BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0121015284 and FWP GRIEVANCE NO. 1-2013:

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| JOHN WACHSMUTH, | ) Case Nos. 288-2013 and 560-2013 |
| | ) HEARING OFFICER DECISION |
| Charging Party, | ) AND NOTICE OF ISSUANCE |
| | ) OF ADMINISTRATIVE DECISION |
| vs. | ) IN A HUMAN RIGHTS CASE |
| | ) AND FINDINGS OF FACT, |
| MONTANA DEPARTMENT OF FISH, | ) CONCLUSIONS OF LAW, |
| WILDLIFE AND PARKS, | ) AND RECOMMENDED ORDER |
| | ) IN A BOARD OF PERSONNEL |
| Respondent. | ) APPEALS GRIEVANCE |

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## I. PROCEDURE AND PRELIMINARY MATTERS

On December 12, 2011, Claimant John Wachsmuth filed a human rights complaint alleging that the respondent Montana Department of Fish, Wildlife and Parks (hereinafter FWP) discriminated against him, retaliated against him and violated the Montana Governmental Code of Fair Practices when it took action to remove him from a Regional Aquatic Invasive Species specialist position as a result of an unintentional cell phone message that Wachsmuth left on a female co-worker's cell phone. On September 21, 2012, Wachsmuth filed a grievance under Mont. Code Ann. § 87-1-205 alleging that he was aggrieved in a serious matter of employment when he was suspended from work for three days without pay in August 2012. On October 14, 2012, the claimant was allowed to amend his retaliation complaint to allege that the August 2012 suspension was also retaliation that violated the Montana Human Rights Act.

The parties agreed that the Step 3 grievance and the human rights complaint could be heard in the same hearing and further stipulated that the hearing officer could consider the transcript and testimony from the July, 2012 grievance proceeding and that nothing in the stipulation required "the hearing officer to make particular findings or conclusions in the Human Rights proceeding, regardless of his findings and conclusions in the Board of Personnel Appeals proceeding." Stipulation and

Order Concerning Use of the July 10, 2012 Transcript and Testimony, issued on December 14, 2012.

Hearing Officer Gregory Hanchett convened a contested case hearing in this matter on December 20, 2012 and January 10, 2013. Wachsmuth attended with counsel Frederick Sherwood. Jack Lynch and Rebecca Jakes-Dockter represented FWP. Wachsmuth, Erik Hansen, Matt Boyer, Joel Tohtz, Jim Satterfield, Eileen Ryce, Julie Sanders, Dave Risley, and Craig Hoffman all testified under oath.

The parties submitted a joint set of exhibits numbered 1 through 113 (See exhibit book entitled "Charging Party's And Respondent's Exhibits")that were admitted into the record by stipulation, except Exhibit 109, as noted in the transcription of the proceedings. In addition, the parties stipulated that the hearing officer could use the transcript of the proceedings from the July 2012 hearing on Wachsmuth's earlier grievance and that nothing in the stipulation required the hearing officer to make any particular findings or conclusion in the Human Rights proceeding, "regardless of his findings and conclusions in the [July 2012]Board of Personnel Appeals proceeding."

The parties graciously provided the hearing officer with post hearing briefing, the last of which was timely received on March 26, 2013 and at which time the record closed. Based on the evidence and argument promulgated in this matter, the following findings of fact, conclusions of law and hearing officer decision are made.

## II. ISSUES

1. Did FWP violate the Montana Human Rights Act by discriminating against Wachsmuth on the basis of sex or age or by engaging in retaliatory conduct when it removed him from the AIS specialist position and placed him in a Region 1 position at Sekokoni Springs fish hatchery?

2. Did FWP violate the Montana Human Rights Act by retaliating against Wachsmuth for engaging in protected conduct by suspending him from work for three days in August, 2012?

3. Was Wachsmuth aggrieved in a serious matter of his employment when he was suspended for three days in August, 2012?

4. If FWP discriminated against Wachsmuth or retaliated against Wachsmuth in violation of the Montana Human Rights Act, what measure of damages should be imposed?

*5.* If Wachsmuth's grievance over his three day suspension is sustained, how should his grievance be adjusted?

## III. FINDINGS OF FACT

1. Wachsmuth began his employment with FWP in 1983. At the time of the incidents giving rise to this case (2011), Wachsmuth was 57 years old.

2. Over the course of Wachsmuth's employment, FWP, as part of its responsibilities to maintain water quality in various watersheds and lakes and streams in those watersheds, developed a program to mitigate the impact of Aquatic Invasive Species (AIS) that began to infest Montana waters. The program to do so became known as the AIS program.

3. Wachsmuth began concentrating on AIS in 1991. Because he enjoyed the AIS specialty area so much, he took it upon himself to obtain a substantial amount of advanced education on the subject, including obtaining a master of science degree from the University of Denver in 2010.

4. Wachsmuth spearheaded a boat inspection program to monitor boats brought in from other states to reduce AIS contamination of Montana waters. He was frequently commended by public and private organizations for his work. Wachsmuth was able to communicate well with the various stakeholders impacted by the AIS program. He had the ability to assuage the stakeholders to create win-win situations. Wachsmuth was instrumental in developing partnerships for advancing the goals of the AIS program.

5. While working with the AIS program, Wachsmuth supervised part-time employees in the boat inspection program. He supervised his employees reasonably well and helped make the AIS program a success. While Wachsmuth was supervising the boat inspection program, things were "cohesive" and no one under Wachsmuth's supervision had a problem with Wachsmuth working as their supervisor. Indeed, Wachsmuth fostered an encouraging atmosphere for the development of the AIS program among his part-time charges.

6. Unquestionably, Wachsmuth was a valuable resource for the AIS program in Northwestern Montana. He was competent, motivated, and very dedicated to seeing the AIS program become highly successful.

7. Prior to 2011, Wachsmuth was under the supervision of John Tohtz. Tohtz fairly consistently rated Wachsmuth with threes and fours (on a scale of 4) in performance appraisals of Wachsmuth's work.

8. FWP began to draft a position description for the position of AIS Resource Specialist in Region 1, a position that Wachsmuth was slated to fill. Wachsmuth's placement in this position was non-competitive. The position included supervising volunteer and short term workers. It also encompassed the ongoing interaction with regional stakeholders that was so critical to the success of the AIS program. Commensurate with Wachsmuth filling the position of Regional AIS Specialist, Wachsmuth was transferred to the supervision of Eileen Ryce, the AIS coordinator.

9. One of Wachsmuth's co-workers was Christine Caye, Region 1 Fisheries Assistant. Caye primarily worked for Tohtz. On occasion, Caye would also complete work assignments that Wachsmuth assigned to her. Wachsmuth, however, did not supervise Caye.

10. Both Wachsmuth and Caye were selected to attend a leadership training conference to be held in June 2011 in Dupuyer, Montana. Caye was tasked with making travel arrangements for both herself and Wachsmuth to that conference.

11. Wachsmuth had also requested to be able to attend the PNWER training. On June 7, 2011, Ryce denied the request, noting that FWP wanted someone from the AIS program to attend, but found it to be more appropriate for "for the new AIS specialist out of Helena to attend." Exhibit 27. In explaining her rationale for not permitting Wachsmuth to attend, Ryce indicated that it was more appropriate for the person filing the AIS statewide position to attend that training since that training related to statewide AIS issues, not just regional issues.

12. On June 13, 2011, Caye called Wachsmuth on Wachsmuth's personal cell phone and left a message with him about travel to the training and what Wachsmuth could or could not bring along. Wachsmuth did not answer the call and Caye left a message on his phone. This set the stage for the incident that led to this hearing.

13. At the time Wachsmuth received the call, he was not working. He was on a kayaking excursion with Cooper. Wachsmuth owns the cell phone and pays the bill

for the cell phone. Unbeknownst to Wachsmuth, his cell phone (which he had just purchased and with which he was not familiar) dialed back to the number of the call that the cell phone had received, Caye's cell phone. Caye did not answer but her voice messaging came on. Wachsmuth's cell phone then proceeded to transmit the conversation he was having with Cooper. Neither Wachsmuth nor Cooper knew that their conversation was being recorded on Caye's cell phone voice messaging system.

14. Wachsmuth did not intend that his conversation with Cooper be directed at Caye and he did not and could not have known that Caye's voice messaging was recording the phone call. The recorded conversation between Wachsmuth and Cooper is for the most part muffled and unintelligible when played back on Caye's cell phone. The only audible portion of the call on the cell phone recording is at the end when Wachsmuth made what sounded like a comment to the effect of "We're having an f—in' hard time with these women," a comment that was obviously about his interactions with Caye.

15. Later that afternoon, Caye, who did not answer her cell phone when Wachsmuth's cell phone called back, retrieved the message. The content of the message, so inaudible that it could not be understood except for the phrase noted above, upset Caye. Still later in the afternoon, Wachsmuth called Caye back regarding her earlier message to him. Wachsmuth and Caye had a normal conversation. Caye made no mention to Wachsmuth about the conversation between him and Cooper that had been recorded on Caye's cell phone.

16. Caye took the recorded message to her supervisor who in turn contacted Region 1 Superintendent Jim Satterfield. Satterfield had to substantially enhance the audibility of the recording in order to make the recording understandable. Even undertaking the enhancement, however, did not increase the audibility except for the portion of the discussion noted above.

17. There is no question that at the time the call was first heard by Caye and subsequently by Satterfield, they knew or should have known immediately that Wachsmuth was not directing the conversation at Caye and that it was intended to be a private conversation between Wachsmuth and Cooper. Wachsmuth did not intend to have Caye hear his conversation with Cooper, and he most certainly did not intend to communicate disrespect directly to Caye.

18. Satterfield asked Caye if she wished to file a complaint with FWP against Wachsmuth about the conversation. Caye indicated that she did and she proceeded to do so. As a result, FWP launched an investigation into Wachsmuth's comment to

Cooper. Ryce, Human Resources Officer Julie Sanders, and Ryce's supervisor, Bruce Rich, conducted the investigation.

19. Wachsmuth was on his way to the leadership conference in Dupuyer when FWP management summoned him to Helena to meet with Ryce, Sanders, and Rich. No one at the meeting had heard the recording of the conversation. Ryce began to question Wachsmuth about the conversation but Wachsmuth had no idea what she was talking about since he was not aware that his cell phone had called back to Caye's cell phone and then recorded the conversation. Ryce asked Wachsmuth where he had been and with whom he had the conversation. Wachsmuth blamed Caye for listening to the message. Wachsmuth also stated that he could not recall whom he had been with or where he was since management could not produce the recording of the conversation. Wachsmuth's inability to remember the conversation was not unreasonable at that point given FWP's inability at that point to provide a copy of the recording for Wachsmuth to listen to.

20. Because no one at the meeting had heard the recording of the conversation, management decided to reschedule the meeting for a time after a copy of the recording was available. Ryce informed Wachsmuth that he could not attend the leadership conference being held in Dupuyer and then sent Wachsmuth back to Kalispell.

21. On June 16, 2011, Wachsmuth sent an e-mail to Ryce complaining that he had been discriminated against by being pulled from the June 13 leadership training conference. He also told Ryce in that e-mail that he felt his First Amendment rights had been violated.

22. After FWP obtained a copy of the enhanced recording of the conversation, they summoned Wachsmuth back to Helena on June 20, 2011 to continue the investigation. By this point, management had concluded that the conversation had not been directed at Caye and that it was meant to be a private conversation between Wachsmuth and Cooper. Ryce asked Wachsmuth to identify the person with whom he was having the conversation. At first he indicated that he could not remember. Later during the meeting, he indicated that he was with friends. Wachsmuth stated that he did not want to reveal who he was with. The interrogators asked him whether he was with a seasonal employee by the name of Chad. He denied that he was with Chad. He continued to blame Caye for listening to the message and insisted that his First Amendment rights had been violated.

23. Wachsmuth apologized to Caye, both in writing and in person.

24. According to the contemporaneous notes of the June 20, 2011 meeting, prepared by Julie Sanders (exhibit 66), Wachsmuth indicated that he was with friends on the day of the call. There is no indication in those notes that Wachsmuth ever stated in that meeting that he was not with a department employee.

25. On June 20, 2011, Ryce appointed Linnaea Schroeer to a newly created Helena based position of AIS specialist. The appointment was non-competitive. Exhibit 24.

26. On July 6, 2011, Wachsmuth e-mailed Schroeer to let her know that he would be happy to help coordinate the table exercise that was going to be held the following October at Lake Kocanusa located in Region 1. Ryce responded back to Wachsmuth's request telling him that Schroeer had been coordinating the table top exercise and that Wachsmuth was "plenty busy with the field crews, so I will have [Schroeer] take the lead." Exhibit 28, page 2. Wachsmuth e-mailed her back, telling her that while he was busy, the exercise was in his region and that he should be involved in the exercise from the start, effectively telling her that because he was going to be the Region 1 AIS specialist, he should be kept involved from the start because he knew the contacts in Region 1 and knew best how to utilize them. In response, Ryce reiterated that Schroeer was taking the lead on the table top exercise and because it involved four states and British Columbia, that Ryce and Schroeer were the best ones to coordinate the table top exercise for FWP. Exhibit 28, page 1.

27. As a result of the meeting, Ryce removed Wachsmuth from the AIS program and created a different position for him within Region 1. In a memo dated July 15, 2011 (Grievant's Exhibit 30), Ryce informed Wachsmuth of the decision. Wachsmuth's supervision was transferred back to John Tohtz, Science program Supervisor in Region 1.

28. After Wachsmuth's reassignment to Region 1, Schroeer took over some of his duties. These duties included taking over general supervision of part-time AIS personal in Region 1. Exhibit 33. 28 year old Jayden Duckworth, filling a part-time position in Region 1, was appointed to act essentially as an on-site supervisor over part-time AIS inspection personnel in Region 1.

29. Management obviously did not engage in any pre-planning nor did it give any thought to the consequences of the impact upon the program prior to moving Wachsmuth out of the AIS program and back into Region 1. Tohtz noted this specifically in his August 5, 2011 e-mail to Jim Vashro. In that e-mail, he noted that he was working to establish Wachsmuth's new assignment and to do that, he needed

"much more information about what precipitated his being moved back into region1 and "what our (FWP) expectations and limitations if any were in making this reassignment." Exhibit 54, 1st Paragraph. Tohtz persisted in his advice that the easiest and least complicated resolution to bringing Wachsmuth back into Region 1 "would be to have John continue doing what he was doing before being assigned to Eileen's supervision,' i.e., he would continue to at least some degree in doing his AIS work. Despite Tohtz' sage advice, Wachsmuth was completely excluded from any participation in the AIS program once he was placed back under the supervision of Region 1.

30. The decision to remove Wachsmuth from the regional AIS coordinator position was detrimental to the regional AIS program. This was confirmed in Tohtz's e-mail to Karen Zackheim wherein Tohtz exclaimed "I'd almost bet money that no one gave any thought to the damage this will do to my program." As Tohtz stated, and the hearing officer finds:

> We had spent three and a half years or something like that prior to John's assignment to Eileen's supervision working with BPA [Bonneville Power Administration] to develop support for AIS funding and contributions to that program. That was a very novel and unique success for us because BPA had, without, with very few exceptions, resisted funding AIS efforts. They understood that that was a hole into which a lot of money could be dumped pretty fast if they opened the door two [sic, should be "too"] wide. So we were very careful on how we had presented the, the case and argued how we would do it and, and accountability that would be in place and so forth. And to suddenly have our, our Regional Coordinator, after all these conversations neutered or eliminated, would not be received well or it would be hard to explain to the Bonneville Power Administration contracting officers I was working with. And, as it turned out, that's exactly what happened. They said, oh, well, we've rethought this and now all that funding we've been talking about all these, these strides we had made are, were back to zero. So we're starting over again.

Transcript II, page 30, lines 43 through 51, page 31, lines 1 through 4.

31. Placing Wachsmuth into a new position under Tohtz's supervision while ensuring that he had no involvement whatsoever with the AIS program was the managerial equivalent of attempting to place a square peg in a round hole. It made no sense in light of the damage that it would (and in fact did) cause to the

relationship with BPA and in light also of the shuffling that Region 1 would have to go through to create a job for Wachsmuth in Region 1 which was totally divorced from AIS functions. Tohtz tried on at least two occasions to explain this to management. In an e-mail dated July 27, 2011, Tohtz noted that "the only viable solution I can suggest is to put John back in his AIS responsibilities for the region without connection to the statewide effort." Tohtz reiterated his "great concern about the negative consequences associates with Karen's [Zackheim] suggestion to play musical chairs with our staff to make a spot for John Wachsmuth . . ."

32. In an last ditch effort to mitigate the negative impact that would accrue to the FWP by removing Wachsmuth from all AIS duties, Tohtz proposed to Ryce that 30% of Wachsmuth's newly created position in Region 1 include duties that involved local (Region 1) AIS support activities in what was clearly not a supervisory role but which included education and outreach and support to local partners in the AIS program. Exhibit 55. Ryce, however, balked at this, noting in a September 2, 2011 e-mail to Tohtz that she had "some major concerns over the 30% of the profile that relates to efforts within the Flathead basin." Exhibit 56.

33. Wachsmuth's new position is at the same paygrade that he was previously at, Grade 5. It does not carry with it any supervisory duties as did his previous work in the AIS program. He was assigned to fish hatcheries work at Sekokoni hatchery. Sekokoni, being a hatchery, is a moist environment that does have some mold. Wachsmuth's position description calls for about 50% of his work to be conducted at the hatchery. The new position, while different than the AIS position and carrying no supervisory responsibilities, is nonetheless an important position within the Region 1 hierarchy of positions and is important to discharging FWP's duties in Region 1.

34. On December 12, 2011, Wachsmuth filed the instant human rights complaint alleging sex and age discrimination and retaliation for engaging in protected activity.

35. Until March 2012, all of Wachsmuth's work time was spent at Sekokoni with no field work. Since March 2012, Wachsmuth has been involved in fish hatcheries work in the field so he is no longer spending as much time at Sekokoni. Wachsmuth has been permitted to attend leadership training. Wachsmuth has not been assigned any AIS duties.

36. Wachsmuth filed a grievance over his removal from the AIS position and his placement in the job working at Sekokoni. The grievance proceeded to a Step 3 contested case hearing held before this hearing officer in July 2012.

37. At the hearing, Wachsmuth revealed during testimony that he had been talking to Tony Cooper, an FWP part-time seasonal employee, during the conversation that was recorded on Caye's phone in 2011.

38. Wachsmuth and Cooper launched a business known as AIS Specialist, LLC. The business existed to provide AIS services to governmental agencies. Sometime during the summer of 2012, Cooper contacted Greg Hoffman, fishery biologist with the United States Army Corp of Engineers, to advise Hoffman of the services that AIS Specialists could provide to the Army Corp of Engineers, specifically services they could provide for AIS check stations. As a result of the contact, Hoffman invited Cooper to provide the Army Corp of Engineers with information about the services which AIS Specialists could provide.

39. Ryce and Hoffman had an ongoing working relationship as FWP and the Army Corp of Engineers worked collaboratively on certain fisheries projects. After Cooper had contacted Hoffman, Ryce and Hoffman had a discussion regarding the proposal for services submitted by AIS Specialists to the Army Corp of Engineers. During their conversation, Ryce expressed concern about Wachsmuth submitting bids to the Corp of Engineers as a private vendor while still being employed with FWP. Ryce also suggested that if Hoffman and the Corp entered into any working relationship with AIS Specialists, that could strain the working relationship between the Corp and FWP.

40. On July 31, 2012, Wachsmuth and Satterfield were at Region 1 headquarters in Whitefish. Wachsmuth received a telephone call about an AIS contaminant in a lake in the region. As Wachsmuth had been removed from AIS duties, he went into Satterfield's office to talk to Satterfield about that situation.

41. Satterfield brought Wachsmuth into his office, sat him down and closed the door. Satterfield then questioned Wachsmuth about Wachsmuth's human rights case asking him if he "was carrying around the document for the earlier decision by Human Rights regarding the reasonable cause unlawful retaliation charges." RT p. 9, lines 29-31. Wachsmuth responded that he was not carrying it around with him but that he had received it. Satterfield than stated to Wachsmuth "well you're strutting around feeling pretty good about that, aren't you?" RT p. 10, lines 5-6. Wachsmuth responded that he wasn't doing that. Satterfield then told Wachsmuth "You're doing

pretty good" and 'Why don't you take the deal?" RT p. 10, lines 6-7. Wachsmuth asked Satterfield what deal he was talking about. RT p. 10, lines 29-31. ' Satterfield responded "the deal, the deal for being retired December, 2013."

42. As the conversation went on, Wachsmuth told Satterfield that he had a choice as to when he wanted to retire and he said that he didn't really want an administrator telling him when to retire. In response, Satterfield told Wachsmuth that "the Department's not going to sit here and take this. Well, their going to take you on . Don't count your chickens. We're going to take you on and when you lose, [you are going to be] what we call in the industry, what we call in the industry is you're going to [be] goat fucked." RT II, page 10, lines 11-12.

43. After Satterfield said that to Wachsmuth, Wachsmuth was understandably upset and he asked to leave Satterfield's office. Wachsmuth went over to Tohtz's office and told Tohtz what Satterfield had said. Wachsmuth was so disturbed by Satterfield's comments that he asked Tohtz if he could take the rest of the day off.

44. About ½ hour after Wachsmuth and Satterfield had their discussion, Wachsmuth was standing outside the building talking to Matt Boyer, a fisheries employee. At that time, Satterfield walked by Wachsmuth and Boyer and yelled at Wachsmuth "Don't count your chickens."

45. On Wednesday, August 8, 2012, Risley authored an e-mail which he copied to Julie Sanders. In it, he complained that he "thought our negotiations during mediation were confidential and are now being used against us in both his earlier hearing and in the discrimination charge. Isn't there some ethics board or other recourse we have for this behavior? By the way, I plan to discipline Wachsmuth for lying during our investigation." Exhibit 63.

46. The predicate sentence in Risley's e-mail demonstrates that he was upset about the situation and leads to the factual conclusion that his decision to discipline Wachsmuth in August, 2012 had nothing to do with revealing Cooper's name during the July, 2012 hearing but was instead retaliatory for filing both the human rights complaint and the grievance.

47. On August 27, 2012, Satterfield provided Wachsmuth with a letter suspending him for a period of three days beginning on August 28, 2012. In the letter, Satterfield indicates that Wachsmuth was being disciplined for "dishonesty" during the investigation surrounding the unintentional phone call to Caye. Exhibit

64. The letter indicated that the purported basis for the discipline was that during the investigation in 2011, Wachsmuth had said he was not with an FWP employee during the cell phone call and that later during the July, 2012 hearing he had admitted that he was with Tony Cooper, a part-time FWP employee. *Id.*

48. FWP's contention in the letter that the suspension was undertaken to punish Wachsmuth for lying during the 2011 investigation is not credible. The testimony at the July, 2012 hearing was revealed to FWP on July 10, 2012 (the date of the hearing). Despite this, there is no inkling of any effort to discipline Wachsmuth for his alleged "lying" until Risley first mentions it in his August 8, 2012 e-mail, some twenty-eight days after the testimony was revealed to FWP. Indeed, the formal disciplinary measure was not undertaken until 19 days after Risley's e-mail, more than one month and two weeks after Wachsmuth's testimony at the July 10, 2012 hearing. Given Risley's predicate sentence in his August 8, 2012 e-mail which demonstrates his anger at Wachsmuth over the situation, the reason for the discipline was clearly and unequivocally retaliation. It was not motivated by any purported lying during the investigation.

49. When Satterfield presented Wachsmuth with the August 27, 2012 letter, he had Wachsmuth come into his office. During their conversation, Satterfield told Wachsmuth that Wachsmuth now had "four fouls." Satterfield then asked Wachsmuth if Wachsmuth knew what this meant. Wachsmuth acknowledged that he did, realizing that the obvious and much less than thinly veiled threat was that if Wachsmuth had one more "foul," he would be fired.

50. In the August 27, 2012 letter, Satterfield ordered Wachsmuth's suspension to take place from August 28, 2012 to August 30, 2012. Wachsmuth was required by the terms of the letter to report to work on August 31, 2012. That weekend was the Memorial day weekend of 2012. Wachsmuth had one month earlier asked Tohtz if he could take off August 31st to extend his memorial day weekend. Tohtz had agreed that Wachsmuth could have that day off. Despite the earlier agreement that Wachsmuth could have off August 31, 2012, Satterfield rescinded it and ordered Wachsmuth to report to work on the 31st. This conduct further demonstrates retaliation for engaging in protected conduct.

51. The only reason for suspending Wachsmuth was to retaliate against him for filing a human rights complaint which by law he had the right to do. No legitimate business reason existed for doing so. Because no legitimate business reason existed to suspend Wachsmuth, there was no just cause for the suspension.

52. Wachsmuth has sustained emotional distress damages in the amount of $20,000.00. Because Wachsmuth's suspension without pay came as result of illegal retaliation, he is entitled to recover that lost pay, both as compensable damages for the retaliation and as appropriate action to adjust his grievance. Interest on that lost pay is also due him as a result of the suspension flowing from the retaliation.

53. Affirmative relief in the form of an injunction to prohibit FWP from engaging in future retaliatory conduct is also warranted. Because the retaliatory conduct ensued from management in Region 1, the AIS program, and into the higher echelons of FWP in Helena (Risley's conduct), four hours training relating to preventing discrimination and retaliation must be required of management in Region 1, AIS management in Helena and FWP management in Helena.

## IV. OPINION[1]

A. *Wachsmuth Has Not Proven Age and Sex Discrimination.*

Wachsmuth contends that he was discriminated against on the basis of age and sex when he was reassigned from the AIS specialist position to the hatchery job at Sekokoni Springs fish hatchery. 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 or sex commits an unlawful discriminatory practice. When 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 indirect 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). The elements generally consist of proof that (1) the charging party is a member of a protected class;

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

(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. The prima facie elements for a sex discrimination claim are essentially the same, except for the fact the fourth element is changed to an issue of whether the position at issue was filled by a member of the opposite sex.

If Wachsmuth presents a prima facie case, the burden then shifts to FWP to show legitimate business reasons for its actions. *Clark, supra.* Should FWP carry that burden, Wachsmuth must then "prove by a preponderance of the evidence that the legitimate reasons offered by [BSB] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). Wachsmuth, 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. "[A] reason cannot be proved to be a '*pretext for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Heiat*, 275 Mont. *at* 328, 912 P.2d *at* 791 (*quoting St. Mary's Honor Center*, 509 U.S. *at* 515) (emphasis added). *See also Vortex Fishing Sys. Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15.

The *McDonnell Douglas* standard of proof is flexible rather than rigid. The four elements are not woodenly applied to every claim, but instead are adapted to the nature of the proof proffered. *See, e.g., Crawford v. Western Electric Company, Inc.* 614 F.2d 1300 (5th Cir. 1980)(fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case). Here, at a minimum, Wachsmuth must show that he is in a protected class, that he performed his job satisfactorily, that he suffered adverse employment action and that he was replaced by either a younger worker or female worker under circumstances giving rise to an inference that he was discriminated against because of either age or gender.

Wachsmuth argued that he proved his prima facie age and sex discrimination cases because (1) he was removed from the AIS specialist in Region 1and replaced by a younger male worker (age) and (2) a female was appointed through a non-competitive appointment to the statewide AIS specialist position (sex). He contended that his replacement by a younger worker and the female's appointment occurred even though Wachsmuth was a good employee and respected supervisor,

was motivated in his work and had good relationships with all Region 1 stakeholders. He further contended that additional indirect evidence of age and sex discrimination exists in FWP's repeatedly denying him opportunities for training (such as the PNWER training and the ability to participate in the Lake Kocanusa table top exercise). Taken together, he argues that this indirect evidence sustained his prima facie case.

The respondent does not dispute that Wachsmuth falls within a protected class (Respondent's post hearing brief, page 3) on both the age and sex complaints. Wachsmuth's removal from the AIS Coordinator position was adverse action. See, e.g., Burlington Northern Santa Fe Railway v. White, 548 U.S. 53, 70-71 (2006) (change of job duties can be materially adverse even where there is no change in compensation or benefits); Carroll v. Gates, 2010 U.S. Dist. Lexus 118539 (S.D. Ohio) (adverse employment action can include removing supervisory duties from an employee). The issue with respect to Wachsmuth's discrimination claims involve the sufficiency of the circumstantial evidence. Was FWP's placement of a 28 year old male into a half time position sufficient circumstantial evidence to support a prima facie case of age discrimination? Was FWP's non-competitive appointment of a female to the Helena based AIS position sufficient circumstantial evidence sex discrimination?

With respect to the age discrimination, Wachsmuth did establish his prima facie case, albeit a weak one, based solely on the fact that Jayden Duckworth was 28 years old. In the end analysis, however, Wachsmuth failed to persuade the fact finder that age was in any way a motivating factor in his removal from the AIS program. It was mere happenstance that the person who took over some of Wachsmuth's duties after his position was eliminated was younger than him. As explicated below, it was FWP's retaliatory animus towards Wachsmuth for engaging in protected conduct, not any discriminatory animus against him on the basis of his age or sex, that motivated his removal from the AIS program.

Three additional facts militate against finding that Wachsmuth established a prima facie case of sex discrimination. First, Wachsmuth's position was completely eliminated. No individual, of whatever gender, replaced him per se. Second, a portion of Wachsmuth's former duties were reassigned to a ***male***, Jayden Duckworth. Third, Linnaea Schroeer was appointed in a non-competitive process to assume some of Wachsmuth's former duties. But that does not demonstrate discrimination at all, because Wachsmuth himself was appointed to his AIS position in Region 1 without a competitive appointment.

Finally, FWP's asserted reasons for not letting Wachsmuth take the lead in the table top exercise and for not sending him to the PNWER training, as explained in Ryce's e-mails, are on their face legitimate and Wachsmuth has not demonstrated how her reasons were pretext. Thus, even if he had established a prima facie case of sex discrimination, weighing all the evidence finds the fact finder unpersuaded that there was any sex discrimination against Wachsmuth.

B. *Wachsmuth Has Proven His MHRA Retaliation Claims.*

Wachsmuth presented a two-fold retaliation claim against FWP. First, he contended that his removal from the AIS program and placement in the hatchery position was retaliatory, because before his removal he informed his employer, on June 16, 2011 (through an e-mail), and again on July 21, 2011 (through his attorney's letter), that he felt he was being discriminated against both on the basis of gender and age. Secondly, he argued that his three day suspension in August 2012, taken while FWP had actual notice of his pending human rights complaint, was retaliatory. Each of these arguments will be considered in turn.

Montana law prohibits retaliation in employment practices for protected conduct. Protected conduct includes opposing illegal discrimination or filing a charge of discrimination and assisting or participating in any manner in an investigation. Admin. R. Mont. 24.9.603 (1)(b), (c). In addition, the Montana Governmental Code of Fair Practices (GCFP) prohibits governmental agencies from retaliating against a person who engages in protected conduct. Mont. Code Ann. §49-3-209.

Retaliation under Montana law exists where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove his claim under the Human Rights Act by proving that (1) he engaged in a protected practice, (2) that thereafter his employer took an adverse employment action against him, and (3) a causal link existed between protected activities and the employer's actions. Admin. R. Mont. 24.9.610 (2).

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. When the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, either by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible.

Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. So. Cal. Permanente Med. Group*, 79 F.3d 859, 868 (9th Cir. 1996). If a respondent with actual or constructive knowledge of a human rights proceeding takes significant adverse action against a charging party during or within six months of the pendency of those proceedings, a disputable presumption arises that the action was in retaliation for engaging in protected conduct. Admin. R. Mont. 24.9.603 (3).

Evidence of statements made by a decision maker related to the decisional process at issue which reflect unlawful retaliation, is direct evidence of retaliation. *Cf., Laudert v. Richland County Sheriff's Dept.*, 2000 MT 218,¶29, 301 Mont. 114, ¶29, 7 P.3d 386, ¶29. Against a direct evidence prima facie case, 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 neither credible nor worthy of belief. Admin. R. Mont. 24.9.610(5); *Reeves v. Dairy Queen*, 1998 MT 13,¶17, 287 Mont. 196, ¶17, 953 P. 2d 703,¶17.

*1. FWP retaliated Against Wachsmuth By Reassigning Him Out of The AIS Program To Sekokoni Fish Hatchery.*

Wachsmuth's claim that his reassignment out of the AIS program was retaliatory necessarily relies upon circumstantial evidence. The first question is whether Wachsmuth has made out a prima facie case of retaliation with respect to his removal from the AIS specialist position. Unquestionably, he has. On June 16, 2011, Wachsmuth complained of unlawful discrimination against him because Chris Caye was permitted to attend the leadership conference in Dupuyer while he was not. Exhibit 29. His e-mail was protected conduct. His e-mail was written just one day after the June 15, 2011 meeting in Helena where the issue of the accidental cell phone call to Caye was first broached. Unquestionably, Ryce was on notice that Wachsmuth was complaining of discriminatory treatment emanating from FWP's reaction to the unintentional cell phone call. Thereafter, on July 15, 2011, FWP took adverse employment action against Wachsmuth by ousting him from the AIS program, severing his involvement and contacts with the program completely and placing him in a completely different job with no possibility of any involvement in the AIS program. Wachsmuth has demonstrated his prima facie case of retaliation.

To rebut Wachsmuth's prima facie case, FWP has proffered Ryce's reasons, in her July 15, 2011 memorandum to Wachsmuth, as its legitimate business reason for removing Wachsmuth. Ryce cited Wachsmuth's purported lack of both leadership and remorse during the investigation into the unintentional cell phone call. This

reason, if believed, is sufficient to meet FWP's burden to show legitimate business reasons for removing Wachsmuth from the AIS program.

As FWP has met its burden, the burden now swings back to the charging party to show that the stated business reasons were, in truth, mere pretext. This the charging party has done quite persuasively. As noted in excruciating detail in findings of fact 29 through 32, not only did the decision to remove Wachsmuth lack any rationale, it was absolutely detrimental to the AIS program. In light of the accidental nature of the cell phone call, the utter lack of intention on Wachsmuth's part to offend Caye, Wachsmuth's linch pin status in FWP's Region 1 associations with area stakeholders and the utter devastation his removal had on the AIS program in Region 1 and beyond, the hearing officer is convinced that FWP's purported legitimate business reasons are patently pretextual. The only reason Wachsmuth was removed from the AIS position was to retaliate against him for opposing discriminatory conduct.

In an effort to shore up its asserted reason for the adverse action, FWP has fallen back to what can be characterized as an argument based upon collateral estoppel. In essence, FWP contends that the finding in the earlier grievance of just cause for the reassignment precludes the charging party from showing pretext. The problem with this argument is that FWP has waived it. In the parties's stipulation regarding the use of the July, 2012 transcript, the parties agreed that "Nothing in this stipulation requires the Hearing Officer to make any particular findings or conclusions in the Human Rights proceeding, regardless of his findings and conclusions in the Board of Personnel Appeals proceeding." Stipulation and Order dated December 14, 2012. A failure to raise the defense of collateral estoppel results in a waiver of that defense. *See, e.g., Rule 8, Mont. R. Civ. Pro*, showing that res judicata (and by implication its issue preclusion counter part, collateral estoppel) is an affirmative defense that must be raised or is waived. *See also*, *Enoch v. Fair Food Stores, Inc.*, 232 Pa. Super 1, 331 A.2d 912 (1974) (noting that the purpose of requiring that collateral estoppel be affirmatively pled is to "narrow issues, avoid unnecessary trials and give the plaintiff adequate notice and an opportunity to rebut*)*. Here, FWP was copasetic with going to hearing without raising the issue of collateral estoppel. Because of this, FWP has waived the defense in this case.[2]

[2]Because the collateral estoppel issue has been resolved on the basis of the respondent's waiver of that argument, the hearing officer makes no finding as to whether or not a timely argued defense of collateral estoppel would apply as between the issue of just cause resolved in the earlier grievance and the present human rights claim of retaliation based upon reassignment out of the AIS program. The hearing officer notes, however, that he would most likely have not found that collateral estoppel

Finally in this regard, Wachsmuth also argues that Ryce's comments to Craig Hoffman of the U.S. Army Corp of Engineers regarding AIS Specialists in and of itself demonstrates retaliation. The hearing officer concedes that this is a close point. In the end analysis, however, Hoffman's testimony convinces the hearing officer that Ryce's comments to Hoffman were not undertaken in retaliation for Wachsmuth engaging in protected conduct.

*2. FWP Retaliated Against Wachsmuth In Suspending Him In August 2012.*

With respect to this claim, Wachsmuth enjoys a disputable presumption that FWP's conduct was retaliatory as the action was taken during the pendency of Wachsmuth's human rights complaint. Admin. R. Mont. 24.9.603 (3).

If Wachsmuth's retaliation claim is viewed as an indirect evidence case, the burden by virtue of the presumption shifts to FWP to show legitimate non-discriminatory reasons for suspending Wachsmuth. To do so, FWP relies on its perception that the suspension was undertaken because Wachsmuth purportedly told Ryce during the June 20, 2011 meeting that he was not with another FWP employee when the accidental and unintended phone call to Caye's cell phone occurred when in fact he was with Tony Cooper. FWP's perception is not supported by the facts. In addition, the circumstances surrounding the suspension (Satterfield's threats and Risley's ire over Wachsmuth's human rights complaint) wholly undermine any good faith FWP might otherwise claim for its alleged perception.

Any notion that the suspension was imposed as discipline upon Wachsmuth for lying is negated by Satterfield's and Risley's conduct. Wachsmuth was forced to come in on what had been a pre-approved day off. Satterfield was clearly incensed that Wachsmuth had obtained a cause finding in his human rights complaint and he made no effort to hide this fact. Satterfield virtually came unglued on Wachsmuth during their July 31, 2012 meeting. Wachsmuth had simply stopped by to ask Satterfield who was handling AIS issues as he had received a phone call about a problem. His follow through was rewarded by Satterfield bringing him into his office, sitting him down and accusing him of flaunting the fact that he had obtained a reasonable cause finding. Wachsmuth was doing no such thing and yet Satterfield

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applies to preclude Wachsmuth from litigating the issue of pretext due to the difference in issues between the human rights complaint and the earlier grievance and the new and substantially broader number of probative facts regarding the business impropriety of the reassignment. *Niles v. Carl Weissman & Sons, Inc.*, (1990) 241 Mont. 230, 786 P.2d 662; *Nasi v. State Dep't of Highways*, (1988) 231 395, 753 P.2d 327.

took the opportunity, out of the blue, to castigate Wachsmuth by telling him that he would get "goat fucked" by taking on FWP. This statement is direct and unequivocal evidence that FWP had the intent to retaliate against Wachsmuth for bringing his human rights complaint. Satterfield further demonstrated his intent to retaliate when he followed up by telling Wachsmuth more than once "not to count his chickens," on one occasion in front of another FWP employee. Later, Satterfield in a less than veiled attempt to threaten Wachsmuth, told Wachsmuth he had committed his "fourth foul," i.e. effectively telling Wachsmuth that if he didn't stop, he would be fired.

If Satterfield's conduct were not enough, Risley erased any doubt about the true motivation for the suspension through his August 8, 2012 e-mail. Risley was incensed that Wachsmuth had brought his claims against FWP.

FWP, as demonstrated through Tohtz's reviews, had considered Wachsmuth a good employee. That changed only after he challenged FWP's actions against him. FWP had already punished Wachsmuth for his conduct in July 2011 by moving him out of the AIS coordinator position. Punishing him again after he challenged FWP's action against him cements the fact that the suspension was retaliatory. FWP's claim that Wachsmuth was suspended for lying during the June 20, 2011 meeting is clearly pretextual. Wachsmuth's August, 2012 suspension was carried out in retaliation for Wachsmuth's filing of his human rights complaint.

Even in the absence of the presumption of retaliatory animus, Wachsmuth would prevail on this claim because Satterfield's comments during the July 31 and August 27, 2012 meetings provide direct evidence of FWP's retaliatory intent. Satterfield said to Wachsmuth"FWP is not going to stand here and take this " and "when you lose, what we call in the industry is you're going to be goat fucked." In addition, at the August 27 meeting, Satterfield told Wachsmuth in no uncertain terms that he was playing with only "one more foul available," implicating that if he did anything else, he would be put out of the game, clearly meaning he would be fired.

These statements are direct evidence of retaliatory intent that require FWP to come back in this matter and prove by a preponderance of the evidence that retaliatory intent played no part in the decision. *Laudert, supra*. FWP has not presented any evidence that overcomes the circumstances, content, context and nature of Satterfield's statements.

Moreover, FWP's contention that Wachsmuth lied by not disclosing during the June 20, 2011 that he was with Tony Cooper during the call to Caye's cell phone is not necessarily correct. Sander's notes of the June 20, 2011 meeting, while mentioning in detail that Wachsmuth at first said he could not remember who he was with and later stated he would not reveal who he was with, make no mention of Wachsmuth stating that he was not with an FWP employee during the call. Certainly, had Wachsmuth said such a thing at the June 20, 2011 meeting, Sander's notes would have reflected it. Wachsmuth's testimony at the July, 2012 hearing does not conclusively demonstrate that he made such an assertion at the June 20, 2011 meeting. Wachsmuth testified that he didn't lie at the meeting. RT I, p. 35, lines 41-42. Thus, the existence of FWP's factual predicate for its action, Wachsmuth's purported lie, has not been proved.

Regardless of whether Wachsmuth lied in not disclosing Cooper's presence, the direct evidence plainly shows that FWP retaliated against Wachsmuth for filing his human rights complaint. As already noted, the asserted legitimate basis for suspending Wachsmuth, his alleged lying, is in fact bald pretext, as demonstrated by Satterfield's and Risley's conduct. Wachsmuth has proven that FWP retaliated against him for taking protected action and, therefore, that FWP has violated the Montana Human Rights Act.

C. *Wachsmuth Has Been Aggrieved In A Serious Matter of Employment By Being Suspended In Retaliation for Filing And Pursing His Human Rights Complaint.*

An FWP employee who is aggrieved by a serious matter of employment and who has exhausted all administrative remedies within the department is entitled to a hearing before the Board of Personnel Appeals. Mont. Code Ann. §87-1-205. Any such hearing must be conducted according to Mont. Code Ann. §§2-18-1011 through 2-18-1013. *Id.*

Admin. R. Mont. 2.21.6509(1) provides that when formal disciplinary action is necessary, "just cause, due process, and documentation, or other evidence of the facts ***are required***." (Emphasis added). Admin. R. Mont. 2.21.6507(6) provides that formal disciplinary actions include suspension without pay. A FWP employee subjected to formal discipline may file a grievance. Mont. Code Ann. § 87-1-205.

The finding that the suspension was retaliatory obviates the need to analyze the grievance beyond noting that because the suspension was undertaken to retaliate against Wachsmuth, not to punish him for lying, there was no just cause for the suspension. Moreover, the lack of just cause is demonstrated by the fact that this

was the second time Wachsmuth was being punished for his conduct during the investigation. His ouster from the AIS program was more than sufficient punishment for what FWP perceived to be his offending conduct during the investigation into the accidental cell phone call.

D. *Damages.*

The department may order any reasonable measure to rectify any harm Wachsmuth suffered due to illegal retaliation. 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).

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. Wachsmuth has been subjected to substantial emotional distress as a result of FWP's conduct. He has had to live for over one year with the threat of discharge if he gets "one more foul." He has been harangued with what can only be described as concerted efforts from management to force him to retire even though he has had no desire to do so and does not plan on doing so. He has been reassigned out of the AIS program, a program which he devoted a substantial portion of his professional life to learning and mastering, and placed into a career track designed to keep him completely separated from the AIS program which is so near and dear to his heart. Wachsmuth's emotional distress is appropriately valued at $20,000.00.

In a grievance proceeding, an aggrieved employee who has demonstrated preponderantly that he has been aggrieved by a formal disciplinary action is entitled to have his grievance adjusted by ordering the agency to take action to do so. Mont. Code Ann. 2-18-1012. Wachsmuth is entitled to have his grievance adjusted by

ordering FWP to reimburse him for the three days of lost pay due to the improper suspension and by purging his employment file of the discipline.

Finally, the hearing officer notes that the adjustment of the grievance with respect to the three day suspension without pay and the award for lost pay in the human rights complaint due to the suspension should not be construed to permit the charging party to "double dip" on the award of those lost wages. The lost wages are compensable only one time as described in the order below.

E. *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.

The charging party has also requested that affirmative relief in the form of requiring FWP to assign AIS duties be imposed. The charging party also correctly notes that the funding for Wachsmuth's former Region 1 AIS co-ordinating specialist has now been cut, making placement back into the position impossible as the position no longer exists.

In situations where a charging party has been discharged as a result of illegal discrimination, reinstatement is the preferred method of remedying discrimination and should be utilized whenever appropriate. *See, e.g.*, *EEOC v. Prudential Fed. Savings & Loan Ass'n.*, 763 F. 2d 1166, 1172 (10th Cir, 1985), *citing Blim v. Western Electric Co.*, 731 F.2d 1473, 1479 (10th Cir. 1984)(reinstatement is the preferred remedy and should be ordered whenever it is appropriate). The reason is it mitigates the impact of the harm inflicted by not permitting the employer to escape the consequences of its unlawful conduct.

By analogy to the law on reinstatement, the charging party's suggestion that Wachsmuth be permitted to engage in AIS work to the maximum extent possible is sound. Tohtz's e-mails, and in particular his July 27, 2011 e-mail referenced in Finding of Fact 31, suggest a plausible method of doing so under Wachsmuth's current position. FWP should be ordered to assign as part of Wachsmuth's job duties AIS work to the maximum extent possible.

## 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. Wachsmuth has proven that FWP retaliated against him in both reassigning him out of the AIS program and in suspending him from work for three days in 2012. The retaliation also violates the Montana Governmental Code of Fair Practices.

3. Wachsmuth has failed to demonstrate that his reassignment out of AIS was undertaken in order to discriminate against him on the basis of either sex or age.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), FWP must pay Wachsmuth lost wages, pre-judgment interest on the lost wages damages through June 7, 2012 on the lost wages, and emotional distress damages of $20,000.00.[3]

5. 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 John Wachsmuth and against FWP as FWP retaliated against Wachsmuth in violation of the Montana Human Rights Act and FWP has aggrieved Wachsmuth in a serious matter of his employment.

2. Within 120 days after this order becomes final, management personnel in Region 1, the AIS program and at Fish, Wildlife and Parks shall enroll in and successfully complete four hours of training on the subject of recognizing and preventing retaliation in employment. 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

[3]The hearing officer was unable to find in the hearing transcripts evidence of the exact dollar amount of the three days lost wages. However, the liquidated amount is easily ascertainable by determining his daily rate of pay at the time of the suspension and multiplying it by 3. As it is easily liquidated, it must be awarded. The dollar amount of the interest due on those three days of lost wages through the date of entry of judgment, June 7, 2013, is also easily liquidated and must be awarded.

completion of the training, FWP shall obtain a signed statement of the trainer or trainers describing the content of the training and the date it occurred. FWP must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. FWP is hereby enjoined from unlawfully retaliating action against any employee engaging in activity protected by the Montana Human Rights Act.

4. FWP shall pay Wachsmuth the unpaid wages for the three days of his suspension in August, 2012 and $20,000.00 in emotional distress damages. In addition, FWP shall pay Wachsmuth interest through the date of decision, June 6, 2013, at 10% per annum on those three days of unpaid wages.

5. FWP shall develop and implement AIS job duties for Wachsmuth in his current position to the maximum extent possible and consistent with the level of responsibility he would have enjoyed had he not been removed from the AIS Region 1 coordinator position.

6. FWP shall purge Wachsmuth's employment file of any reference to the August, 2012 suspension including the August 27, 2012 letter of discipline.

DATED this 6th day of June, 2013.

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

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IN THE MATTER OF THE HUMAN RIGHTS COMPLAINT:

**NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

To: Frederick F. Sherwood, Morrison, Sherwood, Wilson & Deola, PLLP, attorney for John Wachsmuth, Charging Party; and Jack Lynch and Rebecca Jakes Dockter, attorneys for Department of Fish, Wildlife & Parks, Respondent:

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 original transcript is in the contested case file.**

IN THE MATTER OF THE GRIEVANCE:

NOTICE: Pursuant to Admin. R. Mont. 24.26.403(3)(c), this RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are filed, postmarked no later than July 1, 2013. This time period includes the *20 days* provided for in Admin. R. Mont. 24.26.403(3)(c), and the additional *3 days* mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 201503
Helena, MT 59620-1503