

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0109014600:

TRACY L. LIVINGSTON,)	Case No. 1684-2011
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
HUNTLEY PROJECT MUSEUM,)	
)	
Respondent.)	

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I. Procedure and Preliminary Matters

Tracy Livingston filed a Human Rights Act discrimination complaint with the Department of Labor and Industry on September 3, 2010, alleging that her former employer, Huntley Project Museum (“the Museum”), discriminated against her on the bases of sex and disability and retaliated against her for her opposition to the illegal discrimination. On March 31, 2011, the department gave notice Livingston’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The hearing proceeded on June 28-29, 2012, in Billings, Montana. Livingston attended with counsel, Alex Rate, Rate Law Office, P.C. The Museum attended through its designated representative, James Albert (“Jim”) Knapp, Jr., current Museum Board Chairperson, with counsel, Eric Nord, Crist Krogh & Nord, L.L.C.

During hearing, Tracy Livingston, Ronald Ohlin, Brent Morris, Alan Miller, Edward Weidinger, Jim Knapp, Pam Makara, Vicki Eubank, Dick Tombrink, Patricia Loge, FNP-BC, and Mike Myers testified. The Hearing Officer admitted Exhibits 1, 3-7, 9, 11, 13, 15, 17-18, 21-22, 24, 26-28, 30-34, 42-44¹, 48, 107-108, 115, 117, 122 and 125-126 into evidence, sustaining a relevance objection to Exhibit 29, and refusing it.

¹ Exhibits 42-44 are digital recordings of three meetings, the May 18, 2010, Board Meeting [Exhibit 42], the “Accommodation Meeting” of April 14, 2010 [Exhibit 43], and the “Performance Evaluation” Meeting of February 10, 2010 [Exhibit 44]. The recordings are of very poor quality, and the Hearing Officer was not able to use them or rely upon them.

At the conclusion of Livingston's case, the Hearing Officer dismissed Livingston's sex discrimination claim on the Museum's unopposed motion for dismissal of that claim and denied the Museum's opposed motion for dismissal of the remainder of Livingston's discrimination claims.

II. Issues

The dispositive issue in this case is whether the Museum illegally discriminated against Livingston in employment, because of disability in violation of Montana Human Rights Act, Mont. Code Ann., Title 49, Chapter 2. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Tracy L. Livingston responded to an advertisement published by the Huntley Project Museum of Irrigated Agriculture, seeking a Museum Director/Site Manager. Exhibit 107. Livingston had a B.A. in Anthropology. Although she had been a "Master's Candidate" at Mesa State College in Grand Junction, Colorado, her B.A. was her highest academic degree. She had approximately five years of prior experience related to Museum administration, as an anthropologist and member of the curation staff at the Billings, Montana, Curation Center of the Bureau of Land Management for almost a year in 2006-07 and as an administrative assistant to the Curator of the McCracken Research Library and the manager of Curative Office of that Library for more than four years in 2000-04, at the Buffalo Bill Historical Society in Cody, Wyoming. The Museum offered, and Livingston accepted, the position of Director/Site Manager, as confirmed by an employment letter sent to her by then Museum Board Chairperson Ron Ohlin, dated May 31, 2007, and signed by Livingston on June 1, 2007. Exhibit 108.

2. The Museum is a small nonprofit entity, physically located in southeastern Montana in the middle of a field between Worden and Huntley. It operated on a "fiscal year" that began on April 1 of one calendar year and ended on March 31 of the next calendar year. In "Fiscal 2007" (April 1, 2006, through March 31, 2007), the Museum's total revenue from all sources was \$22,738.82. Its total expenses for that same fiscal year were \$12,253.99, for a net gain of \$10,484.83. When it hired Livingston (early in Fiscal 2008), the Museum apparently had investment, or "endowment" funds of more than \$200,000.00.²

² The Museum had a proposed exhibit that contained specific information about the investment fund totals at various times, but it was not admitted into evidence. What is in evidence is that the Museum took \$61,000.00 out of its investment fund in fiscal years 07-08 and 08-09 and still had over \$166,000 in investment funds in October 2009. Simple math dictates the minimum total of the funds before those withdrawals, and at least 80% of that amount would have been present in 2007.

3. The Board did not formalize Livingston's employment agreement with a signed contract, only Ohlin's letter [Exhibit 108], "to summarize our agreement for you to assume the position of Museum Director/Site Manager." Ohlin's letter included the statement: "The functions of developing and maintaining exhibits for the Museum Center, receiving visitors and tending to the every day administrative details are a normal part of this position." Ohlin's letter did not state that Livingston had to be on site at the Museum at all times, and did not state that she was required always to open and close the Museum, but the clear meaning of "receiving visitors and tending to the every day administrative details" gave Livingston notice that her consistent presence at the Museum was expected and that she was responsible for assuring the every day opening and closing of the Museum as scheduled.

4. The Museum hired Livingston at a salary of "\$20.00 per working hour and nominally scheduled 30 hours per week as verified on your time sheet," commencing on June 1, 2007. Over a 52 week fiscal year, with 30 hours per week at \$20.00 per hour, Livingston's base salary would be \$31,200.00 per year. This was the plain meaning of the terms of the letter agreement Ohlin and Livingston signed. For that specified salary Livingston agreed to "take responsibility [as] the Museum Director/Site Manager of the . . . Museum . . . as that position is defined and directed by the Museum Board." Exhibit 108. Ohlin's letter contained no provisions regarding pay increases, health benefits, sick leave, family leave, or vacation leave nor did it state to whom Livingston was to report when ill or absent. Previous directors had typically opened the Museum, remained at the Museum while it was open, and then closed the Museum. It typically was open from 10:00 a.m. to 4:00 p.m., April through September, Tuesday through Saturday, with restricted open days as approved by the Board during October through March. Livingston was also expected to attend and participate in board meetings. Board meetings typically convened in the evenings, at the Museum, outside of the Museum's normal hours of operation.

5. The Museum Director/Site Manager was a crucial employee for the Museum. In that position, Livingston was the Museum's primary employee on-site during Museum hours. She was also the only Museum employee hired to work as many as 30 hours per week. No one else was tasked with opening and closing, and no one else was tasked with meeting and greeting visitors.

6. When hired in Fiscal 2008 (April 1, 2007 though March 31, 2008), Livingston was the Board's third choice for the Museum Director/Site Manager position. Her resumé (Exhibit 26) reported approximately twelve jobs over the fourteen years prior applying with the Museum. Several of her prior positions, including the professional position of anthropologist, had been volunteer positions. On the positive side, Livingston's resumé also indicated that she had some education

in grant writing, as well as preliminary work and research on grants. Given the financial needs of the Museum, a Museum Director/Site Manager who might be helpful in getting grants was a plus.

7. There is no evidence that, at any time during or after the hiring process, the Museum notified Livingston of its financial situation. In Fiscal 2007, the entire wage expense of the Museum for all employees was \$2,133.90. Livingston's base salary over a full fiscal year would be almost 15 times the total wage expense for the entire Museum staff in Fiscal 2007. Her base salary would also be more than two and a half times all of the expenses of Fiscal 2007, and could not possibly be paid out of current Museum income without a huge increase in revenues.

8. Livingston considered the Museum Director/Site Manager position a "dream job." She was very excited to accept the position. As soon as she commenced work, she tried to begin networking with persons involved with other facilities within Montana and the surrounding states, and with persons who might be helpful in enlarging or improving the Museum. In short, she began developing professional contacts. To do so she engaged in some travel and she was absent from the Museum during some of its open hours, and sometimes for an entire day or more, when the Museum was scheduled to be open.

9. Livingston's tenure as Museum Director/Site Manager began with ten months left in Fiscal 2008. That fiscal year was not a financial success for the Museum, as can be seen in Exhibit 48, the Museum's Profit and Loss Statements for the six fiscal years from 2007 through 2012. In Fiscal 2008, the Museum had almost four times as much "revenue" as in Fiscal 2007 (\$82,035.28 rather than \$22,738.82), an enormous improvement. Ohlin had explained to Livingston that the Museum wanted to increase its activities substantially in Fiscal 2008, and that had happened. However, the "revenue" figure was inflated, because in Fiscal 2008, the Museum took a \$31,000.00 draw from its investment funds, counting it as income. Without this inflation of revenue by a reduction in investment funds, the Museum's revenues in Fiscal 2008 totaled \$51,035.28. During that same time, expenses increased almost seven times over the previous fiscal year, from \$12,253.99 to \$94,869.53. On the face of its own numbers, the Museum had a loss of \$12,834.25, but in truth, the loss was far larger. In Fiscal 2008, the Museum actually lost \$43,834.25.

10. Livingston's actual wages, for the ten months of Fiscal 2008 she worked, were \$22,168.68 for 303 days (June 1, 2007, through March 31, 2008). At \$20.00 per hour, that was approximately 1,108 hours of paid time. For this period of around 43 weeks, she had averaged just under 26 hours per week. Had she worked the "nominally scheduled 30 hours per week," over those ten months, she would have worked (and been paid) for around 43 weeks, at 30 hours per week, times \$20.00 per

hour, for \$25,800.00. Livingston did not work, on average, more than 30 hours per week during Fiscal 2008, even though she may have worked more than 30 hours during some weeks.

11. Livingston's wages in Fiscal 2008 were more than ten times the entire wage expense for the Museum in fiscal year 06-07. This could not have been a surprise to the Museum Board. The letter agreement between Livingston and the Museum presaged a net wage expense, as a result of hiring Livingston for the last 10 months of the fiscal year, of \$25,800.00. This does not take into account the extra expenses of Livingston's wages in terms of the employer's share of Social Security and other payroll taxes and insurance. This also does not take into account greater expenses because there were more activities at the Museum and on the Museum's behalf.

12. Apart from wages, taxes and office and business telephone expenses, the largest Museum expenses in 07-08 were building maintenance (\$13,793.57), equipment (\$11,124.23), repairs (\$9,982.35), bus supplies (\$3,932.22), utilities (\$3,395.56), business insurance (\$3,026.00), advertising (\$1,849.82) and outside service (\$1,427.65). This illustrates the degree to which the Museum increased its activities during Livingston's initial tenure.

13. Livingston's efforts to develop professional contacts might have resulted in some very minor expenses to the Museum in 07-08, although the testimony is mixed about whether she or the Museum paid for her professional memberships. Even if the Museum did pay for the memberships, the evidence shows only a de minimis impact on expenses.

14. The Museum contended throughout this case that one of the many problems it had with Livingston was that she repeatedly made purchases for the Museum, without Board authorization, above and beyond her \$50.00 per month discretionary limit. However, with one exception, the Museum did not prove that such purchases in excess of Livingston's authority ever comprised any significant portion of increased expenses during any month or months of her employment.

15. There is no documented evidence of Board complaints to Livingston, from her hire through the end of Fiscal 2008. However, the testimony at hearing did credibly illustrate that a simmering unhappiness, accompanied by board member discussions about problems with Livingston, began to develop among some board members during Fiscal 2008. The obvious causes of these developments were the financial loss suffered (even though a substantial part of that loss clearly resulted from the Board decision to hire Livingston at the wage she was being paid) and the way in which Livingston, right from the beginning, chose not to follow previous

practice and Board direction regarding how she spent her working hours. During the first ten months of Livingston's employment (the last ten months of Fiscal 2008), she did not receive a performance evaluation, a pay increase or a cost of living adjustment of her wages.

16. In Fiscal 2009 (April 1, 2008, through March 31, 2009), the Museum's revenues fell by almost \$15,000.00, to \$68,722.02. In the Profit and Loss Statement for that fiscal year (in Exhibit 48), Museum "income" included a \$30,000.00 draw from its investment funds, swelling total "income" to \$98,722.02, and showing a paper profit for the year. Expenses were reduced by slightly more than \$12,500.00, but with total expenses of \$82,359.52, the Museum actually lost \$13,637.50 that fiscal year, when the draw from investment funds was not included.

17. By the end of Fiscal 2009, that fiscal year and the one before it had resulted in total losses of \$57,471.75, which had been covered by the \$61,000.00 drawn from investment funds in those two fiscal years.

18. In Fiscal 2009, Livingston's wages totaled \$26,128.49, which translated (at \$20.00 per hour) to around 1,306 hours. Over 52 weeks, that was an average of slightly more than 25 hours per week for the year, slightly lower than her weekly average in 07-08, and more than \$5,000.00 less than her projected fiscal year wage, based upon the letter agreement she signed, of \$31,200.00.

19. Had Livingston worked the hours set forth in the letter agreement, in both fiscal years, she would have earned an additional \$9,111.23 over those two years. The losses to the Museum would have been increased by that amount and by the additional payroll expenses, taxes and other employer expenses generated by those additional wages. Given the express language of the letter agreement, the Museum knew or reasonably should have known that Livingston's wages for those first two fiscal years could have been around \$57,000.00, plus additional expenses those wages would have generated.

20. There is no documented evidence of Board complaints to Livingston during Fiscal 2009. During that entire fiscal year, she did not receive a performance evaluation, a pay increase or a cost of living adjustment of her wages.

21. Fiscal 2009 was Livingston's first full fiscal year as Director/Site Manager. The Museum had not expressed any formal or official dissatisfaction with her performance during this fiscal year. However, there was increasing discontent among board members about her performance. That discontent could not have been related to Livingston's MS, a medical condition with which she was not diagnosed until late in Fiscal year 2009, and which might not have been known to the Board at all until early the next fiscal year. The basis for the discontent was that the Museum was still

losing money, and depleting its investment funds, and Livingston was still doing her job as she saw fit and not how some of the board members wanted her to do it.

22. The Museum contended throughout this case that one of the many problems it had with Livingston was that she repeatedly made purchases for the Museum, without Board authorization, above and beyond her \$50.00 per month discretionary limit. However, with one exception in Fiscal 2010 (appearing in Finding No. 39), the Museum did not prove that such purchases in excess of Livingston's authority ever comprised any significant portion of increased expenses during any month or months of her employment. Thus, while this was part of the basis for board member discontent, it was not a reasonable business basis for dismissing her.

23. Near the end of Fiscal year 2009, Livingston was diagnosed with lesions consistent with Multiple Sclerosis ("MS") and was placed on medication. Livingston notified the Museum of her condition during a board meeting in calendar year 2009. Ohlin could not recall Livingston ever telling him she had been diagnosed with MS. Knapp, who became Board Chairperson sometime between the March and May 2010 Board meetings, at the time when Ohlin left the Board in midterm, testified that she had given the notification at a board meeting, in "one of the spring or early summer meetings" in 2009. Thus, the Museum Board was aware of her condition no later than early in Fiscal 2010.

24. Fiscal 2010 was similar to its two immediate predecessors with regard to the finances of the Museum, although the total loss was smaller. The Museum's revenues again fell, this time by slightly more than \$11,000.00, to \$57,678.99. Expenses dropped by almost \$19,000.00, to \$63,543.15. The net loss for the year was \$5,863.16. Fiscal 2010 was the "best" year since the Museum had hired Livingston. Three consecutive years of losses, totaling \$63,334.91, were not the kinds of results to encourage some of the Museum's board members to look for better days ahead.

25. Although the full picture of losses was not fully developed until the end of the fiscal year, the pattern of previous years was obviously continuing, with some mitigation, throughout Fiscal 2010. Board member dissatisfaction grew and became more vocal. Some members of the Museum Board were openly complaining that Livingston placed a higher priority on networking and developing professional contacts (which often required absence from the Museum during its open hours) than on opening the Museum, meeting and greeting guests by being ever present at the Museum, and then closing the Museum. Of course, the specter of losing more money hovered over all of these discussions.

26. The Museum welcomed around 5,000 visitors per year, but its direct revenue from visitors was very small. Usually the largest share of its revenues came from an annual stipend paid by Yellowstone County. Nonetheless, the Board's traditional first priority for its Director was the "open, meet and greet, then close" job on the premises.

27. There was also some resentment boiling up because of Livingston's lack of enthusiasm for participation with and support of the South Central Antique Tractor Club, to which several of the unhappy board members belonged. The Tractor Club was considered by the Board generally to be an "important partner" of the Museum. In Fiscal 2008, Livingston was blamed for closure of a Museum premises gate during the Tractor Club's annual "Threshing Bee," typically attended by approximately eight hundred people, all of whom had to cross the Museum property to get to the event. In Fiscal 2009, Livingston failed and refused to open the Museum during the Sunday portion of the "Threshing Bee," which sharpened the resentment.³ These were major instances of Livingston's defiance of the Board, according to the unhappy board members.

28. Livingston sometimes missed monthly Board meetings. When she did, she often left a typed report on the table for the Board. The report wasn't always read or added to the minutes, and occasionally was completely disregarded.

29. By the late spring or early summer of 2009, probably early in Fiscal 2010, board members had learned of Livingston's MS diagnosis. She was also reporting that spraying weeds around the Museum was causing her health problems. Although the Museum had a small vehicle (the "gator") that Livingston used to cover the extensive Museum grounds instead of walking, her perceived problems with opening and closing, attendance generally, and adequate coverage of the grounds all became further fuel for questions about her performance. Working relationships between many board members and Livingston deteriorated. It also appears that Ron Ohlin's ability to lead the Board was also eroding.

30. The Board tried to assure that the "gator" was in good working order, to facilitate Livingston's ability to cover the Museum grounds. The gator had sometimes been inoperable, and it was repaired. The Board also required any weed spraying of Museum premises to be scheduled outside of Museum hours, but it really had no power to regulate the spraying schedules of surrounding property owners.

³ Livingston would later explain not opening the Museum on Sunday because she was very tired after Saturday. At the time she did not alert the Board she was not going to open on Sunday, nor ask if someone else could open and close the Museum on that Sunday. She knew of the Board's desire to have the Museum open instead of closed on that Sunday.

31. In October 2009, the Board Secretary was unable to attend the board meeting due to illness, and Livingston volunteered to prepare the minutes until a replacement was found. Livingston was increasingly fatigued in the evenings, and had some vision difficulties driving after dark, but she was tasked to continue in this “volunteer” duty, which she found onerous, until early in calendar 2010.

32. By October 2009 the investment funds of the Museum had shrunk to \$166,224.93 [Exhibit 3, board meeting minutes, October 27, 2009]. Continued losses that required more draws could exhaust the investment funds in perhaps five or six years. Some board members were blaming Livingston for the losses. It is wholly incredible that she had no awareness of this increasing discontent.

33. At the October 27, 2009, board meeting, the possibility of limiting Livingston’s hours, to avoid again needing to draw on investment funds to meet current expenses, was raised as new business (Exhibit 3). That same meeting also discussed two possible options for the near future – “go out and make more money or budget cuts” – and discussed a monthly budget limitation for the next two months of \$1,500.00 per month total.

34. This budget limitation, during the “off” season, if it had excluded wages and taxes, would have been reasonable. Referring to Exhibit 48, the total expenses for Fiscal 2010 (\$63,543.15) less wages and taxes (\$43,901.49) totaled \$19,641.66. Thus, average monthly expenses over that fiscal year, excluding wages and taxes, were \$1,636.81. The loss for Fiscal 2010 (\$5,863.16) averaged \$488.60 per month. The budget limit proposed in October, if the Museum had actually observed it for all five remaining months in the fiscal year, would have reduced the ultimate losses by almost \$700.00 [$\$1,636.81 \text{ minutes } \$1,500.00 \text{ equals } \136.81 ; $\$136.81 \text{ times } 5 \text{ equals } \684.05].⁴

35. It was not clear from the financial information how Livingston’s alleged performance problems, as opposed to the simple fact that her wages and hours within the scope of the letter agreement were a strain on Museum finances, might have been causing the Museum’s continued major losses. Without regard to that lack of clarity, board members were focusing upon Livingston’s failures to open and close the Museum herself on schedule. When Livingston began to rely upon some of the Museum’s volunteers to open and/or close, board members asserted that she was not following “Board policy” that only the Director/Site Manager was responsible to open

⁴ Board insistence upon Livingston being physically present at the Museum for her working hours did not abate during the off season. The budget limitation proposal was separate item from the proposal to limit Livingston’s hours to save money. Both facts support linking the budget limitation proposal to expenses not related to wages.

and close the Museum. One board member even refused to assist by opening the Museum, when Livingston called him on account of illness and asked that he use his Museum key to open that day. The same board member testified that he would drive by the Museum and decide whether Livingston was on site doing her job based upon whether he saw her vehicle parked at the Museum. When questioned by Livingston's attorney, he admitted that he had not known that Livingston's significant other sometimes dropped her off at work.

36. In late calendar 2009, Livingston, who still had not received a performance evaluation, a pay increase or a cost of living adjustment of her wages, began asking about getting a performance evaluation from the Board. By late calendar 2009, she was aware both that a "Director Review Committee" was working on her performance evaluation and that a particular "evaluation sheet" and draft "work sheet" were being used in the process. Exhibits 3 [October 2009 Board minutes] and 31 [emails about performance review].

37. On November 13, 2009, Ohlin gave Livingston a letter requiring her to limit her weekly hours to 30 and to limit her discretionary purchases to \$50.00 per month during November and December 2009. Exhibit 13. Knapp testified that Livingston did not limit her hours as directed, neither in 2009 nor thereafter, which was a continuing problem throughout her employment, since the Board could not predict how much her wages would be from week to week or month to month. Yet, the evidence is that over the entirety of Fiscal 2010, Livingston averaged slightly less than 24 hours worked per week [yearly wages, \$24,550.46, divided by hourly wage, \$20.00 {approximately 1,228 hours}, divided by 52 weeks, yields almost 24 hours per week].

38. During Fiscal 2011, the last fiscal year of Livingston's employment, her total wages were \$4,478.01, almost 240 hours at \$20.00 per hour, over slightly more than 7 weeks (51 days from April 1, 2010 through May 21, 2010, her last day, Exhibit 1). 240 hours divided by 7 weeks equals slightly less than 32 hours per week, the most hours per week Livingston had worked during her entire employment, and, for the first fiscal year during her entire employment, an average higher than 30 hours per week.

39. Knapp's testimony was not credible, except as applied to the seven weeks that Livingston worked in Fiscal 2011. The extra weekly working hours in that fiscal year 10-11 did represent another refusal by Livingston to follow directions, which, projected over the entire fiscal year, would have cost the Museum an extra \$2,080.00 had her employment and the extra two hours of work per week continued for the entire year [\$20.00 per hour times 2 hours per week times 52 weeks per year].

40. According to Ron Ohlin, her immediate supervisor and the Chairman of the Board from June 2007 until early in calendar 2010 when he suddenly left the Board, the Museum had no performance issues with Livingston through the end of calendar 2009. In light of the evidence regarding the worsening relationship between Livingston and an increasing number of board members, and the dissatisfaction of multiple board members with Livingston's performance, that testimony is not credible.

41. At the January 19, 2010 board meeting, which Livingston attended, an issue regarding an accusation by one board member that items he had donated to the Museum had been stolen by another board member came to a head. This accusation had been presented to Livingston some time before the meeting, and she had written it up and began the process of investigating the accusation. The Board decided to discuss the accusation in a closed session, two board members (apparently the two board members directly involved in the controversy) were asked to leave, and then Livingston and another individual were also asked to leave the closed meeting. Livingston was still doing the minutes of the meeting, and reported that what happened thereafter was unknown to her. A reasonable inference from the evidence, whatever else happened in the closed meeting, is that some of the board members already dissatisfied with Livingston's job performance criticized her handling of this theft complaint. Exhibit 4.

42. On February 10, 2010, Ohlin, Audrey Walleser and Dick Tombrink met with Livingston and gave her a performance evaluation prepared by surveying the individual members of the Board regarding each member's evaluation of her performance. Tombrink prepared the written account of what happened at that meeting, to which he attached his summary of the evaluation scores. Exhibit 32. According to Tombrink, in testimony as well as in the exhibit, Livingston was told of her strengths and of area in which she needed improvement, which included better recognition of her relationship with the Board (which viewed her as its employee, to supervise and direct) keeping a "sharper eye" on finances, improving relations with the Tractor Club, and improve outside maintenance and grounds care. There was no evidence that Livingston's attendance at the Museum during open hours was an issue in the evaluation.

43. There was some sharp discussion of why the Board was now calling Livingston a "curator" rather than "director," justified by Tombrink as being because the members of the Board were "directors," to which Livingston responded that they were actually "trustees" acting as a "Board of directors." Livingston very reasonably felt that the change in title from the title the job had when she was hired for it reflected the Board's attempts to demote her.

44. During the same February 10, 2010, meeting, after the conclusion of the evaluation, Livingston presented a letter, dated February 9, 2010, to the Museum, again requesting that it, among other things, define her position and renegotiate her employment contract. Exhibit 30. Tombrink pulled from “his file” a typed Museum Director/Site Manager job description developed in the process of seeking to fill that position that led to the hire of Livingston. Livingston denied ever receiving it. According to Tombrink, Ohlin responded that the document had been given to all applicants. In response to Livingston’s written request that the Board define her position, write a position description and renegotiate her contract, she was told that could “probably” be done, but would require the full Board’s input.

45. The information provided to Livingston on February 10, 2010, included a tabulation that 20.68% of the board members’ responses indicated that her performance needed improvement in some particulars and a tabulation that 9.15% of the board members’ responses indicated that her performance was unacceptable in some particulars.

46. The information also included a statement that “It is a matter of judgment by the evaluators whether this level of performance, including the attached comments and any other contributing factors not evaluated is acceptable for the Director’s continued employment.” Put in simpler language, Livingston was given a written statement that it would be up to the Board whether her performance, as reported in the evaluation, would be good enough for the Board to keep her as Museum Director.

47. At this point, Livingston could not reasonably have been unaware that the Board was considering ending her employment.

48. Livingston’s February 9 letter also contained a lengthy recitation of reasons why the Board’s performance evaluation (which she had not seen when she wrote the letter) was not valid. The letter is consistent with the testimony of board members that Livingston’s response to the “needs improvement” and “unacceptable” items was to deny their validity.

49. The long-standing concern of some board members that Livingston spent more than \$50.00 per month of Museum money on purchases without Board authorization was the subject of action at the February 16, 2010, board meeting, which Livingston did not attend. A motion was made, seconded and passed to put a letter of reprimand in Livingston’s personnel file because of \$251.02 of purchases unapproved by the Board (for postage, technical support and for Missoulian charges, perhaps for some advertising or subscription costs). The overall expenses for that

month had been \$3,456.64.⁵ Exhibit 5. The average monthly expenses without wages and taxes in fiscal 2010 were \$1,636.81, and the average monthly loss in that fiscal year was \$488.60. The extra amount Livingston spent in the month before the February 16, 2010, board meeting (\$201.02) amounted to more than 41% of a full month's average loss.

50. Nobody gave Livingston any notice, before or after this disciplinary action, that the Board was considering it or had taken it. This fact speaks volumes about the worsening relationship between Livingston and many of the members of the Museum Board.

51. During the February 16, 2010, board meeting, the investment fund account was reported to contain \$173,644.72, an increase of almost \$7,500.00 since the October 2009 board meeting.

52. Also during the February 16, 2010, board meeting, an amendment of Board policy was proposed and approved, reducing the number of board members constituting a quorum from 14 to 10. The minutes of that meeting reflect attendance by 11 board members, including Ohlin and Feist (identified as Board President and Vice-President, respectively). Although it appears that the Board, without having a quorum present, voted to reduce the quorum requirement so it could conduct business anyway. No issue was made, in this present case, about this apparent irregularity in procedure.

53. On March 15, 2010, Livingston sent a letter to the Museum requesting reasonable accommodation for her disability. Exhibit 18. In her letter, she wrote, "While I am still able to perform the normal duties and responsibilities of Director and Site Manager, for which I was hired, it's not the work, per se; it's the hours that prove difficult." She went on to state that she was "willing to modify my schedule to meet the museum's needs and offset that fixed schedule with some modified hours."

54. The next day, with a board meeting scheduled that evening, Livingston sent a "Hotmail Print Message" to Ron Ohlin at 5:00 p.m., stating that she had "personal business" she needed "to attend to this evening." Exhibit 115. Although the letter did not specifically say so, it clearly was signaling that Livingston would not be attending that evening's board meeting. In the letter, she referenced the previous day's letter requesting an accommodation. She also asked why her February report was "left out" of the February Board minutes, even though it had been left "in absentia" in the Board room, and noted that her March "in absentia" report was now

⁵ This appears to have been the entire expense figure, including wages and tax expenses incurred during that month.

in the Board room for that evening's meeting [Exhibit 22 is that report]. She complained about "finding out about a letter of reprimand" (see Finding No. 44) "by reading the minutes instead of being told personally" and asserted that the reprimand was invalid for lack of "established standards"⁶ and that she was entitled to respond to the allegations before the reprimand was given. She also challenged the "entire procedure" because she did not believe the Museum maintained any personnel records per se. She concluded the letter with an expression of her lack of appreciation for board members referring to her as holding the "less professional position" of curator instead of using the Museum Director/Site Manager job title under which she was hired.

55. By March 2010, the last month of the 09-10 fiscal year, it must have been apparent to the board members that the Museum was having a third consecutive year of losses. However, there is limited evidence and no documentation of what occurred at the March 2010 meeting of the Museum's Board.⁷

56. Ohlin apparently prepared, or at least signed, a letter of March 15, 2010, to Livingston, about exceeding her monthly spending limitations without prior Board approval, also obliquely referencing her use of volunteers to open and close the Museum⁸ and her handling of the theft accusations between board members,⁹ and finally citing the Museum being "arbitrarily closed on the Sunday of the Threshing Bee" the previous year as an example of "deportment and unprofessional behavior that is outside normally accepted guidelines for the interface with board members." Although the Board, during the March 16, 2010, meeting, did not approve sending this letter to Livingston, the content of the letter contains themes characteristic of the board members who wanted to get rid of Livingston. The evidence also suggests that at or near the time of the March board meeting, Ron Ohlin resigned as

⁶ It is appropriate to note that there clearly were "established standards" regarding how much discretionary spending Livingston could do per month without Board authorization, even though she had repeatedly ignored the limit upon her discretionary spending during her employment.

⁷ The April 20, 2010, Board Meeting Minutes indicate that there were no minutes of the March 16, 2010, Board Meeting. Exhibit 7.

⁸ The letter refers to "your recent approval of a volunteer's access to the museum including unattended (whether intentional or not) access to the museum's security system . . . not specifically approved by the Board." While this could refer to one specific incident, it also clearly applies to any circumstance in which someone other than Livingston opens or closes the Museum and adjusts the security system in doing so. The Museum's argument that Livingston simply failed to muster volunteers to help her by opening or closing misses the Board's unrelenting efforts to prevent her from having anyone else open or close the Museum.

⁹ The letter references "[a]ny and all matters that have or could have legal implications" as items that "must be presented to the Board as action items prior to legal consultation."

President, or Chair, of the Museum Board and apparently simultaneously resigned as a board member.

57. At the very beginning of Fiscal 2011, on April 2, 2010, a meeting between some members of the Board and Livingston was scheduled, to discuss her accommodation request. That meeting was postponed when Livingston insisted that she should be able to designate the board members who would attend any such accommodation meeting. The Board then advised her in writing that she had no right to decide which members would act for the Board at the meeting, and the meeting was rescheduled for April 14, 2010.

58. At the April 14, 2010, accommodation meeting, Livingston described some of the symptoms of her MS to the Board and made three specific requests. She requested use of a "gator" for transportation on the Museum grounds; she requested 24 hour advance warning of any weed spraying on the premises; and she requested the ability to call in to board meetings that were held after dark.

59. At the April 14, 2010 accommodation meeting, Livingston also mentioned flexible scheduling, although she made no request for accommodation on that issue. She also said that she would actively seek workable alternatives, such as recruiting new volunteers who could open the Museum when she was ill or arranging for a driver to transport her to the Museum for evening board meetings. Livingston was clear that she was investigating what resources were available to accommodate her disability.

60. The April 14, 2010 accommodation meeting was generally informational. Livingston made no specific requests regarding taking time off while the Museum was open, since board meetings after dark would not be during hours when the Museum was open. One board member noted that every employee has sick days which require accommodation. Livingston specifically told the Board that if it would not accommodate her requests, she would try in every way within her power to continue fulfilling the essential functions of her job.

61. On April 20, 2010, the Board held its monthly meeting, which Livingston attended. During that meeting a motion was made and passed that Livingston be limited to 30 hours of work a week, and that the Museum would be open 10:00 a.m. to 4:00 p.m. on Tuesday through Saturday each week (30 hours). Discussion of the accommodation issue involving Livingston was limited to a Board request that she provide a letter from her physician as soon as possible. Exhibit 8.

62. Livingston did provide a letter, dated April 22, 2010, written by her Nurse-Practitioner, Patricia Loge. It addressed pesticide and herbicide exposures only, and did not mention any other accommodation issues. Exhibit 11.

63. On May 18, 2010, the Board held its monthly meeting. Exhibit 6. During the meeting, the Board confronted Livingston about alleged absences from the Museum when it was open or supposed to be open, and discussed her disability accommodation request. The agenda did not include these topics.

64. Livingston was asked how the Museum was to accommodate her disability. She asked for continued use of the gator, and the gator was reported to be working (it had been down for repairs). The Board asked about a letter from her doctor, and she responded that the letter from her nurse was the only letter the Board would get, and the notification about spraying was the only current accommodation (aside from the gator) she needed. Acting President Joe Feist started a discussion about Livingston's inability to perform job requirements, referring to her alleged failure or inability to keep the Museum open for its scheduled hours. Livingston agreed that non-board members could remain for this discussion. The inability, as the Board perceived it, consisted of Livingston's absence from the Museum at any time, from opening through closing, when the Museum was open. These absences had commenced long before the diagnosis of Livingston's MS, and while it was reasonable for board members to expect such absences to continue in the future, the reasons for continued absences were more likely to be Livingston's views of what her most important tasks were, differed from the views of many board members. Yet, Livingston did express concern that as her MS progressed, she might need someone to open, or to close the Museum, or to be present in her absence while it was open, during times when her disease disabled her, although that was not yet the case.

65. The board members most actively opposed to Livingston's continued employment grasped at her MS as a justification for firing her for not being able to be present at the Museum to open it as scheduled, to meet and to greet visitors whenever the Museum was open, and to close the Museum as scheduled. Clearly, this was not yet the case, but her discharge was an outcome some of them had been seeking since the first fiscal year of her employment, and support for her discharge now, based upon future potential attendance problems, was urged in addition to support for her discharge because of past performance problems (as some members saw it). After this discussion, the meeting was adjourned.

66. After the meeting was adjourned, Joe Feist "made a motion to reopen the meeting to have a discussion on Tracy's employment." Exhibit 6. Some of the persons in attendance at the board meeting that had just closed were not present for this reopened meeting (Livingston being one of them). A portion of the minutes regarding the discussion on Livingston's employment during the reopened meeting were redacted. The minutes reported unanimous agreement of the Board (no

specification was made of the members participating in the reopened meeting) to terminate Livingston's employment, and that a motion to terminate her employment was made, seconded and passed, with the effective date of her firing to be Friday, May 21, 2010.

67. During the discussion of Livingston's employment in the reopened meeting hypothetical performance problems based on a limited understanding of MS were raised and discussed. One member of the Board stated, "We've been pussyfooting around and babying her." The specter of increased future problems helped sway board members to join the movement to end her employment.

68. The Board effectively decided, during the reopened meeting, that Livingston had a condition (MS) that prevented her from performing the essential functions of her job, with or without an accommodation. The Board made that decision without engaging in a reasonable and effective interactive process with Livingston that adequately defined her disability at its current stage.

69. The Board did not have a present justification for making the decision that Livingston was not able, with or without a reasonable accommodation that was not an undue burden on the employer, to perform the essential duties of her job.

70. On May 21, 2010, Livingston was handed a letter terminating her employment effective immediately. Livingston was terminated because the Board had decided that the accommodations she might need (based upon her attendance to date and her continued and perhaps growing need for more flexibility in attendance in the future) were not reasonable for the Museum Director, with an essential duty of being present to open the Museum, to be on-hand to greet visitors while the Museum was open, and to close the Museum at the end of its day. Exhibit 1. The substantial and credible evidence of record establishes that the Board never seriously considered any accommodation addressing this primary attendance requirement, did not investigate any possible accommodation regarding this attendance requirement and did not establish that use of volunteers and/or other employees to cover this duty at least some of the time would have been an undue hardship. The substantial and credible evidence of record establishes that Livingston was not at the time of her discharge unable to perform the essential job duties of her position, with or without a reasonable accommodation that was not an undue burden on the employer.

71. Had Livingston concealed the fact of her MS and made no request for accommodation, the Board would still have discharged her, because her view of the performance requirements of her job was in conflict with the views of (by the time of her discharge) a majority of the Board regarding those requirements, specifically including being ever present from personally opening the Museum through personally

closing the Museum. Livingston never believed that being ever-present at the Museum whenever it was open was the primary function of the Museum Director position, and her job performance reflected her belief. Livingston likewise never believed it necessary and never performed her job to assure that the Museum would be open extra hours or otherwise incur expenses or other burdens in support of the Tractor Club. When the Board attempted to identify for her the deficiencies in her performance seen by some board members, she attacked the entire evaluation process and denied its validity, which the Board also saw as a refusal to acknowledge that she worked at the direction and pleasure of the Board. Whether her beliefs about her job were valid or not, and whether the deficiencies in her performance as seen by the board members seeking her discharge were valid or not, the same conflict, with the same outcome, would have developed and would have culminated, even without Livingston's MS and her request for accommodation, at approximately the same time.

72. Because the Board would have discharged Livingston even without her MS and her accommodation request, she did not suffer any damages by reason of the discharge due to her accommodation request, since even without her MS and her accommodation request, the same result would have occurred.

73. The Museum did engage in illegal discrimination in discharging Livingston because of her disability and accommodation request, since it mistakenly viewed her as already unable to meet the attendance requirements it set, misconstruing the prospective nature of the flexible attendance accommodation she was proposing. The Museum treated that request as a current need, and failed and refused to enter into an effective interactive process with her. Therefore, reasonable affirmative relief to prevent any recurrence of this disability discrimination in the future is appropriate.

74. It is reasonable to require that the Museum undertake recurrent training of its board members in disability discrimination law regarding the accommodation process and adopt policies requiring such training for future board members, as directed by the Human Rights Bureau, with the Bureau to set the frequency of the recurrent training, taking into consideration the length of service for members of the Board and the efficacy of repeat training for long-term members. It is also reasonable to require that the Museum also consult with the Human Rights Bureau and adopt any policies regarding disability discrimination in employment and the interactive accommodation process that the Bureau may recommend as appropriate.

IV. Opinion¹⁰

Montana law prohibits discrimination in employment because of physical or mental disability. Mont. Code Ann. §49-2-303(1)(a). An individual has a physical disability when she has a physical impairment that substantially limits one or more major life activities, a record of such an impairment, or a condition regarded by the employer as being such an impairment. Mont. Code Ann. §49-2-101(19)(a)(i) through (a)(iii). Discrimination based on physical disability includes failure to make a reasonable accommodation required by an otherwise qualified person who has a physical disability. An accommodation that would require an undue hardship is not a reasonable accommodation. Mont. Code Ann. §49-2-101(19)(b).

A physical disability means a physical impairment that substantially limits one or more major life activities, a record of such impairment, or a condition regarded by the employer as such impairment. Whether a particular impairment is a disability under the Montana Human Rights Act requires a factual determination, made on a case-by-case basis. *Reeves v. Dairy Queen*, ¶26, 1998 MT 13, 287 Mont. 196, 953 P.2d 703. In making that factual determination, it is a matter of law that work is a major life activity. *Walker v. Montana Power Company*, 278 Mont. 344, 348, 924 P.2d 1339, 1342 (1999), *Martinell v. Montana Power Company*, 68 Mont. 292, 304, 886 P.2d 421, 428 (1994).

A person with a disability is qualified to hold an employment position if she can perform the essential job functions of that position with or without a reasonable accommodation. Admin. R. Mont. 24.9.606(2). Montana law prohibits employment discrimination based on disability, when the essential tasks of the job do not require a distinction based on that disability. Mont. Code Ann. §49-2-303(1)(a). As the administrative rule makes plain, disability discrimination includes removing an employee from active working status because of disability, without first making inquiry to determine whether a reasonable accommodation is appropriate for an employee who seeks to continue working despite a disability. The pertinent caveat regarding accommodation is that an accommodation is not reasonable if it involves undue hardship to the employer. Mont. Code Ann. §49-2-101(19)(b).

In May 2010, Livingston's MS had not reached the stage where she needed an accommodation to address the hours of work expected of her. She anticipated that might occur in the future, and her inquiry about flexible hours arose out of that future concern. At the time, with the use of the gator, Livingston was capable of performing her job duties without flexible hours. However, as the Museum's letter of

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.

May 21, 2010, makes excruciatingly clear, her employer did not believe she could meet its attendance requirements in the future, and therefore fired her, without engaging in the required interactive process.

In its defense of Livingston's discrimination complaint, the Museum asserted a number of problems with her. It asserted that she was more expensive than expected, worked more hours than her original agreement specified and exceeded her spending limits on purchases for the Museum. It asserted also that she was gone from the Museum far too often, so that the Museum was not open or not staffed during its usual hours, and that she failed and refused to keep the Museum open for the Tractor Club's annual "Threshing Bee," and otherwise disrespected this important "partner" of the Museum. Finally, it asserted that she resisted and refused the direction of the Board, denying deficient performance in the areas identified as needing improvement, and that she actively worked against the existing Board (trying to stage a "coup"). It also asserted that the long-standing conflict between the Board and Livingston predated both her notification to the Museum that she had MS and her subsequent request for an accommodation. The Museum presented testimony in support of all of these defenses, and some limited documentation that also supported these defenses.

None of the defenses set forth in the preceding paragraph directly rebutted Livingston's evidence of illegal disability discrimination. The Museum clearly stated, in her discharge letter, its belief that she was unable to meet attendance requirements of her job was the reason it was firing her, since it could not accommodate that inability.

The evidence amply supports the findings that the Museum engaged in illegal disability discrimination. The Museum did ask about what accommodations Livingston might need, and even asked for a doctor's note supporting the request. The board then disregarded Livingston's very limited accommodation request, the only pertinent part of which was the suggestion that she might need some time off in the future, a flexible schedule, and some time working from home, but would try to do her job without accommodation if the Board required it. The Board paid virtually no attention to what Livingston was saying, going forward and firing her based upon its mistaken belief that her perceived disability made it impossible for her to meet the attendance requirements of the job.

This case does not involve whether the board would have been right or wrong had it fired Livingston for her perceived past performance shortcomings. That would have been a decision based upon a business judgment of the board and unrelated to illegal discriminatory animus. This case involves whether Livingston's notification that she had MS and her subsequent request for an accommodation triggered a

decision to discharge her, without the requisite interactive accommodation inquiry. The evidence is clear that her MS and her request for a very limited present accommodation (and some possible need of more accommodation in the future) did trigger her discharge without that interactive process. However, by the time she made that request for accommodation, the process of firing her was already in motion and had become inevitable.

Perhaps even if Livingston had been present at the Museum for every single hour it was open she might still have been fired. Perhaps even if she had deferred to board members, the Tractor Club and all the ways that things had been done in the past she might still have been fired. Any thing is possible. But the facts of this case are that she was not present at the Museum for every single hour it was open. She did not defer to board members, the Tractor Club and all the ways that things had been done in the past. Although her discharge was discriminatory, because the board fumbled and failed badly at engaging in the interactive process required for possible accommodation, her discharge was also inevitable due to the conflicts that had developed between the Board and her, entirely aside from her MS.

Montana law follows federal precedent that a respondent can show that it would have taken the same adverse action even without its unlawful discrimination. *Crockett*, op. cit., 761 P.2d at 819; *Muntin v. State of Cal. P.&R.D.* (9th Cir. 1984), 738 F.2d 1054, 1056. This affirmative defense bears the rubric of a “mixed motive” case. In essence, Livingston proved illegal disability discrimination, but if the Museum would have discharged her anyway, even without its discriminatory failure to engage in the requisite interactive process, because of the ongoing conflicts between Livingston and the Board unrelated to her accommodation request, then there was no resulting harm to Livingston from the illegal discrimination – the same result would have occurred without it. *Laudert v. Richland County Sheriff’s Dept.*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. The mission of the department to “require any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against”¹¹ was not triggered by her discharge, since it would have occurred anyway.

How to redress a case of mixed motive discrimination is not a matter left to the discretion of the Hearing Officer – the department has already exercised its discretion by adopting a regulation that dictates the outcome when the evidence establishes a mixed motive case:

¹¹ Mont. Code Ann. §49-2-506(1)(b).

When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation, but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case . . . the commission will not issue an order awarding compensation

Admin. R. Mont. 24.9.611.

The idea of “mixed motive” cases serves solely the public interest. The complainant receives no recovery. The determination that a discriminatory motive played a part in the decision mandates injunctive and affirmative relief under the Act, to prevent future discrimination by the Museum. Mont. Code Ann. 49-2-506(1) and (1)(a). For Tracy Livingston, the “mixed motive” determination may accord her some vindication, but it bars any relief for her.

V. Conclusions of Law

1. The Department has jurisdiction over the charges of discrimination made by Livingston against the Museum. Mont. Code Ann. §49-2-509(7) MCA.
2. The Museum illegally discriminated against Livingston when it discharged her effective May 21, 2010, based upon its pretextual belief that she was unable, due to her MS, to meet the attendance requirements of her job as Museum Director/Site Manager, discharging her without first engaging her in the requisite interactive process to determine if she could perform those requirements with or without a reasonable accommodation. Mont. Code Ann. §§49-2-101(19) and 49-2-303(1)(a).
3. The Museum would have discharged her without the illegal discriminatory motive, because a majority of its members had decided that she was too expensive, that she spent too much time out of the Museum itself, and that she refused to pay sufficient deference to board members, the Tractor Club and the way things had been done in the past. Because her discharge resulted from a mixed motive, no reasonable measure to rectify any harm, pecuniary or otherwise, resulting from her discharge is proper, but affirmative relief, ordering the Museum to refrain from engaging in the discriminatory conduct in the future, and prescribing conditions on the Museum’s future conduct relevant to the type of discriminatory conduct found, is proper. Mont. Code Ann. §49-2-506(1) and (1)(a) and (b).

VI. Order

1. Judgment is found in favor of Tracy Livingston and against the Huntley Project Museum of Irrigated Agriculture on the charge that the Museum illegally discriminated against her when it discharged her due to a condition (MS) that it regarded as substantially limiting her ability to work by preventing her from being

present at the Museum to open it as scheduled, to remain at the Museum to meet and to greet any visitors while it was open, and to close it as scheduled, without first engaging her in an interactive process to determine whether with a reasonable accommodation for her perceived inability, she might be able to perform the essential duties of her position.

2. Because the Museum would have discharged Livingston even without its illegal discriminatory motive, for business reasons unrelated to that discriminatory motive, Livingston is not entitled to any recovery from the Museum, since the harm suffered resulted from action that the Museum would have taken anyway.

3. The Museum is ordered hereafter not to take adverse employment action against any employee because of physical disability, without first engaging in the requisite full interactive accommodation process. Within six months of this decision, the Museum must commence training of its board members regarding disability discrimination law and the proper accommodation process involved, and adopt policies requiring such training for future board members, as directed by the Human Rights Bureau, with the Bureau to set the frequency of the recurrent training, taking into consideration the length of service for members of the Museum Board and the efficacy of repeat training for long-term members. Within that same six-month period the Museum must consult with the Human Rights Bureau and adopt any policies regarding disability discrimination in employment and the interactive accommodation process that the Bureau may recommend as appropriate.

Dated: December 6, 2012.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer

Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Alex Rate, Rate Law Office PC, attorney for Tracy Livingston, and Eric Nord, Crist Krogh & Nord LLC, attorney for Huntley Project Museum:

The above decision of the Hearing Officer, 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).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal.