BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0098013854:

VALERIE WILSON,	)	Case No. 1346-2010
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	
STATE OF MONTANA,	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	

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I. INTRODUCTION

Valerie Wilson filed a complaint with the Department of Labor and Industry on July 13, 2009. She alleged that the Montana Department of Corrections (DOC), her employer at the time, retaliated against her for participating in an investigation into a discrimination complaint filed against DOC by a co-employee. The Hearings Bureau received the complaint, and Wilson's subsequent amended complaint on February 16, 2010, from the Human Rights Bureau, with a request to commence contested case proceedings. On February 19, 2010, the Hearings Bureau issued notice that Wilson's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on December 15, 16 and 17, 2010, in Helena, Montana. Wilson, an attorney duly licensed to practice in Montana, attended and represented herself, with her co-counsel, Charles E. Petaja, attorney at law. DOC attended through its designated representative, Steve Barry, with counsel, Trevor L. Uffelman, Drake Law Firm PC.

Witnesses were: Valerie Wilson; Physical Therapist Christine Wike; DOC Facilities Program Bureau Chief Kelly Speer; DOC Legal Services Bureau Secretary Janee Ward; DOC Human Resource Specialist McKenzie Hannan; DOC Director Mike Ferriter; Wilson's spouse, Pastor John Henry Cook; DOC Administrator of Staff Services Division Steve Barry; former DOC Deputy Chief Legal Counsel Colleen White; DOC Chief General Counsel to the Director (former Chief Legal Counsel) Diana Koch; DOC Investigations Bureau Chief (former Paralegal/Investigator) Dale Tunnell; DOC Legal Bureau Chief (former primary counsel within the Legal Services

Bureau for Montana State Prison and working primarily at the prison) Colleen E. Ambrose; and DOC Staff Attorney Brenda Elias. Wilson also offered the deposition testimony of Paul Eodice, D.O., subject to DOC's motion in limine to exclude. That motion is denied. Whether the doctor's testimony establishes that it is more likely than not that Wilson's back problems during the time that she endured the adverse actions of DOC resulted from those adverse actions is a question to apply to evidence of record, not a question that determines admissibility (outside of jury trials).

The following exhibits were admitted into evidence: Exhibits 1(a), 2(a) through 2(e), 3(a) through 3(m)[1], 4, 5(a) through 5(y)[2], 6(a) through 6(c), 7, 8(a) through 8(f) and 8(I), 10(a), 10(c) through 10(g), 10(I), 12(c), 132, 144, 187, 218, 257 and 264.

The following exhibits were admitted into evidence and sealed: Exhibits 9(a), 9(c), 9(f), 9(g)[3], 11 (p. 4 only) and 107.

Exhibits 12(a), 12(b) and 12(c) are admitted into evidence and unsealed, since their contents are necessarily considered to decide whether Wilson (who offered them) suffered physical problems caused by retaliation against her, and Wilson put her physical condition at issue herein thereby waiving her privacy rights therein.

II. ISSUES

1. Did DOC illegally retaliate against Wilson because of her participation in the investigation into the discrimination complaint of Johnson?

2. If DOC illegally retaliated against Wilson, what harm, if any, did Wilson sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If DOC illegally retaliated against Wilson, in addition to an order to refrain from such conduct, what should the department require of DOC to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

Background

1. The Montana Department of Corrections (DOC) is an executive branch public agency. At all relevant times, Mike Ferriter served as the Director of DOC.

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[1] Exh. 3(k) is admitted to prove what Wilson said to DOC therein, as part of the grievance process, but not to prove the truth of her contentions and arguments therein, all of which are hearsay.

[2] Relevance objections to Exhibits 5(a) through 5(y) are overruled.

[3] Relevance objections to Exhibit 9(g) are overruled.

2. From July 26, 2006 to September 25, 2009, charging party Valerie Wilson served as a staff attorney for the DOC's Legal Services Bureau (Unit).

3. From July 2004 to August 2009, Diana Koch served as DOC's Chief Legal Counsel and Bureau Chief of the Unit, supervising the attorneys in that Bureau, including Wilson. During that same time, Colleen White served as Deputy Chief Legal Counsel, supervising support staff in the Unit, and Steve Barry served as DOC's Human Resources Division Administrator.

4. During Wilson's employment with DOC, she received positive performance evaluations, commendations, accolades and pay increases. Her evaluation just months before the difficulties in this case described her as an exemplary employee. Exh. 2(c), February 2009 Performance Appraisal. She conducted the majority of DOC's litigation, including civil rights litigation, inmate property cases and criminal prosecutions. She relied upon DOC's paralegal/investigators Kelly Dunn Johnson and Anita Larner to maintain her heavy caseload. Larner was Wilson's primary paralegal for work done at Montana State Prison.

5. In June 2008, Larner resigned. In August 2008, DOC hired Dale Tunnell, ostensibly to replace Larner, although he was hired for his strong investigation background and had no paralegal training or experience. Tunnell's job profile was different from his predecessor's. His profile was for 25% paralegal work and 75% investigations. Wilson assumed that Tunnell was qualified for and capable of performing the paralegal duties required for his job, and specifically that he was capable of and responsible for doing the same paralegal work that Larner had done.

6. Tunnell developed a good working relationship and reputation with many members of the Unit, including Barry and Colleen Ambrose (at that time DOC's primary counsel for Montana State Prison), and perhaps Koch as well. He did not develop a good working relationship and reputation with Wilson.

Facts Regarding Retaliation

7. On October 2, 2008, Koch directed Tunnell to assist Wilson with discovery responses and a preliminary investigation in two of DOC's civil rights cases. Tunnell did not know how to do the paralegal work but did not advise Wilson of that fact. Tunnell did not complete the assignments, because Koch and/or White assigned him investigative work from other units. Tunnell did not warn Wilson that he would not be able to complete the work Koch had directed him to do for Wilson.

8. In January 2009, Wilson notified Koch and White that Tunnell was not completing assigned tasks, causing her caseload problems. There is no evidence that DOC told Wilson about Tunnell's lack of experience or training in paralegal work.

9. Also in January 2009, Johnson filed a sexual discrimination complaint with the Human Rights Bureau alleging discrimination by DOC against her on the basis of sex in granting Tunnell higher pay, preferential work assignments and a preferential work schedule. Wilson did not know about this complaint when Johnson filed it.

10. Also in January 2009, Wilson and Ambrose were both attending training in Las Vegas. Wilson told Ambrose "that she thought that the Department should just go ahead and pay Kelly as much as they were paying Dale." Ambrose replied that she disagreed, because Tunnell had a great deal more experience and education than Johnson did, and so it was not justifiable to pay Johnson as much as Tunnell was being paid. Ambrose reported what Wilson told her to Koch.

11. In February 2009, White and Koch advised Wilson that Johnson had filed a discrimination claim against DOC, and discussed the case with her.

12. On March 26, 2009, Wilson gave a statement to DOC's outside legal counsel, Amy Christensen, in connection with the Johnson investigation. Wilson told Christensen that White and Koch were treating Johnson less favorably than Tunnell with regard to assignments and work schedule, and expressed her disagreement with that treatment. Christensen reported Wilson's statement to DOC management. Koch and White both learned about the content of Wilson's statement to Christensen almost immediately after Wilson gave the statement.

13. Wilson's perception that Tunnell was receiving more favorable treatment than Johnson was accurate. Tunnell was being groomed for a full-time investigator position with DOC. DOC had hired him to work as a paralegal/investigator, with the purpose and intent of keeping him employed in that capacity until he could be placed in a job that would more effectively utilize his investigative skills and experience. On this record, it appears that DOC never expected Tunnell to perform paralegal tasks with the efficacy of the other employees assigned such tasks. On this record, DOC never informed Wilson during her employment about its plans for Tunnell.

14. DOC had what it considered good reasons for treating Tunnell differently than Johnson. Nonetheless, Koch and White believed that Wilson's perception that Johnson was receiving unjustifiably less favorable treatment could be harmful to DOC's defense of Johnson's discrimination complaint, if Wilson expressed it in a statement to the Human Rights Bureau Investigator or in testimony in any subsequent hearing or trial. White shared this belief with Wilson. Over the rest of the time that Wilson was employed by DOC, White tried several times to get Wilson, in essence, to reconsider her perception that Tunnell was receiving more favorable treatment from DOC than Johnson received. White's efforts were made as Deputy Chief Legal Counsel and support staff supervisor.

15. In February and March 2009, Wilson was negotiating with a Montana State Prison inmate to settle a civil rights claim, with Tunnell assigned to assist her. The inmate agreed to settle the civil rights claim as well as a property claim he had also filed against DOC. Wilson requested the Department of Administration to transfer the property case to her for settlement, drew up a stipulation and release addressing both claims, and directed Tunnell to meet with the inmate and obtain his signature on the documents on March 4, 2009.

16. Tunnell directed his attention toward other assignments, did not meet with the inmate, did not get the documents signed and did not warn Wilson of his failures to carry out that work. Wilson was unaware at the time that Tunnell was not carrying out his assignment.

17. The next week, Wilson received a letter from the inmate reneging on the settlement agreement, which had never been presented to him and which he had never signed. Wilson complained to Koch about Tunnell's failure to complete the assignments and about the impact she believed his failure had upon DOC's liability exposure.[4] There is no evidence that DOC took any action upon Wilson's complaint.

18. On Wednesday, April 8, 2009, Wilson had just returned to the Unit's office after trying a jury case in Billings on Monday and Tuesday (with Johnson's assistance). She was hurrying to prepare all of her pending cases, because she was about to leave for a vacation from mid-April through the first week of May 2009.

19. On April 8, 2009, Wilson sent an e-mail to Koch and White indicating that she wanted Johnson to accompany her to a witness interview just scheduled in one of Wilson's cases, at the prison on the following Monday, April 13, 2009, just two days before Wilson would leave on her vacation. She noted that Tunnell did not work on Mondays. She also noted that Johnson would be monitoring the involved case during Wilson's vacation.

20. On April 9, 2009, Koch overheard Wilson telling staff attorney Brenda Elias, at the office, that Tunnell had never helped her and was worthless.

21. Four days later, on the morning of Easter Sunday, April 12, 2009, Koch responded twice to Wilson's request to use Johnson on Monday, April 13, 2009, with both e-mails sent to Wilson's office e-mail address. Wilson saw the two e-mails the next morning, the day the interview was scheduled at the prison.

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[4] Only if the inmate would actually have signed the documents had they been presented to him by Tunnell shortly after March 4, 2009, could Tunnell's failure to perform the tasks Wilson assigned to him have had any impact on DOC's liability exposure. The evidence does not establish whether the inmate seriously intended to settle his claims when he said he would settle them.

22. Koch's first Sunday e-mail to Wilson refused permission for Wilson to take Johnson with her to Deer Lodge the next day, because Koch and White would be out of the office Monday through Wednesday of that week and the office "needs [Johnson] in Helena." In that first e-mail, Koch advised Wilson that Tunnell would rearrange his schedule and come to Deer Lodge if necessary, but she also noted that although she had talked to Tunnell about the assignment to assist Wilson on that Monday, she had not asked him to rearrange his schedule and be in Deer Lodge that day (Koch wrote that when she talked to Tunnell she had not grasped "the emergency nature" of Wilson's request to use Johnson on April 13). She directed Wilson to call Tunnell and "discuss with him how he can help you with this case," commenting also that Ambrose "should be in Deer Lodge Monday and should be able to meet with [the witness] with you." Before Wilson's interview with Christensen, Koch had never refused Wilson's requests for staff assistance with trial preparations.

23. Ten minutes later on that same Easter Sunday, Koch sent a second e-mail to Wilson, calling Wilson's e-mail "disturbing" to Koch "on a number of different levels," and requesting that Wilson call on her cell phone the next day – the day that Wilson was reading the e-mail before going to the prison.

24. There was no conversation by cell phone between Wilson and Koch on April 13, 2009. On Tuesday, April 14, 2009, Wilson responded by e-mail. She blamed White for the decision denying her Johnson's help with the April 13 interview, although it was Koch who had denied that request. Wilson's e-mail went on to criticize Tunnell at length, to blame White for Tunnell's "dismissive attitude and inability to assist with litigation" and to make hostile comments about White's poor supervision of staff, including the statement that "perhaps Ms. Ambrose can do paralegal work because Ms. White is not adequately supervising the support staff." Wilson's e-mail concluded that she was doing "70-80% of the litigation that comes out of this office," and that she could not complete that work without "working 60 hour weeks" without the level of help from support staff that she received when Larner and Johnson were the paralegal/investigators.

25. Koch forwarded Wilson's April 14 e-mail to White, with directions to forward it to Christensen, who had interviewed Wilson in connection with the Johnson investigation just four weeks earlier. After forwarding the e-mail to Christensen, White also showed it to Tunnell, allowing him to read it. Sharing the e-mail within the Unit resulted in considerable turmoil and escalated the conflicts between Wilson and both Tunnell and White.

26. The record in this proceeding does not establish that Koch took any action to address Wilson's complaints regarding either Tunnell's performance or White's supervision of support staff, other than providing the e-mail to White.

27. At some point, Koch and White told Tunnell that Wilson was complaining about his job performance and that her complaints seemed calculated to strengthen Johnson's claim against DOC. It is impossible to see how they could say this to Tunnell without appearing to encourage him to continue to disregard assignments Wilson gave him.

28. On April 15 through May 7, 2009, Wilson was on vacation. During her vacation, she maintained contact with the Unit to monitor her cases and provide direction as needed for staff. Before her interview with Christensen, Wilson had routinely contacted the office and monitored her cases while on leave. Other staff attorneys sometimes engaged in similar practices while on leave.

29. On April 22, 2009, Koch e-mailed Wilson and directed her to contact Koch "ASAP" to discuss pending litigation. Wilson called Koch on April 23, 2009. Instead of discussing pending litigation, Koch expressed her concerns about Wilson's April 14, 2009 e-mails, including her beliefs that Wilson had an "underlying agenda" and that Wilson's conduct bordered on insubordination. Koch ordered Wilson not to contact the office and not to respond to e-mails during the pendency of her leave. Although Koch had sometimes encouraged attorneys not to contact the office and monitor cases while on leave, she had never barred any attorney, not to mention the attorney with the largest litigation case load in the office, from doing so.

30. After Koch's April 23, 2009, telephone conversation with Wilson, Wilson began to suffer general symptoms of anxiety, sleep disturbance and emotional distress.

31. To assure that Wilson was not contacting the office, on April 23, 2009, Koch directed Johnson and administrative assistant Janee Ward to hang up on Wilson or to transfer the call to Koch, if Wilson attempted to contact the office. Prior to Wilson's statement to Christensen, Koch had never prohibited staff from communicating with Wilson while she was on leave. There is no evidence that Koch treated any other staff attorney on leave in this fashion, at any time either before or after Wilson's leave.

32. On April 23, 2009, Koch directed Ward to "remove" Wilson from the Unit e-mail system. What this actually entailed is unclear, except that it meant that no Unit e-mails would be delivered to Wilson's address(es) in the system. Koch never gave either Ward or Wilson a reason for her directive. There is no evidence that Koch ever took such a step regarding any other attorney in the Unit who was on leave.

33. Before Wilson was removed from the Unit e-mail system, Ward and Wilson had reviewed deadlines (prior to Wilson's departure) and then Ward had

filed some documents with the court under Wilson's direction during Wilson's leave, as Wilson both tracked e-mails and communicated with Ward by e-mail. After Wilson was removed from the Unit e-mail system, DOC missed a discovery deadline in Wilson's case, because Koch had not assigned anyone to follow through on the discovery and Wilson could no longer monitor her cases with staff.[5]

34. The e-mails Koch directed Ward to withhold from Wilson contained information critical to Wilson's cases. Ward saved the e-mails. When Wilson returned to the office on May 7, 2009, Ward forwarded two weeks of the e-mails to Wilson to bring her up to date on her cases.

35. Under the circumstances, it is not credible that Koch took these actions for Wilson's benefit, to assure that she was free of the stress and tension of the office while on vacation. Koch's conduct in barring Wilson from contact with the office, including forbidding office staff to talk to her, call her or provide her with e-mail, for a purported reason that is incredible, is consistent with Koch harboring a retaliatory animus toward Wilson for expressing her views about Johnson's treatment in her interview with Christensen.

36. On May 13, 2009, Koch, White and Christensen attended a fact-finding conference in the Johnson case wherein they discussed Wilson's statement to Christensen.

37. Later that same afternoon, White, Koch and Christensen called Wilson into the Director's conference room and ordered Wilson not to speak with Johnson about her discrimination case. Koch, White and Christensen did not direct any other DOC attorneys not to speak with Johnson about her discrimination case. Koch's reason for singling out Wilson was that she assumed that Wilson was advising Johnson in her case against DOC. Koch had no evidence to support that assumption. It appears she based that assumption upon the content of Wilson's interview with Christensen and the comments she either overheard Wilson making to other staff or received reports that Wilson was making to other staff.

38. Koch talked to Wilson at least twice about the April 14, 2009, e-mail within the six weeks immediately after Wilson sent that e-mail. The first conversation was by telephone, while Wilson was still on vacation. Toward the end of May 2009, Koch talked to Wilson again about the April 14, 2009, e-mail.

39. Koch thought that in those meetings she communicated her concerns to Wilson about the damaging effect of the e-mail upon the work relationships within

[5] There is no evidence that this missed deadline prejudiced DOC.

the office. Wilson thought, after the late May 2009 conversation with Koch, that any concerns about the April 14, 2009, e-mail had been resolved, and that Koch would arrange a meeting between Tunnell and Wilson, in Koch's presence, to resolve their differences.

40. Koch did arrange a meeting between Tunnell and Wilson, but that meeting did not take place, because Tunnell refused to meet with Wilson and Koch until he got an apology from Wilson, which he insisted he should and would get. As far as this record reflects, DOC took no action against Tunnell for his refusal to meet with the Bureau Chief and a Unit staff attorney, at the direction of the Bureau Chief.

41. Shortly after Wilson returned from her vacation, in May 2009, Koch called Wilson into her office and attempted to get Wilson to agree to apologize to Tunnell and to take some responsibility for conflicts with White and with Tunnell. Wilson resisted the efforts, refusing either to apologize or to take any responsibility for the conflicts.

42. Koch vacationed from late May 2009 through the first week of June 2009, and placed White in charge of the Unit. During this time, White met with Wilson twice, trying to persuade Wilson to rescind her comments about Tunnell's work and to soften her view of White's supervision of support staff. Wilson refused to budge from her positions. During one or both of those meetings, White again told Wilson that her statement in the Johnson discrimination case was harmful to DOC. White threatened that Wilson's caseload could be reassigned, demanded that Wilson apologize and rescind her statement, and told Wilson that she would not require Tunnell to complete assignments on Wilson's cases until Wilson apologized for and rescinded her comments about Tunnell's performance. Eventually, Wilson refused to discuss the issues at all with White.

43. Also during Koch's vacation, White and Barry met with Wilson and directed Wilson not to have direct contact with Tunnell without White or a third party present.

44. At approximately the end of May 2009, Wilson heard a report that Tunnell had commented to two DOC employees at Montana State Prison that Koch needed to "get off her ass" and get him an appropriate office. On June 2, 2009, Wilson reported this complaint to Tunnell's supervisor, White.

45. On June 7, 2009, Wilson sent an e-mail to White, asking White to verify following up on Tunnell's alleged inappropriate comments about Koch.

46. White replied by e-mail to Wilson on the morning of June 8, 2009, stating that she was looking into the matter, had requested additional information,

and that the matter would be kept confidential. She added that she knew Wilson had "trust in me handling this appropriately and management chain of command having a right to know. I hope the matter is considered closed by you and [the 2 MSP employees]."

47. Koch returned on June 9, 2009. Wilson met with Koch at the Bagel Company, and told Koch that her working conditions had become so stressful that she had applied for positions outside of DOC.

48. On the afternoon of June 9, 2009, Wilson walked into White's office and said, "I think your e-mail was condescending, and, no, I don't trust your judgment," then turned around and left.

49. Wilson went back to her office, where she was preparing for a meeting. White appeared in the doorway to Wilson's office. Ward and Johnson both witnessed the exchange between White and Wilson. Clenching and shaking her fists, White demanded that Wilson accompany her to Koch's office. Ward described White as flushed and angry. In contrast, Ward noted nothing unusual about Wilson's demeanor during this interaction.

50. Wilson told White that she had an appointment to attend and asked White to move out of the doorway so that she could leave. White refused. Johnson, in Wilson's office at the time, maneuvered around White and left, then Wilson maneuvered around White and walked up the stairs to her meeting with Kelly Speer and another bureau chief for the Community Corrections Division. Speer testified that she did not notice anything unusual about Wilson's demeanor during the meeting. The Unit staff reportedly observed White crying and slamming her office door after the abortive meeting with Wilson.

51. Wilson returned to the Unit offices after her meeting, and went to Koch's office, to talk about White's e-mail to her and her response. During that discussion, Koch read White's e-mail and told Wilson to send White an e-mail clarifying that Wilson's comments were just her opinions.

52. At 5:14 p.m. on June 9, 2009, Wilson e-mailed a further response to White's June 7 e-mail, reiterating that in Wilson's opinion the "tone of your e-mail is condescending." Wilson went on to explain that, in essence, she did not trust White to handle the situation because "in my opinion, you do not properly supervise Mr. Tunnell and this improper supervision has, at least in part, fostered his inappropriate comments and inappropriate attitude towards Ms. Koch."

53. Koch probably did not anticipate the tone of Wilson's e-mail to White, although under the existing circumstances, it is difficult to see how directing Wilson

to send an e-mail to White about her earlier comments to White was going to lead to any amelioration of the conflict.

54. Conflict within the office was not new in the Unit. In a July 2008 meeting with Barry and Kelly Speer (an investigator at that time), Deputy Chief Legal Counsel White became so agitated that she exclaimed that the Unit would no longer represent DOC's Human Resources Division. Barry confirmed this incident, and noted that he took into account that White did not have the authority to make that decision. Koch was advised of White's conduct. There is no evidence that DOC took any action toward White because of her conduct.

55. In September 2008, White telephoned Speer (who was on maternity leave) and advised her that Tunnell had reviewed Speer's investigative reports, and that Speer's reports were indefensible. Speer's supervisor Pam Bunke complained about White's conduct, and Koch apologized to Speer about it. There is no evidence that DOC took any action toward White because of her conduct.

56. In October 2008, White entered Staff Attorney Brenda Elias' office "shaking, crying and nearly hysterical" exclaiming that she could not work for Koch anymore. In a 6-page memo, in evidence as sealed exhibit 9(c), that Koch used in a subsequent meeting she and Barry had with White, Koch outlined the extended and extreme conflict between Koch and White that had been taking place. In sealed exhibits 9(a) and 9(c), Koch also detailed the confrontations with White, culminating in that subsequent meeting between Barry, Koch and White. A major factor in the conflict was White's support of and advocacy for Tunnell, at that time a relatively new Bureau employee. The level of disagreement between Koch and White on that and many other issues clearly was more intense that the disagreements between Wilson and Koch. With the exception of a "verbal warning" reflected on page 6 of that exhibit (if that verbal warning was actually given to White), DOC took no disciplinary action against White

57. At some point in the spring of 2009, Wilson engaged Ambrose in a conversation about Tunnell and his lack of value to DOC. Wilson and Ambrose were friendly, and Wilson may have assumed that Ambrose would consider the conversation personal – a friend venting her feelings to a friend. Ambrose was surprised by Wilson's tirade against Tunnell, thought that Wilson's behavior was "uncharacteristic" and felt that Wilson's criticisms of Tunnell were "unjustified." At some time before June 12, 2009, Ambrose reported this conversation to Koch.

58. On June 12, 2009, Koch suspended Wilson without pay for five days. Barry drafted the suspension letter. Koch finalized and signed the letter. Koch and Barry jointly presented the letter to Wilson at 4:00 p.m. on June 12, 2009. The

letter cited three reasons for DOC's suspension of Wilson: (1) the April 14, 2009 e-mail; (2) the conversation between Wilson and DOC staff attorney Brenda Elias (allegedly on April 23, 2009, when Wilson was on vacation and not in the office), in which Wilson said that Tunnell was not doing his job; and (3) an accusation that on June 9, 2009, Wilson "aggressively confronted" White in White's office, told her that she, Wilson, considered White's e-mail to her condescending and did not trust White to handle "this issue or supervise Dale Tunnell," that later that day, White heard Wilson and Johnson "laughing and conversing in Wilson's office," and that thereafter on June 11, 2009, Wilson stated to Koch that she would not stay in the same building with White if Koch was not present. See, Exhibit 3(a). This was the first disciplinary action DOC had ever taken against Wilson.

59. With regard to the first reason for suspending Wilson, the e-mail on its face bordered on insubordination. However, Wilson sent the e-mail to Koch only. Koch showed very poor judgment in sending the e-mail to White, and White showed even poorer judgment in showing it to Tunnell. Blaming Wilson because the e-mail was "damaging . . . to critical relationships within the unit" (Ex. 3(a), first page, third paragraph) was inappropriate, since any damage to critical relationships within the Unit resulted from first Koch and then White each distributing it to another Bureau employee whose behavior was questioned by Wilson in the memo.

60. Koch's testimony characterizes her discussions with Wilson about the April 14 e-mail (before discipline was imposed) as efforts to make Wilson see the impropriety of the e-mail. There is no evidence that Koch or anyone else ever asked Wilson her reasons for sending the e-mail. Citing the e-mail as a basis for suspension, without first conducting a formal investigation, suggests retaliatory animus, particularly in light of conduct of other members of the Unit toward Koch (such as Tunnell and White) that, on this record, did not result in any disciplinary action against them, with or without investigation.

61. With regard to the second reason for the suspension, Wilson did not deny ever having such a conversation, but did deny that it happened on the date Koch stated in her disciplinary letter. The use of the conversation as a basis for discipline, without any kind of formal investigation and without according Wilson prior notice and an opportunity to be heard, was extraordinary. It indicates haste, inattention to confirming the details of the conversation and a disregard for Wilson's rights as an employee against whom discipline is being considered.

62. Discussing other employees' personnel matters with co-employees is not appropriate. However, Wilson's treatment by DOC, with regard to the conversation with Elias, suggests retaliatory hostility toward her. DOC suspended Wilson, at least in part, for having had such a conversation with Elias. By contrast, there is no

evidence of disciplinary actions taken against White, for comparable or worse behavior toward other staff members in the Unit. This disparate treatment of Wilson began and all occurred after her statements to Christensen that seemed to support Johnson's discrimination claim, and the discipline was imposed without investigation.

63. With regard to the third reason for suspending Wilson, the evidence establishes that on June 9, 2009, Wilson made hostile and belittling comments to White, after which White tried unsuccessfully to force Wilson to go to Koch's office with her. The disciplinary action refers both to Wilson's remarks and to Wilson's departure from her own office when White was confronting her and demanding that she meet with Koch and White in Koch's office.

64. With regard to the nasty remarks Wilson made, in White's office, to White on June 9, 2009, comparison of those remarks to other nasty remarks made by other Unit employees, out of which no disciplinary action resulted, impels the finding that the disciplinary response was disproportionate. This lack of balance, taken by itself, suggests retaliatory animus.

65. In addition, there is again the fact that Wilson nor anyone else was never questioned about the events before, during and after her nasty comments to White (including the later incident on the same day in Wilson's office). No meaningful investigation into the events of June 9, 2009, was undertaken before Wilson's suspension. Koch relied upon White's account of the events, with her only other information being her conversation with Wilson that same day, before Wilson (at Koch's direction) sent the e-mail that repeated the negative comments.

66. Imposing discipline based substantially upon White's account of the events, without an investigation, evidences retaliatory hostility toward Wilson after she opposed what she reasonably perceived[6] as illegal discrimination by making supportive comments to Christensen about Johnson's claims. The inference of retaliatory hostility is further strengthened by the complete lack of evidence of any inappropriate behavior by Wilson during the confrontation with White in Wilson's office. Even a rudimentary investigation of that event would have confirmed that Wilson did nothing wrong.

67. Also included in Koch's third reason for suspending Wilson is the statement that Wilson told Koch on June 11, 2009, that she would not "stay in the building with Colleen White if [Koch] was not present." Barry testified that, after

[6] Because there is no evidence that DOC told Wilson about either its long-terms plans for Tunnell or the changes in his job description as opposed to Larner's job description, Wilson's perception that Tunnell was unfairly receiving preferential treatment was, on its face, reasonable.

the June 9, 2009, confrontation, White told him that she didn't feel safe being in the building when Val Wilson was there. Citing Wilson's statement, of the two statements, as a basis for discipline seems unbalanced, at least. With both Wilson and White leery of interaction with the other, citing Wilson's statement as one of the justifications for a five-day suspension without an opportunity to be heard about the meaning of the statement and without any explanation of why that statement would properly subject her to discipline, is another questionable aspect of the discipline.

68. On June 15, 2009, Wilson submitted a grievance regarding her suspension, for informal resolution efforts with her supervisor ("Step I" of the grievance procedure). The relief she requested was that the disciplinary report be removed from her file, that Koch's directives about what Wilson must do when she returned to work be stayed,[7] that her pay be restored, that Koch be directed to refrain from retaliating against her, and that Koch be admonished that responses to inquiries from potential employers of Wilson must be consistent with Wilson's February 2009 Performance Appraisal.

69. Although DOC may have asked Wilson about negotiating the relief she sought, Wilson's immediate supervisor, Koch, had not responded by the time, on June 22, 2009, that Wilson filed a formal grievance for resolution with either her supervisor or her supervisor's supervisor ("Step II" of the grievance procedure). She sought the same relief requested in Step I.

70. DOC Director Ferriter provided DOC's written response to the Step II formal grievance on July 7, 2009.[8] On the first stated reason for the suspension, Ferriter responded that the April 14, 2009, e-mail issue was resolved by the meetings between Koch and Wilson and was closed. On the second stated reason for the suspension, Ferriter responded that the conversation between Wilson and Elias was probably on April 8 rather than April 23, and that the content of that conversation was, in part if not in entirety, as stated by Koch. On the third stated reason for the suspension, Ferriter responded that formal discipline was appropriate for Wilson's treatment of White on June 9, 2009, which DOC "cannot condone." Exh. 3(g).

71. Ferriter offered in the Step II response to "partially grant" Wilson's grievance, rescinding the suspension and restoring her five days of pay, while instead

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[7] In the letter notifying Wilson of her suspension, Koch directed her, upon her return to work on June 22, 2009, to apologize to both Tunnell and White, discuss with Koch a plan to reestablish working relationships with Tunnell, White and "the other attorneys," and participate in that process in a "positive and relationship-building manner." Exh. 3(a), p. 2.

[8] Wilson's Step II formal grievance was filed before the time limit for Koch's response had run, but DOC elected to respond at Step II anyway.

issuing a formal written warning for violating the Department's "Statement of Ethics" in her treatment of White on June 9, 2009, with the warning that any "further violation" of the Department's "Statement of Ethics" would result in further appropriate disciplinary action. Exh. 3(g).

72. Parsing the Step II response according to its express content, the proposal to rescind the five-day suspension without pay was an offer to compromise the disciplinary action taken, reducing it to a formal written warning, based upon a different violation than any Koch had identified in the suspension letter, the new assertion that Wilson had violated DOC's "Statement of Ethics" in her treatment of White on June 9, 2009.

73. Although it is not entirely explicated in DOC's response at Step II, the apparent violation of the Department's "Statement of Ethics" (which is the "Code of Ethics" attached to Ferriter's Step II response letter) would be "I shall maintain respect and professional cooperation in my relationships with other Department staff members. . . . . I shall treat others with dignity, respect and compassion." Exh. 3(g), attachment, second paragraph. It is undeniable that Wilson did not maintain respect and professional cooperation in her dealings with White on June 9, 2009. It is undeniable that Wilson did not treat White with dignity, respect and compassion on June 9, 2009.

74. On July 14, 2009, Wilson advanced her grievance to Department Head Review ("Step III" of the grievance procedure), asserting several reasons why no disciplinary action was appropriate. First, she challenged DOC's power to recast the basis of the formal discipline during the grievance process. Second, even if DOC had the power to change the justification for the discipline after the fact, she noted that it still had failed to investigate the incident at issue in the proposed recasting of the grievance before imposing the discipline. Third, Wilson asserted that she had stopped in Koch's office on June 9, 2009, after her outside meeting with Kelly Speer and another bureau chief, to talk with her supervisor about her interactions with White that day. She asserted that Koch had directed her to send White the e-mail reiterating the "condescending" remark and the remark about not trusting White to handle the Tunnell investigation appropriately, which then Wilson had done. Wilson added a number of other details regarding other staff interactions and conduct, all of which she argued were indications that her conduct was neither unusual nor out of character for behavior within the Unit. Wilson sought the same relief she requested in Steps I and II.

75. During Steps II and III, Wilson used e-mail and mail to present to DOC additional contentions and arguments regarding her grievance.[9] DOC requested multiple extensions of time to respond to Wilson's Step III grievance, in a large part to address the additional information she provided.

76. Wilson submitted her formal resignation notice on August 28, 2009, identifying September 25, 2009, as the effective date of her resignation. The grievance was still pending at Step III.

77. On September 17, 2009, Director Ferriter sent a short letter to Wilson in which, on behalf of DOC, he indicated that "I am removing all documentation of that formal disciplinary action [from DOC files] and restoring your lost pay." Exh. 3(m). The final sentence of that letter also states, "You have my assurance that any future job reference which issues from this agency will relate strictly to your valuable contributions to the work of the Unit as are reflected in your performance appraisals of record."

78. After receipt of the September 17, 2009, letter resolving her grievance, Wilson had obtained all of the relief she sought in her grievance. She had requested, and obtained her lost pay and removal of the disciplinary report (and all documentation of the discipline) from her file. The record does not indicate that Wilson was ever forced to apologize to either White or Tunnell. Koch stepped down as Legal Unit Bureau Chief and Steve Barry assumed that position effective September 8, 2009, before resolution of Wilson's grievance. There does not appear to have been any "plan to reestablish working relationships" between Wilson and Tunnell, White and the other attorneys, so Wilson never was forced to participate in a "positive and relationship-building manner" in the implementation of any such plan.

79. In her DOC exit interview of September 21, 2009, Wilson asserted that she had been forced out of her job by management and that her supervisor had been "destroying her reputation" in retaliation for her participation in the discrimination investigation into Johnson's complaint.

Damages

80. On May 1, 2009, while on her vacation, Wilson began suffering from acute low back pain and muscle spasms so severe Wilson could not walk, sit, or move

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[9] The findings herein include some parts of those added contentions and arguments, based upon evidence of those events that was properly presented during the hearing. Wilson's written additional contentions and arguments submitted during her grievance, offered by her in this case, were hearsay, whether or not DOC considered them during the grievance process.

comfortably. Over the course of the next several weeks, Wilson suffered from back pain of unusual intensity and duration that prevented her from exercising or driving, and caused her to need assistance from her husband in performing basic activities including walking, sitting, putting on her shoes, dressing, and rolling over in bed.

81. Upon Wilson's return to Montana, she was evaluated and/or treated by Eckman Family Chiropractic (May 11, 2009); Dr. Paul Eodice, Big Sky Medical Clinic (May 13, 2009 and July 13, 2009); Christine Wike, PT, Nash Spine and Joint Rehabilitation (May 14, 2009 through June 24, 2009) and Dr. Tyson Hale, Radiology (May 14, 2009).

82. On May 13, 2009, Dr. Diane Eodice evaluated Wilson, diagnosed her with acute low back pain of an unknown etiology, ordered x-rays, and authorized both physical therapy treatment, and pharmaceutical treatment with muscle relaxers and anti-inflammatory medicine.

83. On May 14, 2009, Christine Wike evaluated Wilson. She confirmed that Wilson exhibited moderate decrease in her lumbar range of motion and experienced worsening pain with routine functional activities including rising, bending, sitting, when still getting dressed and rolling over in bed. Wike designed a short-term treatment plan that would decrease Wilson's pain level by 25 to 50 percent, and allow Wilson to tolerate sitting for 20 to 30 minutes.

84. Wilson established, by substantial and credible evidence, that she suffered physical pain and problems during the time when her employer's retaliatory conduct towards her caused her to suffer emotional distress. She did not establish, by substantial and credible evidence that, more likely than not, her physical pain and problems were proximately caused by her employer's retaliatory conduct. That she suffered the physical pain and problems at the same time as the retaliatory conduct is certainly suggestive, but it is not sufficient proof of causation of the physical pain and problems.

85. Wilson has not suffered any wage loss as a result of the acts by DOC of which she complains herein. DOC restored her lost pay and she is earning a higher salary in her position with MDT than she had when employed by DOC.

86. There is no substantial and credible evidence that Wilson's professional reputation was damaged in any way outside of the Unit, and with the rescinding of the grievance, any internal damage to her reputation was remedied. However, her reasonable concern about damage to her reputation increased her emotional distress.

87. There is no substantial and credible evidence that DOC culpably disclosed confidential information about Wilson. There is evidence that DOC personnel made

such disclosures within the Unit, and also evidence that Wilson herself made such disclosures within the Unit. Again, Wilson's reasonable concern that DOC might be making such disclosures increased her emotional distress.

88. Wilson suffered emotional distress as a direct result of her employer's retaliation against her for expressing her views about the treatment of Johnson. That emotional distress included anxiety and sleep disturbance, concerns that DOC's retaliatory conduct might also extend to attempts to tarnish her professional reputation and concerns about her future with DOC, in a job that she thoroughly enjoyed and was gifted at performing.

89. Wilson defined the time over which she suffered such distress as being from April 12, 2009 until September 17, 2009, when DOC rescinded the disciplinary actions it had taken against her. Cf. "Final Prehearing Order," P. 8, Sec. VII.1.a.

90. Wilson was understandably proud of her stellar performance record with DOC. The actions of DOC – pressuring her to recant her statements to Christensen, completely cutting her off from the office in a hostile fashion during her vacation, taking no action to address the conduct of Tunnell and White while directing increasingly hostile supervisory attention toward her, all leading up to formal disciplinary action against her – had to make it clear to Wilson that her employer was retaliating against her. Subjected to DOC's retaliatory animus, and seeing it for precisely what it was, then being suspended without any opportunity to explain her conduct to a neutral investigator, Wilson suffered substantial emotional distress. As already found, the amount of distress she suffered was increased by her concerns that DOC might also be making damaging disclosures about her conduct and about other confidential personnel information that would cause more harm to her, in terms of professional standing and/or personal reputation. Those concerns were reasonable in light of the illegal retaliatory hostility she was enduring at the time. She also suffered that emotional distress at a time when her physical problems more likely than not left her more susceptible to the emotional distress and sapped her ability to cope with the ongoing stress and emotional distress. For this emotional distress, for approximately six months, Wilson is entitled to recover the sum of $37,500.00.

91. Injunctive relief is necessary to bar DOC from engaging hereafter in retaliation against employees who participate in internal investigations into alleged Human Rights Act violations and give statements DOC considers adverse to its own interests. Training of supervisory employees at the Bureau Chief and Assistance Bureau Chief levels is appropriate.

IV. OPINION[10]

Diana Koch and Colleen White, DOC Legal Bureau Chief and Deputy Bureau Chief, learned that one of their staff attorneys, Valerie Wilson, had made supportive statements to DOC's outside counsel about paralegal Kelly Dunn Johnson's discrimination claims against DOC. Having received that information, Koch and White took a number of adverse actions against Wilson on behalf of DOC. They started refusing her requests for Johnson's assistance (which they had never done before). They cut off her contact with the office during her vacation, without any reasonable explanation. They took no action on Wilson's complaints that the only other paralegal, recent hire Dale Tunnell, was failing and refusing to provide the support work she requested from him. They began to "lean on" Wilson to change her statement about preferential treatment for Tunnell. White, in particular, began to threaten Wilson with such adverse consequences as case reassignments and continued lack of paralegal support in her work unless and until she changed her statement. They disclosed to Tunnell their perceptions that Wilson was taking Johnson's side against Tunnell, encouraging him to be even more intransigent about helping Wilson. They subjected Wilson, and no other staff member, to demeaning instructions that she was not to provide legal advice to Johnson in her discrimination case.

The maneuvering was not entirely one-sided. Wilson was talking to other Unit staff members, complaining and making negative reports about Tunnell, and adding her opinion that DOC should treat Johnson as well as it was treating Tunnell. At least some of the staff members to whom Wilson made such statements reported them to the Bureau Chief.

From the record, and from observation of Wilson during her representation of herself in this case, she is a gifted attorney. One double-edged "gift" she appears to share with the best trial lawyers is the ability to make outrageously hostile comments in a neutral or even pleasant manner and/or voice, sometimes casting them as "just" her "opinions." This can be a very potent technique in litigation, but also a very destructive technique, especially with co-workers and supervisors in an office.

The record in this case is essentially devoid of substantial and credible evidence that Wilson had behaved in any combative or dysfunctional ways before her superiors began their adverse actions against her after her statements to Christensen. That does not excuse her actions, but the record presents a picture in which Wilson, previously a "star employee" (according to her evaluations), began to act in ways she probably deemed appropriate to protect herself after her superiors began to treat her

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[10] 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.

as a problem employee in retaliation for her statements to Christensen about Johnson's claims.

Unlawful and retaliatory actions against a person who has engaged in protected activity cover a broad spectrum, including "coercion, intimidation, harassment . . . or other interference with the person or property of an individual." Admin. R. Mont. 24.9.603(2)(a). As the facts reflect, DOC covered a good part of that broad spectrum in its mistreatment of Wilson.

Wilson was in jeopardy of adverse discipline after she sent Koch a noticeably hostile and sarcastic e-mail on April 14, 2009, excoriating White for poor supervision of Tunnell. The manifest implication of the e-mail was that Koch was derelict in her supervision of White, which was allowing the events of which Wilson complained to occur. Although Koch tried at least twice to convince Wilson to acknowledge the impropriety of that e-mail, Wilson refused. Koch, according to her testimony at hearing, gave up and deemed the incident closed before any discipline was taken against Wilson.

That incident probably would have remained closed, except that Koch had forwarded the e-mail to White as soon as she received it, and White had shown it to Tunnell.[11] The dissemination of the e-mail to White and then to Tunnell did considerable damage to already strained relations within the office.

With Koch on vacation, White stepped up her attempts to bulldoze Wilson into withdrawing her support of Johnson's claim. The evidence indicates that Wilson did not even blink. With neither DOC management nor Wilson making any conciliatory moves, the situation continued to worsen.

None of the participants in this unfortunate workplace drama demonstrated clear judgment. Koch not only caused or allowed sharing of Wilson's April 14, 2009, e-mail with the two employees it targeted, but she later directed Wilson to confirm Wilson's spoken insults to White, on June 9, 2009, with a follow-up e-mail repeating them (as "opinions"), which Wilson immediately did.

White's more or less continuous efforts to change what Wilson's testimony in Johnson's case would seem a perilous undertaking for a member of the bar, but she persevered nonetheless. The increasing hostilities within the office also seemed to erode White's composure in her dealings with Wilson.

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[11] Koch also testified at hearing that it was up to White whether or not to show Wilson's e-mail to Tunnell. In retrospect, White's choice to do so was unfortunate.

Wilson, under a great deal of pressure in what was becoming a more and more hostile work environment, could not resist returning fire, so to speak, whenever she felt attacked by either Koch or White. After her suspension, Wilson rebuffed White when she attempted a conciliatory conversation, saying she didn't want to have another tete-a-tete with White, since the last one-on-one between them had resulted in her suspension.

All three attorneys seemed unable or at least unwilling to cut through the increasingly combative atmosphere and find any common ground.

After the situation exploded on June 9, 2009, discipline without investigation followed.

The three express bases of Koch's discipline included Wilson's April 14, 2009, e-mail, even though Koch confirmed that she had considered that episode closed after her conversational attempts to persuade Wilson to recant failed. It included one of at least several instances of Wilson complaining to co-workers about Tunnell's work performance, but the specific incident cited was misdated. It included most of Wilson's June 9, 2009, interactions with White, without reference to any violation of DOC's code of ethics. It did omit Wilson's e-mail repetition of her remarks, as well as Koch's direction to Wilson to send that e-mail to White.

None of the primary participants looked good during this progressive meltdown of an apparently tense but previously functioning unit. Of greatest import to this decision, DOC's appointed supervisors continued to fuel the fires at every step of this conflagration, with unrelenting efforts to force Wilson to recant her statements in favor of Johnson, undertaken with escalating hostility toward Wilson.

The Montana Human Rights Act (MHRA) (as well as the Governmental Code of Fair Practices Act (GCFPA)), prohibits retaliation against a person who opposes discrimination, or assists or participates in any manner in an investigation or proceeding under the Act. Mont. Code Ann. §§49-2-301 and 49-3-209; see also Admin. R. Mont. 24.9.603(1).

Wilson's prima facie retaliation case consisted of proof that she (1) engaged in protected activity, then (2) suffered adverse employment action (3) causally connected to her protected activity. Rolison v. Bozeman Deac. Health Serv., Inc., ¶17, 2005 MT 95, 326 Mont. 491, 111 P.3d 202; Mont. Code Ann. §§49-2-301; Admin. R. Mont. 24.9.603(1) and 24.9.610(2)(a).

Wilson's statements to Christensen that DOC was treating Johnson less favorably than Tunnell with regard to assignments, work schedule and pay, with no evidence calling into question either her sincerity or her reasonable belief in her

statements, established the first element of her prima facie case – protected activity by giving a statement to DOC's internal investigator that opposed what Wilson reasonably believed was illegal employment discrimination because of sex.

Christensen shared the content of Wilson's statement with Koch and White. They then commenced treating Wilson less favorably than in the past, in all the particulars set forth in the findings and this opinion, culminating in a suspension without pay of Wilson, after which she found work elsewhere and left DOC. This established the second element of her prima facie case – adverse employment actions against her.

Although Wilson grew increasing combative as her supervisors treated her more and more adversely, there is substantial and credible evidence that her supervisors kept pursuing their original course of action, by continuing their adverse acts to punish Wilson into changing her statement about Johnson's case. This established the third element of her prima facie case – the causal connection between the adverse actions against Wilson and her protected activity.

Since Wilson did establish her prima facie case of illegal retaliation, the burden shifted to DOC to demonstrate a legitimate, non-retaliatory reason for its adverse actions against her. Johnson v. Bozeman School District (1987), 226 Mont. 134, 734 P.2d 209, 212.[12]

DOC spent a significant portion of its post hearing briefs arguing that its legitimate, non-retaliatory reason for suspending Wilson for 5 days without pay (and at least presumptively for its prior adverse actions against her) was Wilson's hostile, abusive, and demeaning behavior toward Tunnell. Cf., "Respondent's Post Hearing Brief," pp. 2-5 and "Respondent's Post Hearing Reply Brief," p. 2. At the second tier of the McDonnell Douglas test, DOC established a justification for its conduct.

This second tier of proof under McDonnell Douglas is appropriate for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with

[12] On this record, Wilson has proved her prima facie case with indirect evidence, since she never produced direct evidence that her superiors were trying to retaliate against her for supporting Johnson. As Johnson states, the applicable standards of proof are the "three tier" standards articulated in McDonnell Douglas Corp. v. Green (1973), 411 U.S. 792, applied to cases arising under Montana anti-discrimination law, with the prima facie case of the complainant being the first "tier." Had Wilson succeeded in establishing retaliation by direct evidence, DOC's burden of rebutting that proof would have been higher.

> sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.
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> Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56.

DOC need only raise a genuine issue of fact by clearly and specifically articulating legitimate non-retaliatory reasons for its adverse actions against Wilson. Johnson. DOC met this burden with evidence of Wilson's conduct toward and about Tunnell.

Once DOC raised legitimate reasons, Wilson had the burden to prove that those reasons were pretextual. McDonnell Douglas at 802; Martinez v. Y.C.W.D. (1981), 192 Mont. 42, 626 P.2d 242, 246. To meet this third tier burden, Wilson had to marshal evidence that made pretext more likely than actual reliance upon legitimate, non-retaliatory reasons:

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.
>
> Burdine at 256.

Wilson always had the ultimate burden to persuade the fact-finder that DOC illegally retaliated against her. Crockett v. City of Billings (1988), 234 Mont. 87, 761 P.2d 813, 818; Johnson, 734 P.2d at 213. She met her ultimate burden.

First, Koch's suspension letter referenced Wilson's April 14, 2009, e-mail as "deriding the work . . . Tunnell completed for you" and as criticizing White's methods of "supervising support staff." However, what Koch specifically cited as the reason why that e-mail supported discipline of Wilson was because it was so "damaging . . . to the critical relationships within the unit." Exh. 3(a). Wilson's e-mail may well have been insubordinate, but it was only damaging to critical relationships within the Unit (except between perhaps between Wilson and Koch) because Koch and then White disseminated it within the Unit. Wilson sent it only to Koch. Sending the e-mail to Koch could not have been a basis for Tunnell's complaints about Wilson, except for Koch forwarding that e-mail to White who then showed it to Tunnell. Koch's resuscitation of the issues regarding the April 14, 2009, e-mail, which she had considered closed, and now making it one of the justifications for formal discipline, was retaliatory.

Second, DOC inexplicably failed, over the entire course of these events, to communicate to Wilson the differences between the expectations it had of Tunnell as an employee and the expectations it had previously had of Larner, the paralegal that

Tunnell, at least on the surface, was hired to replace. There was plenty of evidence that DOC did not expect Tunnell to function primarily in a paralegal role. Indeed, there was evidence that Tunnell was not expected to do very much paralegal work at all, and certainly was not expected to do high-level paralegal work without considerable direction and assistance. Yet, there was no evidence that Wilson, the primary litigator in the Unit, and the attorney who relied most heavily upon paralegal assistance, was ever told about these key differences between the parameters of Larner's work and Tunnell's work. Wilson made no effort to train Tunnell. She had no information that she needed to train him. She had no information that indicated she could not expect the same quality and quantity of paralegal work from Tunnell that she had received from Larner.

Instead of clearing the air by telling Wilson what DOC's plans were for Tunnell, Koch and White tried to bully Wilson into silence about Tunnell's serious shortcomings in performing the paralegal work he was assigned to do for her. The only palpable reason for this failure to clear the air was retaliatory animus toward Wilson because she had reported to Christensen that Tunnell was being treated more favorably than Johnson.

Certainly, Montana's anti-retaliation statute is not meant to shield a rogue employee from discipline when the employee's conduct toward other employees necessitates disciplinary action. It is clearly not intended to tie the hands of employers who must deal with an employee whose conduct creates a hostile work environment for other employees, simply because the employee opposed what he or she reasonably believed was illegal discrimination/retaliation.

The evidence at hearing established that DOC management considered Tunnell highly qualified to head up its investigation bureau, and hired him in the paralegal position to keep him onboard until that bureau chief position was available. The evidence indicated that other attorneys in the Unit (who on the face of it did much less litigation than Wilson) were at least okay with Tunnell's paralegal work, even assisting him in some of his work for Wilson. Ultimately, this evidence, considered within the record as a whole, does not justify the adverse actions against Wilson as legitimate and nondiscriminatory in light of her conduct.

Sometimes Tunnell simply didn't do the work Wilson assigned to him, without warning her that he was not doing it. DOC did nothing about Wilson's repeated complaints that Tunnell failed to get her work assignments done. As already noted, this "nothing" included a total failure to share with Wilson DOC's views of Tunnell's present and future roles with the agency. If DOC genuinely wanted Tunnell for the job he currently holds, and was willing to leave its primary litigator with considerably less paralegal support than she had needed and felt she

still needed, the unanswered question remains, why didn't DOC just tell Wilson that was the situation?

Counsel for DOC did yeomen's work in trying to justify the retaliatory conduct of Wilson's supervisors. However, the evidence does not support findings that Wilson embarked upon a "bizarre crusade" against Tunnell, which caused DOC to discipline her. The failure of DOC to address the conflicts between White and Wilson, Tunnell and Wilson, and Koch and Wilson were not aberrations caused by Wilson. Indeed, the record contains instances of prior conflicts, in which Wilson was not involved, that bubbled and boiled along over time without any resolutions. The record does not reflect either disciplinary or conciliatory resolutions of those conflicts, and thus the findings are about the absence of such evidence. What this record ultimately reflects is that the conflicts between Wilson and her supervisors escalated because she resisted their efforts to get her to change her statements about Johnson's case (which necessarily involved abandoning some of her complaints about Tunnell's work). Ultimately, the evidence indicates that multiple judicial and administrative proceedings arose out of the disputes involving Johnson, Tunnell and Wilson and their interactions with each other and with Koch and White. The evidence does not establish that Wilson's conduct was so out of step with conduct ordinarily tolerated in the Unit that suspending her without pay, as the first discipline ever taken against her, without a full investigation, was justified.

The merits of the other litigation are not involved in this case. On the merits of this case, DOC's only legitimate non-retaliatory reasons for engaging in a series of adverse acts against Wilson, culminating in her suspension, are more likely than not pretexts.

"[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." Heiat v. Eastern Montana College (1996), 275 Mont. 322, 912 P.2d 787. 791 (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993)) (emphasis added). See also Vortex Fishing Sys, Inc. v. Foss, ¶15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. "[T]o establish pretext [Wilson] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [DOC's] proffered legitimate reasons for its actions that a reasonable [fact-finder] could rationally find them unworthy of credence.'" Mageno v. Penske Truck Leasing, Inc., 213 F.3d 642 (9th Cir. 2000) (quoting Horn v. Cushman & Wakefield Western, Inc., 72 Cal. App. 4th 807 (1999)). Wilson had to present credible evidence of pretext or else fail to carry her ultimate burden. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994); Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1066

(9th Cir. 2003) (claimant must produce specific, substantial circumstantial evidence of pretext). She did.

DOC commenced its course of adverse actions against Wilson almost immediately after she met with Christensen, refusing to authorize Johnson's assistance to her, for the first time ever.

DOC let Tunnell simply not do work for Wilson that he had been assigned and not tell Wilson he wouldn't be getting that work done, without consequences.

DOC let Tunnell refuse to meet with Wilson and Koch, and took no action when Tunnell demanded that DOC make Wilson apologize before he would meet with her. At least part if not all of what Tunnell demanded an apology for was the content of Wilson's April 14, 2009, e-mail to Koch, her direct superior, which Koch provided to White, who provided it to Tunnell. A reasonable inference to draw here is that DOC made sure Tunnell found out about what Wilson said to her supervisor about him. After that DOC allowed Tunnell, without consequences, to refuse directions from that very same supervisor, the Bureau Chief, to meet with Wilson in the supervisor's presence, unless and until Wilson apologized to him.

DOC elected to discipline Wilson for her conduct, even though other members of the Unit, including the Deputy Bureau Chief, had engaged in conduct that was at least as egregious, with no evidence of record of any resulting discipline. None of those other employees had supported, in their internal investigative statements, the merits of any Montana law discrimination claims filed against DOC. Of course, Tunnell had filed a discrimination complaint of his own at some point, but for whatever reason there is no evidence here that DOC ever retaliated against him.

It is not the case that letting other employees get away with improper conduct allows all employees to engage in it whenever they please. But here, other employees engaged in rather similar improper conduct contemporaneously with or soon before Wilson's improper conduct. On this record, Wilson alone had given a statement that supported, in some respects, Johnson's administrative discrimination complaint against DOC, and Wilson alone was subjected to discipline.

At the end of the day, DOC's director rescinded the disciplinary action taken against Wilson, restored her docked wages and, to the greatest extent possible, remedied its retaliation. DOC could not retroactively remedy either any physical problems (and resulting pain) or any emotional distress proximately caused by its retaliation.

Wilson failed to prove that her physical problems (and pain caused by those problems) resulted from DOC's retaliatory conduct. Her own testimony only

established that the flare up of her back problems (of whatever etiology) began and continued during the time when her employer was retaliating against her. Her additional documentary and testimonial evidence regarding the causation of those problems did not persuade the Hearing Officer that it was more likely than not that the flare up of her back problems resulted from the illegal retaliation.

DOC moved to exclude the deposition testimony of Dr. Paul Eodice, because he was unwilling to state, as a treating physician, that there was a causal connection between the stress endured by Wilson and the flare up of her back problems. After considering the testimony of Dr. Eodice, as well as the remainder of the causation evidence, the Hearing Officer found that, indeed, Wilson had not proved it more likely than not that her flare up of back problems resulted from DOC's illegal retaliation.

In Montana Workers' Compensation law, it is possible to establish insurer liability for a condition (an "injury") without meeting the usual evidentiary standard for civil matters. When medical science cannot say what causes a condition, and that condition develops at the same time as particular work-related stress, and there is at least some medical evidence that there could be a relationship between this particular work-related stress and the condition, that can be sufficient evidence to consider the condition a compensable injury. Hengel v. Pac. Hide and Fur Depot (1986), 224 Mont. 525, 730 P.2d 1163, 1165-66. There is no such doctrine outside of the statutory workers' compensation laws, and Wilson has not even argued that there should be.

Under Montana law, emotional distress recovery is an appropriate remedy when the emotional distress results from illegal discrimination (including retaliation). Benjamin v. Anderson, ¶70, 2005 MT 13, 327 Mont. 173, 112 P.3d 1039; see also, Vainio v. Brookshire (1993), 258 Mont. 273, 852 P.2d 596, 601. The severity of the harm governs the amount of recovery rather than its availability. Vortex F.S. v. Foss, ¶33, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

Wilson's physical problems (including resulting pain), while not resulting from the illegal retaliation, unquestionably made her emotional distress more difficult to bear. Although she failed to prove that her reputation suffered any lasting harm or that DOC disclosed any confidential information about her outside the Unit that caused her harm from breach of privacy, her reasonable concerns about DOC causing both kinds of damage also intensified her emotional distress.

In determining an award for emotional distress, evidence of manifestations of emotional distress can indicate its severity. Wilson suffered from anxiety and sleep disturbance, endured concerns that DOC's retaliatory conduct might also extend to

attempts to tarnish her professional reputation and despite her best efforts, lost a promising future with DOC, in a job that she thoroughly enjoyed and was gifted at performing, ultimately seeking and finding other employment to escape the hostility that kept growing in her work environment. On the other hand, Wilson is a very composed individual, both by the evidence and by her demeanor during this hearing, but the other evidence of her emotional distress should not be devalued because of her composure.

There is no objective measure by which to determine an appropriate amount to compensate a charging party for emotional distress caused by illegal discrimination, including retaliation. Thus, a reasonable method to determine the appropriate award can be comparing circumstances in other cases to the current case, and considering an appropriate award in this case based upon the awards made in those other cases.

Kaycee Groven was subjected to escalating unwelcome sexual advances, physical touching, and ultimately sexual assault by her supervisor over approximately 3 ¾ years, before she finally had to quit her job to escape from further harassment. She had endured the escalating sexual harassment because she loved her job, was good at it, and would likely have trouble finding a better or even equivalent position. She had been complaining to the employer throughout the entire time. After quitting her job, Groven has found other work that pays her about half as much per year. Groven had been sexually assaulted when she was a child, and the harassment has brought up bad memories of the prior assault. She continued to suffer emotional distress, impacting her life activities and her interpersonal relationships, and has not yet regained her ability to function in and enjoy her life. She was awarded $75,000.00 to compensate her for all of her emotional distress, a Hearing Officer decision that has been affirmed in all respects <u>except</u> the emotional distress award, Human Rights Commission remanded to the Hearing Officer to reconsider in light of its holding that the evidence supported a larger award for emotional distress. Groven v. Havre Eagles Club, Case No. 1877-2010, HRB No. 0101014036, "Decision" (Apr. 8, 2011) and Human Rights Commission "Order" (Aug. 4, 2011). Thus, Groven's emotional distress merits an award of at least $75,000.00 (subject to further proceedings).

Denise Riddle had cancer, for which her employer provided accommodation. The employer then unreasonably ceased accommodating her, even though continuing the accommodation would not have been a hardship. It required her to resume nearly full-time work (at least 35 hours a week), without asking for and awaiting medical documentation in support of a continued accommodation, effectively forcing her to quit and thereby taking away her livelihood and her insurance at a time when her ability to find another job was seriously compromised by her disease. She was

awarded $50,000.00 to compensate her for emotional distress (with additional awards for the other harms she had suffered). Riddle v. Dollar Tree Stores, Inc., Case No. 15-2008, H.R.B. No. 0071012203, "Decision" (Mar. 14, 2008).

Michelle Currier was subjected to three months of escalating unwelcome sexual advances and physical contact, and then was fired because she continued to reject the advances of her supervisor. She then had to seek new employment while providing for two children and endured the anguish and uncertainty caused by the retaliatory discharge. She was awarded $40,000.00 for the entirety of her emotional distress. Currier v. Old Montana Iron Works, Case No. 1581-2007, H.R.B. No. 0079012124, "Decision" (Jul. 11, 2008).

Shonna Stearns was fired, after enduring 7 ½ months of escalating hostility from her employer because she assisted a co-worker to file an internal complaint of sexual harassment. During the 7 ½ months, she was subjected to a formal reprimand for assisting in reporting the alleged sexual harassment, threatened with firing if she ever assisted with another such internal complaint, fabricated or at least exaggerated performance problems and daily angry confrontations by her supervisor, to the point that other employees feared escalation into a physical altercation. After her supervisor made multiple false reports of Stearns' alleged poor performance and insubordination to the Board of Directors, she was ultimately fired. She was awarded $35,000.00 for the entirety of her emotional distress. Stearns v. Family Service, Inc., Case No. 1210-2011, H.R.B. No. 0109014463, "Hearing Officer Decision and Notice of Issuance of Administrative Decision," (July 22, 2011).

It is clear that Wilson, although she suffered substantial emotional distress, did not suffer as much emotional distress as either Kaycee Groven or Denise Riddle. Arguably, Wilson suffered emotional distress comparable to Michelle Currier and greater than Shonna Stearns, although unlike either of them, Wilson (due to her advanced degree and professional accomplishments), was able to find another and perhaps even better professional position before resigning from her job with DOC. For that reason, the Hearing Officer has awarded Wilson $37,500.00 to remedy her emotional distress.

Wilson also sought a further award to compensate her for DOC's failure to follow its own anti-discrimination policies (including policies against retaliation). As the Hearing Officer noted in the prehearing order (p. 9, footnote 1), an award above and beyond that necessary to rectify the harm that Wilson suffered because of the illegal retaliation is an essentially punitive award. The department is empowered to "require any reasonable measure to rectify any harm, pecuniary or otherwise, to the person discriminated against." Mont. Code Ann. §49-2-506(1)(c). The department is specifically barred from awarding punitive damages, except in awards enforcing

housing discrimination law under Mont. Code Ann. §§49-2-305 and 510(2) (not involved in this case). Mont. Code Ann. §49-2-506(2).

Injunctive relief is a statutory requirement here, and training for supervisors at the levels of White and Koch is appropriate to prevent future recurrence of the retaliatory conduct. Mont. Code Ann. §49-2-506(1) and (1)(a). DOC already has the appropriate policies in place, and its supervisory employees must be trained to follow those policies.

There were some credibility determinations in this matter, regarding three of the primary witnesses. Wilson was generally credible. Her artful denial that her conversation with Elias could not have occurred on the date cited (without regard to conversations on other dates) did raise some question about her credibility, but her testimony throughout the hearing was consistent with reason, common sense, and the documents of record, and her artful denial was not untrue. Koch's credibility was damaged by her insistence that the hostile and total cut-off of communication between the Unit and Wilson during vacation was for Wilson's benefit, which was not believable. White's credibility was undercut by her extremely poor memory, evidenced both by her lack of recollection of key events in which she was a participant, and also by her shifting recollection of the sequence of events on or about June 9, 2011. Her accounts of that sequence of events never did make any sense in view of the rest of the evidence.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over Wilson's retaliation complaint. Mont. Code Ann. §49-2-512(1).

2. DOC illegally retaliated against Wilson because she gave a statement to its internal investigator that supported aspects of Johnson's discrimination complaint against DOC, and because she refused to recant the statement and give or agree to give a contrary statement in the formal investigation of Johnson's discrimination complaint and/or any subsequent hearing or trial regarding that complaint. Mont. Code Ann. §49-2-301.

3. The harm to Wilson as a result of this illegal retaliation was substantial and severe emotional distress. The reasonable measure to correct this harm is an award of $37,500.00. Mont. Code Ann. §49-2-506(1)(b).

4. The circumstances of the discrimination in this case mandate the imposition of affirmative relief in order to eliminate the risk of future violations of the Montana Human Rights Act, as determined by the department's Human Rights Bureau in light of this decision. Mont. Code Ann. §49-2-506(1)(a).

VI. SEALING ORDER

The following provisionally sealed documents and evidence are unsealed, for the indicated reasons. All other sealed documents and evidence remain sealed unless and until unsealed by an order of a tribunal exercising jurisdiction over the matter. In one instance (the sealed hearing testimony), the reasoning behind keeping it sealed is also discussed herein.

Exhibits 12(a), 12(b) and 12(c) are unsealed, for the reasons stated on page 2 of this decision.

Exhibit 107 is unsealed, because the decision in this case utilized it, and the conduct it described, in making a decision about whether DOC engaged in illegal retaliation against Wilson when it took adverse employment actions, leading up to and including a disciplinary suspension of her, while not taking comparable adverse actions against other similarly situated professional employees who engaged in comparable conduct. Since the conduct reported in the exhibit was a part of the basis for this decision, the privacy rights of the involved professional employees do not clearly outweigh the public's right to know the basis of this decision, including the comparable conduct of the employees, at least to the degree that information is presented in this written form.

On the same basis, the sealed deposition testimony of Dr. Paul Eodice is unsealed.

The sealed portion of the hearing transcript consists largely of testimony regarding the conduct of other employees, and the lack of knowledge of the witnesses about any discipline resulting from that conduct. Given the range and detail of that testimony, the Hearing Officer is satisfied that the public's right to know more about these matters than is already detailed in this decision is clearly outweighed by the privacy rights of the involved employees. Therefore, the sealed volume of the transcript remains sealed. It is not necessary for the public to know the details therein in order to understand the basis of this decision, which is adequately stated in the decision itself.

For all sealed portions of this record, the Hearings Bureau file copies (or originals) of those documents and transcripts (the above sealed volume and the sealed transcript of the October 18th, 2010, in-person oral argument and presentation of evidence on two motions in limine) will be placed in sealed envelopes clearly and prominently marked as sealed, and will not be available other than to counsel herein, parties herein, department personnel requiring access to all or part of the sealed matter in the course and scope of their duties, and any tribunals either reviewing this decision or addressing the sealing order itself. Persons with access to

the sealed matter, aside from the tribunals, over which the Hearing Officer has no power, must not disclose the contents of the sealed matter to any person or entity, except those with the right of access to the sealed matter, unless and until an order from a tribunal exercising jurisdiction over the question changes the scope of the sealing.

VII. ORDER

1. Judgment is found in favor of Valerie Wilson and against State of Montana, Department of Corrections, on the charge that it illegally retaliated against her.

2. State of Montana, Department of Corrections, is ordered immediately to pay to Valerie Wilson the sum of $37,500.00 to rectify the harm she suffered as a result of the illegal retaliation. Post-judgment interest accrues as a matter of law.

3. State of Montana, Department of Corrections, is ordered to prepare, and submit to the Human Rights Bureau, Montana Department of Labor, within 60 days after the date of issuance of this order, a plan for 4 -hour training of its Bureau Chiefs and Deputy Bureau Chiefs (and comparable supervisors with other titles), for approval by HRB of the trainer or trainers and the content, presentation and materials to be utilized in the training, making any changes recommended by HRB and then implementing the plan, as changed, within a time-frame mandated by HRB.

Dated: August 19, 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: Valerie Wilson and Charles E. Petaja, co-counsel for Valerie Wilson, and Trevor L. Uffelman, Drake Law Firm PC., attorney for Montana Department of Corrections:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission, c/o Katherine Kountz
Human Rights Bureau, Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties are responsible to arrange preparation and filing of the transcript of the hearing at their expense (unless the parties have agreed to some other allocation of the costs involved). Contact Kimberly Howell (406) 444-3870 immediately regarding the transcript and any other matters regarding appeal.

Wilson, Valerie.HOD.tsp