BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0115014731:

FELICIA GALLMEIER,	) Case No. 2286-2011
	)
Charging Party,	)
	) **HEARING OFFICER DECISION**
vs.	) **AND NOTICE OF ISSUANCE OF**
	) **ADMINISTRATIVE DECISION**
MONTANA DEPARTMENT OF CORRECTIONS, MONTANA WOMEN'S PRISON,	)
	)
Respondent.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Felicia Gallmeier, an inmate at the Montana Women's Prison (MWP), filed a complaint against MWP alleging both sex and disability discrimination under the Montana Human Rights Act (MHRA) and the Montana Governmental Code of Fair Practices Act (GCFPA). The matter was assigned to Hearing Officer Gregory L. Hanchett.

MWP filed a motion for compulsory joinder of the mental health professional who engaged in the alleged sex discrimination against Gallmeier. In an order dated September 20, 2011, the hearing officer denied that motion for the reasons stated in the order.

MWP also filed a motion for summary judgment and Gallmeier responded in opposition. The hearing officer denied the motion for summary judgment at the time of the final pre-hearing conference on the basis that material issues of fact remained and on the basis that the independent contractor status of the mental health professional who engaged in alleged sex discrimination did not relieve MWP of liability under the GCFPA.

Thereafter, the parties agreed to submit the matter for decision without hearing or briefing on the basis of the entire record before the hearing officer. This record included transcripts of depositions of various witnesses, affidavits of witnesses and exhibits attached to the summary judgment motion and the response, and upon the exhibit notebooks presented by each party. The matter was deemed submitted for decision on March 5, 2012. All of the depositions, affidavits, and exhibits were carefully considered by the hearing officer in evaluating this case and rendering this decision. Having reviewed all the material presented by the parties, the following hearing officer decision is rendered.

II. ISSUES

1. Does the fact that the mental health provider was a contractor providing mental health services to the MWP alleviate MWP's liability in this case?

2. Did MWP discriminate against Gallmeier on the basis of her disability in failing to transfer her to the Montana State Hospital (MSH)?

3. Did MWP discriminate against Gallmeier when the mental health contractor indicated that she should not be sent back to MSH because she refused to take a birth control shot and because she might engage in sexual acting out?

4. Has MWP proven a mixed-motive defense?

III. FINDINGS OF FACT

1. Gallmeier was convicted of robbery in Cascade County, Montana, and sentenced to MWP for 20 years, with 10 suspended. Gallmeier began her sentence at MWP on April 9, 2008.

2. Jo Acton is the warden at MWP. Michael Buchanan is a licensed clinical professional counselor (LCPC). Dr. Thomas Van Dyke is a psychiatrist. Both Mr. Buchanan and Dr. Van Dyke work for South Central Regional Mental Health Center. MWP contracts with South Central Regional Mental Health Center to provide mental health evaluations, diagnosis, and treatment for inmates of MWP in need of such services. Mr. Buchanan's primary work for South Central Regional Mental Health Center is to evaluate inmates at MWP and to "help with day-to-day decisions about their care." Deposition transcript of Dr. Van Dyke, page 11, lines 14 through 19. Dr. Van Dyke would spend approximately four hours per week working at MWP evaluating inmates referred to him for mental health assessment.

3. During the course of her criminal proceedings, Gallmeier participated in fitness to proceed evaluations conducted by Dr. Patrick Davis on September 29, 2006, and by John Van Hassel, PhD. and Virginia Hill, M.D., staff psychiatrist at MSH. All three evaluators reached a diagnosis of schizophrenia. Michael Buchanan, the Clinical Services Director at the MWP, diagnosed Gallmeier as experiencing Schizoaffective Disorder in his initial intake assessment. Anti-psychotic medication is the only effective treatment for individuals like Gallmeier who have schizophrenia.

4. On September 20, 2008, prison staff placed Gallmeier on a "suicide watch" for one week. When on suicide watch, inmates are placed in what is known as "intake," which is removed from the general population, to monitor behavior and primarily for safety. There is usually a serious risk involved. Staff conduct around-the-clock 15-minute checks. Because of this, on November 6, 2008, Gallmeier was transferred from MWP to Montana State Hospital (MSH) for an evaluation, pursuant to Mont. Code Ann. § 53-21-130.

5. On September 27, 2008, MWP staff took Gallmeier to the St. Vincent Hospital emergency room because she was unresponsive, wrote a "rambling psychotic note" and had abrasions on the tops of her toes. (BS 482). Michael Buchanan wrote, "Because of psychotic state, unable to protect life: health @ this time." On September 30, 2008, Gallmeier presented to Vicki Boling, APRN-BC as paranoid schizophrenic.

6. By October 2008, Gallmeier began displaying "quite delusional and psychotic" symptoms, though she was neither suicidal or homicidal. (BS 142). She refused anti-psychotic medications and was "not appropriate for the general prison population," an oft repeated phrase during her entire stay at the prison to this very moment.

7. By the end of October 2008, Gallmeier's mental health had so decompensated that Michael Buchanan felt that she was unable to function in the prison environment and requested that she be sent to MSH for a ten-day evaluation. Dr. Van Dyke confirmed as much on Gallmeier's medical chart in an entry signed by him on November 4, 2008. Michael Buchanan spoke to Warden Acton in this regard. The warden agreed that Gallmeier was unable to function in the prison environment.

8. Warden Acton telephoned the MSH administrator, Ed Amburg, to request a ten-day evaluation. Her reasons included psychotic behavior and medication maintenance. No discussion occurred regarding any threats to self or others or ability

to care for herself. On November 5, 2008, Warden Acton faxed a letter to Amberg requesting the ten-day evaluation reflecting the phone conversation from the day before. Amberg approved the transfer to MSH from MWP the next day, writing on Warden Acton's letter, "Admit in accordance with 53-21-130(2) M. C. A."

9. At the end of the ten-day period, Gallmeier applied for voluntary admission to MSH, citing its environment for her reason. Dr. Hill signed the application. Dr. Hill did not reference risk of harm to self or others or self care. Treatment Plan Review notes reveal MSH's intent to keep Gallmeier until "she has reached maximum benefit from this period of hospital care."

10. During her time at MSH, Gallmeier began a relationship with a male patient.

11. As Gallmeier's psychotic symptoms lessened at MSH, her personality dysfunction was becoming more prominent, and she became defiant about complying with rules at the state hospital. Gallmeier was engaged in rules violations including inappropriate touching with the male peer at the hospital. On several occasions, the hospital put Gallmeier on 15-minute checks to ensure compliance with hospital rules.

12. The hospital ultimately concluded that because her psychotic symptoms were in remission and because she was refusing to follow hospital rules, that her behavior was best managed in a correctional setting. The male patient with whom Gallmeier was having a relationship could not be transferred out of MSH due to his commitment status. Just prior to her discharge from MSH, Gallmeier became pregnant by the male patient. At the time of her transfer, MSH was not aware that Gallmeier was pregnant, because a pregnancy test taken at the hospital came back negative.

13. On May 15, 2009, Gallmeier was transferred back to MWP from MSH because she had received maximum hospital benefit.

14. After she gave birth to her child, in February 2010, Gallmeier's psychotic behaviors increased. Gallmeier refused to take anti-psychotic medication.

15. Neither the Department of Corrections or the MWP require inmates to take birth control medications as a condition of being transferred to MSH. There is neither a formal or informal policy requiring an inmate to be on birth control prior to transferring to Montana State Hospital.

16. When Gallmeier was transferred to MSH in November 2008, she was not required to be on birth control.

17. Unbeknownst to either MSH or MWP, Gallmeier was pregnant at the time she was returned to MWP. Within two weeks of her return, it was necessary to place her again on suicide watch. Two months later, Buchanan documented reports that she had been attempting to harm her unborn baby. As her estrogen levels increased with her pregnancy, she began to stabilize. After she delivered her baby in February 2010, she became more bizarre, did not interact with other inmates or with staff, and her self care deteriorated.

18. On May 24, 2010, Buchanan opined to Deputy Warden Bob Paul, "We may be looking at a commitment to Montana State Hospital/Warm Springs in the near future." (Exhibit 11). By May 31, 2010, Buchanan indicated that involuntary medication proceedings should be commenced. Gallmeier was again on suicide watch from May 26 through June 1 and on three subsequent occasions. (2010 Intake & Sick Bay Log attached as Exhibit 12). Buchanan again wrote, "Ms. Gallmeier is quite psychotic and delusional but refuses all psychotropic medications. Denies being suicidal or homicidal. Not appropriate for general population." (Exhibit 13).

19. On June 1, 2010, Dr. Van Dyke wrote a note that Gallmeier wanted to go to MSH, "but refuses to consider taking a Diethylstilbestrol shot before she goes." (Exhibit 14, BS 426). He, too, was considering convening the Involuntary Medication Committee.

20. On May 25, 2010, Dr. Van Dyke reported that Gallmeier had not eaten in five days and wrote, "I feel there is a danger to her primarily from not eating and victimization by other inmates in her psychotic state." (Exhibit 15, BS 679-80). In the same report he wrote, "I think she needs either to be committed through the County Attorney or we need to convene an Involuntary Medication Committee to decide if she should be medicated." In his hand written note that accompanies the typewritten progress note, Dr. Van Dyke wrote, "Do not believe Warm Springs [is] appropriate due to sexual acting out." (Exhibit 15, P.3).

21. On August 20, 2010, corrections officers recovered eating utensils from Gallmeier's cell. (See Exhibit 10, attached to deposition of Jo Acton). Also, she was eating off the floor. Warden Acton described this behavior as "not appropriate self care." (Deposition of Jo Acton at 82, lines 5-6). Moreover, she testified that prison policy regarding eating utensils are that they may not leave the dining room because they pose a safety risk. (Deposition of Jo Acton at 81, lines 4-8).

22. On August 22, 2010, Gallmeier threw clothing soaked with menstrual blood at prison guards. She also smeared blood around her room. (Exhibit 16).

23. The August 31, 2010 progress note from Dr. Van Dyke states, "She was hoarding food that was rotten and eating off the floor a week ago." In the plan section of the progress note, Dr. Van Dyke noted that "there may be enough material to file for involuntary commitment to Warm Springs . . . . [W]e need a trial of antipsychotic medicine in order to protect her and the personnel who work with her in the institution." *Id.*

24. Gallmeier had been refusing psycho tropic medication on and off throughout her incarceration. Buchanan attributed this to her lack of insight into her mental illness. In this regard, he stated specifically:

> Felicia doesn't view herself as having a mental illness. She calls herself an artist, and so she lacks that insight. If she had that insight, then that would lead to the need for medication, but she doesn't see herself as mentally ill.

(Buchanan deposition, page 44, Lines 22-25; page 45, Line 1).

25. Warden Acton issued a "procedure order" to address the threat posed to guards and other inmates by inmate's bodily fluids. The subject line refers to "offender hygiene." The purpose of the procedure is to "maintain a healthy and clean environment not just for themselves but also for their personal area, for the health and safety of both offenders and staff . . . ." The procedure was necessary "so as not to endanger the health, security, and safety of staff or other offenders."

26. Acton felt that the incident regarding the menstrual blood stated that this incident fell within the rubric of the above described procedure. Gallmeier's conduct obviously compromised the safety of the prison guards, as even Warden Acton acknowledged.

27. Buchanan considered this behavior an occasion in which Gallmeier failed to demonstrate an appropriate measure of self care, according to measures employed by the controlled environment of the prison. When asked what he would expect to see of a person who is able to care for themselves, he said,

> I would expect good hygiene and grooming. I would expect appropriate interaction with staff and inmates, keeping their cell clean, being appropriate on the unit, participating in groups.

(Deposition of Michael Buchanan at 22, Lines 1-16). The incident was later characterized by staff as requiring a "show of force after she became out-of-control."

28. Beginning with the suicide watch in May 2009, only six days after Gallmeier returned from MSH, she was placed in Mental Health Administrative Segregation. She has been there continuously ever since. (Deposition of Michael Buchanan at 28, Lines 4-20). Administrative Segregation involves placement in a cell on F-pod, which contains 11 single occupancy cells. Buchanan noted that it was a "protective custody kind of situation." (Buchanan Deposition, page 26, Lines 16-17; page 28, Lines 19-20). Out of the 200 women at MWP, only 11 are housed in F-pod.

29. In his deposition, Buchanan stated that he was concerned that Gallmeier was unable to care for herself, noting "She was decompensating. She wasn't eating. She wasn't taking fluids. Her behavior was bizarre and we had to remind her to eat and to drink water . . . ." (Buchanan deposition, page 30, lines 11-16).

30. Gallmeier first became eligible for parole on October 16, 2008. In March 2010, she was granted parole, subject to completion of the pre-release program. Buchanan noted in the mental health evaluation portion of the Parolee Report "MWP would recommend that I/M Gallmeier be given a chance in the community by paroling to a Mental Health group once she stabilizes at MWP." (BS 563 and 65).

31. The parole board granted parole, subject to completing one year in the pre-release. On April 21, 2010, the parole board issued a disposition report that provided for her reappearance before the parole board prior to her being placed on parole because of her "need [for] further mental health treatment."

32. Progress notes from May and June 2010 reveal that Dr. Van Dyke and Gallmeier discussed returning to Warm Springs on May 3, May 25, June 1, and August 31, 2010. (See Exhibits 13 - 16). On May 3, 2011, Dr. Van Dyke admitted that Gallmeier had earlier told him that she wanted to return to Warm Springs. He stated that if she did return, she might have to take a birth control shot.

33. No group homes or pre-release centers were willing to take Gallmeier. (BS 408). On October 30, 2010, the parole board rescinded Gallmeier's parole. She has remained at MSP ever since in Administrative Segregation.

34. Gallmeier was placed in Administrative Segregation for her own protection.

35. As between placement at either MWP or MSH, Gallmeier's mental health issues, when considered in light of her inability or unwillingness to follow institutional rules, demonstrate that the best environment for her to be in both for her safety and treatment of her mental health issues is at MWP. The testimony of the therapists and doctors in this case proves that point overwhelmingly.

36. Because Gallmeier's treatment is better facilitated at MWP, it is clear that regardless of the apparent sex discrimination in this case, Gallmeier would not have been sent back to MSH in any case. MWP has proved, therefore, that this is a mixed-motive case.

IV. OPINION[1]

Gallmeier alleges two bases upon which she claims that the MWP discriminated against her. First, she argues that she was discriminated against on the basis of her disability (schizophrenia) because she was not transferred to MSH when her mental faculties decompensated to the point that she engaged in, to say the least, bizarre and erratic behavior. Second, she contends that she was discriminated against on the basis of sex when Dr. Van Dyke stated in his written report that he did not believe that returning Gallmeier to MSH was appropriate "due to sexual acting out" and Van Dyke's statement to Gallmeier that she must take a birth control shot before she could be sent to MSH. DOC argues that there is no basis for finding liability for its actions since (1) Gallmeier could not have been either committed or sent for a ten-day temporary transfer to MSH because her mental condition did not warrant such action and (2) Van Dyke was an independent contractor and therefore, liability cannot be ascribed to MWP for his conduct. MWP further argues that even if such conduct was discriminatory, this matter presents at best a mixed-motive case where only affirmative relief and no damages can be awarded.

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[1] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

A. *The Applicable Case Law Prohibits A Finding That MWP Discriminated Against Gallmeier On The Basis Of Her Mental Disability.*

As to the issue of discrimination based on her disability, boiled to its essence Gallmeier's argument is that the best place for her treatment for her schizophrenia is at MSH but that MWP will not send her there for treatment. For support for her argument, she relies on the examples of her bizarre behavior at MWP. In contrast, the gist of the testimony of the medical professionals in this case is that, given Gallmeier's circumstances of her schizophrenia and her increasing behavior problems (not following institutional rules), the best placement for her treatment is in the correctional setting at MWP (see, e.g., Dr. Hill's deposition, page 44, lines 1-3). In other words, Gallmeier's claim under her disability prongs is that she is not being properly treated for her illness.

MWP argues that the expert medical testimony demonstrates the lack of discriminatory animus that defeats Gallmeier's claim of disability discrimination claim. The hearing officer agrees with this contention since it is clear from the uncontroverted medical testimony in this case that Gallmeier's mental illness, coupled with her inability or unwillingness to follow institutional rules, that she is best treated in the setting at MWP, not MSH.

Aside from this reason, however, there exists an equally compelling reason for finding that Gallmeier's disability discrimination claim is not cognizable under either the MHRA or the GCFPA – disputes over the appropriate medical treatment related to the disease that makes a person disabled cannot serve as a basis for finding a violation under Title II of the ADA. This is because the ADA was not intended to create a cause of action under Title II where treatment decisions are involved.[2] *Simmons v. Navajo County*, 609 F.3d 1011 (9th Cir. 2010). *See also, Copleton v. Correctional Corp. of America*, 2009 U.S. Dist. LEXIS 109887 (D. Mont. October 21, 2009). In *Copleton*, the Montana federal district court recognized specifically that medical treatment decisions are not a basis for Title II ADA claims. *Id., citing Burger v. Bloomberg,* 418 F.3d 882, 882 (8th Cir. 2005). *Accord, Fitzgerald v. Corrections Corp. Of America,* 403 F. 3d 1134, 1144 (10th Cir. 2005) *(overruled on other grounds)* (noting that where the handicapping condition is related to the condition to be treated, it will rarely if ever be possible to say . . . that a particular decision was 'discriminatory'.)

[2] Gallmeier concedes that Title II of the ADA provides the appropriate model for gauging the reach of the MHRA and GCFPA on Gallmeier's disability discrimination claim. See generally, Gallmeier's Answer Brief to Respondent's Motion For Summary Judgment, page 14.

Gallmeier's disability discrimination claim is quintessentially a dispute over medical treatment for Gallmeier's schizophrenia. Gallmeier contends that she is best treated at MSH while MWP argues that, because of her inability to follow rules and given her schizophrenia, she is better treated at MWP. As the case law makes clear, such a dispute does not form the basis for a Title II ADA claim. Accordingly, her disability discrimination claim fails.

B. *Dr. Van Dyke's Status As An Independent Contractor Does Not Insulate MWP From Liability For The Alleged Sex Discrimination Under The MHRA Or GCFPA*.

In arguing that it can have no liability for the sex discrimination claim, MWP argues it has no liability for Dr. Van Dyke's conduct with respect to the sex discrimination claim because Van Dyke was an employee of an independently contracted mental health counseling firm. Gallmeier counters, correctly so, that the language of the GCFPA and supporting case law relating to Title II of the ADA supports the finding that contractual relationships do not obviate a public entity's liability for discriminatory acts of its service vendors. In addition to requiring governmental entities to provide services without regard to sex or mental disability, the GCFPA provides in pertinent part that a state or local facility may not be used in furtherance of any discriminatory practice nor may a "state or local governmental agency become a party to an agreement, arrangement or plan that has the effect of sanctioning discriminatory practice." Mont. Code Ann. § 49-3-205. In a similar vein, Title II of the ADA provides "that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. 12312.

The case law interpreting Title II supports Gallmeier's position on this issue. *See generally, Armstrong v. Schwarzenegger*, 622 F. 3d 1058 (9th cir. 2010), *Kerr v. Heather Gardens Assoc.*, 2010 U.S. Dist. LEXIS 99020. As those two cases recognize, a governmental entity may be liable for the discriminatory acts of its contractor. In *Kerr*, for example, the respondent governmental entity that owned the assisted living home where the plaintiff lived argued that it was entitled to summary judgment on the plaintiff's Title II claim as it was the private management company to whom the government contracted out the management of the home, not the governmental entity, that discriminated against the plaintiff. In rejecting the argument, the district court noted that the supporting Code of Federal Regulation (CFR) noted that "all governmental activities are covered [under Title II's language] even if they are carried out by contractors."

Here, the complained of action was carried out by an employee of an entity contracted by MWP to deliver mental health counseling to MWP's inmates. Under the plain language of the GCFPA and the guiding case law, the fact that the services have been contracted for does not obviate MWP's liability.

Montana case law regarding tort liability has no application to this case. As Gallmeier correctly noted in her response to the motion for summary judgment, this case arises under the MHRA and GCFPA which establish remedies for discrimination which are separate from tort law. *Saucier v. McDonald's*, 2008 MT 63, ¶39, 342 Mont. 29,179 P.3d 481. Unlike a tort case, a case arising under the GCFPA imposes liability under certain circumstances for governmental entities that have entered into contracts for services that result in discrimination against disabled persons. Dr. Van Dyke's status as an employee of a contracted service provider to MWP does not in and of itself alleviate MWP's potential liability in this case.

C. *MWP Violated the GCFPA.*

Gallmeier contends that MWP discriminated against her on the basis of sex when Dr. Van Dyk refused to send Gallmeier to MSH because she would not go on birth control. It is incontrovertible that Dr. Van Dyke wrote in his report of June 1, 2010 that Gallmeier wanted to go to MSH "but refuses to consider taking Diethylstilbristol shot before she goes." Exhibit 12. Dr. Van Dyke also wrote in his hand written case notes of May 31, 2010 that he did not believe that MSH was appropriate for Gallmeier "due to sexual acting out." Exhibit 15.

The MHRA prohibits discrimination on the basis of sex. Mont. Code Ann. § 49-2-303. The GCFPA prohibits MWP from denying any of its services or benefits to Gallmeier on the basis of sex. Mont. Code Ann. § 49-3-201(1).

To establish a prima facie case of discrimination, Gallmeier must show that: 1) she is a member of a protected class; 2) that she was denied a service or benefit because of her membership in the class; and 3) she was otherwise qualified for the service or benefit. Admin. R. Mont. 24.9.610, *Stevenson v. Felco Industries, Inc.*, 2009 MT 299, 352 Mont. 303, 216 P.3d 763, *Carr v. Ibex Group, Inc.*, HRC Case No. 0001009220 (January 25, 2002).

Discrimination can be proved by either direct or circumstantial evidence. Direct evidence is "evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Black's Law Dictionary*, p. 460 (6th Ed. 1990). *See also*, *Laudert v. Richland County Sheriff's Department*, 2000 MT 218, 301 Mont. 114,

7 P.3d 386. In Human Rights Act employment cases, direct evidence relates both to the adverse action and to the employer's discriminatory intention. *Elliot v. City of Helena*, HRC Case No. 8701003108 (June 14, 1989) (age discrimination).

Where the charging party presents evidence of statements of a decision maker which in themselves reflect unlawful discrimination and which are related to the challenged action, then the case is a "direct evidence" case. *Laudert ,*¶25. Where a prima facie claim is made out by direct evidence, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(5); *Reeves v. Dairy Queen*, 1998 MT 13, ¶17, 287 Mont. 196, 953 P. 2d 703. However, the charging party at all times retains the burden of ultimately persuading the trier of fact that she has been the victim of discrimination. *Heiat v. Eastern Montana College,* 275 Mont. 322, 912 P.2d 787, 792, (1996), citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Gallmeier has presented direct evidence of elements 1 and 2 of her prima facie case. Being a female, and therefore a member of the only sex that can become pregnant, she is within a protected class. Coupled with Dr. Van Dyke's statement that Gallmeier could possibly go to MSH for treatment "but she refuses to take [a birth control shot]," Gallmeier has made a prima facie demonstration of the first two elements of her case.

Gallmeier has also made a prima facie showing of the third element of her case, that she is otherwise qualified. She has made this showing by pointing out the history of her 2008 transfer to MSH. Under what are ostensibly similar circumstances to her mental condition in 2010 (as demonstrated by the facts of this case), MWP transferred Gallmeier to MSH for a ten-day treatment period in 2008. In 2010, MWP, through its contractor, refused to do so. Gallmeier has thus presented a direct evidence prima facie case of discrimination.

Because Gallmeier has presented a direct evidence prima facie case of sex discrimination, the burden shifts to MWP to show that unlawful discrimination played no role in its decision not to send Gallmeier to MSH for treatment. It has attempted to do so by showing first that Gallmeier was not qualified for either a temporary placement or involuntary commitment at MSH because she was not a danger to herself or others and she could care for herself. Second, while the MWP has not articulated this basis in any pleading, it is evident after reading through all the depositions and documentary evidence that all mental health care providers were

concerned about Gallmeier getting pregnant again in the unstructured setting at MSH. The male ward at MSH who impregnated her in 2009 was still a patient at MSH at the time the mental health professionals were contemplating sending Gallmeier back to MSH due to her decompensating mental health. Each basis will be considered in turn.

The suggestion that Gallmeier could not have been admitted to MSH because she was not a danger to herself or others nor was she unable to care for herself is not convincing. Gallmeier's conduct was, to say the least, very disturbed. She was schizophrenic and, as all mental health providers seem to have concurred, she was not a malingerer. Her conduct included such things as hoarding rotten food in her cell and failing in the most basic way to care for herself (such as the episode regarding smearing menstrual blood around her cell). She was obviously delusional given her well documented incoherent interactions with mental health providers and with prison guards. Less than two years earlier, similar conduct on her part had been the very basis of Warden Acton's request for a ten-day transfer to MSH. In light of this evidence, the hearing officer agrees with Gallmeier that the respondent's evidence in support of its argument that Gallmeier was not otherwise qualified for at least a ten-day transfer to MSH does not overcome Gallmeier's prima facie case of discrimination.

This leaves the question in the hearing officer's mind about whether there were reasonable concerns that Gallmeier could fall prey to the male ward at MSH that had previously impregnated her. Reasonable exemptions from the prohibition against discrimination are permitted. However, those exemptions are to be strictly construed. Mont. Code Ann. § 49-2-402. Certainly, a concern for the risk to Gallmeier in becoming pregnant again, founded in a particularized assessment regarding the likelihood of Gallmeier either being victimized or suffering severe physical or mental health risks from becoming pregnant, could form a lawful basis for a decision not to send her back to MSH. However, it is apparent from Dr. Van Dyke's own deposition testimony surrounding his decision that a particularized assessment of Gallmeier's safety was not the reason for his decision not to send her back to MSH. Rather, it emanated from his understanding that Gallmeier would be required to have a birth control shot before she could go back to MSH. (Van Dyke deposition, page 68, lines 21 through 25, [page 69, lines 1 through 12). This decision was rooted in Gallmeier's sex, not particularized concerns about her safety. Strictly construing the proffered exemption, Van Dyke's decision, therefore, does not present evidence sufficient to overcome Gallmeier's prima facie showing of sex discrimination. Gallmeier has proven her sex discrimination claim.

D. *MWP Has Proven Its Mixed-Motive Defense*

MWP has also asserted that even if Dr. Van Dyke's action amounted to sex discrimination, this is a mixed-motive case which permits only the imposition of affirmative relief. A mixed-motive case arises when the charging party proves illegal discrimination "but the respondent proves that the same action would have been taken in the absence of the unlawful discrimination . . . ." Admin. R. Mont. 24.9.611. In a mixed-motive case, the department will order a respondent to undertake affirmative steps to refrain from such discriminatory conduct in the future, but will not award compensation "for harm to the charging party caused by an adverse action that would have been taken by the respondent regardless of an unlawful discriminatory . . . motive." *Id.* The employer must prove by a preponderance of the evidence that without the discriminatory motive, it would have made the same decision. *Laudert, supra*.

MWP has stated several facts upon which it relies to demonstrate a mixed-motive case. Ultimately, the hearing officer is persuaded by a preponderance of the evidence from the medical testimony of Gallmeier's caregivers at both the MWP and the MSH that the best setting in which to handle both her mental illness and her refusal to obey rules and instructions was at MWP. Dr. Hill's deposition testimony is perhaps most compelling in this regard. Dr. Hill stated that when Gallmeier was transferred back to MWP in 2009, it was because she had reached her maximum benefit at MSH and she was disobeying the rules at MSH. As Dr. Hill recognized, and as all the other health care providers either stated or alluded to, Gallmeier's increasing behavior problems, considered in the context of her schizophrenia and her increasing unwillingness or inability to follow rules, were "best managed in a correctional setting." (Hill deposition transcript, page 44, lines 1 through 3). This very sentiment was repeatedly echoed by Dr. Van Dyke and Michael Buchanan, the LCPC who attended her at MWP. There simply is no question in the hearing officer's mind that despite the sex discrimination, under no circumstances would Gallmeier be transferred back to MSH given her mental health issues and her schizophrenia as it existed in 2010 and as it continued to exist through the summer of 2011.

Gallmeier contends that MWP's mixed-motive argument fails because Dr. Van Dyke and Michael Buchanan had in 2008 recommended that Gallmeier be transferred to MSH when she was exhibiting symptoms similar to those she was manifesting in 2010 and this fact renders their testimony that she could be better treated at MWP incredible. Gallmeier's point might be well taken but for the fact that Van Dyke's and Buchanan's position is fully corroborated by Dr. Hill, the

administrator of MSH. Dr. Hill had no "dog in this fight" and her testimony only serves to corroborate that Van Dyke and Buchanan would despite the sex discrimination have continued to treat Gallmeier at MWP because it was the best place to treat her. In light of this, the hearing officer is convinced by a preponderance of the evidence that despite the sex discrimination, MWP would have not transferred Gallmeier to MSH in any event because as a mater of fact the best place to treat her was at MWP in light of all of her maladies and inability to follow the rules at MSH. MWP has, therefore, proven its mixed-motive defense.

E. *Affirmative Relief is Appropriate.*

The circumstances of the discriminatory conduct in this matter require affirmative relief in order to prevent future discriminatory acts by MWP and its vendors. Affirmative relief in the form of training is appropriate.

V. CONCLUSIONS OF LAW

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

2. MWP cannot be found to have discriminated against Gallmeier on the basis of her disability since her complaint regarding the treatment decision on her disability is essentially a complaint that her medical treatment is inadequate, something which is not cognizable under the ADA, and, by analogy, under the GCFPA.

3. MWP violated the GCFPA when Dr. Van Dyke discriminated against Gallmeier on the basis of sex. Mont. Code Ann. § 49-3-205(2).

4. MWP would have in any event not transferred Gallmeier to MSH because the best treatment for her, given her mental health affliction and inability to follow rules, is at MWP, not MSH. Consequently, Gallmeier did not suffer any harm, pecuniary or otherwise, from which she would have been free but for illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b), Admin. R. Mont. 24.9.611.

5. The circumstances of the illegal discrimination mandate particularized affirmative relief. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Gallmeier and against MWP on the charge that MWP discriminated against Gallmeier on the basis of sex. MWP is enjoined from taking any adverse action against any inmate on the basis of sex.

2. Within 180 days of this order, MWP shall ensure that its mental health providers, both contracted and employees, are provided with a two-hour course conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the methods and means of identifying and preventing sex discrimination. Upon completion of the training, MWP shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred, and that its mental health providers attended for the entire period. MWP shall submit the trainer's statement to the Human Rights Bureau within three weeks after the training is completed.

3. Gallmeier is not entitled to any relief as she did not suffer any harm, pecuniary or otherwise, from which she would have been free but for the illegal discrimination.

DATED this 1st day of June, 2012.

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Hearings Bureau

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Felicia Gallmeier, and her attorney, Roberta Zenker; and Montana Department of Corrections, Montana Women's Prison, and its' attorney, Brenda Elias:

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 Marieke Beck
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).