BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0121015521:

GERALD R. REISBECK, Charging Party,	) Case No. 963-2013
vs.	) **HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**
STATEWIDE PUBLISHING, INC., Respondent.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Gerald Reisbeck brought this complaint alleging that his employer, Statewide Publishing, Inc., discriminated against him on the basis of age and disability when it removed him from servicing accounts after his amputation and then fired him. Reisbeck also alleges that Statewide retaliated against him.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on May 6 and 7, 2013 in Helena, Montana. Rick Sherwood, attorney at law, represented Reisbeck. Cherche Prezeau, attorney at law, represented Statewide.

At hearing, Reisbeck, Jon Moline, Kim Holzer, Stacey Lamphear, Dennis Tagas, Stan Johnston, Parker Heller, Denise Street, Tara Werner, Phillip Johnson, Bonnie Andrew, Leslie Root, Wendy McKamey, Ron Vaughn, Donna Wagner, Jeff Hile, and June Kernaghan all testified under oath. Charging Party's Exhibits 1-9, 11,15 - 28, 30, 32 - 46, 48 - 52, 54 - 59 and Respondent's , R's 101-103, 105-110, 114, 116, 119, 120-142, 147-150, 152-154, 156 and 157 were admitted into evidence.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Hearings Bureau on July 23, 2013. Based on the evidence adduced at hearing

and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES:

A complete statement of issues is contained in the final pre-hearing order issued by this tribunal on April 30, 2013 and that statement of issues is incorporated into this final agency decision.

III. FINDINGS OF FACT:

1. Statewide Publishing publishes phone books for the Great Falls, Helena and Bozeman (a.k.a. Sky or Big Sky) market areas. Statewide sells advertising space in those phone books by employing outside sales representatives who follow up on leads and make in-person and telephone contact with potential and existing advertising customers. Outside sales representatives work on a strictly commission basis.

2. Statewide's personnel policies incorporate recognition of the requirements of the American with Disabilities Act (ADA). The policy specifically advises employees that the ADA prohibits employment discrimination based upon disability and requires employers to make employment decisions based upon the essential functions of the job, not a person's disabilities. Exhibit 1, Statewide Publishing Operating Policy Handbook, page 10. The personnel policies require that in complying with the requirements of the ADA, Statewide will:

> Identify the essential functions of a job.
>
> Determine whether a person with a disability, with or without accommodation, is qualified to perform duties, and determine whether a reasonable accommodation can be made for a qualified individual.

Id.

3. Phillip Johnson is president and general manager of Statewide. The Great Falls market is managed by Statewide employee Greg Mecham. The Bozeman and Helena markets are managed by Statewide employee June Kernaghan, who was 71 years old at the time of hearing.

4. Each year, Statewide conducts sales canvases over a period of months in each of the three market areas. For the canvas years of 2011 and 2012, the canvases began in August with a sales meeting which all sales reps were required to attend.

5. Statewide hired Reisbeck as an outside sales representative in 2004. As of the time of hearing, Reisbeck was 73 years old. Kernaghan was his sales manager. Reisbeck was an outside sales representative throughout his tenure at Statewide.

6. Reisbeck had serious performance issues by the time Statewide terminated his employment in 2012. Reisbeck's sales numbers were decreasing annually and he had become consistently more difficult to manage. He did not attend mandatory weekly sales meetings. He regularly failed to secure down payments from his customers. He ignored admonitions about the improper use of restaurant trade privileges. He regularly would put off selling advertising until the tail end of a sales canvas period, which would require Statewide to extend both the canvas period and the publication date. In the year before his termination, both Reisbeck's managers and his co-workers were very frustrated with Reisbeck's performance and its effect on the company.

7. Statewide had begun to address Reisbeck's performance issues in late 2010. During the end of the Bozeman canvas that year, Kernaghan took away some of Reisbeck's accounts and reassigned them to other outside sales representatives. Kernaghan explained to Reisbeck that he "wasn't getting to [his accounts] quick enough." Mecham also reassigned some of Reisbeck's sales accounts that year because Reisbeck was not working on his accounts as quickly as he should have been.

8. During the Helena canvas in 2011, Kernaghan only allowed Reisbeck to begin work on the contracts he had written in the first three months of the prior year's sales canvas. Kernaghan hoped that holding back some of Reisbeck's accounts from him would force Reisbeck to work his contracts earlier. Reisbeck, however, did not change his habits. As Kernaghan explained to Johnson in a June 21, 2011 e-mail:

> He has had plenty of work in his hands this canvas and still didn't send in hardly any contracts. I have done with this canvas exactly what you are suggesting to do next year but it doesn't seem to make much difference with him. He makes excuses, says it wasn't made clear to him, says he's confused when I have explained over and over to him the situation. He has done this same thing for so long, he thinks he can continue with no consequences. He tries to work around me by getting lead sheets on the contracts that I am holding and writing them anyway. When he sends in these rushed contracts at

> the end of the canvas, they are incomplete, no deposits, artwork not included causing the book to be published later and later. It's frustrating to me, the rest of the team, and everyone at corporate trying to get the book to the publisher. I've told him it's over.

(Ex. 114.)

9. Johnson reviewed Reisbeck's sales reports and discovered that:

- Reisbeck had turned in only 16 contracts in the 6-month period from July 1, 2010, through January 1, 2011.
- Reisbeck did not turn in any contracts for more than one month after the Helena canvas began in 2011.
- Reisbeck did not turn in any contracts for 25 weeks between July 5, 2010, and May 29, 2011.

10. As the result of Reisbeck's conduct, Statewide issued Reisbeck a written warning on July 13, 2011 and removed and permanently reassigned 22 of his Helena accounts. Kernaghan met with Reisbeck to discuss the disciplinary action. Kernaghan noted that she had:

> I have tried endlessly to get the point across to him, that he can't continue to do business in the same way he has without hurting the book. I have had countless meetings with him discussing all of this through 3 canvases. . . . He continues to twist and turn everything to defend his position.

(Ex. 116, p. 2.)

11. Statewide noted in the written warning that Reisbeck's sales had been tardy in the last several canvases and that Reisbeck had "been warned countless times that accounts would be pulled if you did not keep on track with sales during each canvas." Ex. 119. Statewide also noted that Reisbeck's late sales had resulted in late publication and distribution dates. (Ex. 119.) Statewide advised Reisbeck that any attempt to contact his re-assigned accounts "would be considered a breach of company policy and can result in termination." (Ex. 119.)

12. Even after Statewide took these significant steps to manage his performance, Reisbeck refused to accept any responsibility for his performance issues, including his untimely sales and his refusal to follow his supervisor's directives.

Reisbeck consistently seemed to believe that he was immune from rules imposed on all other outside sales representatives. Ex. 114.

13. Statewide commenced the 2011 Bozeman and Great Falls canvases in August 2011. Before the canvases began, Reisbeck assured Kernaghan that "he would start working the . . . canvases earlier to make sure he stays on track to get done on time." Kernaghan was hopeful that Reisbeck would "follow through with his good intentions" (Ex. 121) and agreed that Reisbeck could start working on his Helena accounts early, after he finished his work in the other two communities.

14. At the opening meeting for the Bozeman canvas, Kernaghan provided all sales reps, including Reisbeck, the standard "Kick-Off" handout. Reisbeck was present at the SKY-12 kick-off meeting and received the "SKY-12 Kick-Off" handout ("the Handout"). The Handout sets forth the beginning date, halfway point, and end date of the canvas and includes a formula for calculating sales pace during the canvas period, by both revenue numbers and number of contracts.

15. The Handout advises the sales representative that they "will be expected to and hold the responsibility to":

- "Meet your individual sales goals";
- "Stay on or ahead of pace";
- "Attend all meetings";
- "Contact management directly for extenuating circumstances"; and
- "Follow management's guidance with and toward accounts and clients."

(Ex. 107.) Reisbeck understood that these were expectations of his employment with Statewide that he was required to meet.

16. The Handout specifically advised sales representatives that the halfway point of the sales canvas was November 3, 2011. Sales representatives were counseled that by November 3rd, they "must be halfway through your revenue in dollars sold and number of accounts sold; halfway through your new business in dollars sold and white leads completed; halfway to your goal dollars in total sales." Ex. 107, pp. 1-2.

17. Kernaghan expressed her concerns about Reisbeck's timeliness six weeks into the 2012 Bozeman canvas, noting:

> Reisbeck is the same old story as he has always been . . . He is not helping our numbers at all. He gives the same old story that he is working accounts [in

> Bozeman] but they just aren't finished. Same promises every week that he will have sales next week . . . I honestly don't believe there is any wake up call that would get Reisbeck's attention enough to change his way of doing things. He tells me the same old stories (lies).

(Ex. 122.)

18. By October 19, 2011 (two weeks from the halfway point), Reisbeck had turned in only one sales contract and was far behind schedule. Kernaghan's other sales manager's weekly reports show that other sales representatives were regularly turning in weekly sales. (Ex. 110.) By mid-December, Kernaghan reported that she had not had any contact with Reisbeck for "over 3 months." (Ex. 123.)

19. On January 14, 2012, Kernaghan noted:

> At this time, [Reisbeck] is supposed to be working in Bozeman and then in GF. Greg called me to see where Reisbeck is in the [Bozeman] campaign and he is holding his accounts until I release him from this canvas. I have not had any sales activity from Reisbeck. Nor do I even get phone calls explaining where he is or what he is doing. I have repeatedly asked him to contact me and let me know what he is doing.

(Ex. 124.)

20. Reisbeck's lack of timeliness in meeting his sales goals caused publishing problems for Statewide. Statewide had to meet sales goals in order to meet publishing deadlines. Reisbeck's repeated refusal to meet the sales goals resulted in additional angst for his sales managers and his employer in concern over meeting deadlines for publishing and retaining and attracting customers.

21. Statewide felt that one of the essential functions of the outside sales representative position is the employee's ability to meet with business owners face-to-face to negotiate advertising programs:

> One of the conditions of working as an outside sales rep is that we are able to go out and visit our customers in the majority of cases. If we don't do that the customer isn't served properly. We also pay the reps a healthy commission to see customers face to face so that they gain a loyalty to our product and service.

(Ex. 126.)

22. Reisbeck did not tell his supervisor that he had a medical condition until January 2012. Before that time, the company knew that Reisbeck had diabetes but that medical condition did not affect his ability to work as an outside sales representative. In January 2012, Reisbeck told Kernaghan that he was "having trouble with his foot" (Ex. 124); however Statewide had no knowledge of the severity of the medical condition until late January 2012, after Reisbeck had been hospitalized and his leg had been partially amputated.

23. On January 25, 2012, Reisbeck's left leg below his knee was amputated. He convalesced for a period of three weeks and was released from his hospitalization in late February, 2012 and able to resume work on March 9, 2012.

24. On February 1, 2012, Johnson removed Reisbeck from his accounts in Bozeman. He contacted Kernaghan by e-mail that day. In his e-mail, he noted that he was removing Reisbeck from his accounts, stating:

"One of the conditions of working as an outside sales rep is that we are able to go and visit our customers in the majority of cases. If we don't do that, the customer isn't properly served. We also pay the reps a healthy commission to see the customers face to face so that they gain loyalty to our product and our service."

(Exhibit 5, Johnson's February 1, 2012 e-mail to Kernaghan.)

25. Statewide prohibited Reisbeck from contacting his clients at all and his accounts were assigned to other sales reps. He was permitted, however, to retain some of the commissions from accounts that he had already secured. Johnson set out a hierarchy of how Reisbeck would be paid the commissions on those existing accounts. Exhibit 5. Under that hierarchy, Reisbeck would be paid only 75% of the commission due him on those accounts in which the newly assigned sales rep had to do no more than "pick up a check." *Id.* If the new rep had to visit with the client for more than 20 minutes, Reisbeck would get only 50% of the commission on the account. If the client had not already entered into a contract, Reisbeck would get no commission on the account. *Id.*

26. A large number of accounts taken from Reisbeck were reassigned to Kernaghan. Exhibit 49. A large number also went to Ron Vaughn at Reisbeck's suggestion and one went to Donna Wagner, who was 65 years old at the time of hearing.

27. In 2010, Statewide had taken similar measures with former employee Wendy McKamey after she broke her leg and was required by her doctor to be off her leg for eight weeks. Statewide reassigned Wendy's accounts during her medical leave until she was able to make personal visits with her customers. Statewide also advised Wendy that she should not contact her clients by telephone during her medical leave period.

28. At no time did Statewide engage in any type of interactive discussion with Reisbeck about whether he could or could not fulfill the requirements of his employment, which included meeting with customers in person. They ordered him not to have any further contact, not even phone contact, with his established customers because Statewide was worried it might prove too confusing for customers.

29. In fact, Reisbeck's telephone contact with clients was not problematic. Stacey Lamphear, for example, stated specifically that she did not mind if Reisbeck contacted her by telephone. Another client. Belgrade Dental Associates' office manager, Dennis Tagas, told Reisbeck that there was no need for him to come down to process the advertisement for the 2012 campaign that Belgrade Dental would be running with Statewide. Testimony of Tagas. Indeed, Tagas had mostly dealt directly with Statewide over the years on the specific layouts of their advertisements, not in person with Reisbeck, and he did not find Reisbeck's telephone contacts with him to be confusing. Neither Lamphear nor Tagas complained to Statewide about Reisbeck's dealings with them.

30. Statewide also learned that Reisbeck had only sold five advertising contracts during the entire twenty-nine week period of the Bozeman canvas. These five contracts represented 14% of Reisbeck's renewal clients. In contrast, other sales representatives had completed half or more of their renewal contracts during the same time period.

31. In addition, although Reisbeck told his supervisors that he had completed five additional contracts prior to his surgery, Statewide discovered that this was not true. When sales representatives contacted these customers in February 2012 to pick up signed contracts and checks, they learned that contracts had not been negotiated prior to Reisbeck's hospitalization. (Kernaghan testimony.) Instead, Reisbeck and his sons had only recently contacted these clients by telephone and fax to commence the negotiation process.

32. Johnson removed Reisbeck from the Bozeman and Great Falls canvases on February 18, 2012. In doing so, Philip told Reisbeck during that conversation that

there was a greater than 50% chance that he also would be terminated from the Helena canvas. Johnson told Reisbeck that he would make the final decision about whether to terminate his employment at the beginning of the Helena canvas, which was to begin in late April 2012.

33. Reisbeck regularly missed the timing goals set by Statewide in the 2011Bozeman canvas. Indeed, Reisbeck himself acknowledged at hearing that he had sold only 5 out of his 35 contracts in Bozeman by February 9, 2012. He had several months prior to his illness and amputation to work on those contracts and yet he did very little. Statewide's removing Reisbeck from his accounts did nothing to impede his sales progress on those accounts.

34. Statewide employee Lisa Kramer sent Johnson an e-mail regarding a call Reisbeck made to her asking about deductions that had been made from his commissions checks. Reisbeck had told Kramer that he could get up and work again and that he had reported this to Kernaghan. Kramer forwarded this information to Johnson. In response, on April 5, 2012, Johnson e-mailed her back stating, among other things, "Currently, we are still not sure that we will keep Jerry on unless he can prove to me that he can get out and see the businesses face to face." Exhibit 54.

35. On April 10, 2012, Reisbeck faxed a message to Johnson in an effort to find out about whether he was still employed. In doing so, he noted that he wanted to go back to work in all three canvases, Helena, Great Falls and Big Sky. Exhibit 43. He also stated he could meet with clients both over the phone and in person and that he was able to drive and could "get my own help with my wheelchair." *Id.*

36. When they are traveling, outside sales representatives are allowed to use "trade" at restaurants, hotels, and other businesses in order to defray travel costs. Trade is a benefit that Statewide negotiates with customers (restaurant establishments, hotels and the like) in lieu of payment from those customers for advertising that the customer places in the phone book. Misuse of trade for non-approved purposes is effectively a theft of company resources.

37. Statewide's written policy makes it clear that the purpose of allowing trade is to "reduce the expenses of those who are working out of their area of residency." (Ex. 103.) Sales consultants regularly are reminded that "trade is a special perk" and "must be treated as a privilege not a right." (Ex. 106-108; Testimony of Kernaghan, Wagner, Vaughn.) Sales representatives are to "use trade sparingly and properly." (Ex. 106.) Sales representatives are not permitted to use trade in their hometown,

except with prior approval of their sales manager. Reisbeck had received the written policy contained in Exhibit 103 and understood that it governed his employment.

38. In June, 2011, Statewide prohibited Reisbeck from using any trade, including out of town trade, due to his misuse of trade at a local pizza restaurant. In January 2012, Statewide learned that Reisbeck had continued to use trade in Helena despite the express warning from his employer not to do so. Statewide found out about Reisbeck's continued use of trade when it received an invoice from Jorgenson's Restaurant for excess trade usage in December 2011, when the Helena canvas was not in session. Kernaghan requested copies of the receipts that had overdrawn the account and discovered that the trade had been used by Reisbeck. Reisbeck agreed to pay the $99.73 balance and it was taken out of his paycheck.

39. Statewide also learned that Reisbeck had used trade at Shellie's Country Café in Helena. When Statewide reviewed the signed invoices from Shellie's, the company discovered that Reisbeck had used over $800 worth of trade at the local restaurant. (Ex. 137.) Most of this trade was used during the months that the Helena canvas was not in session.

40. Donna Wagner was the Statewide sales representative for Red Fox Supper Club in Helena and had negotiated the use of approximately $1,700 in trade at the club during the 2012 canvas. When Donna visited the Red Fox in late April 2012, she discovered that all of the trade at the Red Fox – which was to have been used during the 2012 canvas – had been depleted. Reisbeck had used $1,678.75 of that trade between June 8, 2011 and January 13, 2012. even though he lived in Helena (and therefore was not eligible to use it) and even though he had his trade privilege revoked in 2011.

41. Reisbeck used trade to pay for his and family member's dinners at different restaurants around Helena. Reisbeck could not reasonably have considered this use of trade to be proper within Statewide guidelines. For example, Reisbeck regularly used trade to pay for dining for him and his family at Red Fox Super Club. Leslie Root, a bartender and waitress at the Red Fox, waited on Reisbeck and his family on many of those occasions. Root never heard the family discussing advertising and the meals were not business meetings. Even if those family gatherings had been meetings, Red Fox is only two miles from Reisbeck's house (testimony of Reisbeck) and using trade at that restaurant was a patent violation of the employer's policy. Moreover, he knew that he should not be using trade at all because his trade privilege had been withdrawn from him in June, 2011. Reisbeck's improper use of trade was a legitimate basis for his discharge.

42. Reisbeck used over $2,700.00 in trade at local Helena restaurants between May 2011 and January 2012. Most of this trade usage occurred after Reisbeck was prohibited from using any trade, including out-of-town trade. (Ex. 114.) Statewide was not aware of the extent of Reisbeck's misuse of trade until Donna Wagner visited the Red Fox in late April 2012. From Statewide's perspective, this trade abuse was the equivalent of theft of company resources. As Johnson stated, and the hearing officer agrees, "It's a big offense. It's like dipping into our till."

43. Johnson discharged Reisbeck from his employment on May 4, 2012, at the start of the 2012 Helena canvas. Johnson gave three reasons for the discharge. The first was that Reisbeck had only worked a "handful" of his accounts from July through January in the Great Falls canvases. Exhibit 131. The second was his misuse of trade. The third reason was selling of Helena accounts at discounted rates. *Id.*

44. The decision to terminate Reisbeck's employment was based upon a pattern of unacceptable performance, including continued untimeliness in completing sales canvases, dishonesty regarding his sales progress, and unauthorized use of trade.

45. Reisbeck's age did not factor into Statewide's decision to terminate Reisbeck's performance.

46. Disability factored into the decision to remove Reisbeck from his accounts in February, 2012 and the employer has failed to prove that disability played no part in that decision. The employer has proven that disability played no part in the decision to terminate Reisbeck in May, 2012. That decision resulted from wholly lawful concerns regarding Reisbeck's performance and improper use of trade.

47. As a result of removing Reisbeck from servicing his accounts, Reisbeck suffered a loss of commissions in the amount of $5,300.00 (from the reassignment of the accounts he had already started working on). Interest on the amounts of commission lost is $848.25, calculated from the date that presumably those account commissions would have been payable to Reisbeck , February 17, 2012 (at the close of the canvases in which he had the accounts; *see, e.g.*, Exhibit 107, which notes that the Sky Canvas began in August, 2011 and ended on February 17, 2012), through the date of judgment in this matter, September 25, 2013.[1] Reisbeck also suffered a

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[1]Interest was calculated by determining the daily value of the interest at 10% per year on the lost commission amount of $5,300.00, and then multiplying that daily amount by the number of days that elapsed between the loss of the amount, February 1, 2012, and the date of judgment, September 25, 2013. 585 days have elapsed between February 1, 2012 and September 25, 2013. The

loss of other commissions as well, but has failed to present reasonable proof of the amounts of those damages.

48. Affirmative relief must be imposed against Statewide to ensure that it does not engage in disability discrimination in the future.

IV. OPINION[2]

Reisbeck contends that he was discriminated against on the basis of age and disability and that he was retaliated against by his employer "for wanting to do work with a reasonable accommodation." Reisbeck's reply memorandum, page 7.

A. *Statewide Did Not Discharge Reisbeck By Placing Him on What It Termed "Medical Leave" But That Action Did Constitute Adverse Employment Action.*

As a preliminary matter, the parties disagree about what effect placing Reisbeck on what the employer terms as "medical leave" has upon the discrimination issue in this matter. The charging party maintains that placing Reisbeck on medical leave was a *de facto* discharge because he got no pay once that occurred. The employer contends that it was not. Resolution of this factual issue is important for sorting out Reisbeck's claims.

As a factual matter, placing Reisbeck on medial leave was not a discharge. While it is true that placing him on medical leave impacted his employment, he was not entirely severed from remuneration as he was still entitled to some commission compensation in accordance with Johnson's hierarchy (Exhibit 126). Moreover, Statewide had taken similar action with respect to employee Wendy McKamey when she had injured her leg in 2010. Thereafter, they returned her accounts to her after she had fully recovered. Moreover, while Johnson removed Reisbeck from the Great Falls and Big Sky canvases at about that time, he did not remove Reisbeck from the Helena canvas (although he indicated that there was a 50% chance that he would when the canvas started). As a matter of fact, then, Reisbeck's being placed on medical leave in February, 2012 was not a discharge.

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daily interest value of $5,300.00 at 10% interest per year is $1.45 (.10 divided by 365 = .00027 x $5,300.00=$1.45). $1.45 per day for 585 days equates to $874.13 ($1.45 x 585 days = $848.25).

[2] 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.

It was, however, adverse employment action. Adverse employment action includes "rates of pay or compensation and changes in compensation." Admin. R. Mont. 24.9.604. By placing Reisbeck on a reduced commission basis in February 2012, Statewide undertook adverse employment action that is sufficient to support that prong of Reisbeck's various discrimination claims. *Id.*

B. *Reisbeck Has Not Proven Age Discrimination.*

Reisbeck contends that he was discriminated against on the basis of age when his commissions were reduced and when he was subsequently discharged from his employment at Statewide. Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of age commits an unlawful discriminatory practice. Where, as here, there is no direct evidence of discrimination, the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College,* 275 Mont. 322, 912 P.2d 787 (1996). *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386. Under that burden-shifting scheme, a claimant who makes out a prima facie case of discrimination is entitled to judgment if the respondent does not come forward to rebut the prima facie case with evidence that the adverse employment action taken was done for legitimate business reasons.

A charging party establishes a prima facie case with evidence sufficient to convince a reasonable fact finder that all of the elements of the prima facie case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In an indirect evidence case, the elements generally consist of proof that (1) the charging party is a member of a protected class; (2) who was qualified for the position sought or held; (3) who was denied or who lost the position in question and (4) who was replaced by a substantially younger worker. *Clark v. Eagle Sys.,* (1996), 279 Mont. 279, 927 P.2d 995. In *Clark*, the Montana Supreme Court noted that the plaintiff's prima facie case was established by showing that the plaintiff (1) was in a protected class, (2) performed his job in a satisfactory manner, (3) was discharged, and (4) was replaced by a substantially younger worker. *Clark, supra*, 279 Mont. at 286, 927 P.2d at 999.

If Reisbeck presents a prima facie case, the burden then shifts to Statewide to show legitimate business reasons for its actions. *Clark, supra.* Should Statewide carry that burden, Reisbeck must then "prove by a preponderance of the evidence that the legitimate reasons offered by [Statewide] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). Reisbeck, however, at all

times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *St. Mary's Honor Center*, 509 U.S. *at* 507; *Heiat,* 912 P.2d at 792. At a minimum, Reisbeck must show that he is in a protected class, that he performed his job satisfactorily and that he suffered adverse employment action under circumstances giving rise to an inference that he was discriminated against because of age.

Reisbeck has failed to present even a prima facie case of discrimination based upon age because there is no evidence that his accounts were transferred to substantially younger workers nor is there any evidence that he was replaced by any worker, much less a younger worker, after his discharge. While the act of placing Reisbeck on medical leave which resulted in a loss or lessening of his commissions is adverse employment action, his prima facie case of age discrimination with respect to this facet still fails as a substantial number of his accounts were reassigned to Kernaghan, a person who is a scant two years younger than Reisbeck, and to Wagner who was 65 years old at the time of the hearing.

In *Clark*, the Montana Supreme Court affirmed a trial court's entry of summary judgment in favor of the employer, noting that, while the claimant had proven he was a member of a protected class, he had not proven any of the other elements for age discrimination. In particular, the court noted that the claimant had been replaced by a 51 year old worker, not a substantially younger worker. Like the situation in *Clark*, in the case before this tribunal, there is no evidence that the persons to whom Reisbeck's accounts were transferred were substantially younger workers.

The fact that three of Reisbeck's accounts were transferred to Vaughn does nothing to add to Reisbeck's prima facie case since those accounts were reassigned to Vaughn at Reisbeck's suggestion. Reisbeck has failed to make a prima facie case of age discrimination because the act of transferring his accounts under the circumstances of this case does not give rise to a reasonable inference that he was discriminated against on the basis of age. *Clark, supra*.

C. *Reisbeck has Proven One Facet of His Disability Discrimination Claim*.

Reisbeck contends that he was subjected to adverse employment action on three occasions (he contends he was fired each time), once on February 1, 2012 when he was not permitted to continue to make phone contact with his clients, once when he was pulled from the Great Falls and Big Sky canvases on February 18, 2012 and the third time when he was discharged from employment in May 2012. Reisbeck's

Post Hearing Memorandum, page 1. As already discussed, prohibiting Reisbeck from any contact with clients as of February 1 was adverse employment action that supports a prima facie case of discrimination. And it is obvious that removal from the Great Falls and Big Sky canvases and the discharge constitute adverse employment action. The question that remains is whether any of these adverse employment actions were carried out as a result of a desire to discriminate based upon Reisbeck's disability.

It is unlawful for an employer to discriminate against a person in a term, condition, or privilege of employment because of physical or mental disability unless the reasonable demands of the position require a distinction based on physical or mental disability. Mont. Code Ann. §49-2-303(1)(a); *McDonald v. Dept. of Environmental Quality*, 2009 MT 209, ¶39, 351 Mont. 243, 214 P.3d 749. The parties do not dispute that Reisbeck is limited in a major life function as a result of his leg amputation.

Discrimination based on physical disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical disability. Mont. Code Ann. §49-2-101(19)(b); Admin. R. Mont. 24.9.604(3)(c), 24.9.606(1)(a). A person with a physical disability is qualified to hold an employment position "if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical or mental disability." Admin. R. M. 24.9.606(2); *McDonald, supra.* An individual with a disability is 'otherwise qualified' . . . if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions." Accordingly, an employer has a duty to provide a reasonable accommodation to a person with a physical or mental disability if, with such accommodation, the person could perform the job's essential functions. This duty to make reasonable accommodations is an essential part of Montana's anti-discrimination statutes. *Hafner v. Conoco, Inc.*, 1999 MT 68, P 36, 293 Mont. 512, 293 Mont. 542, 977 P.2d 330.

To establish a prima facie case of discrimination disability under the Montana Human Rights Act (MHRA), Reisbeck must show (1) that he has a disability, (2) that he is qualified to perform the essential functions of his job, with or without reasonable accommodation, and (3) that he suffered an adverse employment action because of his disability. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999) (en banc). Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability …unless [the employer] can demonstrate that the accommodation would

impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. § 12112 (b)(5)(A). The proof necessary for discrimination cases is flexible and varies with the specific facts of each case. *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998).

Discrimination can be proved by either direct or circumstantial evidence. Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979); *e.g.*, *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 employer's adverse action and to the employer's discriminatory intention. *Elliot v. City of Helena*, HRC Case No. 8701003108 (June 14, 1989).

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.

The parties disagree over whether this is a direct evidence case. The charging party contends that it is, and the hearing officer agrees. Johnson's February 1, 2012 and April 5, 2012 e-mails constitute direct evidence of discrimination based upon disability. Because of these e-mails, Reisbeck has made out his prima facie case of disability both as to being taken off of his accounts and as to his discharge. He was disabled, he was subjected to adverse action, and the direct evidence of the basis for the employer's action, Johnson's February 1, 2012 and April 5, 2012 e-mails, show that Reisbeck was subjected to adverse employment action because of his disability.

The respondent attempts to topple Reisbeck's prima facie case by stating that he could not meet an essential function of the job. Statewide contends that an essential function of the job was face to face contact with customers. The evidence from the customers (for example, Tagas), however, belies that assertion. In the case of Belgrade Dental, it is apparent that Reisbeck's and Statewide's course of dealing with that client was primarily by telephone contact. Statewide made no efforts to

engage in any dialogue about a reasonable accommodation even though Reisbeck inquired about such an accommodation in February, March and April, 2012.

Moreover, even if it were true that face to face contact was an essential job function, the problem here is that it was not necessarily the case that Reisbeck could not meet face to face with his clients merely because he had suffered an amputation. He indicated that he could continue to do so and offered to do so in March and again in his facsimile to Johnson on April 10, 2012. Statewide refused to engage in any interactive process with Reisbeck to see if an accommodation was feasible or to undertake any type of individualized assessment to see if he could be accommodated. This violated Statewide's own policy which required Statewide to "determine whether a reasonable accommodation can be made for a qualified individual." Exhibit 1, page 10. Despite this policy, Statewide took no steps to make such a determination but unilaterally assumed that Reisbeck was no longer qualified to carry out the duties of his outside salesperson's position.

As the *McDonald Court* poignantly noted, the duty to make a reasonable accommodation is an ***essential*** part of the Montana Human Rights Act. Statewide, without discussing the issue with Reisbeck in any manner, made a unilateral decision that no accommodation could be reached for Reisbeck. To condone Statewide's conduct would undermine the policies behind the MHRA in a case such as this where it is not apparent either in fact or logic that Reisbeck could not under any circumstance fulfill the requirement to meet face to face with his clients and Statewide made no effort to undertake an individualized assessment of his abilities. This tribunal, on the basis of the reasoning in *McDonald*, has found discrimination to have occurred under similar circumstances in the context of providing governmental services. *Jaqueth v. Warm Springs State Hospital*, HR Case No. 0105014459, July 13, 2012 (holding that treating psychologist's decision not to provide accommodation to patient where no interactive process was engaged in violated the prohibition against disability discrimination).

Statewide's reliance on *Scott v. Montgomery County*, 164 F. Supp. 2d 502 (D. Md. 2001) is misplaced. In that case, Scott, who was a delivery driver for the employer, suffered from sleep apnea and was prone to falling asleep with little or no warning. Because of this condition, Scott's license to drive had been revoked, demonstrating that under no circumstance could he fulfill the essential function of his job, driving. In that case, engaging in the interactive process to ascertain whether an accommodation could be made would have be a futile act as there was no scenario under which Scott could have performed an essential function of his job (driving).

Id. at 507. Reisbeck's situation is different because he has put on evidence that he could perform the essential functions of his job after his recuperation from his amputation. Reisbeck has sustained his burden of making a prima facie case.

Because Reisbeck has made out a prima facie case of discrimination by direct evidence, Statewide must show that none of its adverse action against Reisbeck (either the initial removal of Reisbeck from the accounts or his discharge) was the result of discriminatory animus toward Reisbeck. Statewide has failed to carry that burden with respect to the initial removal from the accounts. Statewide has carried that burden with respect to Reisbeck's discharge.

As to the removal of Reisbeck from his accounts, Statewide has essentially argued that the decision to remove Reisbeck from his accounts was a legitimate business decision because Reisbeck could not meet with his clients face to face while he was recuperating. Statewide attempts to underscore the legitimacy of its decision by pointing to the fact that it undertook the same action with Wendy McKamey when she had broken her leg. The problem with this argument, however, is that Reisbeck's exisitng customers who testified at hearing, and in particular Dennis Tagas, undercut the asserted legitimacy of the employment action. Tagas' testimony convinces the hearing officer that phone contact during Reisbeck's convalescence was sufficient from a business perspective to maintain the accounts. Statewide has not provided sufficient evidence to overcome the direct evidence of discrimination contained in Johnson's e-mails, Reisbeck's inability to meet face to face with customers due to a leg amputation. Reisbeck has thus proven discrimination with respect to his removal from his accounts.

Statewide has proven, however, a very legitimate and compelling basis for discharging Reisbeck in May, 2012. Kernaghan's testimony is particularly compelling on this issue. For almost two years, Reisbeck had failed to keep up with deadlines for completion of sales canvases. He refused to keep up with timeliness even though he had been repeatedly warned that he must do so and even though he knew that his failure to do so caused substantial delay problems for the employer. Indeed, at hearing, Reisbeck did not dispute that he had been behind on his contracts (although he ascribed the blame for that to Statewide). Moreover, Reisbeck abused trade and continued to abuse trade even though he had been told not to use anymore trade. The evidence of Reisbeck's repeated refusal to meet time lines- -time lines that were critical to the employer's business success-- coupled with repeated misuse of trade despite having had his trade privilege revoked, overwhelmingly convinces the hearing

officer that Johnson discharged Reisbeck on May 4, 2012 for reasons unconnected to discrimination.

Contrary to Reisbeck's suggestion, the employer had become aware before the time Johnson fired him in May, 2012 that Reisbeck had used trade contrary to the 2011 warning him not to do so. *See, e.g.,* Exhibit 124, Kernaghan's e-mail to Johnson dated January 14, 2012. The citation to Reisbeck's misuse of trade in the May 4, 2012 discharge letter was not an after acquired basis for discharging Reisbeck and was a credibly legitimate basis for his discharge.

Moreover, while it is unclear to the hearing officer whether Reisbeck was or was not improperly discounting accounts (and for that reason, not found to be a proper basis for letting Reisbeck go), that does not lessen the fact that (1) unquestionably Reisbeck repeatedly failed to meet time lines even though he had been told not to do so and had promised not to do so in the future and (2) he had used trade in direct contravention of his employer's directive not to do so. The employer earnestly and correctly believed that Reisbeck was failing to meet deadlines and was using trade in violation of the prohibition upon him not to so. The fact that the employer may have been in error regarding the discounts does not demonstrate pretext under the facts of this case.

Reisbeck's argument that not discharging Reisbeck at an earlier time undermines the employer's position that the discharge was unrelated to discrimination is not convincing. Given the facts as adduced at hearing and the demeanor of the witnesses, there is nothing sinister to be gleaned from the fact that the employer did not discharge Reisbeck until May, 2012. The timing of the discharge does nothing to dispel the legitimacy of discharging Reisbeck for repeated malfeasance in failing to meet time lines and because of his insubordination with respect to the use of trade.

The parties have also argued the applicability of a mixed motive defense in this case with respect to the discharge. Under a mixed motive defense, a respondent who proves that the discriminatory action would have been taken even in the absence of unlawful discrimination is relieved from paying compensation to the charging party. Admin. R. Mont. 24.9.611. While the hearing officer agrees that in any event he likely would have found that the respondent had proven a mixed motive defense with respect to the discharge, it is unnecessary to do so under the facts of this case. Again, the evidence convincingly establishes that discrimination played no part in the decision to discharge Reisbeck. The discharge was motivated solely by legitimate

business concerns as outlined above and it is not necessary to consider the mixed motive defense in this case.

D. *Reisbeck Has Failed to Prove His Retaliation Claim.*

The charging party has also asserted a claim of retaliation. He has not, however, articulated the specifics of his claim regarding what action of the charging party should be considered protected conduct or what action of the employer is considered to be retaliatory.[3] The hearing officer gleans from the pre-hearing contentions and the post hearing briefing that the asserted protected conduct is the charging party's request to continue working via some sort of accommodation and the employer's retaliation was in discharging the charging party from his employment.

The elements of a *prima facie* retaliation case are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. *Beaver v. DNRC*, 2003 MT 287, ¶71, 318 Mont. 287, 78 P.3d 857. In MHRA cases, the relevant administrative rule provides that the elements of a *prima facie* case of retaliation in the employment context vary, but generally consist of proof that the charging party was qualified for employment, engaged in a protected activity, and was subjected to adverse action, as well as a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of the protected activity. Admin. R Mont. 24.9.610(2).

A charging party presents a prima facie case of retaliation when he shows that (1) he engaged in statutorily protected activity, (2) he was subjected to adverse action, and (3) that a causal link exists between the protected activity and the adverse action. *Beaver v. Dpt. of Natural Resources and Cons.*, 2003 MT 287, ¶ 71, 318 Mont. 35, ¶ 71, 78 P.3d 857, ¶ 71; *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). Protected activity includes opposing any act or practice made unlawful by the Montana Human Rights Act. Admin. R. Mont. 24.9.603 (1)(b).

As in a discrimination claim, in a retaliation claim a charging party must present evidence that is sufficient to convince a reasonable fact-finder that all of the

[3] The charging party's preliminary and final pre-hearing statements regarding the retaliation facet of the claim make a generalized assertion of retaliation but do not give fact specifics. See, page 4, paragraph 3, Charging Party's preliminary pre-hearing statement, dated January 22, 2013, and charging party's final pre-hearing statement, page 4, paragraph 27, dated April 22, 2013.

elements of a *prima facie* case exist. *St. Mary's Honor Center, supra. v. Hicks*, 509 U.S. 502, 506 (1993); *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005). If the charging party succeeds in making a *prima facie* case, the burden of production shifts to the respondent to show a legitimate, non-retaliatory reason for the action. *Id.* at 754-55. If the respondent meets its burden, the presumption of discrimination created by the *prima facie* case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* Reisbeck at all times retains the burden of persuading the trier of fact that he has been the victim of retaliation. *St. Mary's Honor Center at* 507; *Heiat,* 912 P.2d at792. "[T]o establish pretext [the charging party] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the respondent's] proffered legitimate reasons for its actions that a reasonable [fact-finder] could rationally find them unworthy of credence.'" *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642 (9th Cir. 2000) (*quoting Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (1999)).

Given the lack of any discussion from the charging party as to what protected activity he engaged in, it is not clear that anything other than Reisbeck's repeated requests to begin working despite his amputation could be construed to constitute the protected activity necessary to make a prima facie case of retaliation. Assuming that such action amounts to opposing discrimination and therefore constitutes protected activity, the charging party has failed to persuade the hearing officer that Statewide's asserted and wholly legitimate basis for discharging Reisbeck– his repeated failure to obtain contracts in a timely manner and his abuse of trade--were mere pretext. As noted above, Reisbeck for two years continued to miss deadlines for obtaining contacts, putting the employer "behind the eight ball" in getting its directories published. He did this despite repeated warnings, prodding and exhortations from his supervisors to stay on track. He repeatedly and consistently abused his trade privilege, so much so that it left the employer owing money to customers. He did this despite having his trade privilege revoked due to misuse. Reisbeck has failed to carry his burden of proof to show that these two reasons were pretext. His retaliation claim, therefore, fails.

E. *Damages and Affirmative Relief*

The department may order any reasonable measure to rectify any harm Reisbeck suffered due to illegal discrimination. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. *E.g., P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523, (1989). *See also, Dolan v. School District*

No. 10, 195 Mont. 340, 636 P.2d 825, 830 (1981); *accord*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

A charging party who has proved a human rights violation has a presumptive entitlement to an award of wages lost as a result of the illegal conduct. *Dolan, supra*. Such an award should redress the full economic injury the charging party suffered to date because of the unlawful conduct, including interest. *Rasimas v. Mich. Dpt. Ment. Health*, 714 F.2d 614, 626, (6th Cir. 1983).

Here, it is reasonably certain that Reisbeck lost $5,300.00 in commission income as a result of Statewide removing his accounts from him.[4] The respondent has failed to put forth any evidence that contravenes the amount of that presumptive loss. Reisbeck, therefore, is entitled to that amount as well as interest on that amount through the date of judgment.

Damage awards must also include compensation for emotional distress suffered as a result of the illegal discrimination when the facts show that the charging party has suffered from emotional distress. The value of this distress can be established by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶33, 308 Mont. 8, ¶33, 38 P.2d 836, ¶33. Reisbeck was subjected to emotional distress as a result of Statewide's unlawful conduct in removing him from servicing his existing accounts. He suffered the loss of his commission income and had to deal with the impact of the loss of that income. $10,000.00 is a proper amount to compensate him for the distress he suffered over losing that income.

F. *Affirmative Relief*

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). Affirmative relief in the form of both injunctive relief and training to ensure that the conduct does not reoccur in the future is necessary to rectify the harm in this case.

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[4] The respondent initially raised an issue about whether awarding the commissions to Reisbeck was appropriate, arguing that doing so would violate the 180 day statute of limitations contained in Mont. Code Ann. §39-3-207 in the Montana Wage and Hour Act. At the close of hearing, respondent's counsel conceded that an award of unpaid commissions emanating from discriminatory conduct in violation of the MHRA would not be subject to the 180 day statute of limitations contained in the Montana Wage and Hour Act. This concession moots issue number 5 contained in this tribunal's Final Pre-Hearing Order of April 30, 2013.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over the human rights complaint and the grievance. Mont. Code Ann. § 49-2-509(7); Mont. Code Ann. §87-1-205.

2. Reisbeck has proven that Statewide discriminated against him on the basis of his disability by removing his existing accounts from him on the basis that he was disabled. Statewide failed to provide or even consider any accommodation even though Reisbeck was qualified to carry out the essential functions of the position.

3. Reisbeck has failed to prove that Statewide discharged him based upon his disability. Statewide had legitimate business reasons for discharging Reisbeck based upon his repeated and protracted failure to timely obtain and service contracts and his misuse of trade even after having been told to not use trade.

4. Reisbeck has failed to prove that Statewide discriminated against him on the basis of his age.

5. Reisbeck has failed to prove that Statewide retaliated against him for engaging in protected conduct.

6. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Statewide must pay Reisbeck lost commissions in the amount of $5,300.00, pre-judgment interest on the lost commissions through September 25, 2013, and emotional distress damages of $10,000.00.

7. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Gerald Reisbeck and against Statewide Publishing on his claim that Statewide discriminated against Reisbeck in removing his existing accounts from him as a result of his disability.

2. Within 120 days after this decision becomes final, management personnel at Statewide shall be required to enroll in and successfully complete four hours of training on the subject of recognizing and preventing disability discrimination. Said training shall be conducted by a professional trainer or trainers in the field of personnel relations and/or civil rights law, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Statewide shall obtain a signed statement of the trainer or trainers describing the content of the training and the date it occurred. Statewide must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. Within 30 days after this decision becomes final, Statewide shall submit a copy of its disability discrimination guideline contained in its policies to the Human Rights Bureau for review and approval. Statewide shall implement any additional policies regarding prevention of disability discrimination as is determined by the Human Rights Bureau in its sole and absolute discretion.

4. Statewide is hereby enjoined from discriminating against any employee on the basis of disability.

5. Statewide shall pay Reisbeck the sum of $16,148.25, representing $5,300.00 in unpaid commissions, $848.25 in prejudgment interest through September 25, 2013 and $10,000.00 in emotional distress damages.

DATED: September 25, 2013

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Frederick F. Sherwood, attorney for Gerald R. Reisbeck, and Cherche Prezeau, attorney for Statewide Publishing, Inc.

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).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. ***The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Smith, (406) 444-4356 immediately to arrange for transcription of the record.***

REISBECK.HOD.GHP