

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0079012621:

MICHAEL WOODARD,	)	Case No. 1678-2008
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
BNSF RAILWAY COMPANY,	)	
	)	
Respondent.	)	

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I. INTRODUCTION

Michael Woodard filed a complaint with the Montana Department of Labor and Industry on September 10, 2007. The complaint alleged that BNSF Railway Company (“BNSF”) illegally terminated him in retaliation for his participation in protected activities when he opposed practices he considered to be discriminatory.<sup>1</sup> On March 4, 2008, the department gave notice that the complaint would proceed to a contested case hearing, and appointed Terry Spear as Hearing Officer.

The contested case hearing was held on October 4-6, 2010, in Billings, Montana. Woodard attended with his counsel, Donald Ford Jones, Hohenlohe, Jones, PLLP. BNSF attended through its designated representative Travis DeVault, with its counsel Jeff Hedger, Hedger Friend, PLLP.

Michael Woodard, Travis DeVault, Catherine B. (Cathy) McGee, Curtis Meyers, Bret Bridges, Paul McLeod and Robert Graham testified under oath. The depositions of Maurice Plott and Steve Klug were admitted as further testimonial evidence by agreement of the parties. Following the hearing, Kelly Duryea’s perpetuation deposition was taken and also admitted by agreement of the parties. Exhibits 2-14, 16-18, 20-21, 23-61, 101-103, 105-107 and 109-122 were admitted by stipulation of counsel and Exhibits 62, 63, 64, 66 and 102 were offered at hearing and admitted into evidence. Exhibit 65 was offered and refused.

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<sup>1</sup> Woodard’s complaint also included a disability discrimination claim, but only the retaliation claim was still at issue when this case was heard, and only the retaliation claim is addressed by this decision.

## II. ISSUES

The dispositive issue is whether BNSF terminated Woodard for his involvement in protected activity.

## III. FINDINGS OF FACT

1. Charging Party Michael Woodard was hired on July 25, 2005 as a Human Resource Manager by BNSF for the Montana Division.

2. BNSF is a railroad operating in 28 states and two Canadian provinces. BNSF operates through the state of Montana and maintains a division headquarters at Billings, Montana.

3. Woodard's job duties included providing human resource services to the Montana Division, the recruiting and hiring of new employees and the investigation of Montana Human Rights issues and complaints. His initial supervisor was Robert Graham whose title was Director of Human Resources for the Montana Division. Graham was transferred in early 2007 and Woodard's supervisor became Travis DeVault, the new Director of Human Resources for the Montana Division in addition to the Twin Cities Division, in February 2007. DeVault was Woodard's direct supervisor at the time of Woodard's termination in June 2007.

4. In Woodard's last employee evaluation, at the end of 2006, by Graham, he was rated as "on target" or "exceeds target" in all of his job duties. Woodard received an "Exceeds Target rating for the following three performance measures: (1) Ensures compliance with regulations through the hiring process; (2) Ensures compliance with HR standards and protocols in the hiring process and (3) Coordinates with the director all employee relations investigations.

5. With regard to Woodard's work responding to EEOC and Human Rights complaints, Graham stated in that same 2006 evaluation that responding to such complaints was one of Woodard's strong suits. Graham complimented Woodard on his work investigating and responding to complaints, stated that Woodard had a keen sense of potential possible issues before they became critical and noted that Woodard had done an excellent job in handling investigations, write ups and responding to employee relations issues. He also commended Woodard's "sense of urgency," because of which "many issues never reached the status of a hotline call, EEOC or Human Rights charge."

6. Travis DeVault began his employment with BNSF on April 5, 2004 as a trainmaster in the Operating Department. He transferred to the Human Resources Department, becoming an HR manager in Amarillo, Texas. He was promoted to Director of Human Resources for the Twin Cities and Montana Divisions, with his

office in Minneapolis, in February 2007, at which time he became Woodard's direct supervisor. In addition to Woodard, DeVault directly supervised one other HR manager, Joe Spier in Minnesota. DeVault's first visit to Montana as HR Director for the Twin Cities and Montana Divisions occurred in March 2007. DeVault had never paid any particular attention to Woodard's work before becoming his supervisor on February 16, 2007.

7. DeVault's supervisor was Cathy McGee, Regional Director of Human Resources. Her office was in Chicago. McGee reported directly to Steve Klug, Assistant Vice President Human Resources, in Fort Worth, Texas.

8. In February 2007, a BNSF employee (denominated as "A.M." in this decision) filed a discrimination complaint with the Montana Human Rights Bureau, based upon BNSF not hiring him. Woodard was initially assigned to respond to A.M.'s complaint.

9. In March 2007, a former employee of BNSF (denominated as "M.R." in this decision), filed a discrimination complaint with the Montana Human Rights Bureau, based upon BNSF's termination of his employment. Woodard was initially assigned to respond to that complaint.

10. A.M. was a candidate for a position out of the Great Falls area who was given a conditional offer of hire dependent upon meeting a number of further requirements, including successful completion of an IPCS test.<sup>2</sup> A.M. did not pass the test, and his conditional offer was rescinded. A.M. contacted Woodard and complained that the test was inappropriately conducted and the results were therefore invalid. Woodard had concerns about the validity of the IPCS test, but did not share those concerns with A.M.

11. A.M. filed a disability discrimination complaint under the Montana Human Rights Act, involving, in part, a challenge to the IPCS testing. Woodard advised Graham of his concerns about the IPCS test. He later advised DeVault by email (Exhibit 21), "I think we need to concentrate on proving our actions and not the test. I think we acted fairly and properly in this case . . ." [Emphasis added.]

12. M.R. was a new hire that, during his probationary period, was discharged because his supervisors and coworkers felt he could not safely perform the work assigned. While M.R. was in his probationary period, Woodard heard comments

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<sup>2</sup> The IPCS test measures, in a mechanical fashion, the range of rapid motion against resistance capacities for a candidate's arms and legs, using calibrated resistance and standardized scoring. BNSF utilizes the test, performed by independent contractors, in an effort to confirm whether applicants have at least the minimal physical capacity safely to perform the labor required in railroad work.

from local management at the station where M.R. was training that M.R. could not perform the work, perhaps because he was too old or might have had a stroke. Woodard responded to local management that BNSF could not terminate M.R. for those reasons and that BNSF had to document and to provide to Woodard a valid basis for discharge before taking action. Local management discharged M.R. in late 2006, without consultations with Woodard and without providing documentation to Woodard.

13. Woodard was upset that M.R.'s discharge was effectuated without his approval of the discharge. Woodard shared his concerns with Graham, his supervisor at the time. Apparently, BNSF made a change as a result of Woodard's concern about being left out of the loop, requiring local management to include the HR manager in such decisions in the future.

14. M.R. filed a complaint with the department on April 5, 2007, alleging that BNSF terminated his employment because of age and a perceived medical disability. Local management then provided information about the basis of M.R.'s discharge, which Woodard believed had been created "after the fact" to support BNSF's action in discharging M.R. Woodard sent DeVault, now his supervisor, a memo detailing the history of M.R.'s claims and Woodard's concerns about the firing. That memo also reported that M.R.'s on-the-job trainer had confirmed that the discharge was performance based, even though there were no records documenting the deficiencies.

15. In his own discrimination complaint to the department and in his testimony at this hearing, Woodard asserted that, in performing his duties as a Human Resource Manager, he had been very outspoken about his IPCS concerns in the A.M. case and his concerns about fabricated evidence and inappropriate procedure in the M.R. case. However, the evidence is at best equivocal about how outspoken he actually was to Graham and whether he was at all outspoken to DeVault, his new supervisor. Woodard did express concerns about the potential outcomes in both cases. However, the contemporary email and memo evidence indicates that, in substance, Woodard told DeVault that BNSF's decision not to hire A.M. and its decision to end M.R.'s employment during his probationary period were both justified under the actual facts. Giving his employer advice that it had exposure in two cases is not the same as opposing illegal discrimination.

16. There is no credible evidence that Woodard reported any of his alleged concerns to McGee in February through April 2007.

17. Woodard was going on a three-week vacation to Chile in late April 2007. Both the A.M. and M.R. complaints were then pending.

18. Before Woodard left on vacation, DeVault contacted him and advised that DeVault and McGee would be performing an audit of Woodard's files with regard to hiring procedures. According to BNSF, this audit procedure was just being started by McGee, and later became standard operating procedure for her as a regional HR director. Woodard appears to have been the first HR manager that McGee audited. BNSF offered testimony that Woodard's audit was prompted by reports of that he had departed from standard operating procedures for hiring. DeVault attributed the reports to BNSF's "hiring staff" in Ft. Worth. McGee attributed the reports to a U. S. Department of Labor document audit in Ft. Worth.

19. Unable to find a date that would work for all three of them before Woodard left on vacation, McGee and DeVault decided to audit Woodard's files in late April 2007, while he was on vacation. Woodard was concerned and unhappy that the audit would occur in his absence.

20. Before the audit, on April 23, 2007, DeVault received an email from Kelly Duryea, a BNSF management employee in Billings, Montana, reporting that Woodard was using a company vehicle to transport family members. Duryea worked in Billings, Montana, in the BNSF Operations Department. His office was down the hall from Woodard's office, in the same building (1555 Campus Way). Duryea was not in Human Resources and had no supervisory power over Woodard.

21. Duryea saw Woodard at the office along with his wife and two children, and noticed that Woodard's blue Jeep Liberty (an assigned company vehicle) was in the parking lot with luggage in it. Duryea asked Woodard what was going on and Woodard said that he and his family were going on vacation. Duryea then watched Woodard and his wife and children get in the company vehicle with all of their luggage. Duryea knew that BNSF's company vehicle policy allows an employee using a company vehicle to drop off or pick up family members at school or other locations that are on the employee's way to or from work, with permission from an appropriate supervisor. Duryea surmised that Woodard was taking his family and their luggage to the airport, which he believed to be a violation of the company vehicle policy. Duryea had previously observed Woodard and his family present at the office with only the company vehicle on Saturday mornings, which also seemed inconsistent with dropping off or picking up family members pursuant to the company vehicle policy.

22. After Duryea sent DeVault the April 23, 2007, email about Woodard's apparent violations of company vehicle policy, DeVault contacted and talked to him directly and got more details. Duryea was never aware of any concerns Woodard might have had about BNSF's handling of Human Rights complaints.

23. Woodard was familiar with BNSF's company vehicle policy, as it existed at the pertinent times. He knew that if you had a company vehicle, dropping off or picking up your kids at school was acceptable if the route involved did not take you far out of your path to or from work. He understood generally that it was okay to transport family members in a company vehicle along the way home from work or along the way to work from home. He knew or reasonably should have known that supervisor permission was also required.

24. In April 2007, Woodard lived in Billings on Poly Drive and his office was approximately a mile from his home. From his office, going to the airport was in the opposite direction from going home. There was no express prohibition against bringing family members to work in the office building, contrary to Duryea's conclusions regarding the earlier incident or incidents in which Woodard had some family members with him at the office. However taking family members from the office building to the airport on top of the "Rims" in Billings, with Woodard's home in the opposite direction from the office building, was a violation of BNSF's company vehicle policy. It was not dropping off or picking up a family member en route either way between his home and work. In addition, Woodard did not have the required permission from his BNSF supervisor or a BNSF Assistant Vice President to transport his family within the confines of the vehicle use policy. This lack of permission applied to bringing his family to the office as well as to going to the airport. DeVault had all the information necessary to determine that Woodard had violated BNSF's company vehicle policy at least twice.

25. During Woodard's vacation, McGee and DeVault performed the audit of Woodard's files regarding his hiring procedures. To make records of the audit, McGee created a special file on Woodard that was separate from, and not a part of, his official personnel file at BNSF. McGee's explanations for why she created that special file for the audit records were somewhat confusing, but supported an inference that she subsequently followed the practice of creating separate audit files whenever she did file audits on HR managers.

26. McGee and DeVault found indications in Woodard's files that new employees were hired by BNSF and brought "on property" without proper clearance through criminal background or medical background checks. The audit was not completed before Woodard's discharge.

27. When Woodard returned from vacation in May 2007, DeVault removed him from handling the A.M. and M.R. complaints. DeVault testified credibly that the only reasons for this action were Woodard's workload and the approaching HRB response deadlines. DeVault had the authority to reassign such duties, either to himself (as he did in this instance) or to another BNSF Human Resources employee.

At the time DeVault reassigned the cases, Woodard was more familiar with these cases and had more experience with Montana Human Rights complaints than DeVault. Since Woodard did not prove it more likely than not that DeVault even knew about Woodard's alleged opposition to illegal discrimination in the cases of A.M. and M.R., the Hearing Officer cannot properly infer that DeVault removed him from those cases because of that alleged opposition.

28. Also when Woodard returned from vacation in May 2007, DeVault had a discussion with him about the company vehicle policy and told him that he needed to be a model and was not to be outside the policy. Woodard acknowledged the discussion with DeVault by an email dated June 5, 2007.

29. On or about June 12, 2007 a catalog, Bud Plant's Incurable Products, addressed to Woodard, arrived in the mail at Woodard's BNSF office in Billings. The front cover of the catalog included a cartoon drawing of an apparent pin-up girl wearing fireman's clothing with an exposed midriff, and the back cover had three small photographs of women wearing underwear and/or swim-wear. The catalog was sealed shut, with only the front and back covers visible.

30. Amber Tilzey, a female administrative assistant in the BNSF office, complained about the catalog to General Manager Richard Bartoskewitz. Bartoskewitz called DeVault and advised that Woodard had received a catalog that appeared to have inappropriate content. DeVault contacted Duryea, the management employee that Tilzey had first approached about the catalog, and asked for a report of the incident. Duryea sent an email to DeVault on June 13, 2007, regarding the delivery of inappropriate materials at work.

31. After he received the email from Duryea, DeVault arranged to go to Billings to meet with Woodard. Before he left for Billings, he advised McGee about the situation and discussed the issues with her.

32. When DeVault got to Billings, he was shown the catalog in question. DeVault made copies of the front and back covers of the catalog and forwarded the copies by email to McGee and to her supervisor Steve Klug. DeVault could see that the front and back covers were visible to anyone who happened to see the catalog, including Tilzey. As HR Director for the Twin Cities and Montana Divisions, DeVault concluded that receiving this inappropriate material at work was a violation of BNSF's HR policies.

33. DeVault also discovered that material of a similar nature had been sent to Woodard at his BNSF office at the beginning of 2007. The general manager at the time, Maurice Plott, had warned Woodard that he should no longer receive such

material at the office and should take whatever steps necessary to ensure that it was not sent to the office again.<sup>3</sup>

34. McGee reviewed the catalog covers and agreed that they were offensive, just as Tilzey had complained. McGee also learned from DeVault of the previous warning by Plott about similar material. She directed DeVault to suspend Woodard pending further investigation.

35. On June 14, 2007, DeVault delivered a letter (which was inadvertently dated May 13, 2007, instead of June 13, 2007), notifying Woodard that he was suspended from service pending further investigation of alleged inappropriate behavior. Following standard BNSF practice, DeVault asked Woodard for his keys to BNSF property, his company vehicle, his company computer and any other BNSF property in Woodard's possession, for the pendency of the investigation.

36. Woodard denied having his company laptop, telling DeVault that he may have left it in Great Falls (he had just returned from a meeting at a Great Falls hotel). BNSF began efforts to work with hotel staff to find the computer. Woodard knew that the computer was not in Great Falls, because it was still in his possession. He lied about its whereabouts because he was angry about being suspended. Eventually Woodard would "find" the computer and return it to BNSF. That company laptop contained, in various retrievable forms, numerous documents with multiple lists of candidates or current employees, including their Social Security numbers, other identifying data and other personal data.

37. On June 15, 2007, the day after his suspension, Woodard had a surgery (scheduled before his suspension) on his right arm.

38. After advising Woodard of his suspension, DeVault conferred by telephone with McGee and Klug about Woodard, and the investigation proceeded. McGee discussed the company vehicle policy with Duryea. She concluded, as DeVault had, that Woodard could not, under any reasonable interpretation of the policy, take his family members to the airport in Billings from his BNSF office without violating the policy. In addition, the company car policy required authorization from management before transporting family members in a company vehicle and Woodard had no such prior authorization for either transporting his family to the airport or transporting his family to the office.

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<sup>3</sup> According to his deposition testimony, Plott's specific words to Woodard had been, "this material is inappropriate to receive at the office." Counsel for Woodard paraphrased that counseling of Woodard as "don't-let-me-see-this-in-the-office-again." Plott agreed. Woodard admitted during his testimony at hearing that receiving Bud Plant's Incorrigeble Products at work was inappropriate.



39. McGee also confirmed Woodard's past warning from Plott about the "Bud Plant" mailings.

40. On or about June 19, 2007, McGee interviewed Woodard at the Crowne Plaza Hotel in Billings, Montana. Woodard was still recovering from his surgery and was under the influence of pain medications. He required a ride to and from the meeting, because he could not drive. He had not wanted to have the interview at that time, but McGee had insisted and had arranged Woodard's transportation to and from the office.

41. During the interview, McGee questioned Woodard about the catalog. Woodard explained he had made a prior purchase of art supplies and a "Dynatopia" print from the "Bud Plant" website. He told McGee that after those purchases, he was put on the "Bud Plant" mailing list without his knowledge or consent, and began receiving "Bud Plant" catalogs. The catalogs were sent to his office at BNSF because he was using his office address, with his supervisor's permission, as his personal mail address. Woodard also told McGee that after initial BNSF directions not to have inappropriate materials mailed to the office, he had tried to have his name and address removed from the mailing list.

42. McGee decided that Woodard, a Human Resources person responsible for enforcing policies regarding offensive materials in the work place, who had already been warned about not receiving such materials in the past, had again violated the policies. His explanation of how he had tried to get off the "Bud Plant" mailing list did not reassure her that Woodard had recognized the seriousness of receiving offensive materials in the workplace and had made strenuous efforts to assure that no further offensive materials would be arriving at BNSF.

43. During McGee's interview of Woodard on June 19, 2007, McGee never questioned Woodard or discussed with Woodard anything about any alleged vehicle use policy violations. At the time of the interview, McGee already had the information regarding Duryea's complaint about Woodard's violations of the company vehicle policies. By June 22, 2007, she also had information that Woodard's daughters had been seen at the hotel in Great Falls when Woodard was there before returning to meet with DeVault on June 14, 2007. McGee concluded that Woodard had again violated the vehicle use policies, for at least a third time, after DeVault had counseled him about them. That was a mistake. There was no evidence that Woodard transported any of his family members in a company vehicle, to or from Great Falls, on or about June 14, 2007. Woodard's own testimony, uncontroverted on this point, was that his wife had transported the children to and from Great Falls in a personal vehicle.

44. After the June 19, 2007 interview, on or about June 22, 2007, McGee recommended to her supervisor Klug that BNSF terminate Woodard's employment. Klug agreed, and made the decision to discharge Woodard. The specific grounds for Woodard's discharge were his violation of HR policies 90.2 and 90.6, since he had created a hostile work environment by receiving sexually offensive materials at the company workplace (after a prior admonition not to receive such materials at work) as well as violating the company vehicle policy and showing poor judgment in all of these particulars as an HR manager responsible for explaining, interpreting and enforcing these policies.

45. In making her recommendation, McGee had no knowledge of Woodard's actual or alleged concerns about M.R.'s Human Rights case or A.M.'s Human Rights case or concerns generally about the IPCS test. In making the decision to discharge Woodard, Klug was not informed by either McGee or DeVault of any action or concerns Woodard took or expressed regarding M.R., A.M. or the IPCS tests.

46. BNSF discharged Woodard effective June 22, 2007, the date of the letter giving him notice of that discharge.

47. BNSF's policy regarding "explicit materials" in the workplace states the appropriate discipline for a first offense would be "a written warning to suspension and probation." Plott, in warning Woodard early in 2007 not to receive such materials at the office again, neither documented a "verbal warning"<sup>4</sup> nor gave Woodard a written warning. Klug was unhappy with Plott for this omission, but BNSF nonetheless treated the prior occurrence as a first offense even though an appropriate level of discipline for such an offense had not been applied at the time.

48. As already noted, there is no credible evidence that either Klug or McGee had knowledge of Woodard's alleged opposition to illegal discrimination. Thus, although their treatment of the incident in June 2007 as a second offense may not have been in technical compliance with the policy, Woodard did not prove that their decision to discharge him was in retaliation for his alleged opposition to illegal discrimination.

49. Woodard was also terminated for violating the vehicle use policy at least three times. He clearly did violate the policy twice, when he transported his family to the airport to take their vacation and when he transported his family to and from his office. McGee and Klug mistakenly concluded that he had violated the policy a third time, within approximately a month after he was warned about his first two

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<sup>4</sup> In Human Resources terms, a "verbal warning" typically refers to telling the employee not to do it again and documenting that "verbal warning" in writing in the appropriate personnel file.

violations, when he transported his daughters to Great Falls in a company vehicle on June 14, 2007. Again, there is still no credible evidence that either Klug or McGee had knowledge of Woodard's alleged opposition to illegal discrimination. Thus, Woodard did not prove that either Klug or McGee knowingly and falsely drummed up and attributed a third vehicle policy violation to him because of his alleged opposition to illegal discrimination.

50. Although BNSF's vehicle use policies do not include termination or suspension as a form of discipline for their violation, McGee and Klug credibly explained that the violations (they mistakenly believed there had been three rather than two violations) of the vehicle use policy, coupled with the explicit materials violations (there were two such violations), called into question Woodard's judgment in performing his Human Resources duties. Adding to the weight BNSF was entitled to give to its concerns about Woodard's judgment, McGee had verified and more likely than not advised Klug, before the decision to discharge Woodard, that Woodard had lied to DeVault on June 14, 2007, about the whereabouts of his company computer when he refused to provide it to DeVault.

51. Woodard has not proved that BNSF's decision to discharge him, which did include some mistaken fact-finding, was motivated by retaliatory animus instead of legitimate business concerns about his judgment and his willingness to conform his conduct to the requirements of his job.

52. BNSF did not submit substantial and credible evidence that others similarly situated (which could include being a Human Resources person) who had engaged in substantially comparable behavior were terminated, with or without having first been placed on a performance improvement plan. On the other hand, there is also no substantial and credible evidence that others similarly situated who had engaged in substantially comparable behavior were retained as employees. Indeed, there is no evidence that anyone similarly situated had ever engaged in substantially comparable behavior.

53. After BNSF terminated Woodard's employment in June 2007, he filed his retaliation charge with the department, alleging that he was terminated for his Human Rights activities. In his answer to Interrogatory No. 11, asking him to describe what he believed those "human rights activities" were, Woodard stated that he was terminated because he opposed specific hiring/firing decisions which he believed violated the Montana Human Rights Act, and because he generally advised BNSF that hiring and firing decisions in Montana did not comply with the Montana Human Rights Act. Woodard identified two hiring and firing decisions that led to cases that he contended caused his termination, both of which had resulted during Woodard's employment in charges being filed with the department, as the cases of

A.M. and M.R. Woodard agreed under oath at the hearing that his claim in this case is solely that he was terminated because of his involvement with those two cases.

54. Woodard has not proved that protected activity in dealing with the discrimination claims of A.M. and M.R. were the cause of BNSF's adverse actions against him. He did not prove that his conduct (which he asserted was protected activity) regarding those case was known to the BNSF decision makers who fired him, at or before the time that they fired him.

55. Woodard's arguments and evidence in this case about his alleged protected activity are far clearer than any of the contemporaneous evidence of that alleged opposition to illegal discrimination. Copying some of his emails, which might be construed as expressing some opinions about the merits of various questions about how BNSF handled hiring and firing decisions, to one or more of the BNSF decision makers is not enough to establish a causal connection between the adverse action and his alleged protected activity. That is particularly true when Woodard's testimony in other particulars was impeached by credible testimony from BNSF's witnesses. Woodard did not prove that he engaged in protected activity.

#### IV. OPINION<sup>5</sup>

It is illegal to take adverse action against an individual for opposing practices forbidden by Montana's Human Rights Act. Mont. Code Ann. §49-2-301. Absent direct evidence of discrimination, Montana applies the three-tier burden shifting analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Heiat v. Eastern Montana College*, 275 Mont. 322, 328, 912 P.2d 787 (1996). There is no credible direct evidence that BNSF investigated, suspended and ultimately discharged Woodard because of his alleged opposition to what he considered illegal discrimination in the cases of A.M. and M.R. Therefore, *McDonnell Douglas* provides the appropriate framework to analyze this case.

In the first tier of *McDonnell Douglas*, Woodard had to prove that: (1) he opposed practices that he reasonably believed were forbidden by the Montana Human Rights Act; (2) BNSF subjected him to significant adverse acts and (3) there was a causal connection between the adverse acts and Woodard's opposition to what he considered to be illegal discrimination. Admin. R. Mont. 24.9.603(1).

With regard to opposition to illegal practices, Woodard testified that he expressed concerns to his supervisor and other BNSF officials that the refusal to hire and firing decisions involved in the A.M. and M.R. Human Rights complaints against

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<sup>5</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.

BNSF actually were inconsistent with the Montana Human Rights Act and violated Montana Human Rights law. He also testified that he had concurrently expressed broader concerns about BNSF's hiring procedure and decisions in the Montana Region. He testified that he had voiced those concerns with DeVault, expressing to his supervisor a belief that unlawful acts by BNSF had occurred in both cases and warning his supervisor that he would not lie for BNSF regarding the two cases.

The problem with this aspect of Woodard's case is that DeVault did not confirm that he heard or read such statements by Woodard. Nevertheless, for purposes of the analysis in this decision, the Hearing Officer will assume at this point that Woodard proved this much of his case, establishing the first element of McDonald Douglas' first-tier.

Clearly, BNSF took significant adverse acts against Woodard. Woodard proved the second element of McDonald Douglas' first-tier.

Woodard did not present substantial and credible evidence proving the third element of McDonald Douglas' first-tier. The people who decided to fire him were McGee and Klug. Without substantial and credible evidence that McGee and Klug knew of Woodard's "opposition" to illegal disability discrimination, Woodard cannot possibly prove that they fired him in retaliation for that opposition.

Before Woodard's "opposition" to certain company practices in the A.M. and R.M. cases, he had never been subjected to any disciplinary actions, documented or otherwise. Because this is an opposition rather than a participation claim, the rebuttable presumption of a causal connection between protected activity and adverse action while or within six months after the protected activity is inapplicable. Montana's presumption recognized by regulation, applies only to participation cases. Admin. R. Mont. 24.9.603(3). Proximity in time between opposition to illegal discrimination and subsequent adverse action can give rise to a common law presumption of a causal connection. *Hamner v. St. Vin. Hosp. & Health Care Ctr.*, 224 F. 3<sup>rd</sup> 701, 707 (7<sup>th</sup> Cir. 2000).<sup>6</sup> Soon after his alleged opposition to illegal discrimination by BNSF, Woodard found himself subjected to an audit, a suspension, and ultimately a discharge. Without proof that the decision makers had actual or imputed knowledge of his "opposition," this proximity in time still gives rise to a weak presumption of retaliatory animus.

For purposes of the analysis, at this point, the Hearing Officer will consider a prima facie case established.

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<sup>6</sup> Montana follows federal precedent, when it is consistent with the substance and purposes of our law. *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813, 819 (1988).

Woodard's prima facie case raised an inference of discrimination under McDonnell Douglas, shifting the burden to BNSF to "articulate some legitimate, nondiscriminatory reason" for its adverse action (in addition to attacking the case Woodard presented). McDonnell Douglas, 411 U.S. at 802. BNSF had the burden to present evidence showing that it had a legitimate nondiscriminatory reason for its adverse action. Crockett at 817.

Given how thin the contemporaneous evidence is that Woodard engaged in the vigorous "opposition" that his testimony asserts, and how even thinner the evidence is that the decision-makers who discharged him had any knowledge of his alleged protected activity, Woodard's credibility is crucial in this case. BNSF successfully discredited his credibility.

Woodard testified that he undertook, on his own, an investigation of the IPCS test to determine if the persons giving the test were adequately trained. He asserted that he had looked at statistics regarding the characteristics of persons who had failed the test. Yet, he did not and has not ever produced any such statistics. Despite very extensive discovery, including searches of the data on Woodard's BNSF computer hard drive, no such statistics came to light.

Woodard also stated that other HR managers made complaints about the IPCS tests but he could not remember the name of any particular HR manager who made such a complaint to him. Woodard could not produce a single witness who could corroborate in any respect his testimony that he complained about the validity of IPCS test.

Woodard also claimed that to determine if persons administering the test were doing so properly, he spoke with persons who administered the test, including the technician who gave the test. Again, in this case, Woodard could not remember a single name of any technician who administered the IPCS test to whom he claims to have spoken. Indeed, Woodard cannot remember any names of any of the people administering the IPCS test in Montana, at various clinics and medical facilities in Great Falls and in Havre.

Woodard claimed that he had notes about his conversations with his supervisors and with the technicians, but he did not produce any such notes during these proceedings.

Woodard was interviewed by Meg Bennett, an investigator with the Human Rights Bureau in A.M.'s case. Woodard told Bennett that the plant manager of the Havre facility and Woodard together decided that at the next opportunity they would test the IPCS process themselves as they were convinced the tests were not being administered correctly. Although (as Woodard knew) the IPCS test was given

to new hire candidates on the railroad and not to existing employees, Woodard asserted that the plant manager and existing employees at the Havre shop subsequently told him that some current employees took the IPCS test without anyone in BNSF management having any knowledge of it. Woodard told Bennett that the plant manager's name was Meyers and that the two current employees who had surreptitiously taken the IPCS test were named Collins and Palmer. According to Woodard, Meyers, Collins and Palmer sat down with him to explain that Meyers arranged for Collins and Palmer to take this test without the company's knowledge and that the reason he was being told this was because somebody at BNSF found out and there was "hell to pay."

Curt Meyers is currently the shop superintendent at the Topeka, Kansas facility on the BNSF Railway Company. His previous position was shop superintendent in the diesel shop in Havre, Montana from May 2006 to September 2008. He was the highest ranking management official at that location responsible for the shop and agrees that the term "plant manager" could be used to describe his position. In Havre, he supervised a general foreman by the name of Brett Bridges. Bridges currently works for BNSF as a general foreman in Alliance, Nebraska. Meyers also had first line supervisors under his supervision by the names of Collins and Palmer, and also a union employee by the name of Paul McLeod. Meyers credibly testified that while he was superintendent in the Havre diesel shop, two of his existing employees (Bridges and McLeod) took the IPCS test.<sup>7</sup> All three men testified.

Bret Bridges currently works for BNSF in another state. Before taking his current job, he was a BNSF general foreman in Havre, Montana, working under the supervision of Curt Meyers. He supervised two other management employees by the name of Matt Collins and Mike Palmer. He started his position in Havre in November 2006 and left Havre in May 2009. In 2007, Bridges took the IPCS test along with another existing employee, Paul McLeod. Bridges became interested in the IPCS test because people who had been extended offers to work in the shop had been disqualified and Bridges was curious about the IPCS component of the hiring process.

Paul McLeod was the union elected safety assistant in the diesel shop in 2007. He took the IPCS test at the request of Brett Bridges. After he took the test McLeod had no further involvement with the IPCS test.

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<sup>7</sup> Meyers has no knowledge of Collins or Palmer ever taking the test.

Bridges had never heard anyone complain about the IPCS test, he was just personally curious about it. His curiosity and interest in the test had nothing to do with Michael Woodard, but arose because some candidates given conditional job offers by BNSF were subsequently disqualified, presumably by the IPCS test, their background checks or the medical review. The assumption around the diesel shop was that these prospective hires were failing the IPCS test. The workers in the shop had an interest in new hires (for vacation relief, etc.) and Bridges was not the only shop worker who wondered about the test.

Bridges told Meyers that he wanted to take the test. Meyers had no objection. Bridges called Fort Worth, sought permission to take the test, got the test scheduled and asked Paul McLeod to go with him to take the test. The test was taken during normal business hours. Meyers had no concerns about Bridges and McLeod taking the test, and it was not a secret that they were taking the test. Meyers spoke to Bridges after Bridges had taken the test and asked about how it went and whether the directions to do the test were clear and Bridges responded to his questions. After that conversation, Meyers had no further concerns about the IPCS test.

Meyers never received any push back, negative reaction, objection or any other kind of adverse interaction with BNSF management from Fort Worth or anywhere else as a result of Bridges and McLeod taking the IPCS test. Meyers never had a meeting with Woodard where he told him that there was going to be “hell to pay” about people taking the test. Meyers had never had any concern that the test was being used in any sort of discriminatory fashion. Bridges and McLeod took the test, at the Havre Clinic, with the complete knowledge and full cooperation of the railroad’s Medical Department in Fort Worth, Texas. That was essential, because neither candidates nor current employees, could take the test without the prior approval of Ft. Worth, which arranged the appointments to take it.

McLeod and Bridges each individually took the test. Each was given simple instructions, which each readily understood, to lift their legs, move their arms in a certain fashion, pedal a machine for 60 seconds, and engage in other equally simple tasks, with equally direct instructions. They had no problems understanding the instructions to the test. After Bridges took the test, his curiosity was satisfied and he never raised any further questions or concerns about the test after that.

None of the three men recalled ever participated in any meeting with Michael Woodard about the IPCS test, before or after McLeod and Bridges took the test, and none of the three men ever received any negative reaction from BNSF because two of them took the IPCS test.



The Hearing Officer has recited these events at some length, placing them here in the discussion to explain the finding that Woodard was not credible. Since his surgery and his discharge from BNSF, Woodard has dealt with a number of personal problems. Some of those problems could have impacted his memory regarding the events preceding and surrounding his discharge from BNSF. Regardless of the cause, Woodard's testimony was not credible in the face of substantial and credible conflicting evidence.

The Hearing Officer is not willing to conclude that every one of the witnesses who contradicted Woodard's testimony and evidence, each of whom was credible in demeanor and largely consistent in testimony, was either engaging in convenient recall or outright lying because of their continuing associations with BNSF. Evidence of Woodard's lie about the whereabouts of his computer (which he admitted under oath), and direct conflict between his testimony about problems with the IPCS testing and the testimony of those employees who actually took the test seriously damaged his credibility.

Another key factor in discrediting Woodard's credibility is the content of his own memos to DeVault, stating his belief that BNSF's decisions were justified in both the A.M. and M.R. cases. Opposition to illegal discrimination is opposition to employer conduct that the charging party reasonably believes to be illegal discrimination. The opposition must be to a practice that the Human Rights Act prohibits, *Evans v. Kansas City, Missouri School Dist.*, 65 F.3d 98, 101 (8<sup>th</sup> Cir. 1995); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411-12 (9<sup>th</sup> Cir. 1987), and the charging party must have reasonably believed in good faith that the conduct opposed did violate the anti-discrimination law involved. *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7<sup>th</sup> Cir. 2002). This reasonable belief must be objectively as well as subjectively reasonable. *Hamner, op. cit.* Woodard uncut his own evidence of opposition with the contradictory content of his own memos.

Woodard's very weak evidence of the decision-makers' alleged knowledge of his protected activity was effectively negated by the substantial and credible evidence presented by BNSF that the decision-makers did not have such knowledge.

In the same fashion, Woodard's weak evidence of his protected activity was negated by the substantial and credible evidence of record that Woodard really did not engage in such protected activity in the first place.

BNSF satisfied its second tier of proof by presenting evidence that negating Woodard's case in chief and specifically articulated a legitimate reason for discharging him – his violations of two BNSF policies, coupled with his dishonesty

about his computer's whereabouts. E.g., *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212

Once BNSF satisfied its second tier burden of proof, Woodard had the burden to prove that BNSF's reasons for its adverse actions were a pretext and its evidence negating his proof was unworthy of credence. *McDonnell Douglas* at 802; *Martinez v. Yellowstone Cnty. Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246. To meet this third tier burden, Woodard could present either direct or indirect proof of the pretextual nature of BNSF's reasons. *Burdine* at 256.

Ultimately, Woodard always had the burden to persuade the fact-finder that BNSF illegally retaliated against him. *M.R.L. v. Byard* (1993), 260 Mont. 331, 860 P.2d 121, 129; *Crockett, op. cit.*, 761 P.2d at 818; *Johnson, op. cit.*, 734 P.2d at 213. He failed to carry that burden.

## V. SEALING ORDER AND OTHER ADMINISTRATIVE DETAILS

BNSF requested an order taking administrative notice of the contents of the computer that Woodard retained after his suspension. The notice requested is included in Finding No. 36.

There are substantial documents, and a hard drive, which have been provisionally sealed by prior orders. All such orders remain in full force and effect, unless and until modified in whole or part by a tribunal exercising jurisdiction over the question. Only those portions of the Hearings Bureau file sealed by prior orders remain sealed. Sealed documents in the Hearings Bureau files will be destroyed upon closure of this case when this decision, or any superseding decision on any reviews, becomes final. The hard drive will be returned to counsel of record for BNSF at that same time.

The exhibits herein have been redacted to remove the names of A.M. and M.R. Any other redactions of exhibits were done by counsel herein, at the conclusion of the hearing. The exhibits, as redacted are not sealed. The transcript is not sealed.

## VI. CONCLUSIONS OF LAW

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

2. The evidence did not establish that BNSF illegally retaliated against Michael Woodard as he alleged in his complaint. Mont. Code Ann. §49-2-301.

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VII. ORDER

1. Judgment issues in favor of BNSF Railway Company and against Michael Woodard on his charge that BNSF retaliated against him for opposing illegal discrimination.

2. The Human Rights Act complaint of Michael Woodard against BNSF Railway Company is dismissed.

Dated: March 3, 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: Donald Ford Jones, attorney for Michael Woodard, and Jeff Hedger, attorney for BNSF Railway Company:

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

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

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

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

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

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

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

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the filing of the transcript of the hearing at their expense.