

**BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA**

DARCIE DAVEY,

Charging Party,

-v-

IPC INTERNATIONAL CORPORATION,

Respondent,

Case No. 1545-2009

HRB Case No. 0089013260

ORDER AND REMAND

Charging Party, Darcie Davey (Davey) filed a complaint with the Human Rights Bureau, Department of Labor and Industry (Department) on August 1, 2008, which alleged discrimination in employment by IPC International Corporation (IPC) on the basis of gender and retaliation for reporting the alleged sexual harassment perpetrated by another IPC employee.

Following an informal investigation, the Department determined that a preponderance of the evidence supported Davey's allegations of unlawful discrimination and retaliation. The matter next went before the Hearings Bureau of the Department of Labor and Industry, which held a hearing pursuant to Mont. Code Ann. § 49-2-505. The hearing was conducted on July 28 and 29, 2009, and the hearing officer issued a decision on November 17, 2009.¹

The hearing officer determined that Davey failed to demonstrate disparate treatment by IPC on the basis of gender because IPC treated both male and female employees in an equally harsh manner. The hearing officer also found that Davey had failed to establish a prima facie case for retaliation because Davey's act of reporting the alleged sexual harassment of a non-IPC employee by an IPC security guard to her supervisor was not an activity protected by the Montana Human Rights Act. Therefore, the hearing officer concluded that Davey was neither

¹ The contested case hearing also included the case of *Anne Bolves v. Holiday Village Mall and GK Development d/b/a North Grand*, Case Nos. 1462-2009 and 1461-2009. The two cases were heard together, with the consent of the parties, due to the intertwined nature of the facts. The Human Rights Commission affirmed the hearing officer's decision in the *Bolves* case, and no further appeal ensued.

discriminated against on the basis of gender nor was she subjected to retaliation when she was suspended without pay and her employment was terminated.

Davey filed a timely appeal with the Human Rights Commission (Commission), which considered the matter on May 18, 2010. Patrick F. Flaherty, attorney, appeared and argued on behalf of Davey. Maxon R. Davis, attorney, appeared and argued on behalf of IPC.

The majority of the Commission affirmed the hearing officer's decision, in part, and reversed, in part. Specifically, the Commission determined that the findings of the hearing officer were based on competent substantial evidence. However, the Commission determined that the hearing officer's conclusions of law related to the Davey's claims of discrimination and retaliation were incorrect. Therefore, the Commission reversed the hearing officer's conclusions and modified the corresponding discussion related to the determination of IPC's liability. The Commission afforded the parties an opportunity to submit briefs on the issue of damages, which the Commission considered at a special meeting on July 21, 2010.

By Order of the Commission, dated August 4, 2010, the Commission affirmed the factual findings of the hearing officer and corrected the legal conclusions related to the liability of IPC for unlawful discrimination and retaliation against Darcie Davey. The Commission ordered IPC to pay Davey \$40,144.00 in lost earnings, \$6,021.60 for prejudgment interest, and \$20,000.00 for emotional distress damages. The Commission further ordered IPC to provide affirmative relief to eliminate the risk of continued violations of the Montana Human Rights Act.

IPC and Davey filed cross-petitions for judicial review of the Commission's August 4, 2010 Order in the Montana Eighth Judicial District Court, Cascade County. Davey also petitioned the Court for reasonable attorney fees and costs as the prevailing party. On July 26, 2011, the District Court issued a Memorandum and Order Re: IPC's Appeal and Darcie Davey's Appeal (Memorandum), Cause No. ADV-10-831. The District Court reversed the Commission's August 4, 2010 Order and remanded the case to the Commission for further proceedings.

The District Court determined that the Commission provided insufficient reference to the factual record to support the Commission's conclusion that Davey's discrimination claim was meritorious. The Commission's Conclusion of Law No. 3 stated, "Davey demonstrated that she was treated differently on the basis of sex and her supervisor's conduct was based on an intent to discriminate based on sex." The Court faulted the Commission for propounding a legal conclusion in the absence of appropriate legal analysis grounded upon factual findings.

The District Court further concluded that the Commission's Conclusion of Law No. 4, which declared that Davey "prevails on the retaliation claim," was incorrect. Although the Commission reversed the hearing officer's determination regarding Davey's engagement in a protected activity, the Court determined that the Commission failed to complete the requisite legal analysis of the retaliation claim.

Finally, the District Court determined that the Commission's Conclusion of Law No. 5 incorrectly ordered IPC to pay a monetary damage award to Davey in the absence of specific factual findings regarding the harm Davey sustained as a result of the unlawful discrimination and retaliation.

The District Court declined to address Davey's petition for a higher damage award because the Court found the Commission's award of \$66,165.60 to be unsubstantiated. The Court remanded the matter to the Commission for further proceedings and, therefore, also declined to address Davey's petition for attorney fees and costs.

The Commission considered the District Court's Memorandum at its meeting on September 14, 2011. After careful deliberation, the Commission re-affirms that the hearing officer's findings of fact are based on competent substantial evidence in the record. The Commission further affirms the determination of liability of the Commission's August 4, 2010 Order, and, by this Order, presents a detailed legal analysis of Davey's discrimination and retaliation claims, based upon the evidence of record. And finally, the Commission remands the

case to the Hearings Bureau for further fact-finding regarding the harm to Davey proximately caused by the unlawful discrimination and retaliation and for a determination of an appropriate damage award.

Gender Discrimination

The Montana Human Rights Act prohibits an employer from discriminating against a person in a term, condition or privilege of employment because of sex when the reasonable demands of the position do not require a sex distinction. *Mont. Code Ann. § 49-2-303(1)(a), MCA.*

Discrimination claims are analyzed under the three-part test articulated in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688. Accordingly, the Commission employs the following burden-shifting procedure:

First, charging party must establish a prima facie case of discrimination. Establishing a prima facie case creates a presumption that the employer unlawfully discriminated against charging party. If charging party established the prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for its actions. After the employer has produced a legitimate, nondiscriminatory reason for its actions, charging party has the opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by the employer are only a pretext for discrimination.

See, *Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15.

Charging party bears the ultimate burden of proof that the employer discriminated against her.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 253, 101 S.Ct. 1089, 1091.

In this matter, Darcie Davey asserted that IPC International Corporation (IPC) discriminated against her based on gender by subjecting her to harsher disciplinary actions than male co-workers, which culminated in her termination from employment. A prima facie case of gender discrimination based on disparate treatment and ending in termination consists of proof of the following elements:

- 1) charging party belonged to a protected class;
- 2) charging party was qualified for continued employment; and

- 3) charging party was denied continued employment under circumstances that raise a reasonable inference that she was treated differently because of her gender.

Admin. Rule Mont. 24.9.610(2); Vortex, ¶ 17.

The hearing officer observed that the parties did not dispute that Davey was a member of a protected class and was well qualified for her employment. *Hearing Officer's Findings of Fact (FOF) Nos. 32, 52; Hearing Officer Decision (Decision)*, p. 14. In fact, Davey performed her work as a security guard in an exemplary manner for over eight years. *FOF No. 32*. Therefore, the only element of the prima facie case in dispute was whether Davey raised a reasonable inference that IPC treated her differently based on her gender.

Evidence establishing a reasonable inference that a charging party was treated differently because of membership in a protected class includes "proof that similarly situated persons outside of the protected class were treated more favorably" than the charging party. *Admin. Rule Mont. 24.9.610(2)(b)(ii)*.

The record establishes that Davey and a male co-worker, Robert Laubach (Laubach), were both suspended for one day on March 22, 2008, based on the mistaken assumption of security supervisor Scott Buennemeyer² (Buennemeyer) that the two security guards had been patrolling the mall together, in violation of Buennemeyer's direct order. *FOF Nos. 46-49*. Laubach and Davey both refused to sign written disciplinary warnings presented by Buennemeyer. *Complaint*, p. 9. However, Buennemeyer took no further disciplinary action against Laubach. *Exhibit 75*. Laubach was allowed to return to work after 24 hours. *Complaint*, p. 2; *Hearing Transcript 279, 355, 384-386*. Davey was subjected to escalating disciplinary action, which resulted in her termination from employment. *FOF Nos. 50-54*.

² Alternatively spelled "Buenemeyer" in the record.

The Commission finds that Davey raised a reasonable inference that the disparate treatment in the terms and conditions of her employment was based on gender, which establishes Davey's prima facie case.

Once a charging party establishes a prima facie case of disparate treatment the burden shifts to respondent to rebut the presumption of unlawful discrimination. *Admin. R. Mont. 24.9.610(3)*. Accordingly, IPC must produce a legitimate, nondiscriminatory reason for adverse employment actions against Davey. *Laudert v. Richland Co. Sheriff's Dept.*, 2000 MT 218, ¶ 20, 301 Mont. 114, ¶ 20, 7 P.3d 386, ¶ 20.

IPC argued that Davey's one-day suspension was not discriminatory because Buennemeyer suspended both Davey and Laubach at the same time for the same alleged infraction. *Hearing Transcript 306-7, 332*. IPC contended that the further disciplinary action and Davey's termination from employment were justified because Davey had failed to prepare an incident report on an alleged child molester lurking in the men's restroom at Herberger's department store on March 19, 2008. *FOF Nos. 53-54*. IPC also offered male comparators, which indicated gender equity in IPC's terminations. Finally, IPC defended its decision to terminate Davey's employment on the grounds that the individual at IPC who made the final decision had no independent knowledge of Davey's job performance and relied solely on the information provided by her local supervisor.

The Commission determines that the record supports a conclusion that IPC met its burden of producing a legitimate, non-discriminatory reason for the disciplinary action and termination from employment.

Once a respondent produces a legitimate, non-discriminatory reason, the burden shifts back to the charging party to demonstrate, by a preponderance of the evidence, that the legitimate, nondiscriminatory reason for the adverse employment action was pretext for discrimination. *Admin. R. Mont. 24.9.610(3)*. Charging party may meet this burden directly by

showing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256, 1015 S.Ct. at 1095. A reason is proven to be a 'pretext for discrimination' when it is shown both that the reason was false, and that discrimination was the real reason." *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787, 791 (citing *St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502, 515).

The hearing officer determined that neither Davey nor Laubach, in fact, were patrolling together and neither had violated Buennemeyer's instructions. *FOF No. 47*. The hearing officer further determined that Buennemeyer falsely reported to IPC corporate headquarters that Davey had failed to prepare a written report on the March 19, 2008 pedophile incident. *FOF Nos. 41, 53; Exhibits 78, 80, 128*. Buennemeyer knew that Davey actually had completed the incident report. *FOF No. 53*.

The record shows that IPC terminated male security guard Keystow Sawyer on March 10, 2008, for inattention to duty and allegedly accessing pornography on the company computer. *Hearing Transcript 169-171; 173-4; Exhibit 75*. IPC terminated male security guard Kelly Brugman³ on July 25, 2008, for explicitly describing the intricacies of the prostitution trade in Great Falls to two young, female security guards, who reported to management that the incident made them extremely uncomfortable. *Hearing Transcript 183-6; Exhibits 74, 75, 129*.

The Commission finds that supervisor Buennemeyer treated Davey more harshly than her co-worker Laubach for the infraction of alleged tandem patrolling when Buennemeyer re-suspended Davey and requested that IPC review Davey's employment status. Buennemeyer demonstrated discriminatory animus when he falsely asserted that Davey failed to prepare the March 19th incident report. In addition, the Commission notes that IPC terminated both Keystow

³ Alternatively spelled "Bruggeman" or "Bruggerman" in the record.

Sawyer and Kelly Brugman for egregious, work-related misconduct. In contrast, IPC terminated Davey based on intentionally fabricated accusations, which Davey's supervisor forwarded to IPC. Consequently, the Commission finds the comparative information on male employee terminations to be unpersuasive. The Commission further finds IPC's performance-based, nondiscriminatory reasons for Davey's two suspensions and ultimate termination from employment to be "unworthy of credence" as legitimate grounds for disciplinary action.

IPC acknowledged that the corporate officer who decided to terminate Davey's employment had no independent knowledge of Davey's job performance. *Respondent's Brief in Opposition of Charging Party's Appellate Brief*, pp. 5-6; *Hearing Transcript* 79-83. The record also indicates that IPC undertook no independent investigation to verify Buennemeyer's claims regarding Davey's job performance and alleged policy violations. *Hearing Transcript* 85.

The definition of "employer" in Montana includes the employer's agents. *Mont. Code Ann. 49-2-101(11)*. A respondent may be held liable for a biased employee's prejudice even when the manager or decision-maker lacked discriminatory intent. See, e.g. *Staub v. Proctor Hospital*, 562 U.S. ___, 179 L.Ed. 2d 144, 131 S.Ct. 1186 (2011) (holding employer at fault because its agent committed an act based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment action); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) (holding employer liable when biased subordinate's discriminatory reports, recommendation or other actions caused the adverse employment action). A charging party must show that the decision-maker followed the biased recommendation of a subordinate without independently investigating the complaint against the employee. *English v. Colo. Dep't of Corrections.*, 248 F.3d 1002, 1011-12 (10th Cir. 2001).

Having determined that Buennemeyer's intentions were discriminatory, the Commission finds IPC's argument that its corporate officers bore no discriminatory animus against Davey to be without merit. As the local security supervisor, Buennemeyer served as the agent of the

Employer and IPC failed to independently verify the supervisor's reports related to Davey. Accordingly, the Commission concludes that Davey met her ultimate burden of persuasion. A preponderance of the evidence demonstrates that the reasons proffered by IPC for disciplinary action and termination constituted pretext for disparate treatment. The Commission reverses the hearing officer's conclusion that Davey's discharge from employment constituted equal, gender-balanced, harsh treatment. Consequently, the Commission concludes that IPC discriminated against Davey in employment on the basis of gender.

Retaliation

The Montana Human Rights Act prohibits an employer from taking adverse action against an employee because the employee has opposed any practices forbidden under the Act. *Mont. Code Ann. § 49-2-301; Admin. Rule Mont. 24.9.603(1)*. The retaliation statute protects two kinds of activities: (1) opposition to discrimination and (2) participation in an investigation of discrimination. *Mont. Code Ann. § 49-2-301*. Retaliation is prohibited separately from the underlying alleged discrimination. *Mahan v. Farmers Union Cent. Exch. Inc. (1989), 235 Mont. 410, 422, 768 P.2d 850, 858*.

The following elements generally constitute a prima facie case of retaliation in employment:

- 1) charging party engaged in a protected activity;
- 2) charging party thereafter was subjected to an adverse employment action by her employer; and,
- 3) a causal connection exists between the protected activity and the employer's adverse action.

Beaver v. Dep't of Natural Resources and Conservation, 2003 MT 287, ¶ 71, 318 Mont. 35, ¶ 71, 78 P.3d 857, ¶ 71.

IPC policy specifically required employees to report sexual harassment by other employees and to report such harassment to their supervisors. *FOF No. 35; Exhibit 131*. On February 23, 2008, Davey and Laubach reported to supervisor Buennemeyer that co-worker and fellow security guard Kelly Brugman allegedly had been sexually harassing high school student Anne Bolves, a young woman who worked at the mall. *FOF No. 16*. On March 8, 2008, Davey reported the on-going complaints from Bolves about Brugman's incessant attentions. *FOF No. 17*. Buennemeyer did nothing to address the alleged harassment, and told Davey that he needed "more documentation" before he would take any action. *FOF No. 17*. Almost two months later, and only after the young girl's mother and the girl's work supervisor complained directly to IPC corporate headquarters about the alleged sexual harassment, did IPC take action to investigate the complaints and direct Brugman to have no further contact with Bolves. *FOF Nos. 9, 18, 21, 24, 25, 28, 29, 30; Exhibits G-K*.

The hearing officer determined that Davey failed to establish a prima facie case of retaliation on the grounds that Davey's report to her supervisor of alleged sexual harassment was not a "protected activity." *Decision, p. 16*. The Commission disagrees.

"Protected activity" includes opposition to any discriminatory act or practice prohibited by the Montana Human Rights Act. *Mont. Code Ann. § 49-2-301; Admin. Rule Mont. 24.9.603(1)(b)*. The plain language of the retaliation statute states that it is unlawful to discharge or discriminate against an individual because the person has "opposed any practices forbidden under this chapter." *Mont. Code Ann. § 49-2-301*. The Act prohibits sexual harassment and creation of a hostile work environment because of sex. *Mont. Code Ann. § 49-2-303(1)(a); Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200.

GK Development was the owner of the Holiday Village Mall in Great Falls where both Brugman and Bolves worked. *FOF No. 1*. GK Development contracted with IPC to provide security services at the mall. *FOF No. 2*. IPC employed Brugman, the alleged perpetrator of the

sexual harassment, as a security guard. GK Development employed Bolves, the alleged victim of the harassment, as a customer service representative at the mall information desk. *FOF No. 7*. At the hearing, Bolves attempted to prove that Brugman's conduct was so severe and pervasive as to create a hostile work environment due to sexual harassment, and that GK Development knowingly allowed the harassment to continue. Because the hearing officer determined Bolves failed to meet her burden of proof, GK Development bore no liability as Bolves' employer, pursuant to Mont. Code Ann. § 49-2-303(1). *See, Decision, pp. 10-12*.

The employment status of the perpetrator of the sexual harassment is not germane to a determination of the employer's potential liability for the creation and perpetuation of an unlawful hostile work environment. Similarly, IPC's liability for the allegedly unlawful conduct of Brugman in sexually harassing a non-IPC employee is not relevant to the issue of whether Davey's act of reporting Brugman's conduct constitutes a protected activity.

The Commission finds that, by reporting Bolves' complaints about Brugman's sexually harassing behavior, Davey "opposed a practice" that the Montana Human Rights Act forbids. Davey made two, reasonable, internal complaints to her supervisor about a co-worker's inappropriate conduct with a teenager, which was conduct that could amount to either sexual harassment or creation of a hostile work environment because of sex. Therefore, the Commission determines Davey engaged in a protected activity and established the first element of a prima facie case.

Unlawful retaliation may occur when a person is subject to discharge, demotion, denial of a promotion, or other material adverse employment action. *Admin. Rule Mont. 24.9.603(2)*.

The hearing officer found that Davey was suspended without cause at lunchtime on March 22, 2008. *FOF Nos. 46-49*. When Davey returned to work on March 25, 2008, her supervisor directed her to sign two written warnings. *FOF No. 51*. After Davey refused to sign

the warnings, Buennemeyer suspended her for a week without pay. *FOF No. 51*. On March 28, 2008, IPC terminated Davey's employment on the grounds that Davey had failed to write up an incident report about an alleged pedophile. *FOF No. 53*. The Commission determines that Davey was subjected to the adverse employment actions of two suspensions and ultimate termination and, therefore, established the second element of a prima facie case.

Evidence establishing a reasonable inference that charging party was treated differently due to involvement in a protected activity includes proof that there was a close proximity in time between the protected activity of the charging party and the adverse action by the respondent. *Admin. Rule Mont. 24.9.610(2)(b)(iii)*. The causal link can be established by showing that the protected activity was closely followed in time by the adverse employment action. See, *Cifra v. General Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1255 (10th Cir. 2001).

The proximity in time between Davey's first report of Brugman's sexually harassing conduct with Anne Bolves and Davey's termination from employment was less than four weeks. The causal link is also established by the fact that similarly situated security guards were not subjected to escalating, adverse employment actions. Laubach who co-reported the harassment on February 23rd was merely suspended without cause for 24 hours. Brugman, the alleged harasser, received no disciplinary action related to his inappropriate conduct with Bolves. The Commission concludes Davey established a causal relationship between her protected activities and the employer's adverse actions, which completes a prima facie case of unlawful retaliation.

Once charging party establishes a prima facie case of illegal retaliation, the employer must produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Admin. Rule Mont. 24.9.610(3)*. If the employer produces evidence of a legitimate, nondiscriminatory reason for a challenged action in response to a prima facie case, the charging party must demonstrate that the reason offered by the employer is a pretext for illegal retaliation.

Admin. Rule Mont. 24.9.610(4). The charging party can prove pretext with evidence that the employer's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief. *Admin. Rule Mont. 24.9.610(4)*.

As noted above, Davey and Laubach both engaged in protected activity when they together reported Brugman's alleged sexual harassment to Buennemeyer on February 23, 2008, and both were summarily suspended without cause on March 22, 2008. *FOF Nos. 43, 47, 48*. The record also shows that security guard Kelly Brugman approached Buennemeyer on March 22, 2008, to relay some information about Davey. *Exhibit 137*. Brugman told the supervisor that Davey intended to file a complaint with IPC corporate headquarters about Buennemeyer's supposed mishandling of the pedophile incident at Herberger's on March 19, 2008. Buennemeyer recounted Brugman's allegations in a "Follow Up" memo. *Exhibit 137*. Buennemeyer noted in the memo that he considered Davey's intention to "go over my head" as a violation of IPC policy and "once again illustrates Davey's unwillingness to follow directions and her insubordinate attitude." *Exhibit 137*.

On March 22, 2008, Buennemeyer suspended Davey, wrote his "Follow Up" memo based on Brugman's allegations, and placed the memo in Davey's personnel file. *FOF Nos. 46-49; Hearing Transcript 80; Exhibit 137*. Nothing in the record indicates that Buennemeyer investigated further or questioned Davey regarding Brugman's allegations.⁴

Before Davey returned to work on March 25, 2008, following the one-day suspension, Buennemeyer contacted IPC headquarters for guidance on issuing Davey another reprimand for insubordination. *Hearing Transcript 271*. IPC's human resource officer Mindy Grinde advised Buennemeyer to suspend Davey again, pending corporate review of her employment status.

⁴ The veracity of Kelly Brugman's assertion that Davey planned to complain to IPC about Buennemeyer's alleged mishandling of the pedophile incident was not explored at the hearing. Brugman did not testify at the hearing and neither party addressed questions to Darcie Davey on the subject.

Hearing Transcript 271, 278. On March 25, 2008, Buennemeyer forwarded information on Davey's two suspensions and her alleged failure to write up a report on the pedophile incident at Herberger's. *Hearing Transcript 275-276.* IPC decided to terminate Davey's employment on March 28, 2008. *FOF No. 54.*

As this Order sets forth in detail, each adverse employment action against Davey had no grounding in actual employee misconduct, and the employer's agent, security supervisor Buennemeyer, was well aware that the reasons propounded were intentional misrepresentations of the facts. The Commission finds the articulated reasons for IPC's adverse employment actions to be unworthy of credence, motivated by supervisor Buennemeyer's discriminatory animus, and legally unsupported.

Moreover, the Commission affirms the hearing officer's numerous findings that demonstrate no legitimate business reason for IPC to have taken any adverse employment action against Davey. Davey had an exemplary employment record as a security guard at the mall for more than eight years. *FOF No. 32; Exhibits 1-7.* Her supervisor was mistaken when he thought Davey and another security guard were patrolling together and wrote up a disciplinary warning based upon his mistake. *FOF Nos. 48, 49, 51.* Telling Davey to "turn in her keys, get her stuff, and 'get out of here'" when she refused to sign the unfounded warning indicated to Davey that Buennemeyer had fired her. *FOF No. 51.* Davey checked on her status three days later and discovered IPC had decided to terminate her employment. *FOF No. 53.* While the individual at IPC corporate headquarters who made the final decision to fire Davey knew nothing about the sexual harassment allegations, the termination decision was based on false job performance reports, which IPC failed to investigate. *FOF Nos. 53, 54; Hearing Transcript, p. 85; Exhibit 128.*

The Commission concludes that Davey successfully demonstrated, by a preponderance of the evidence, that IPC terminated Davey's employment without cause shortly after Davey

engaged in the protected activity of reporting what she reasonably believed to be violations of the Montana Human Rights Act. IPC took adverse action against Davey based upon Buennemeyer's false reports and retaliatory motivation without conducting any independent investigation. The fact that Buennemeyer had not informed IPC personnel at corporate headquarters of the alleged sexual harassment Davey reported does nothing to shelter the employer from liability for unlawful retaliation.

Damages

When the Commission finds that a party against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the Commission may order any reasonable measure to rectify any harm, pecuniary or otherwise, to the person discriminated against. *Section 49-2-506(1)(b), MCA*. Remedies provided by the Montana Human Rights Act seek to return an employee who is a victim of discrimination to the position she would have occupied absent the discrimination. *Vortex*, ¶ 27.

In this case, the hearing officer made no findings regarding the harm Davey experienced as a result of IPC's unlawful discrimination and retaliation. The Commission determines that remanding this case to the Hearings Bureau for additional factual findings, as necessary, and a determination of a monetary damage award is an appropriate disposition. See, e.g., *Wilson and Shumacher v. Catholic Diocese of Great Falls-Billings, et al*, Case Nos. 1122-2005, 1123-2005, 1124-2005, 1126-2005, 1128-2005 and 1129-2005.

In ordering this remand, the Commission notes that the testimony Davey presented at the hearing clearly describes how she was "devastated" economically, physically and emotionally by the loss of her job with IPC. *Hearing Transcript 397*. The record indicates that Davey was earning \$9.65 per hour as a security guard for IPC. *Hearing Transcript 346, 400*. A selection of time records indicate that Davey worked full time. *Exhibits 34, 76, 77*.

As a direct result of the discrimination and unlawful retaliation, Davey lost her employer-provided medical and dental insurance coverage on March 31, 2008. *Exhibits 64, 65.*

Continuing coverage under a COBRA plan would have cost Davey \$324.97 per month for medical care and \$29.54 per month for dental care. *Exhibit 65.* Once unemployed, Davey could not afford to pay for her regular medications, much less the monthly insurance premiums. *Exhibit 91; Hearing Transcript 399.*

While employed with IPC, Davey had extensive dental work completed. In June 2007, her dentist proposed a dental treatment plan at an estimated cost total of \$5,955, of which \$723 would be paid by Davey's insurance. *Exhibit 88.* Prior to her termination, Davey incurred actual dental expenses in the amount of \$4,358, which she paid from her savings. *Exhibits 92, 123; Hearing Transcript 398.* However, after Davey's dental insurance coverage ended, she could not afford to continue the extensive program of crown replacement that she had initiated. *Hearing Transcript 398.* She experienced extreme oral pain, which required her to seek emergency treatment from a private dentist in September 2008. *Exhibit 126.* Two emergency room visits for dental caries and abscesses occurred in December 2008. *Exhibits 85, 87; Hearing Transcript 397, 410.* Davey was billed a total of \$3,020.59 for the emergency treatments related to her teeth. *Exhibits 100, 101, 113, 119, 125, 126.* Without money or insurance, Davey had no choice but to go to the local Rescue Mission and have four of her problem teeth extracted. *Hearing Transcript 398.*

Within six weeks of her termination from employment, Davey experienced high anxiety and heart palpitations, which required treatment at the hospital emergency room. *Exhibit 81.* Further testing procedures to determine the cause of the palpitations and chest pain ensued. *Exhibit 89, 90; Hearing Transcript 407, 413.* One month later, Davey was back in the emergency room with bronchitis. *Exhibit 82.* She was advised to avoid all strenuous activity

until her condition improved. *Exhibit 84*. These emergency treatments and laboratory charges totaled \$1,983.05. *Exhibits 83, 99, 106, 111, 113-118*.

Davey testified that she had not felt well since her termination from employment, due to recurrent oral infections and chest pain. *Hearing Transcript 413*. Her financial devastation resulted in a loss of credit and her inability to meet on-going financial obligations. *Exhibits 93-98; 107-108, 110*. Davey could not afford to continue her post-hysterectomy estrogen medication and follow-up examinations. *Exhibit 91; Hearing Transcript 413*. Due to her exacerbated ailments and limited ability to seek treatment, Davey estimated that she felt well enough to work full time only about 10% to 20% of the time. *Hearing Transcript 414*.

Davey testified that if she was able to find a job, she would have pushed herself to go to work, despite not feeling well. *Hearing Transcript 414*. Between the time of her termination and the hearing, Davey testified that she had been actively seeking new employment. *Hearing Transcript 409-412*. She put in applications at numerous businesses, including Sam's Club, WalMart, ShopKo, K-Mart, Corral West, and various video stores. *Hearing Transcript 409, 412*. She applied for work at restaurants and the West Side Veteran's Club. *Hearing Transcript 410*. At the time of the hearing, Davey was only able to find work for a limited duration dealing in second hand merchandise on E-bay. *Hearing Transcript 409-410*.

The Commission notes that but for the discrimination and retaliation against Davey, which resulted in the loss of her livelihood, Davey may well have been able to continue in her capable and reliable manner as an IPC employee, without extended absences from work due to illness. Davey demonstrated during 2007 that she could undergo major oral surgery and dental work without missing a significant number of workdays. The testimony presented at the hearing links Davey's anxiety disorder, heart palpitations, and general malaise to the discriminatory acts that directly resulted in her loss of employment and insurance coverage. Davey stated that she "would have given anything" to have had professional counseling, but she could not afford it.

Hearing Transcript 408. Davey testified that she “used to be able to go do things, go places,” but now she cannot. *Hearing Transcript 408*. Davey’s loss of income and health benefits, in particular, may have exacerbated the emotional stress she experienced due to the unlawful discrimination and retaliation.

Following a review of the complete record, including the briefing prepared by the parties prior to the Commission’s special deliberations on damages, which occurred on July 21, 2010, the Commission finds that the record supports an award of monetary damages. However, for the reasons discussed below, the Commission remands this matter to the Hearings Bureau for additional factual findings on the harm experienced by Davey as a result of the unlawful discrimination and retaliation and for a determination of an appropriate monetary award.

Lost wages. Based on the Commission’s finding of unlawful discrimination and retaliation in this case, Davey is entitled to a back pay award. *Dolan V. School Dist.* (1981), 195 Mont. 340, 349, 636 P.2d 825, 830. Davey’s back pay period may be reduced if she would have been unavailable for employment due to nondiscriminatory reasons and therefore would not have been able to earn the amounts claimed. *P.W. Berry Co. v. Freese* (1989), 239 Mont. 183, 197, 779 P.2d 521, 523, *citing* A. Larson, 2 Employment Discrimination (ed. 1988) §55.37(a)(iii). The Commission remands for a determination of an appropriate back pay award.

Lost future earnings: Davey may recover for losses in future earnings, if the evidence establishes that future losses are likely to result from the discriminatory acts. *Martinell v. Montana Power Co.* (1994), 268 Mont 292,321, 886 P.2d 421, 439. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible.

The record is silent on whether Davey could return to her position as a security guard with IPC. Therefore, the Commission remands with direction to explore the possibility of reinstatement. If the hearing officer determines that reinstatement is not possible, the

Commission requests the hearing officer to determine an appropriate award for Davey's lost future earnings.

Lost fringe benefits. Davey long ago missed her opportunity to enroll in the COBRA insurance program to continue, at her own expense, the medical and dental coverage provided by IPC. The monthly COBRA premium was \$354.51, which the Commission surmises to be an amount considerably less than the cost of comparable insurance on the open market. The Commission remands for a determination of an appropriate award for the loss of fringe benefits from the date of Davey's unlawful termination until her reinstatement with IPC, or other appropriate future date, as the hearing officer determines.

Medical and dental costs: As of the date of the hearing in this matter on July 28 and 29, 2010, the record shows Davey had incurred medical costs in the amount of \$1,983.05 and dental costs totaling \$3,020.59. The Commission notes that the record does not clearly establish that Davey's physical debilitation and dental disorders were proximately caused by her employer's unlawful conduct. The Commission remands for factual findings regarding causation and a determination of an appropriate award for medical and dental costs.

Emotional distress damages: A compensatory award for humiliation and emotional distress may be established by testimony or inferred from the circumstances. *Vortex*, ¶ 33. The Commission remands for a determination of an appropriate award for emotional distress damages that may reasonably be attributed to the employer's unlawful conduct and the resultant disruption to Davey's life.

Interest. Darcie Davey filed her complaint with the Human Rights Bureau on August 1, 2008. The Commission requests that the hearing officer calculate the appropriate amount of pre-judgment interest in this matter.

ORDER

IT IS ORDERED, the Commission affirms all findings of fact of the November 17, 2009 Hearing Officer Decision, and the Commission hereby adopts and incorporates those findings by this Order.

IT IS ORDERED, the Commission affirms Conclusions of Law No. 3 and 4 of the Commission's August 4, 2010 Order. By this Order, the Commission presents the legal analysis of the liability of IPC for unlawful discrimination and retaliation, in violation of the Montana Human Rights Act.

IT IS ORDERED, the Commission affirms the August 4, 2010 Order requiring IPC to provide affirmative relief, as ordered.

IT IS FURTHER ORDERED, the Commission remands this case to the Hearings Bureau of the Department of Labor and Industry for a determination of the an appropriate monetary award to make Darcie Davey "whole" and compensate her for the harm she has experienced as a result of the unlawful discrimination and retaliation. The hearing officer shall have the discretion to conduct any additional fact-finding necessary to determine harm and an appropriate award.

DATED this 16th day of September, 2011.



L.M. Minich, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 16th day of September 2011.

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Tam Newby, Legal Secretary
Montana Human Rights Bureau