

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013835:

TRACEE RAYMOND, ) Case No. 1230-2010  
)  
Charging Party, )  
) HEARING OFFICER DECISION  
vs. ) AND NOTICE OF ISSUANCE OF  
) ADMINISTRATIVE DECISION  
OPERATING ENGINEERS LOCAL 400, )  
)  
Respondent. )

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I. PROCEDURE AND PRELIMINARY MATTERS

Tracee Raymond filed a complaint with the Department of Labor and Industry on June 23, 2009, alleging that Operating Engineers Local 400 discriminated against her in employment and retaliated against her when it terminated her employment on August 3, 2009. On February 1, 2010, the department gave notice Raymond’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer. During prehearing proceedings, the charge for hearing was narrowed to the retaliation claim only (Ftnt. 1, “Amended 9/20/10 Order,” p. 2, 9/21/2010), and bifurcated, with the initial hearing only addressing liability, and a separate and subsequent damages hearing to be set after this decision, if appropriate.

The contested case hearing on liability was held on September 28 through October 1, 2010, in Forsyth, Montana. Raymond attended and was represented by Gary L. Beiswanger. Local 400 attended through its designated representative, Randy Sobeck, and was represented by Karl J. Englund, Karl J. Englund, P.C.

The witnesses who testified at hearing were Randy Sobeck, Tracee Raymond, Mercedes Kroll, Andy Korn, Robert Blanchard, Bryan Wier, James (Joe) Martens, Dennis Maag, Steven E. Porter, Jeff Cady, Richard (Rick) McCulloch, Charles Cashell, Bruce Daniels, Greg Holum, Gomo Rosado, John R. Groom, William Jarrod Broadus, David Johnson, John (JR) Charette, Jr., Kendall Wolcott, Terry Sprenger, Michael Woodworth, Dewey Nygaard, Colleen Cartwright, Kevin Murphy, Bob Daniels and Richard Larson, and Rion Miles (by deposition).

The Hearing Officer admitted Exhibits 1, 6, 101 through 106, 108 through 110, and 112 through 114, and refused Exhibit 12 on hearsay and foundation objections.

Raymond filed the last post-hearing argument on November 22, 2010. A copy of the hearing officer's docket accompanies this decision.

## II. ISSUES

The issue for this hearing is whether Local 400 retaliated against Raymond when it terminated her employment effective August 3, 2009. A full statement of the issues appears in the final prehearing order.

## III. FINDINGS OF FACT

1. Operating Engineers Local 400 ("Local 400") is a labor union representing heavy equipment operators, surface mine employees and stationary (building) operating engineers throughout Montana. Local 400 has approximately 1,500 members in both public and private employment. Most of its members work in heavy and highway construction, or the building industry, or surface mines (slightly less than 1/3 of its members in each category). The remainder of its members are owner/operators and apprentices. Local 400 is a chartered local union of the International Union of Operating Engineers (the International).

2. Local 400 is governed by its written by-laws and by the International's constitution. Local 400's by-laws provide specifically that the duties of its officers "shall be as provided in the International Constitution and Local 400 by-laws." Should these governing documents conflict with applicable laws, the applicable laws govern.

3. As required by federal law, the Labor Management Reporting and Disclosure Act, 42 U.S.C.A. §401 et seq., which governs the internal operations of labor unions, Local 400's by-laws and the International's constitution have been adopted through democratic processes. Both Local 400's by-laws and the International's constitution provide that Local 400's leadership must be elected democratically by the members of Local 400.

4. Local 400's leadership consists of elected officers and an elected business manager. The elected officers make up an executive board which is the policymaking body of Local 400.

5. Local 400's elected business manager is the chief executive officer of Local 400. The business manager is elected by the members of Local 400 for a three-year term. The business manager is charged with the responsibility to direct and conduct

the affairs of Local 400 for the benefit of all of its members. Local 400's by-laws and the constitution of the International identify the responsibilities of the business manager's responsibilities as including (but are not limited to) directing the negotiation and enforcement of collective-bargaining agreements ("CBAs") with employers and hiring, firing and supervising Local 400's staff. The International's constitution also provides that the elected business manager "shall appoint any and all representative, agents and assistants . . . They shall work directly under his supervision. He may terminate them at any time." Local 400's by-laws provide that the elected business manager "[s]hall be in direct charge of all representatives and office employees and vested with full authority to employ, discharge and set salaries and allowances of same." The elected business manager does not need the approval of Local 400's executive board to hire, supervise, discipline or discharge Local 400's staff.

6. Except as otherwise noted, at the times involved in this case, Local 400's business manager was Randy Sobeck, elected by vote of the members of Local 400 at an election held in August 2008, who took office in September 2008.

7. Local 400 has its headquarters in Helena, Montana. Local 400 has five field offices in Missoula/Kalispell, Butte, Great Falls, Billings and Colstrip. When fully staffed, Local 400 has a total of ten employees – the elected business manager, a dispatcher, an assistant business manager/business agent, two office administrative staff and five business agents, one assigned to each of the field offices. The business agents are responsible for servicing the bargaining units in the geographic area of the office to which they are assigned. Due to the downturn in the economy and the resultant lack of jobs in the heavy construction industry, Local 400 has not always been fully staffed since August 24, 2009.

8. The primary duties of a business agent involve negotiating and enforcing CBAs and serving the needs of the members in the geographical area to which the business agent is assigned. Business agents have significant responsibilities for the day-to-day conduct of the affairs of Local 400 as it relates to the bargaining units within their respective geographic areas of responsibility. For example, business agents are heavily involved, and often Local 400's chief spokespersons, in collective bargaining with employers. They draft collective-bargaining proposals, they participate with bargaining unit members in deciding bargaining strategy, and they critique the employer's bargaining proposals. After an agreement is reached, business agents present the agreement to the members for ratification and, if the agreement is ratified, insure that the final agreement reflects what was agreed to at the bargaining table. Business agents also respond to workers' complaints, decide if a complaint is a valid grievance under the applicable CBA, investigate potential grievances, draft

written grievances, present them to employers and represent the employee and Local 400 in the grievance process. Business agents make strategic decisions regarding collective bargaining and grievance processing and are the chief organizers of strikes. Business agents work directly for the business manager.

9. On October 30, 2006, Local 400's then business manager Jim Keane hired Raymond as a business agent for Local 400. She was assigned to Local 400's Colstrip office, where she was the sole employee. The Colstrip office services bargaining units of employees of the coal mines in Colstrip, Sarpy Creek and Savage. The two largest employers of Local 400 members are Westmoreland Resources' Absaloka Mine, located on Sarpy Creek near Hardin, and Western Energy Company's Rosebud Mine, located near Colstrip, with Local 400 members employed at both facilities served out of the Colstrip office. Raymond was informed when hired that she would be in charge of the Colstrip office and would be primarily responsible for negotiation and enforcement of the CBAs covering the employees of the mines. She was also given written notice, in the 3-page Local 400 Staff Handbook, that she worked directly for the business manager, who was her boss and who could terminate her employment "at any time." Raymond signed an acknowledgment of receiving the Local 400 Staff Handbook.

10. Raymond's primary duties, typical for business agents of Local 400, consisted of negotiating and enforcing CBAs and processing grievances filed by bargaining unit members related to issues arising under CBAs. In her role as a negotiator, Raymond regularly met with members of the bargaining units for the purpose of determining issues arising under the applicable CBAs, identified issues for future collective bargaining negotiations, set priorities for bargaining with employers, drafted proposals, critiqued employer proposals, explained proposals for changes in the agreements to the members and participated in the negotiation process itself at the bargaining table. As the person responsible for handling grievances related to issues arising under CBAs, Raymond took bargaining unit members' complaints, investigated those complaints, determined if those complaints constituted grievances under the CBAs, drafted grievances, and acted as an advocate for the bargaining unit members and for Local 400 through the multiple steps of each CBA's grievance process, including the presentation of grievances to the employer, to joint union-employer committees and to arbitrators.

11. Raymond also was responsible for policing the CBAs, which include union security clauses (clauses which require union membership or the payment of union fees as a condition of employment). Thus, she was also responsible for signing up new members and collecting dues. Raymond attended and ran all of Local 400 meetings in her geographical area. She also assisted members with such things as

insurance claims, pension claims and disability claims. She filed and processed unfair labor practice charges.

12. The Colstrip business agent position was particularly important because it served the two largest bargaining units that Local 400 represented, at the Rosebud Mine and at the Absaloka mine. With the Colstrip office located about 330 miles from the Local 400's headquarters in Helena, Raymond had considerable autonomy and responsibility as the sole union employee in her area and considerable responsibility to represent Local 400's elected management with bargaining unit members, the public and employers. Successfully to represent the bargaining unit members of Local 400 who worked at the Western Energy mine at Colstrip, Raymond had to maintain a good, professional working relationship with the employer, Western Energy Company, and in particular with its human resources manager.

13. Western Energy Company is a wholly owned subsidiary of Westmoreland Mining LLC. Its Rosebud Mine is a surface coal mine located just outside of the town of Colstrip, which employs approximately 300 hourly employees, all of whom have been, at all pertinent times, in one or in one of two collective-bargaining units, all represented by Local 400. The bargaining unit or units consist of employees engaged in all phases of the mining operations, the crushing and loading of mined coal and the maintenance and repair of the mine's equipment and facilities. Western Energy and Local 400 have been parties to a series of CBAs, the latest of which is effective from March 1, 2009 through February 28, 2013. The agreement in effect prior to the latest agreement was effective from March 1, 2006 to February 28, 2009.

14. Beginning in January 2009, Western Energy and Local 400 began negotiations for a successor to the 2006-09 CBA. The negotiations involved face-to-face bargaining until the end of February, after which the parties engaged in mediated bargaining with Ted Handel from the Federal Mediation and Conciliation Service. The negotiations were long and difficult. There was a strike beginning at around midnight on March 21, 2009, and ending on April 6, 2009, when employees began to return to work after they voted to ratify the 2009-2013 agreement.

15. Raymond was the lead negotiator and chief spokesperson for Local 400 during these 2009 negotiations. Assisting her was a Local 400 negotiation team of three bargaining unit members, and two bargaining unit members who were alternates. Also assisting her was Richard Spencer, an employee of the International. Spencer, at the request of then-business manager George Golie, had assisted Raymond in 2008 during the Sarpy Creek mine negotiations with Westmoreland Resources, which were completed before Sobeck assumed his duties as business manager. Arrangements for Spencer to assist Raymond during the Rosebud Mine

negotiations were made by Local 400 some time before the negotiations began. Other union employees who participated or tried to participate in the 2009 Rosebud Mine negotiations included Sobeck, assistant business manager Dewey Nygaard and office manager Colleen Cartwright.

16. CBA negotiations involve the resolution of disputes between an employer and Local 400 representing the employees. CBA negotiations can be stressful. To be successful, negotiations must be conducted in a business-like and professional manner. It is important that union employees keep their composure during difficult CBA negotiations. A strike is very stressful, and it is vitally important that union employees keep their composure during a strike. Union employees must follow the direction of their elected supervisors, particularly during difficult CBA negotiations and more especially during a strike.

17. It was common practice going back many years for the business manager to be involved in the Rosebud Mine negotiations. Sobeck had commitments out of state and assigned his assistant business manager, Nygaard, to attend the first round of negotiations on January 27-29, 2009.

18. Nygaard observed that there were times during those initial negotiations when the Local 400 negotiation team appeared to be unprepared. He felt that at other times members of the team acted unprofessionally by being unduly argumentative or hostile to the employer's bargainers. Cartwright, who also attended the initial negotiations, agreed with Nygaard's assessment. Raymond herself characterized some of the interaction between the employer and union on these days as "very hostile," "not good," "quite heated" and "out of hand."

19. On January 29, 2009, International employee Spencer was not at the bargaining table. Nygaard and Cartwright observed that the face-to-face negotiations that day were less hostile than on the previous two days and that Raymond did a better job leading the Local 400 negotiation team that day.

20. On January 30, 2009, Nygaard met with Sobeck in Helena and reported his observations of the negotiations. Nygaard suggested to Sobeck that Raymond lead the negotiations without Spencer's assistance, because Nygaard believed Spencer was the cause of too much confrontation with the employer's bargainers. Sobeck and Nygaard called Raymond, told her that she had done a good job on January 29, and suggested that Spencer not be involved in future negotiations. Raymond reacted strongly, adversely and crudely, threatening to quit and demanded that Nygaard not be further involved in the negotiations.

21. Sobeck instructed Raymond to settle down. He said he would call her later. When he attempted to do so, she did not answer his calls. Nygaard, who had

recommended Raymond for the job when she was first hired and who considered her a friend, called her several times, but she did not answer his calls or call him back.

22. After the January 30, 2009, phone call from Sobeck and Nygaard, Raymond called Local 400's executive board member Kevin Murphy (one of the alternates for the Local 400 negotiation team) and told him that Nygaard wanted to take over the negotiations, eliminate her, Spencer and the negotiation team from future negotiations and "sell out the miners." A rumor to this effect spread through the bargaining unit and caused considerable unrest.

23. Raymond also called Local 400 president Bob Daniels (a member of the Rosebud Mine bargaining unit) and made denigrating comments about Sobeck and Nygaard, and said that Sobeck and Nygaard wanted to "give everything away" to Western Energy.

24. At hearing, Raymond testified that in the January 30, 2009, call, Sobeck and Nygaard told her they wanted to negotiate with the employer without not only Spencer but also the entire rest of the Rosebud Mine negotiation team. She testified that Sobeck and Nygaard wanted "go in and make a deal" with the employer, and that she told them that she would have "no part of that," but she would "let them do that" if that was what they wanted to do. Her testimony was not credible. It is not at all believable that an elected first term business manager would propose bypassing the entire Local 400 negotiation team of bargaining unit members and striking a deal with the employer by himself, with only his assistant manager (with or without the local business agent) participating with him, for one of the two largest bargaining units in Local 400.

25. At hearing, Raymond also testified that she had far more experience in labor negotiations than Nygaard, and that Nygaard did not know what he was doing. When Nygaard testified, he detailed his experience in labor negotiations and other work for unions. From his unrebutted testimony, Raymond's assertions about their comparative experience were simply not true.

26. After the January 30, 2009, telephone call between Raymond and Sobeck and Nygaard, throughout the course of the Rosebud Mine and for the remainder of Raymond's tenure as the Colstrip business agent, she criticized Sobeck, and often Nygaard, to the rest of the Local 400 negotiation team and the rest of the Rosebud Mine bargaining unit. She continued to tell team members and other bargaining unit members that Local 400's business manager and assistant business manager were not acting and had not acted in the bargaining unit's best interests with regard to the negotiations.

27. The Local 400 negotiation team bargained with the employer on three separate occasions in February 2009 – on February 11-13, February 19-20 and February 24-26. Sobeck attended some of those bargaining sessions. Cartwright attended all of those bargaining sessions. Both Cartwright and Sobeck observed that Raymond was, at times, not effectively leading the Local 400 negotiation team. For two examples, at times the team members were arguing with each other and at other times they seemed less prepared than they should have been. They also observed that some members of the Local 400 negotiation team members, including Raymond and Spencer, were unnecessarily hostile to and sarcastic with the Western Energy bargainers.

28. At the end of February 2009, Western Energy presented an offer which Local 400 agreed to refer to the bargaining unit members for a ratification vote. The vote was against ratification. Western Energy and Local 400 agreed to request mediation assistance from the Federal Mediation and Conciliation service.

29. Handel, the federal mediator, suggested that Nygaard attend the mediation. Handel and Nygaard had recently worked together successfully in reaching two agreements between Local 400 and Flathead County.

30. Raymond was angry about the suggestion, and called both Handel and Nygaard to protest and complain about the suggestion. Nygaard had not proposed his participation and knew nothing about the mediator's suggestion that he participate until after the fact. Raymond also called Cartwright and Sobeck to complain about the suggestion and to criticize the mediator.

31. Mediation, with Handel, occurred on March 12-13, 2009. Although Sobeck believed Nygaard would have been helpful, he decided not to have Nygaard attend the mediation to avoid a dispute with Raymond. The mediation resulted in a tentative agreement which was referred to the bargaining unit members for a ratification vote. The members voted not to accept the agreement, which also constituted a vote to strike.

32. Accordingly, the Rosebud Mine bargaining unit went out on strike on March 21, 2009, at 12:01 a.m. When Raymond called Terry Sprenger (Western Energy Human Resources head and main bargainer for the employer) and informed him of the vote, she told him the contract had been rejected "overwhelmingly" even though the vote had been, in fact, very close. When Sobeck told a unit member that the vote had gone down by seven votes, Raymond told him to tell members that the vote against the contract had been overwhelming.

33. Raymond explained at hearing that she learned in negotiations training always to report to the press and the employer that any union vote had been



“overwhelming,” to preserve the appearance of unity for further negotiations. Sobeck was more concerned about preserving mutual trust, for a good working relationship after the negotiations were over, between his local business agent and the employer’s HR head. Both concerns were legitimate.

34. On about March 23, 2009, Nygaard traveled to Colstrip to help Raymond manage the picket lines. After being out on the picket lines and talking with members, Nygaard found that the members he spoke with and listened to did not have a common base of knowledge about the negotiations and the issues which resulted in the strike. Nygaard suggested to Raymond that she prepare a simple information sheet and distribute it to the members so the members would all have the same basic information. Raymond refused.

35. On March 24, 2009, Nygaard and Raymond went out for dinner at a restaurant in Colstrip. Nygaard heard a conversation between Raymond and another person in the restaurant in which Raymond was unprofessionally profane and talked disparagingly about members of the Western Energy negotiation team.

36. On March 25, 2009, Nygaard met with Sobeck and reported that Raymond had refused his request that she prepare an information sheet and distribute it to members and had behaved in public in a manner which Nygaard believed was unprofessional.

37. On or about March 25, 2009, Sobeck (based on advice from the International) decided that Local 400 would make an unconditional offer to Western Energy that the miners would return to work without a contract. Raymond did not agree with this decision. At a meeting in Local 400's Colstrip office on that day attended by Raymond, Nygaard, Sobeck, Daniels and several bargaining unit members, Raymond was asked to accompany Sobeck and Nygaard to deliver the letter containing the offer to return to work to Western Energy. She rudely refused, declining to cross the picket line to deliver the letter. Sobeck and Nygaard delivered the letter.

38. Shortly after Sobeck and Nygaard returned to the Colstrip office that same day, Western Energy’s president, Kent Salitros, called and asked to meet the next day with Local 400 staff (Sobeck, Nygaard and Raymond) to discuss the offer to return to work. Raymond insisted that the entire Local 400 negotiation team attend the meeting. Salitros said he did not want to meet with the entire team because the meeting was for discussion of the logistics of putting the miners back to work in an orderly fashion, and not for CBA negotiations.

39. After that phone call, in the ensuing discussion about whether to meet with Salitros and who would attend the meeting, Raymond again vociferously

objected to the fact that the entire negotiating team was not invited to the meeting. That debate ended when she threw a file on the desk in the office, said something to the effect of, "I don't like this, I don't want to be a part of this and I am out of here," and then abruptly left the meeting and the office. Sobeck did not know where she went or whether she had merely left the discussion or instead had quit her job.

40. Sobeck, Raymond and negotiation team member Dave Johnson ultimately attended the meeting with Salitros the next day and received from Western Energy the conditions under which it would allow the miners to return to work. Rather than either accept or negotiate over the employer's conditions, Sobeck decided to wait until after the next mediated bargaining session, scheduled for April 2, 2009.

41. On March 31, 2009, Sobeck informed Raymond that he intended to have Nygaard attend the April 2 mediated bargaining session. Sobeck then went to the picket line to talk with his members. Raymond drove up to the picket line to argue with Sobeck about Nygaard attending the mediation. She got out of her car and told Sobeck, who was at that time standing on the line talking with members, "We need to talk." Sobeck, who knew from his previous conversations with Raymond that she did not want Nygaard at mediation, told her, "Well, I can tell you that he is going to be here and that he is going to be at the meeting tomorrow." Raymond then said to Sobeck, in the presence of the Local 400 bargaining unit members, "You're about ready to have my resignation." Sobeck and Raymond then went to Sobeck's car for a private conversation, which ended when Sobeck again told Raymond he wanted Nygaard at the mediation, Raymond told Sobeck, "I've had enough of this and I am going home. I quit," and then left abruptly. Later that night, Raymond told Daniels, in very crude and derogatory words, that Sobeck and Nygaard "wanted to give stuff away."

42. On April 1, 2009, Sobeck, Cartwright, Raymond, the bargaining unit members of the Rosebud Mine negotiation team, Spencer and Spencer's boss, International western representative Dennis Lundy, met in Billings to discuss strategy for the next day's mediation session. Raymond asserted that the meeting would also address "major problems we were having internally." The meeting was originally scheduled for Local 400 and International staff only, but Raymond called Cartwright and insisted that the negotiation team attend and that Nygaard not be there. She told Cartwright that if Nygaard was at the meeting, she would not attend, and if Nygaard attended the next day's mediation she would quit. Sobeck invited the negotiation team to the meeting, and did not have Nygaard attend. At the end of the meeting, Raymond and Spencer argued about related matters (according to Raymond's testimony, they were arguing about the strike, negotiations, mediation

and “internal union problems”). The argument ended abruptly when Raymond said that she had “had enough of this” and left the meeting in tears.

43. Sobeck did not know whether Raymond would attend the next day’s mediation. He asked Cartwright to find out if she would be present for this critical mediation. Ultimately, Raymond did attend the April 2, 2009, mediation and Sobeck did not direct Nygaard to attend.

44. On April 2, 2009, Western Energy and Local 400 had a mediated bargaining session regarding the new CBA for the Rosebud Mine Local 400 bargaining unit. A draft CBA was developed, which Local 400 agreed to present to its members for ratification. During the mediation session, Raymond sometimes was rude and unprofessional.

45. Before the April 5, 2009, Local 400 vote on whether to accept the proposal from Western Energy, Sobeck told Raymond that, as part of her job, she needed to “sell the contract” (the proposed CBA) to the members. Sobeck wanted the members to approve the proposal CBA and end the strike. He believed that the strike was damaging to the union and to the bargaining unit and that the proposal was a good deal for his members, particularly given the state of the economy.<sup>1</sup> Raymond told Sobeck that she would not do that – that she had never “sold a contract” to the members and she was not about to start now. Based upon the evidence adduced at hearing, Raymond’s insistence that she remain neutral about the proposal was neither inappropriate nor insubordinate, given her role in any further negotiations that might follow.

46. On April 5, 2009, the Rosebud Mine bargaining unit members voted to accept the contract proposal put forth during the April 2 mediation. Accordingly, the strike ended on April 6, 2009, when the miners returned to work.

47. On April 23, 2009, Sobeck gave Raymond a letter of reprimand (which he had drafted and dated on April 17, 2009) regarding her conduct during the Rosebud Mine negotiations. The letter specifically mentioned her conduct during the January 30 phone call, her abrupt exit from the meeting in March (concerning the unconditional offer to return to work), her use of profanity in public, and her threatening to quit on March 31 and again on April 1. Sobeck asked Raymond to sign the letter as an acknowledgment that she had received it. She refused. She denied she had done anything to deserve a letter of reprimand. Sobeck informed her

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<sup>1</sup> The proposed CBA contained significant increases in wages, at a time when other Local 400 bargaining units were accepting wage freezes by agreeing to CBAs without wage increases and many individual members of Local 400 were out of work altogether.

that a copy of the letter would be put in her personnel file. Sobeck informed her that her behavior during the negotiations and strike had not been acceptable. Sobeck asked Raymond to keep the matter confidential. Raymond did not do so, instead telling members of her negotiation team and other members of the Rosebud Mine bargaining unit about the reprimand, portraying herself as unfairly treated because she had consistently stood up for the interests of the bargaining unit whenever the business manager wanted to sell the unit out to the employer.

48. On or about May 14, 2009, Raymond sent Local 400 a response to the reprimand, in which she denied some of the factual allegations of the reprimand and challenged the interpretations of those factual allegations she admitted. She essentially denied any wrongdoing of any kind. She sent a copy of her response to Local 400's Executive Board, although the "e-board" had no power over hiring and firing, and presumably no power over disciplinary actions, regarding local business agents (Exhibit 102, pp. 16-20).

49. Between April 23 and June 6, 2009, Sobeck received numerous hostile calls from members of the Rosebud Mine bargaining unit complaining about his treatment of Raymond, including but not limited to the letter of reprimand. Sobeck knew that Raymond had not kept the letter of reprimand confidential as he had asked, and reasonably concluded that she was raising questions with the membership about his leadership and his decisions.

50. Sobeck also received numerous angry calls from members of the bargaining unit complaining about the delay in picket duty pay (pay earned for walking the picket line during the strike). Picket duty payments come from the International. There had been recent changes in the manner in which the International processed requests for picket duty pay which had caused a delay in the payments being sent to the members (characterized at the hearing as a "paperwork issue"). Raymond knew about the delay and the reasons for it. Sobeck believed he was getting angry calls complaining about the picket duty pay because Raymond was not doing an adequate job of explaining to members the reasons for the delay. In fact, Raymond was telling members of the bargaining unit who contacted her about the delay in picket duty pay that she had nothing to do with it and to call either Local 400 management or International management.

51. Sobeck spoke with Raymond about getting calls from members about the letter of reprimand and about the picket duty pay. Additionally, Sobeck asked Raymond to call Nygaard and apologize to him (regarding rumors that Nygaard had wanted to "sell out" the members). Raymond told her that she would call Nygaard but that she would not apologize.

52. On June 6, 2009, Sobeck met with Raymond at Local 400's Helena office, and told her that her employment was terminated. Sobeck fired Raymond because of her conduct during the Western Energy negotiations and strike and because of what he reasonably perceived as turmoil within Local 400 caused by her refusals to:

- Accept the letter of reprimand.
- Accept his authority to issue that letter.
- Acknowledge any responsibility for her conduct or for the disputes that arose between her and Nygaard.
- Admit responsibility for rumors around Colstrip that he and Nygaard wanted to “sell out” the bargaining unit and to “cut a deal” with Western Energy.

53. Later on June 6, 2009, there was an Executive Board meeting at Local 400's Helena office. Some Rosebud Mine bargaining unit members came to that meeting to support Raymond because she had told them in advance that she believed she was going to be fired. Some of those members, including two “e-board” members who were in the Rosebud Mine bargaining unit, complained to Sobeck about his treatment of Raymond. They asked Sobeck to reconsider his decision. Sobeck did reconsider. He met again on June 6, 2009, with Raymond and reinstated her. He told her that he was giving her one last chance. His clear expectation in reinstating Raymond was that she would be a good employee, loyal to Local 400 and to him, and would stop being a source of turmoil and rumors within the Rosebud Mine bargaining unit and between that unit and the employer.

54. Raymond paid no attention to what she knew or should reasonably have known Sobeck expected of her as one of his local business agents. She believed that the only reason she was reinstated was because Sobeck “was getting way to [sic] much heat from the miners” (Exhibit 1, p. 9).

55. After the June 6, 2009, meeting, while Raymond was still working out of the Colstrip office, she met with HR manager Terry Sprenger and complained to him about Sobeck, spending between half an hour and 45 minutes gratuitously telling Sprenger that Sobeck “was not a very good business manager” who was having her do “stupid things.” After the meeting, Sprenger called Sobeck, informed him of this conversation and “told him he had some internal personnel issues he needed to address.”

56. From June 15 to June 18, 2009, Sobeck was in San Francisco at meetings of the International. While there, he received a brief phone call from Daniels to tell him that some Rosebud Mine bargaining unit members were meeting at Local 400's

Colstrip office and that something was awry. In the previous week, Daniels had received a call from Raymond, who asked him to come to the office because “we’ve got something to discuss with you.” When Daniels arrived at the office, he found Raymond and a few of the bargaining unit members and stewards (whom Raymond had appointed). Dennis Maag read aloud to Daniels (in Raymond’s presence) a draft of a letter to the International complaining about Sobeck’s leadership of Local 400 and his “wrecking the union and tearing the union apart.” Raymond told Daniels, “We’ve got to do something about Randy Sobeck.” When Daniels complained that the letter was not a “formal letter,” he was informed that it would be “tweaked” by Raymond. Daniels refused to sign the letter.

57. When Sobeck returned to his office in Helena on Friday, June 19, 2009, he called Raymond and asked what was going on in Colstrip. Raymond told Sobeck she had allowed members to use the Colstrip office, but she did not know what was going on and she did not want to know.<sup>2</sup> Sobeck told Raymond he would be coming to Colstrip to find out what was going on.

58. On the morning of June 22, 2009, Sobeck received a call from the Colstrip office, placed by Dave Johnson, a member of the Rosebud Mine bargaining unit, who asked why Sobeck was not in Colstrip. Raymond, believing Sobeck was coming to Colstrip to fire her on June 22<sup>nd</sup>, had called her supporters. Some of her supporters, including Johnson, gathered at the Colstrip Local 400 office on June 22, 2009, to confront Sobeck when he arrived. When Sobeck did not arrive, Johnson called him. Sobeck informed Johnson that he would be coming to Colstrip at some point in the near future.

59. Later on June 22, 2009, Sobeck received a note from Raymond’s health care provider stating that Raymond should be excused from work until July 6, 2009, due to “anxiety” and “increased life stressors.” She was placed on paid leave.

60. Also on June 22, 2009, Sobeck received from the International a copy of the letter signed by about 20 Rosebud Mine bargaining unit members complaining about Sobeck’s leadership of Local 400 and his treatment of Raymond (Exhibit 109). The letter stated that the signatories believe that Sobeck had “made several false and misleading accusations against our local BA [Raymond]” and that “(t)here is

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<sup>2</sup> At the hearing, Raymond initially denied she had anything to do with the letter to the International or that she knew of its contents. That testimony was contradicted by Daniels and by Raymond’s witnesses who testified she was present when it was written and when it was signed. In rebuttal she testified, “I kind of knew about it, didn’t want to know about it, but I knew about it, but didn’t want to know about it.”

currently a petition in the works . . . addressing his ability to lead the union into a prosperous future.”

61. Sobeck reasonably suspected that the information the members received about “accusations” against Raymond had come from Raymond herself, since he had refused to discuss what he considered confidential personnel matters with any of the members. Sobeck also reasonably suspected that Raymond had been involved in drafting and sending the letter. At the least, he correctly suspected that she had known of the letter and had failed to inform Sobeck of it, even when he specifically asked her on June 19, 2009, what was going on in Colstrip.

62. On June 23, 2009 (the day after Raymond went on leave), Sobeck traveled to Billings where he met in Local 400's office with Billings-based business agent Mike Woodworth and Local 400 member Ron McNamara. McNamara at that time had recently been laid off from a union job elsewhere in Montana. Sobeck hired McNamara as the temporary business agent in Colstrip while Raymond was off work.

63. Sobeck, McNamara and Woodworth traveled to the Colstrip office. They found a copy of a petition in the office copy machine requesting the International allow the miners to break away from Local 400 and form their own local union. Sobeck suspected that Raymond either had participated in this break-away preparation, or had known of it and had not told him about it. Either way, it also appeared that Raymond had at least allowed the miners to use Local 400's office to the detriment of Local 400.<sup>3</sup>

64. On June 23, 2009, Raymond filed a charge of discrimination in which she claimed that she was discriminated against on the basis of sex by the issuance of the letter of reprimand. Sobeck first saw the charge on June 25, 2009.

65. On June 28, 2009, Sobeck received another note from a physician about Raymond which said, “No work for this lady until further evaluation on 7 June [sic] ‘09.” Raymond did not return to work on July 6 or 7, 2009. She remained on paid leave until July 20.

66. On or about July 15, 2009, Sobeck received a written report from McNamara. It reiterated some of the conditions which allegedly existed in the office on June 23, 2009, expanding upon and detailing a litany of complaints about lack of organization and cleanliness. Of more significance, he reported that the Rosebud Mine bargaining unit was deeply divided and not functioning smoothly, and that

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<sup>3</sup> There was also testimony that they found the office messy and in disarray and had trouble finding active grievance files. The Hearing Officer did not find this evidence sufficient to establish that Sobeck had a basis for adverse action against Raymond because of the condition of the office.

Raymond had created an unreasonably adversarial relationship with employers that caused problems with the processing of pending grievances. Sobeck believed the contents of the report because it was consistent with what he had observed with the problems he had been having with Raymond.

67. In early to mid-July, Sobeck called Sprenger and asked a general question about “how things are going” in Colstrip. Sprenger reported to Sobeck that he had concerns both about grievances taking too long to be resolved and about Raymond’s truthfulness. Sobeck asked Sprenger to put his thoughts in writing. On July 17, 2009, Sprenger sent Sobeck an e-mail explaining that he had experienced significant problems in working with Raymond and detailing the unprofessional manner in which she delayed the processing of employee grievances. The e-mail also expressed Sprenger’s “concerns with misrepresentations during the work stoppage that were simply not true,” which he detailed therein.

68. On July 17, 2009, Sobeck learned that Raymond’s doctor had released her to return to work as of July 20, 2009. From June 6, 2009, when he reinstated Raymond, until July 17, 2009, Sobeck had received troubling information regarding Raymond, adding to the concerns he already had when fired her but then reinstated her for a last chance.

69. Sobeck decided to take some time to review the situation before taking any action. On July 20, 2009, he temporarily closed the Colstrip office and temporarily laid off both McNamara and Raymond.

70. Sobeck hired an independent experienced labor attorney, Richard Larson of Helena, to advise him about the situation with Raymond. Larson advised Sobeck that Raymond’s charge of discrimination could not be considered by Sobeck in determining what course of action to follow. After he received that advice, Sobeck considered his options and decided to fire Raymond.

71. Local 400 provided Raymond with written notice of her discharge, by a letter that Sobeck signed, dated and effective August 3, 2009. That discharge letter specifically states that the reprimand was not a basis for the discharge.

72. Local 400’s discharge letter cites poor physical condition of the office, poor records keeping and poor file maintenance as some of the reasons for the discharge. Local 400 has not proved that any of these matters were legitimate and sufficient business reasons for the discharge of Raymond.

73. Local 400’s discharge letter cites failure to follow through on aspects of maintaining and administering the Western Energy CBA. There is substantial and



credible evidence in this record supporting this basis for Raymond's discharge as a legitimate non-retaliatory business reason.

74. Local 400's discharge letter concludes, "Taking everything into consideration, I no longer have any confidence that you can represent the interests of Local 400 in an effective, professional manner." There is substantial and credible evidence in this record supporting this basis for Raymond's discharge as a legitimate non-retaliatory business reason.

75. By administrative rule when a respondent (in this case, Local 400) has actual notice that proceedings are pending with the department to enforce a provision of the Human Rights Act, significant adverse action taken by that respondent against a charging party (in this case, Raymond) with the proceedings pending creates a disputable presumption that the adverse action was in retaliation for the protected activity.<sup>4</sup> The requisites of the rule are met in the present case, and the disputable presumption is created.

76. The disputable presumption is rebutted by substantial and credible evidence that Sobeck learned, after Raymond's reprimand, of conduct of which he was unaware at the time of the reprimand. Substantial and credible evidence indicates that Raymond surreptitiously continued to engage regularly in destructive criticism of Sobeck and Nygaard. That criticism, much of which appears to have been false and all of which was improper for her in her employment as a local business agent, engendered a deep division within the bargaining unit. It could also have undermined Sobeck's authority and credibility, within and outside of the bargaining unit. In addition, substantial and credible evidence establishes that Raymond surreptitiously participated in or supported efforts both to damage Sobeck's standing with the International and to break the Rosebud Mine bargaining unit away from Local 400 altogether.

77. Sobeck's decision to fire Raymond was for legitimate non-retaliatory business reasons related to his evaluation of her performance and conduct and his responsibility and authority to manage Local 400 for the benefit of all of its members, and with advice of counsel regarding his obligations not to retaliate against her for filing her discrimination complaint. Sobeck, acting on behalf of Local 400, did not in any respect retaliate against her in violation of the Montana Human Rights Act.<sup>5</sup>

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<sup>4</sup> Admin. R. Mont. 24.9.603 (3).

<sup>5</sup> Assuming for the sake of analysis that Sobeck's decision was also in retaliation for Raymond's filing of her claim of discrimination, the legitimate business reasons for firing Raymond would have caused Sobeck to fire her even without the filing of her claim of discrimination.

#### IV. OPINION<sup>6</sup>

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in a protected practice, (2) thereafter her employer took an adverse employment action against her, and (3) a causal link existed between her protected activities and the employer's actions. *Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; see also, Admin. R. Mont. 24.9.610(2).

By filing her discrimination complaint on June 23, 2009, Raymond engaged in protected activity. By firing her, effective August 3, 2009, Local 400 took a significant adverse action against her. However, the only evidence of any causal connection between these two events is a rebuttable presumption established by administrative rule. Admin. R. Mont. 24.9.603 (3) specifically provides that when significant adverse actions are taken against a charging party during the pendency of a human rights proceeding by a respondent with actual knowledge of the proceeding, a rebuttable presumption arises that the action was in retaliation for engaging in protected conduct.

Rule 301(b)(2), Mont. R. Ev., provides, in pertinent part:

. . . . A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

In this case Local 400 presented substantial and credible evidence contrary to the disputable presumption. The Commission Comments to Rule 301 explicate the appropriate use of a disputable presumption when contrary evidence is introduced:

. . . . If evidence is introduced which gives rise to a presumption, and the presumption is not controverted or disputed, the trier of fact must find in accordance with the presumption. In order to avoid this and overcome a presumption, the rule necessarily requires that the burden of persuasion shift to the party against whom the presumption operates. See *Holen v.*

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<sup>6</sup> 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.

Phelps, 131 Mont. 146, 152, 308 P2d 624 (1957) and cases cited therein. If evidence contrary to the presumption is introduced, the presumption is given the weight and effect of evidence and a question is raised for the trier of fact who may give the presumption such weight in the face of the contrary evidence as it thinks the presumption should have. See Lewis v. New York Life Ins. Co., supra; Williams v. Swords, 129 Mont. 165, 173, 284 P2d 674 (1955); Roseneau Foods Inc. v. Kohlman, 140 Mont. 572, 577, 374 P2d 87 (1962); Crissey v. State Highway Comm'n, 147 Mont. 374, 379, 413 P2d 308 (1966).

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This subdivision may change existing Montana law by providing that a preponderance of evidence is required to overcome all disputable presumptions. Previously different amounts of evidence were apparently required to overcome different presumptions. For example: "slight proof," *Sommers v. Gould*, 53 Mont. 538, 545, 165 P 599 (1917); "substantial evidence," *State ex rel. Rankin v. Martin*, 68 Mont. 392, 404, 219 P. 632 (1923); "preponderance of evidence," *In re Wray's Estate*, 93 Mont. 525, 535, 19 P.2d 1051 (1933); "proof must be clear, satisfactory and convincing," *In re Colbert's Estate*, 31 Mont. 461, 468, 78 P 971 (1904); "conclusive evidence," *Gardiner v. Eclipse Grocery*, 72 Mont. 540, 550, 234 P. 490 (1925); and "beyond a reasonable doubt," *Spratt v. Helena Power Transmission Co.*, 37 Mont. 60, 79, 94 P. 631 (1908). However, the Commission feels that in the interest of obtaining a simple, practical rule, one amount of evidence should be required and that amount should be a preponderance of the evidence.

See also, *In re Seizure of \$23,691.00*, 273 Mont. 474, 905 P.2d 148 (1995) (disputable presumption must be overcome by a preponderance of the evidence), following *State v. Flack*, 260 Mont. 181, 860 P.2d 89 (1993) and distinguishing, as to overcoming a presumption, *Magone v. Aul*, 269 Mont. 281, 887 P.2d 1235 (1994).

Local 400 also asserted that poor physical condition of the office, poor records keeping and poor file maintenance were among its reasons for firing Raymond. Local 400's failure to prove the truth of this justification could be a basis for distrusting its proof of the two nondiscriminatory legitimate business reasons it did prove. Justifications for adverse actions taken, asserted but unproved (particularly if

those reasons are abandoned part way through the process) can be a basis for finding pretext. *Holland v. Washington Homes, Inc.* (4th Cir. 2007), 487 F.3d 208, 217, n. 7; *Hernandez v. Hughes Missile Systems Co.* (9th Cir, 2004), 362 F.3d 564, 569; *Thurman v. Yellow Freight Sys., Inc.* (6th Cir. 1996), 90 F.3d 1160, 1167. The shifting justification permits but does not require the inference of pretext. In this case, the Hearing Officer did not find the inference applicable.

Local 400 successfully overcame the disputable presumption of causation with its extensive and persuasive evidence of legitimate and non-retaliatory business reasons for the discharge of Raymond. She always carried the ultimate burden of persuasion to demonstrate her firing was motivated, at least in part, by retaliatory animus. *Hearing Aid Institute v. Rasmussen* 258 Mont. 367, 852 P.2d 628, 632 (1993). At the end of the day, she failed to carry that burden.

The findings of fact delve extensively into the prior history of dealings and events involving Raymond, Sobeck and Nygaard, because those dealings and events provide the context in which the determination of causation for Raymond's eventual discharge must be made. It is more likely than not that Raymond's antagonism and distrust of Raymond towards Sobeck caused her inappropriate work-related conduct, and Sobeck's discovery, after she went on medical leave, of the depth and breadth of that inappropriate work-related conduct caused him to fire her. Raymond failed to prove her case of retaliation.

## V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Mont. Code Ann. §49-2-512(1).
2. Raymond failed to prove that Local 400 illegally retaliated against her because she filed a discrimination complaint. Mont. Code Ann. §49-2-301.

## VI. ORDER

1. Judgment issues in favor of Operating Engineers Local 400 and against Tracee Raymond on her charge that Local 400 illegally retaliated against her.
2. Raymond's complaint is dismissed.

Dated: January 21, 2011.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Gary L. Beiswanger, attorney for Charging Party Tracee Raymond, and Karl Englund, attorney for Operating Engineers Local 400:

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) and (4).

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 Staci Green, (406) 444-3870 immediately to arrange for transcription of the record.