "nigger" and "jungle bunny." In addition, given the

relatively short time that Wazoua was on the job driving the scraper (for just over one month), the number of times that the terms were used and the fact that the epithets were broadcast to the whole crew over the radio and discussed at lunch by the crew demonstrates that the offensive conduct was both sufficiently severe and pervasive under the circumstances of this case to prove the existence of a hostile working environment. Wazoua's testimony about the harassment both explicitly and implicitly confirms that the conduct was pervasive. Even if, however, the use of the terms "nigger" and "jungle bunny" was not pervasive, their use amounts to the type of severe conduct that in and of itself constitutes discriminatory conduct. The only basis for their use by co-workers was to single out and humiliate Wazoua because of his race. They were not errant slips of the tongue but were designed first and foremost to discriminate against Wazoua because of his race. Wazoua has, therefore, proven preponderantly that he was subjected to a hostile working environment.

The question that remains, then, is whether Ames took reasonable steps to correct the problem. In light of Wazoua's complaints to supervisors, at least one of which was overheard by Garcia, and the failure to do anything to stop the conduct, the answer is "no." Wazoua complained on one occasion to Makousky, two occasions to Jenner and even confronted a co-worker, Drummond, in order to stop the conduct. These complaints were made in a relatively short period of time (approximately one month). Jenner's testimony corroborates that Wazoua complained to him on at least one occasion. Despite the complaints, nothing was done to stop the conduct. There is no evidence, for example, that any of Wazoua's co-workers was disciplined or even talked to about use of racial epithets toward Wazoua.

The only actions that Ames could potentially rely upon to show reasonable efforts to remedy the situation are (1) Makousky's decision to take Wazoua off the scraper for one and one-half weeks, then placing him on another scraper with a different team and (2) pulling Harrelson off the bulldozer and placing him on a scraper for a time. These did nothing and could not reasonably be expected to change the situation. Placing Wazoua onto the second team only resulted in Wazoua encountering more epithets and an even more hostile work environment (with Harrelson and Todoroff being in Wazoua's new crew). Moreover, there is no evidence to show that Harrelson was admonished not to engage in patently discriminatory conduct nor was placing him on a scraper sufficient to isolate Wazoua from Harrelson's racial slurs.

Because Wazoua has proven a hostile working environment existed and because his supervisors did nothing about it, Wazoua has proven that Ames discriminated against him on the basis of race.

The alleged "ramming" of Wazoua's scraper does not show a hostile working environment. Whether such conduct is considered to be direct evidence or indirect evidence of discrimination, it is clear that under the soil conditions (very rocky) that existed at the Bull Mountain site, as well as the nature of the work itself, the harsh bumping is inherent in the work and was not undertaken with discriminatory intent. Most telling in this respect is the testimony of Garcia who himself relayed that he was often hit hard and that one of his co-workers was injured when the piece of equipment that worker was operating was hit very hard by a dozer. The harsh bumping that Wazoua encountered from other drivers while driving the scraper was not the product of an intent to discriminate against him.

B. Ames Did Not Retaliate Against Wazoua When It Discharged Him For Repeated Accidents.

Wazoua also claims that Ames retaliated against him for engaging in protected activity when it discharged him after his repeated efforts to get his co-workers to stop creating a hostile work environment. Ames counters that Wazoua's poor operation of vehicles which resulted in no less than three accidents provided the only basis and a legitimate basis for discharging him that precludes a finding of retaliation. The credible evidence in this case substantiates the respondent's claim that Wazoua was discharged for legitimate business reasons and that Ames' conduct in discharging him was not retaliatory.

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

A charging party presents a prima facie case of retaliation when he shows that (1) he engaged in statutorily protected activity, (2) he was subjected to adverse action, and (3) that a causal link exists between the protected activity and the adverse action. Beaver v. Dpt. of Natural Resources and Cons., 2003 MT 287, ¶ 71, 318 Mont. 35, ¶ 71, 78 P.3d 857, ¶ 71; Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir.

1994). Protected activity includes opposing any act or practice made unlawful by the Montana Human Rights Act. Admin. R. Mont. 24.9.603 (1)(b).

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

"[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason" for the adverse action. Heiat, 275 Mont. at 328, 912 P.2d at 791 (quoting St. Mary's Honor Center, 509 U.S. at 515) (emphasis added). See also Vortex Fishing Sys, Inc. v. Foss, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15. "[T]o establish pretext [the charging party] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the respondent's] proffered legitimate reasons for its actions that a reasonable [fact-finder] could rationally find them unworthy of credence.'" Mageno v. Penske Truck Leasing, Inc., 213 F.3d 642 (9th Cir. 2000) (quoting Horn v. Cushman & Wakefield Western, Inc., 72 Cal. App. 4th 807 (1999)).

Wazoua has met the first two criteria. His opposition to his co-worker's conduct which was articulated to his supervisors is protected activity under the Montana Human Rights Act. Mont. Code Ann. §49-2-301. Although Ames argues that the discharge was undertaken for wholly legitimate reasons, the respondent does not dispute that a discharge from employment constitutes an adverse employment action sufficient to satisfy the second prong of the prima facie case.

Wazoua's evidence of the third prong is weak to say the least. The only real causal connection is the factor of the proximity of the adverse action to Wazoua's complaints to his supervisors. He was discharged within a few weeks of his complaints to his supervisors. Temporal proximity between a complaint of discrimination and adverse action can be sufficient to make out a prima facie case.

See, e.g., Oliver v. Digital Equip. Corp., 846 F.2d 103, 110 (1st cir. 1988). The evidence of the timing of Wazoua's discharge is sufficient to support the third prong and establish a prima facie case of retaliation.

Wazoua's prima facie case, based upon circumstantial evidence, shifts the burden to Ames to show a legitimate non-discriminatory basis for the conduct. If Ames can do this, Wazoua must then prove that Ame's reasons for the discipline were merely pretextual. Wazoua, however, bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by unlawful discrimination, in this instance, by retaliatory animus. Hearing Aid Institute v. Rasmussen (1993), 258 Mont. 367, 852 P.2d 628, 632.

Ames has presented compelling legitimate bases for its actions: Wazoua's safety record in driving the equipment in light of Ames' paramount and reasonable concern of maintaining safety on the job sites. It is clear that Ames' concern for safely operating equipment is and continues to be of utmost importance to the employer. Ames understandably has a very low tolerance or operating errors from drivers that result in accidents. The concern is wholly legitimate in light of (1) the work that Ames does, (2) the amount of activity on the sites, (3) the presence of ground workers who can be easily overlooked and instantly crushed during even the slightest oversight, (4) the enormous capital expenditure for the equipment, and (5) the costs that Ames can incur in even minor accidents. The even handed application of discipline which includes discharge for safety violations is amply demonstrated in the fact that Ames fired several other drivers (most Caucasian) for poor operation of equipment that resulted in accidents.

Ames' safety concerns with Wazoua's operation of the equipment were well substantiated. He tipped over a dump truck when he raised a dump truck bed on an uneven surface. Within a span of one month, he was involved in two additional accidents which he caused while driving a scraper. Each of these accidents resulted in damage to other vehicles. Ames was under no obligation to continue to employ Wazoua until such time as he seriously damaged a piece of equipment or killed or seriously injured another worker. In light of the evidence, Ames has proven that it employed only legitimate business considerations for its decision to terminate Wazoua.

Because Ames has made this showing, the burden swings back to Wazoua to show that the considerations were merely pretext. In this regard, Wazoua relies on the timing of the adverse action, inconsistencies in Ames' evidence such as the failure to file written reports on certain incidents where no damage occurred, the timing of

the discharge, and the alleged "practice of putting write-ups in Wazoua's personnel file without giving him an opportunity to respond to the allegations. None of these arguments are convincing in the face of Wazoua's difficulties in operating the equipment safely and the importance of safe operation to Ames.

The failure to file reports on the dump truck incident does not change the fact that it occurred. Wazoua did not contest that he had been involved in that accident and that it had been caused by his trying to raise the dump bed on uneven ground. Because the incident created no damage and did not slow the operation down, Makousky chose not to report it. The two additional accidents that were Wazoua's fault were in fact reported in the disciplinary actions taken by Jenner. The reasons for the actions were explained to Wazoua. Although Wazoua contends there was no damage during the second incident and third incidents, there clearly was such damage.

Also strongly corroborating the legitimacy of Ames' conduct is the fact that when Todoroff hit Wazoua's vehicle, Jenner properly investigated the incident and Todoroff was found to be at fault and disciplined with a two-day suspension. Wazoua agreed at the hearing that Todoroff's accident had been properly reported. Certainly, if there had been some type of effort to manufacture Wazoua's unsafe driving record, Jenner would not have written up and then suspended Todoroff. The fact that Jenner impartially assessed the January 10, 2009 Todoroff accident during the time that Wazoua was complaining about his co-worker's conduct, lends credence to Jenner's conclusions that Wazoua in fact caused the accidents Ames reported he caused.

Contrary to Wazoua's testimony, Jenner in fact gave Wazoua an opportunity to explain his version of the events before issuing any discipline. He certainly did so when Todoroff hit Wazoua's scraper. And, again, Jenner undertook this investigation during the very time that Wazoua was complaining about the racial harassment that Wazoua was experiencing. Had Jenner been determined to ensure that Wazoua was fired, he would have had no problem in ignoring Wazoua's version of the facts as to the cause of the Todoroff accident and manufacturing a result that blamed the accident on Wazoua. Jenner didn't do so, which confirms for the hearing officer the legitimacy of Jenner's observations with respect to Wazoua's accidents, and Makousky's and ultimately Ame's decision to release Wazoua from the Bull Mountain site due to his poor operation of the equipment.

Wazoua also argues that the failure to discharge either Todoroff or Garcia as a result of their accidents also shows retaliatory and discriminatory animus. The

evidence does not show, however, that either Todoroff or Garcia were involved in repeated accidents as was Wazoua. Indeed, Todoroff was suspended for two days for what appeared to be an accident similar to Wazoua's where and for which Wazoua received only a one shift suspension. Moreover, the fact that neither Todoroff nor Garcia were terminated does not change the fact that Ames discharged other drivers (including Caucasian drivers) for poor driving.

The charging party has also suggested that Makousky's failure to hire back Wazoua after discharging him from the Bull Mountain site undermines the legitimacy of the claim that Wazoua was discharged for repeated accidents. Makousky's testimony that he would hire Wazoua back if the opportunity arose but that no such opportunity has arisen (as of the time of the hearing) is credible. The charging party has failed in his burden to show that his discharge was motivated by either discriminatory animus or out of retaliation. His retaliation claim, therefore, fails.

C. Damages

The department may order any reasonable measure to rectify any harm Wazoua suffered as a result of illegal retaliation. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. E.g., P. W. Berry v. Freese, 239 Mont. 183, 779 P.2d 521, 523, (1989). See also, Dolan v. School District No. 10, 195 Mont. 340, 636 P.2d 825, 830 (1981); accord, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Here, Wazoua's discharge was not the result of illegal conduct. Therefore, Wazoua is not entitled to either back pay or front pay since his loss of income due to his discharge is not causally connected to the discrimination he faced while on the job. Wazoua is entitled to compensatory damages for humiliation and emotional distress which he suffered on the job as a result of the illegal discrimination. The value of this distress can be established by testimony or inferred from the circumstances. Vortex Fishing Systems v. Foss, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836.

Wazoua unquestionably suffered emotional distress from the illegal discrimination he suffered. He was subjected to highly derogatory racial epithets on the job. These epithets were broadcast over work radio to the entire work crew. Wazoua was so upset that he complained to his supervisors and even confronted a co-worker, Joe Drummond about the use of the epithets. Contrary to the

respondent's argument, the evidence of the method of discrimination, coupled with Wazoua's testimony about his anguish, plainly establishes his emotional distress.

In Johnson v. Hale 13 F.3d 1351 (9th Cir. 1994), two African-American men responded to an advertisement to rent an apartment. When they met with the landlord's wife to see the apartment, she told them "that her husband would not allow her to rent to 'Negro men.' Id. The district court awarded the plaintiffs $125.00 each. The court of appeals set aside the district court order and awarded $3,500.00 to each man, noting that "sum would appear to be the minimum that finds support in recent cases . . ." Id. at 1354. Unlike the case at bar, the Johnson plaintiffs were not subjected to essentially public humiliation as was Wazoua (through the broadcasting of the racial epithets over the radio to several co-workers). The Johnson plaintiffs were alone when the discriminatory conduct occurred. And only one statement was made to the Johnson plaintiffs unlike the repeated conduct that Wazoua endured.

In Herron v. Blackwell, 908 F.2d 864, 872 (11th Cir. 1990) the court of appeals upheld an emotional distress award of $40,000.00 against a property owner who refused to sell his home to a black couple because of their race. The plaintiffs were anguished over, among other things, the fact that someone would deny them the ability to purchase a home for which they were financially qualified, their disappointment that their race would be a factor after thirty years of fighting for equal justice, and the invasion of privacy caused by the publicity. Id. at 873.

Here, Wazoua was understandably upset over the racial slurs that he endured. These slurs were broadcast over the radio to other co-workers. His co-worker's language was directed at him specifically because of his race, i.e., he was singled out for discriminatory treatment because of his race. Wazoua's humiliation, anger and angst at being subjected to the ridicule of being called "nigger" and "jungle bunny" by his co-workers, having such comments broadcast over the radio to the entire work crew justifies, and the fact that his employer did nothing to help him justifies awarding emotional distress damages of $30,000.00.

D. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). Ames' failure to curtail its employee's racially discriminatory conduct toward Wazoua was inexcusable. Affirmative relief in the form of both injunctive relief and training to

ensure that the conduct does not reoccur in the future is necessary to rectify the harm in this case.

V. CONCLUSIONS OF LAW

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

2. Ames violated the Montana Human Rights Act by permitting its employees to racially discriminate against Wazoua while taking no effective action to stop such discrimination.

3. Ames did not retaliate against Wazoua when it discharged him from the Bull Mountain site for repeated accidents.

4. Wazoua is entitled to be compensated for emotional distress damages.

5. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Ames must pay Wazoua the sum of $30,000.00 as damages for emotional distress.

6. The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Guy Wazoua and against Ames Construction, Inc., for discriminating against Wazoua in violation of the Montana Human Rights Act.

2. Ames Construction, Inc., is enjoined from discriminating against any employee on the basis of race or national origin.

3. Ames Construction, Inc., must pay Guy Wazoua the sum of $30,000.00 for emotional distress.

4. Ames Construction, Inc., must develop and implement a specific plan to ensure that site supervisors in Montana are adequately trained in methods to prevent and timely remedy racial discrimination on job sites in Montana. In developing and implementing this plan, Ames Construction, Inc., shall work with the Montana

Human Rights Bureau and any such plan shall be approved by the Montana Human Rights Bureau. In addition, Ames Construction, Inc., shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

5. Wazoua's claim of retaliation, having not been proven, is hereby dismissed.

Dated: May 27, 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: Patricia D. Peterman, attorney for Guy Wazoua; and Brooke B. Murphy and Brian D. Bolinder, attorneys for Ames Construction, Inc.:

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).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Shawndelle Kurka, (406) 444-3870, immediately to arrange for transcription of the record.