BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0121015678:

TARIK WATSON, Charging Party, vs. NIGHTINGALE NURSING SERVICE, INC., dba NIGHTINGALE NURSING AND CAREGIVING, Respondent.	)	Case No. 1537-2013 HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

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I. Procedure and Preliminary Matters

Effective May 27, 2014, the name of what previously was the department's Hearings Bureau has been changed to the "Office of Administrative Hearings" ("OAH"). Contact information regarding OAH and its employees are unchanged, except replacement of "Hearings Bureau" with "Office of Administrative Hearings."

Sua sponte, the Hearing Officer has changed the name of the respondent in the caption to conform to the name of the respondent set forth in Uncontested Fact No. 3 in the "Final Prehearing Order" (hereinafter referenced as "Nightingale").

Tarik Watson filed a complaint with the Department of Labor and Industry on September 12, 2012 and an amended complaint on November 13, 2012. He alleged that Nightingale discriminated against him in employment because of his race by failing to investigate and address his multiple complaints of racial harassment by one of the clients to whom he provided care as a caregiver for Nightingale, and retaliated against him for resisting this discrimination (through his complaints and through his request to no longer work with that client) by reducing his work hours and then discharging him. "Charge of Discrimination" (9/12/12) and "Amended Charge of Discrimination" (11-13-12). On April 24, 2013, the department gave notice Watson's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

Contested case hearing convened on August 27, 2013, in Missoula, Montana, concluding the next day, August 28, 2013. Daniel J. Flaherty and Patrick F. Flaherty,

Flaherty Law Firm, represented charging party Tarik Watson.[1] Karl J. Englund, Karl J. Englund, P.C., represented respondent Nightingale. The designated representative for the respondent, Patricia (Patty) Rigney, also attended the hearing. Watson, Rigney, Leah Bessette, Jeffrey A. Rhoa[2], Diane Holland, Tiffany Kammerer and Steve Richards each testified under oath. Watson and Rigney each testified a second time, Rigney, initially called by Watson to testify, was recalled to testify again, without objection, in Nightingale's case in chief. Watson, initially the first witness in his own case in chief, was called again on his own behalf as the only rebuttal witness.

Exhibits 2-4 and 101-114 were admitted into evidence. Exhibit 1 was refused on Nightingale's hearsay objection, with the reasons for the ruling memorialized in the record, on the second day of hearing after the conclusion of rebuttal testimony, on digital recording "Watson, Tarik Hearing (27).WMA".[3] Watson interposed a hearsay objection to Exhibit 115, the handwritten statements of Cindy Ball and Susan Sandau, as taken and retained by Nightingale at or shortly after the time when Rigney had disciplined Suzanne Hackworth and Watson in August 2012, as well as shortly after Watson's complaint was filed. Nightingale advanced the business records hearsay exception as the basis for admitting the exhibit, and argued that Exhibit 115 was not offered for its truth. The Hearing Officer reserved his ruling until after the parties completed their post-hearing briefing, to allow both sides to provide any additional authority for their respective positions. Having reviewed the legal arguments, Exhibit 115 is inadmissible hearsay, for the reasons stated in the "Opinion" herein, and is refused.

II. Issues

The issues here are whether Nightingale illegally discriminated against Watson in employment because of his race, and whether Nightingale illegally retaliated against Watson for protected activity (opposing what he perceived as racial discrimination), both being violations of Montana Human Rights Act, Title 49, Chapter 2, MCA. A full statement of the issues appears in the final prehearing order.

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[1] Patrick Flaherty was absent during the August 28, 2013, afternoon session that concluded the contested case hearing, without objection.

[2] Rhoa testified by telephone, without objection, and testified out of order, by agreement of counsel, as a witness called by Nightingale, but before Watson had rested his case in chief.

[3] In post-hearing briefing, Watson included a reprise of the same arguments about Exhibit 1 as he made at hearing. There was no reason to revisit the ruling made during the hearing, and based upon the same arguments, Exhibit 1 remains inadmissible and remains hearsay, since it had no relevance unless it was offered to prove the truth of the statements therein.

III. Findings of Fact

1. Charging Party Tarik Watson ("Watson") is an African-American. He began working for Nightingale in December 2011 as a Personal Care Attendant.

2. Nightingale Nursing Service, Inc., dba Nightingale Nursing and Caregiving ("Nightingale"), is a corporation registered to do business in the state of Montana. It is a home health care business providing a range of home health services and care, including in-home services, skilled nursing care, therapies, companionship and recreation and social services. Nightingale is one of twelve "sister companies" that provide a broad range of health care services for clients, across quite a number of states including Montana, with a thirteenth "sister company" (Consumer Direct Management Solutions) providing human resource, personnel, and payroll/finance and bookkeeping services to the other twelve.

3. Watson was hired by Nightingale on or about December 20, 2011 to work as a Personal Care Attendant (PCA). He was one of 60 or 70 employees (nurses and PCAs) of Nightingale in the Missoula vicinity. Watson's job was covered by a job description for the position of Personal Care Attendant /Certified Nurse's Aide (PCA/CNA). PCAs provide in-home personal care and activities incidental of personal care for Nightingale's clients under the direction of a nurse supervisor. Watson's supervisor was Leah Bessette. PCAs provide direct client care and social support to home-bound clients of all ages. Direct personal care consists of tasks related to the individual's physical care such as bathing, grooming, dressing, feeding, and eliminations. PCAs assist clients with physical activity involving changing positions in bed, ambulation, transfers, routine exercises, and routine care of prosthetic and orthopedic devices. PCAs are also responsible for household chores incidental to meeting the client's personal care needs. PCAs must consistently display a sympathetic attitude toward the care of the sick, elderly and disabled.

4. Nightingale maintained an employee handbook revised in March 2011. When Watson was hired, he was provided a copy of Nightingale's employee handbook and he acknowledged receipt of the handbook. He also acknowledged that he was responsible for familiarizing himself with the contents of the handbook and that he understood that failure to follow the policies and procedures contained in the handbook would result in disciplinary measures including dismissal. He also successfully completed training on fraud prevention and HIPAA-related privacy and boundary issues.

5. The employee handbook contained specific policies about harassment at work. Ex. 102, p. 3. Those policies included a prohibition against "all forms of harassment," specifically including harassment based on race. Id. Employees were

specifically instructed, "It is your responsibility to report any harassing behavior to your supervisor immediately." Id. In addition, the policies stated that "All reports of harassment shall be investigated promptly." Id. None of these specific provisions excluded harassment of employees by clients. Thus, all of these specific provisions applied to harassment of employees by clients.

6. Watson was oriented to the way in which Nightingale did business and was trained by Nightingale to be a PCA. Like all of Nightingale's newly-hired PCAs, Watson was informed when he was hired that because his work load depended directly on the number of clients to whom he provided care and the amount of services needed by those clients, he would not be guaranteed or assured of a minimum number of work hours. That information was not found in Nightingale's employee handbook. Watson thought he was a "regular full time employee" and nobody in Nightingale management ever told him he was not a full time employee. Watson was instructed how to complete a time sheet and he was informed that "padding" a time sheet was recording a false in or out time, that signing a time sheet was an acknowledgment that the caregiver actually worked the hours recorded and completed the tasks delineated on the time sheet, and that false information or misrepresentation of time or tasks on time sheets constituted fraud.

7. A significant number of Nightingale's clients were on Medicaid. Generally, when a person is disabled and deemed eligible to receive services through Medicaid, they have a case manager who determines the amount and kind of services to be provided to the person and who coordinates the person's care. When a disabled individual is determined by Medicaid to be eligible to receive home health care services, the eligible individual selects the home health agency to provide those services. The agency selected provides the authorized services and then bills Medicaid for the services provided. The agency has little or no authority over the eligible individuals who become its clients. It cannot discipline a client or force a client to do anything. It must provide the services for which it was contracted or, alternatively, discharge the client after providing the client 30 days advance notice.

8. Watson was generally assigned to work with Nightingale clients who lived in the Solstice Building, a building located in Missoula, housing people with physical and mental disabilities. Over the time of his employment, Nightingale had five to seven clients who lived in the Solstice Building, all of whom were receiving services through Medicaid. The Nightingale clients pooled some of their Medicaid-allowed hours of care for the purpose of having an on-call caregiver in the Solstice building to provide services to any of the clients in the event of unforeseen need.

9. One of Nightingale's Solstice Building clients was "Mr. H" (initials "CH") Mr. H was one of Watson's assigned clients. Mr. H had cerebral palsy[4] which resulted in significant mental and physical disabilities, and he relied upon a wheelchair for mobility. The services that Watson provided included getting Mr. H out of bed; getting him dressed; putting in his catheter; emptying his catheter bag; making his bed; making him meals; doing his hygiene (which included helping him shower, brush his teeth, wash his hair and shave); helping him position himself in his wheelchair; and helping him do his laundry.

10. Mr. H's services were funded through Medicaid. His Medicaid case manager, who was not a Nightingale employee, was Geret Chrestensen. Mr. H had the right to select an agency to provide his home health care. He had selected Nightingale.

11. Mr. H was sometimes difficult. He would, on occasion, be cross with or rude to his caregivers, especially when he felt that he was being treated like a child. Nightingale knew that he could be difficult. Prior to the events at issue in this case, Mr. H had not, to Nightingale's knowledge, crossed the line dividing boorish or rude behavior and engaged in illegal or unacceptable behavior. Nevertheless, working for Mr. H was not a highly sought assignment.

12. In the first half of 2012, Watson generally worked approximately 39 hours per week. He worked approximately 15 hours per week for Mr. H. In the first half of 2012, between 10 to 12 of Watson's weekly hours were "on-call" at the Solstice Building. That left 12 to 14 of Watson's weekly hours assigned to other clients. Watson's work schedule was prepared by a Nightingale scheduler, generally Diane Holland. Watson did not go to any Nightingale office except to turn in his time sheets. He testified that his weekly schedule was prepared and printed out in advance, so the he could pick it up and plan his week.

13. Watson's weekly schedules for Sunday, July 22, 2012, through Saturday, September 22, 2012, are Ex. 4. The first day of each weekly schedule is Sunday. The evidence established two kinds of caregiver appointments on Watson's schedule – appointments to go to an individual client's residence and deliver services to that client, and appointments to be on the premises of the Solstice building with the "on-

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[4] "Cerebral palsy is a disorder of movement, muscle tone or posture . . . caused by an insult to the immature, developing brain, most often before birth. . . . [I]n general, cerebral palsy causes impaired movement associated with exaggerated reflexes, floppiness or rigidity of the limbs and trunk, abnormal posture, involuntary movements, unsteadiness of walking, or some combination of these. . . . People with cerebral palsy often have underlying developmental brain abnormalities." Quoted from http://www.mayoclinic.com/diseases–conditions/cerebral-palsy/definition/con-20030502 as that web address on that website appeared on July 25, 2014.

call" cell phone, to provide services to any of the Solstice Building Nightingale clients in the event of unforeseen need (see, Finding No. 8). Appointments for each day, Sunday through Saturday, are listed in seven columns, one per day, starting with morning appointments on one page, and afternoon appointments on a second page. Immediately under the day and date, the appointment information begins with the times (start to finish) for the first appointment, under which appears the name of the client (blacked out except for the initials). Under the client name appears the client phone number. Under the client phone number appears a series of capital letters – the letters are "ABPAS" for appointments with individual clients to provide care to that client, and "SOLSOC" for appointments in the Solstice building with the "on-call" cell phone to provide services as needed to any of the Nightingale clients residing there. Nightingale is paid by Medicaid for the services delivered during both these kinds of appointments, and the services are documented in detail in the caregiver's time sheets (cf. Ex. 110, two pages of "Service Delivery Record" forms completed and signed by Watson, for 9/9 through 9/15/12 and 9/2 through 9/8/12). Under the appointment designation appears the date and the time scheduled to deliver the services (in hours or fractions of hours).

14. Scheduling PCAs for Nightingale clients involved regularly scheduling the same PCA for the same client as often as possible, and when possible also having a regular "back-up" PCA for that client for times when the PCA regularly providing most of the services to that client was not scheduled. Generally, when the same PCA was regularly scheduled for the same client or clients, better working relationships resulted, to everyone's benefit, although there were exceptions.

15. When a new client came to Nightingale, the services that client needed would be identified, and then Nightingale would offer those hours to Nightingale PCAs who had let the Nightingale schedulers know that they wanted more hours and offer hours not covered in that fashion to other Nightingale PCAs whose current schedules allowed them to accept additional assignments. Similarly, if Nightingale hired a new PCA, it would begin assigning available service hours with the clients to that PCA. Watson, for example, was assigned seven patients in the Solstice Building when he finished his training and qualified as a PCA. In his training, he worked with Mr. H, and thus he and that client met and got to know each other before Watson began actually delivering services "one on one" as a PCA to Mr. H. When possible in assigning a PCA to a client that PCA had not worked with before, Nightingale scheduling might start slowly, for introduction and orientation purposes, to see how the PCA got along with this "new" client, but if the hours were available and needed to be covered a new PCA might become a "regular" for a new client at once. Ideally, over time, hours with the "new" client would become regular assignments for PCAs and part of the usual schedule for the schedulers. With Mr. H and Watson, the

training provided that familiarity when Watson started out as one of Mr. H's regular PCAs. From Watson's testimony, he did not train with the other six clients he was initially assigned, but started in at once working for them as a PCA at the conclusion of his training.

16. During the scheduling process, a PCA wanting more hours or new PCAs or PCAs whose current schedules allowed them to accept additional assignments would also be offered hours with clients that would not immediately lead to regular assignments. Those hours of service needed to be covered, and a PCA accepting those assignments for a client who had not seen that PCA before would become at least a somewhat familiar face to more clients, and visa versa.

17. This scheduling practice was followed at the Solstice Building. Some of the regular PCAs for the Nightingale clients in the Solstice Building were able to work all or most of their weekly hours at that location, which meant considerably fewer hours of driving to scattered locations around the vicinity to deliver services to Nightingale clients. The regular PCAs tended to have consistent schedules from week to week. The availability for "on call" paid time at the building worked best if the PCA "on call" already knew and had worked at least occasionally for all of the five clients in the building, so that any emergency for any client that necessitated a response from the "on call" PCA would bring a PCA who was familiar to the client and who had some experience interacting with and assisting the client. All these factors reinforced the development of stable schedules for the PCAs providing services to the five Solstice Building clients.

18. As a result, when a client in the Solstice Building or a regular PCA for such a client decided that their work relationship was no longer working, for any reason, it was not always possible to provide a replacement immediately for all hours assigned to that regular PCA. Unless one of the other PCAs working with the Solstice Building clients was willing to do that work and had the additional hours available, one or more PCAs "new" to the building and clients had to be found and assigned, as their schedule or schedules permitted.

19. On May 8, 2012, Watson exchanged some e-mails with Bessette regarding Mr. H. He requested a meeting with her and with Nightingale scheduler Diane Holland. Ex. 114, 1st page and half of second page. Bessette asked for the reason for the meeting. Ex. 114, first page, 1:36 p.m. e-mail from Watson and 1:58 response from Bessette. Watson's cryptic reply was "Its [sic] not the elevator." Ex. 114, first page, 1:59. Bessette's next e-mail (Ex. 114, same page, 2:06) clearly indicates some further information had been communicated to her from Watson, outside of the e-mail string:

> I will ask Dianne when a good time to meet should be. When [name blacked out] starts acting like this towards a caregiver [it] usually means he feels like he is being treated like a child and cannot make his own decisions. He can get pretty "nasty". I do not want you to think that I am pushing this aside, but we have been busy and Dianne has a lot on her plate. Do you want to meet with Diane and I first to problem solve and then schedule a meeting with all of us to hash it out?

Watson responded, at 2:14 p.m. (Ex. 114, first page, last e-mail):

> Sounds good cus [sic – because] its becoming an every dag [sic – day] ordeal.

Twenty minutes later, at 2:34 p.m., Holland sent an e-mail telling Watson that Leah [Bessette] wanted all three of them to meet on May 15 at 3:15 p.m. at the Eagle Building [Eagle Watch]. Ex. 114, p. 2, first e-mail. Watson responded with what appears to be some relief. Ex. 114, p. 2, second e-mail (2:55 p.m.):

> Ok sounds good i just feel that [name blacked out] n i haven't been getting along for a few weeks i was hoping maybe it was just a mood or rut he was in but it seemed to be just a bit more than that.

20. The remainder of the e-mails in Ex. 114, second page, and those on the third page of the exhibit, occurred on May 16, 2012, the day after the meeting between Watson, Bessette and Holland. The messages in these e-mails are included here in their entirety, because their tone and what they do not say is significant:

> <u>May 16, 2:12 p.m.</u> – Watson to Holland and Bessette: Thanks for meeting with me. His mom called and said leah lied to his mom bout what we spoke of he tried to get me to tell him what happened at meeting. Boy the look he had this morning was priceless. He tried to have me lie to his mom for him. I staied [sic] out of it.
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> <u>May 16, 2:51 p.m.</u> – Bessette to Watson: Hi! He called me and of course, denied that he wasn't eating and keeping his laundry up. I did ask him some questions about his loss of appetite and he says he has been eating but we know differently. I asked why anyone would say differently. He said he is doing his laundry when it is full. I told him that if [he] does not need the time we can cut back until things change. He said no he needs the hours and will try to eat. I mentioned that he is at risk for skin breakdown if he continues to lose weight because he spends so much time in his

chair. We will see, it is pointless to argue. Just keep encouraging him to eat even if it is a piece of toast in the morning. Has he been choking more?

May 16, 3:21 p.m. – Watson to Bessette: Yes he has been choking a lot more now its more a steady for 5 to 10 minutes

May 16, 3:40 p.m. – Bessette to Watson: This could be why he is not eating. I asked him if he was choking more and he said no. He is hiding this because he does not want to have tube feedings again. Since he likes the coffee that is thicker liquid, maybe suggest he pick up foods like cream soups, yogurt, ground meats, applesauce. Food items like that which would make it easier to swallow and not so easy to choke on. Is he [sic] tilted his chin down when he drinks or eats? This will also help the choking. Just a reminder. Difficulty swallow[ing] is typical with his diagnosis, but there are some preventative measures.

May 16, 3:48 p.m. – Watson to Bessette: He had yogurt soup n other items he coughs only when i first get him up n when he drinks liquids other carrgivers [sic] know of his appetite also

21. Between May 8, 2012, and July 23, 2012, there were no further incidents involving Watson and Mr. H and no racial slurs directed at Watson.[5]

22. Watson was scheduled to work with Mr. H on July 23, 2012. When he came in that day, Mr. H cursed at him and used a racial epithet towards him. Watson thought that Mr. H, might have had a "rough weekend" and apparently was "worked up about some sort of event" and he "got upset with" Watson while he getting Mr. H dressed. Mr. H started repeatedly shouting at Watson, "Get the fuck out of my room, you black nigger bastard!" Watson testified that he asked Mr. H "three different times" to stop, and warned that he was going to record the shouting with his cell phone if it continued. Mr. H did continue shouting the same offensive words at Watson, and Watson did record it, after which he left Mr. H's room and called Bessette. Watson reported the incident to Bessette, consistent with his understanding of the Nightingale harassment policy. She responded that she would "Talk to" Mr. H, and asked Watson, "Are you going to go back in his room?" Watson told her that he would not be returning to Mr. H's room, that he wanted to put in a request to be rescheduled to another client at the earliest convenience and that he did not want to go back into Mr. H's room at all.

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[5] Despite Watson's varied testimony and contentions regarding many different occasions that Mr. H hurled racial epithets at him (discussed in the "Opinion," infra.), he stipulated to this uncontested fact.

23. Nightingale informed Watson, in response to his report, that he had the option of requesting removal from being a caregiver for Mr. H. Nightingale also informed Watson that it generally took approximately three weeks for Nightingale to hire and train a new caregiver (this information was also in the form that Watson signed, Ex. 107, "Request for Removal from a Home"). Watson accepted this method of removal, and Watson signed and submitted the form on July 23, 2012. The process of removing Watson as a caregiver for Mr. H began, and was completed by August 7, 2012, when Watson had his last appointment to go to Mr. H's individual residence and deliver services to him. Ex. 4, eighth page, showing "Sunday 8/5/2012" as the date for the first column of appointments, with the first appointment in that column being "CH" (Mr. H) for 11:30 - 12:30, designated "ABPAS." Watson's last appointment on call appointment charged to Mr H appears for Tuesday, August 7, 2012, 12:30 – 1:30, designated "SOLSOC" Ex. 4, fourteenth page.

24. Nightingale investigated Watson's complaint, but the record does not reflect any written documentation of Watson's complaint by Nightingale. However, on August 18, 2012, Mr. H signed an "Agency/Client Contract" in which he agreed, among other things, to be respectful of his caregivers, to "respond appropriately to prompts from caregivers," and have his life coach help him learn some behavioral skills to enable him to tell a caregiver to "please leave before I say something we both regret." Ex. 113.[6] From the testimony at hearing, this was an effort to address Watson's complaint and reduce any recurrence of it. Nightingale presented credible testimony that Mr. H was plainly told that further racial epithets towards caregivers could result in Nightingale giving him a thirty-day notice it was ceasing to provide him with services. The evidence does not reflect that Nightingale told Watson about what it had done to address Mr. H's conduct towards him.

25. Watson lost 15 or 16 hours a week when he requested to be removed from providing services to Mr. H. Watson considered himself a full time employee and expected Nightingale to assign him to one more other clients. However, Watson did not accept any assignments from Nightingale, whether he was offered one or several, because he wanted multiple hours and short drives. Nightingale had only two buildings with multiple clients in residence. Watson was unrealistic in limiting what he would accept to assignments similar to the ones he had. The evidence is clear that Watson refused to orient with a new client (with whom he might have developed a working relationship with regular hours), additional "field work" (instead of clients in

[6] Mr. H's first name was not blacked out in the last caption on the first page of Ex. 113. The Office of Administrative Hearings has blacked out that name at that point in that exhibit. Counsel are directed to make certain it is blacked out in their copies of the exhibit as well.

one or the other of the two residence buildings), and failed to return a call from a scheduling who had 15 hours of work per week putting multiple clients to bed. In each case, Watson saw problems with the potential work that led him to refuse it. Refusing assignments that were not similar to the ones he had resulted in giving the schedulers a message that Watson was not accepting assignments. The calls dwindled. His attitude continued to sour, because he felt the employer was punishing him for complaining about Mr. H. His relationships with his remaining clients suffered.

26. Near the end of August, Watson "pocket dialed" Nightingale Operations Manager Patty Rigney, who oversees all of Nightingale's operations in seven offices located throughout Montana. In some fashion, Watson's phone was bumped or otherwise accidentally triggered to call Rigney's number. The call went to her voice mail, and Rigney found a message in her voice mail that consisted of Watson's litany of complaints, dissatisfactions and resentments with Nightingale management, his coworkers and the clients, in a conversation with another Nightingale employee, which occurred at work at the Solstice Building. The conversation included Watson using profanity, making offensive remarks, violating the privacy provisions of HIPAA (in that he spoke about one client in front of another), and violating employee and client privacy.

27. Rigney investigated the matter by talking with both Watson and the other caregiver. Neither denied that the conversation occurred at work or that it occurred in the apartment of one of Nightingale's clients, with the client in the apartment at least part of the time. Rigney gave Watson a written reprimand dated August 30, 2012, for unprofessional behavior, HIPAA violations, boundary violations, negative attitude, carelessness and not following proper company procedures. The reprimand included the warning that future violations of Nightingale's employee handbook would result in termination from employment. The other employee involved in the conversation received a similar reprimand. The warning to Watson appears in its entirety as Ex. 108, dated 8-30-12, consisting of a one page "Employee Counseling Form" completed by Rigney, a handwritten continuation of Rigney's written comments on the back of the form (second page of the exhibit) and a typed summary of what was on the recording (third page of the exhibit).

28. In that written warning, Patty Rigney gave Watkins notice that he was no longer eligible for the Solstice Building on call phone assignment. Rigney had asked Watson if he would go to Mr. H's room in response to a call on the on call phone and Watson had told her "no." Since Watson was not available to all of the Solstice Building Nightingale clients, Rigney removed him permanently from the on call assignment. The substantial and credible evidence supports a finding that this was

reasonable. Watson was told again to contact Nightingale's scheduler if he wanted more work hours. He did not do so, and he did not return calls from the scheduler when she offered him work in the community. Watson now had an average of less than 20 hours of work per week, and his health insurance through his employer was cancelled as a result, leaving his son without the coverage that Watson was required by court order to maintain. He was furious.

29. Patty Rigney testified, on the first day of the hearing, that after Watson was disciplined (which occurred on August 30, 2012), she began to receive calls complaining about Watson's conduct from other employees, and responded by asking the callers to put their complaints in writing. Watson's counsel challenged her to explain how Ex. 115, two handwritten complaints about Watson from other employees, one dated August 30, 2012, and the other dated August 31, 2012, could have been so quickly prepared if they resulted from the process Rigney described. Recalled the second day of hearing Rigney testified that after reviewing her records, she now recalled that the other employee disciplined for the pocket dial conversation received her discipline on August 28, 2012. Rigney testified that she believed this other employee was the source of rumors and gossip about the underlying incident, and that explained how the two written complaints could have been dated either the day of or the day after Watson's discipline.

30. On September 8, 2012, Watson filed his complaint with the Human Rights Bureau against Nightingale. The complaint was transmitted to Nightingale on September 14, 2012.

31. Nightingale's employee handbook, the receipt for which Watson acknowledged when he was hired, provides that an employee will be terminated for any of the following acts: "reporting more time than actually worked, padding time sheets, showing up late or leaving early and not reporting the actual time working, or taking a break and not reporting the break as unpaid time by signing out and back in again."

32. On September 19, 2012, one of the clients for whom Watson was still caring asked that he no longer be assigned to her. Ex. 109. The Nightingale employee who reported this request was not identified by name (Id. No. 32660, no signature on the Activity Report that is Ex. 109).

33. Also on September 19, 2012, Holland received a call from a caregiver at the Solstice Building that Watson was not present for a scheduled visit with client "LH." Holland and Program Manager Jill Fredrickson went to the Solstice Building, arriving when Watson was scheduled to be caring for LH. They found LH outside the building smoking a cigarette, and Watson not present.

34. The next day, Watson was called to a meeting with Holland and Fredrickson and asked whether he performed the scheduled visit with LH. Watson at first said he did the full visit and later admitted that he did not. He had written down the full visit on his time sheet and had not changed it as of that time. He also said that on September 12, LH was not there when he went to the scheduled visit, he waited outside her door for an hour and 15 minutes, she did not show up, and he wrote on his time sheet that he provided services to her when in fact he did not.[7] The Service Delivery Record states, beside the line for the employee signature, that the employee certifies that he worked the hours recorded and completed the tasks checked on the time sheet. Watson signed it. Exhibit 110. Watson was suspended.

35. On September 24, 2012, Watson received an e-mail from Rigney indicating his employment had been terminated for committing timesheet fraud, negative attitude, unprofessional behavior, carelessness, boundary violations, and violating the employee handbook.

IV. Opinion[8]

The Montana Human Rights Act prohibits discrimination in employment based upon race, Mont. Code Ann. §49-2-303(1)(a), and retaliation based upon opposition to discrimination prohibited by the Act, Mont. Code Ann. §49-2-301. Tarik Watson, the charging party in this case, is an African-American. He asserted that he was subjected to racial harassment in employment, and then was retaliated against for opposing the racial harassment, all by his then-employer, Nightingale.

Racial Discrimination Charges

When there is no direct evidence of discrimination, Montana courts apply the 3-tiered burden shifting analysis of McDonnell Douglas Corp. v. Green (1973), 411 U.S. 792. Hearing Aid Institute v. Rasmussen (1993), 258 Mont. 367, 852 P.2d 628, 632; Crockett v. City of Billings (1988), 234 Mont. 87, 761 P.2d 813, 816; Johnson v. Bozeman School District (1987), 226 Mont. 134, 734 P.2d 209, 212-13; European Health Spa v. H.R.C. (1984), 212 Mont. 319, 687 P.2d 1029, 1032;

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[7] Nightingale has a standard practice all caregivers are supposed to follow in the event the client is not present for a scheduled visit. The caregiver is to wait for 15 minutes and then call the scheduler. If the scheduler is unable to find the client, the caregiver is to leave the premise and is paid for the 15 minute show up time. Nightingale does not (and cannot) bill Medicaid for the visit because it provided no services to the client. Watson's testimony indicated, at one point, that he had been trained to mark the services performed that he would have performed had the client let him in. This was not credible.

[8] 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.

Martinez v. Yellowstone County Welfare Department (1981), 192 Mont. 42, 626 P.2d 242, 246. Watson did not provide substantial and credible direct evidence of racial discrimination by Nightingale. There simply is no direct evidence of any racial bias expressed or manifested by any member of Nightingale management. The circumstances surrounding his discipline and his treatment after he complained about Mr. H are what Watson must rely to prove his case.

McDonnell Douglas applies to assure that plaintiffs can have their day in court "despite the unavailability of direct evidence." TWA v. Thurston, 469 U.S. 111, 121, quoted in Laudert v. Richland County Sheriff's Office, ¶ 22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386; see also Martinez at 245-46 (observing that one of the purposes of the McDonnell Douglas test is to ease the difficulty of bringing a claim of employment discrimination in the absence of direct evidence).

The McDonnell Douglas "burden-shifting approach" applies because this case involves circumstantial rather than direct evidence of unlawful discrimination (also know as a "pretext" case). See, Laudert, supra at ¶20. Watson did not produce any credible direct evidence that Nightingale management took adverse employment action against him because he was African American.

The McDonnell Douglas standard has three parts:

(1) Watson must establish a prima facie case of discrimination;

(2) if he makes such a showing, the burden shifts to Nightingale to produce a legitimate, nondiscriminatory reason for its actions; and

(3) if Nightingale makes such a showing, Watson may show, by a preponderance of the evidence, that the legitimate reasons offered are only a pretext for discrimination.

Vortex Fishing Systems, Inc. v. Foss, ¶15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

The elements of a prima facie case (the first tier) depend on the facts of the case. Vortex Fishing Systems at ¶16. In this case of racial harassment, Watson had to show that (1) he was a member of a protected class (in this instance, African American); (2) he was subjected to racial harassment by one of his assigned clients, Mr. H, and (3) Nightingale failed immediately to investigate and address his complaints of racial harassment and did not promptly act to protect him from the

racial harassment once it knew or should have known about it. Id.[9] See also Admin. R. Mont. 24.9.610(2)-(4).

Watson is African American. This established the first element of his prima facie case. With regard to the second element, Watson proved that he was working successfully as a caregiver for Nightingale, averaging 39 working hours a week, and was subjected to racial harassment by Mr. H, one of the Nightingale clients to whom he was assigned to provide care, on July 23, 2012. He established the second element. With regard to the third element, when Watson notified Nightingale, and requested removal from assignment to Mr. H, Nightingale took two plus weeks to effectuate the removal, and did not replace the working hours lost by Watson. Watson established the third element, generating a presumption of discriminatory intent.

Watson's prima facie case under McDonnell Douglas raised an inference of discrimination at law. The burden then shifted to Nightingale to "articulate some legitimate, nondiscriminatory reason for the [adverse action]." McDonnell Douglas at 802. This burden required that Nightingale present competent evidence that it had a legitimate nondiscriminatory reason for taking as much time as it did to remove Watson from caregiving for Mr. H and for failing to replace the hours Watson lost when he was removed from working for Mr. H. Crockett supra, 761 P.2d at 817. Nightingale had to satisfy this second tier of proof under McDonnell Douglas for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56.

Nightingale did articulate a legitimate non-discriminatory reason for taking as much time as it did to remove Watson from caregiving for Mr. H and for failing to replace the hours Watson lost when he was removed from working for Mr. H. It took time to find a replacement caregiver or caregivers to replace Watson, Watson agreed to the time period of weeks to replace him with Mr. H, and Watson refused the opportunities offered by Nightingale for hours providing care to other clients.

Once Nightingale produced its legitimate reasons, Watson had the burden to prove that Nightingale's reasons were in fact a pretext. McDonnell Douglas at 802;

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[9] Cf. also, Martinez supra, 626 P.2d at 246 citing Crawford v. West. Electric Co., Inc., 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of McDonnell Douglas to the allegations and proof of the particular case).

Martinez, 626 P.2d at 246. To meet this third tier burden, Watson could have presented either direct or indirect proof of the pretextual nature of Nightingale's proffered reasons:

> [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine at 256. Ultimately, Watson had the burden to persuade the fact-finder that Nightingale did illegally discriminate against him. Crockett, op. cit., 761 P.2d at 818; Johnson, op. cit., 734 P.2d at 213.

Watson argued that the size of Nightingale's workforce (approximately 60 to 70 employees in the Missoula vicinity, according to Operations Manager Rigney) indicated that it should be able at once to offer Watson replacement hours, but that Nightingale offered him paltry and insufficient replacement hours, and that his hours continued to shrink after the initial loss of the hours he had worked as the regular caregiver for Mr. H. His arguments were unpersuasive and insufficiently supported by the evidence. He did not carry his evidentiary burden of persuading the fact-finder that there was illegal discrimination.

Retaliation Charges

In addition to prohibiting race discrimination in employment (see above), Montana law also bans retaliation against a person who files a discrimination complaint under the Human Rights Act. Mont. Code Ann. § 49-2-301. Watson claimed that after he complained to his employer about the racial harassment, Nightingale's retaliation consisted of not replacing his lost hours, continuing to reduce his hours, taking disciplinary action against him on pretexts, encouraging his coworkers and clients to make complaints against him and, ultimately, firing him after he filed his Human Rights complaint against Nightingale.

To establish his prima facie case of unlawful retaliation in violation of Mont. Code Ann. §49-2-301, Watson had to prove three elements: (1) that he engaged in activities protected by the Human Rights Act; (2) that Nightingale subjected him to significant adverse acts and (3) that there was a causal connection between these adverse acts and his protected activities under the Act. Admin. R. Mont. 24.9.603(1).

Watson clearly established the first element of his prima facie case. He engaged in activities protected by the Act by complaining to the employer about racial harassment and by requesting he be replaced as a caregiver for Mr. H. He did resist illegal racial harassment, a protected activity. and eventually, he filed a

complaint with the Montana Department of Labor and Industry's Human Rights Bureau, another protected activity under Mont. Code Ann. §49-2-301.

Watson proved the second element of his prima facie case of retaliation – his hours were twice reduced after he complained about Mr. H (each time an adverse action), he was subjected to discipline (another adverse action) and he was ultimately fired (a third adverse action). The firing occurred after his Human Rights Complaint was sent to the employer.

Watson clearly established the third element of his prima facie case. All of the above adverse actions followed closely upon his resistance of racial harassment, and related fairly directly to his removal from being caregiver for Mr. H. In addition, Admin. R. Mont. 24.9.603(3) dictates a disputable presumption of retaliatory motive for significant adverse acts against a Human Rights Act complainant while the complaint is pending or within six months after its resolution. Watson's discharge from employment came while Watson's complaint against Nightingale was pending, and after Nightingale had notice of it. The required presumption of retaliatory motive also established a causal connection between protected activity and the last adverse act. Laib v. Long Const. Co. (Aug. 1984), HRC Case No. AE80-1252, quoting Cohen v. Fred Meyer, Inc. (9th Cir. 1982), 686 F.2d 793; see also, Schmasow v. Headstart (June 1992), HRC Case No. 8801003948; Foster v. Albertson's (1992), 254 Mont. 117, 127, 835 P.2d 720, citing Holien v. Sears Roebuck (Or. 1984), 689 P.2d 1292.

Nightingale's defenses to allegations of retaliatory reductions in hours were twofold. First, as already noted about the racial harassment claim, Nightingale articulated a legitimate non-discriminatory reason for failing to replace any of the hours Watson lost, initially and subsequently, after he was removed from working for Mr. H. Watson refused the opportunities offered by Nightingale for hours providing care to other clients. Second, Nightingale offered legitimate non-discriminatory business reasons for the disciplinary action and the second reduction of hours (Watson's pocket dial and Watson's refusal to respond to any call from Mr. H on the Solstice Building on call phone). Finally, Nightingale offered Watson's Medicaid fraud as a legitimate and non-discriminatory business reason for firing him.

Once again, Nightingale having produced its legitimate reasons, Watson had the burden to prove that Nightingale's reasons were in fact a pretext. McDonnell Douglas at 802; Martinez, 626 P.2d at 246. His efforts to do so were creative, but unsuccessful. He failed to carry his ultimate burden to persuade the Hearing Officer that Nightingale did retaliate against him.

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Credibility

Very often in Human Rights harassment cases, be it sexual harassment, racial harassment or some other kind of harassment, the key events constituting the alleged harassment itself occur with two people present – the individual alleged of doing the harassment and the individual alleging that he or she was harassed. The question of which individual is telling the truth about the key events is regularly the central fact question in the harassment case. In the present case, the harasser did not testify at hearing, and the credibility questions here arise between the individual reporting the harassment to management, Watson, and the management employees to whom he reported it. He did report one serious incident of racial harassment. But his allegations of multiple instances of harassment were not credible.

Watson's Credibility

For any credibility question, consistency is important. There is a basic presumption in the law that a witness testifying under oath is presumed to tell the truth, but, a fact finder may properly find that this presumption for speaking the truth has been overcome where there is evidence that a witness has made inconsistent statements. Mont. Code Ann. § 26-1-302(7).

In his original, verified complaint, Watson alleged Nightingale discriminated against him in employment because of his race by failing to investigate and address his multiple complaints (in "May 2012," in "early July 2012," and on July 23, 2012) of racial harassment by a Nightingale client whom he was a caregiver. "Charge of Discrimination" (9-12-12), , "Particulars of the Charge," Paras. B and C, D, and E and F. Watson also made the following contentions, which were incorporated into the Amended Final Prehearing Order, as approved by the parties on the record at the hearing:

> 5. Mr. H is a client of Nightingale. He is a physically disabled individual and possesses a competent mind. In May 2012, Mr. H began using profanity in racial terms and remarks towards Watson.
> 6. Watson complained about Mr. H's behavior and statements to Nightingale management. In particular he complained to Diane Holland and Leah Bessette.
> 7. Over the next several weeks Mr. H yelled at him and told him to "get the fuck out of my room you black nigger bastard" and used the n-word multiple times. Watson maintains that he told Nightingale management about these comments.

. . . .

10. On May 8, 2012 Watson requested a meeting with management and on May 15, 2012 he met with Bessette and Holland. Watson asserts that he discussed Mr. H's behavioral problems and his use of the N-word.
11. On July 23, 2012 Watson was assigned to work with Mr. H. During that time, Mr. H made numerous racial comments towards Watson. Watson objected, stated that he would record them on his phone, and warned him that if he didn't stop he would leave. Mr. H did not stop and Watson left the room.

"Final Contentions, Witness List, Exhibit List, Requested Relief, and Proposed Uncontested Facts" (filed Aug. 16, 2013), second page, lines 11-18,[10] third page, lines 4-13; see also, "Amended Final Prehearing Order," p. 5 "V. Watson's Contentions," Nos. 3-5 and 8-9 and 12 (issued Aug. 23, 2013).

In his testimony at hearing, Watson testified that Mr. H "in May" said "a few words" that Watson did not care to repeat, even at hearing, because he still found them upsetting. He testified that he reported it to his supervisor, Leah Bessette. He testified that Bessette said that she would "talk to him [Mr. H]" and would get back to Watson, but Bessette never did get back to Watson about any conversation she had with Mr. H about the reported racial epithets. Watson testified that Mr. H "contacted me himself" about it, however, on a day soon after Watson had spoken to Bessette about the racial comments, when Watson came in to provide services to Mr. H, still in May 2012. Watson testified that Mr. H told him that "Leah's a liar," and that Bessette had "talked to my mom" and asked Watson to "talk to my mom for me." Watson also testified that Mr. H said to him in that same conversation that he [Watson] was "one of the most detailed caregivers – I get along with, I very rarely get along with caregivers" and that Mr. H said that he did "consider you [Watson] a very good caregiver." The problem with this testimony is that the Hearing Officer finds it incredible that Watson should be reporting inflammatory and wildly in appropriate racial slurs by Mr. H in a face-to-face meeting with Bessette and Holland in May, and yet the e-mails between them during the same time period never touch directly upon that matter, but focus entirely upon working with Mr. H to address his needs. These e-mails are far more consistent with Nightingale's evidence that Watson did not report the racial epithets until July 23, 2012.

[10] Pages unnumbered, line numbers do not line up with the lines of print. The Hearing Officer has used the line number closest to the first and last lines of print quoted to locate the quotes.

Watson testified and contended that Mr. H had denigrated him with racial slurs and profanity a number of times (with the only real specificity about dates being about the July 23, 2012, racial harassment). But he also testified that after the May incident he alleged, he continued to provide care to Mr. H, simply not conversing with Mr. H while doing so. Putting together his various assertions, agreements, allegations and testimony, Watson claimed that there was one or more racial harassment incidents in May, many such encounters after May 8 and before July 23, and yet stipulated that between May 8, 2012, and July 23, 2012, there were "no further incidents involving Watson and Mr. H" and "no racial slurs directed at Watson."

The Hearing Officer found Watson to be a confusing witness, making multiple inconsistent statements. His testimony did establish an incident of racial harassment on July 23, 2012, which he reported that same day. But Watson also testified (without corroborating evidence) about some other kinds of racial comments, directed towards him and also sometimes directed towards television shows Mr. H was watching, and made various comments during his testimony to suggest that there were a number of such other incidents. Human Rights Bureau Jeffrey Rhoa testified that Watson told Rhoa, during the investigation, that Mr. H had thrown racial slurs at Watson multiple times, over multiple months, and that Watson had also told Rhoa that at least one other client had reported to Watson that Mr. H had referred to Watson with racial epithets back in March 2012. At the end of the day, there was so much evidence of so many inconsistent statements that it left the Hearing Officer without substantial and credible evidence to support any incidents of racial harassment except the incident of July 23, 2012.

With regard to the "pocket dialing" incident, Watson's testimony was that he was approaching another Nightingale employee, one he testified he considered to be one of his supervisors, to complain about the employer, about the other employees and about the clients, in profane as well as extremely unflattering terms. He was warned about his conduct and he accepted the warning. The incident did not enhance or diminish his credibility.

With regard to the Medicaid fraud issue, Watson's testimony was again confusing. However what was fairly clear from the overall evidence is that Watson told his employer that he had checked off specific tasks that he "would have" performed on appointments when he actually never entered the residence of the client because the client never opened the door. Watson appeared to believe that he had been told to do precisely that – mark off what he would have done, had he been

let in, during the time that he actually spent outside the door.[11] Given the credible evidence Nightingale presented, it is extremely unlikely that Watson was ever trained by Nightingale to do this, since that clearly would be Medicaid fraud. When Watson said it, his discharge became inevitable. This was an entirely different thing than correcting an error on a Service Delivery Record. This was providing false reports of work performed, to induce payment by Medicaid. A welter of confusing and conflicting evidence about timesheet entries and corrections really was beside the point.

The Hearing Officer had insufficient evidence to find that Nightingale forced Watson to sign a confession of Medicaid fraud, but that was another irrelevant issue. Watson clearly did not believe he had committed any kind of fraud, and probably still believes today that all he did was fill out the Service Delivery Records as he was instructed to do. He was not credible in blaming Nightingale regarding this record keeping, but he may well believe that what he was saying was true, and he may, indeed, have heard other employees describe doing that same thing.

Credibility of Nightingale's Witnesses

Nightingale's witnesses consistently testified that the first report they received from Watson about Mr. H racially harassing him came on July 23, 2012, when Watson asked to be removed from caring for Mr. H. Circumstantial evidence appears to support that testimony. Although there are some oblique references within some of the e-mails to things not spelled out therein, Nightingale's evidence corroborated the one incident of racial harassment that Watson unquestionably did report, and corroborated that Nightingale did take action to try to prevent any further incidents.

Watson did not insist upon being removed from delivering services to Mr. H immediately. Nightingale did not force him to continue to deliver services for multiple weeks before taking Mr. H entirely off his schedule. He agreed that it would take up to three weeks, and testified that he had been okay with that, and the credible evidence appears to be that Watson continued to work with Mr. H without further incident. The only real evidence about this is that when Rigney asked him, at the end of August, if he would go to Mr. H's room and deliver service to him should Mr. H call him on the on call phone, Watson said "no."

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[11] Watson also testified that he was trained to fill out the Service Delivery Form in advance, checking the services to be delivered, and then "close it up" when you left the client. He never really developed this explanation, perhaps because it would be difficult to explain how he could forget that he simply waited outside the client's door, but then forget to change the form to reflect that he did not actually perform the duties. If this was meant to explain the context in which he claimed he was trained to check the services he would have performed if he had been allowed to enter, it was not credible.

The lack of any documented investigation of Watson's complaint about the July 23, 2012, racial harassment is disturbing. However, with Watson's immediate request for removal from the client at the same time as the first proven report of racial harassment, and with Watson's agreement that his removal could take up the three weeks, Nightingale's response of working with Mr. H to prevent further racial harassment was an adequate response.

With regard to the pocket dialing incident, this is not the first case before the Office of Administrative Hearings in which an employee's cell phone called management from the employee's pocket and accidentally presented management with a "wire" into a private gripe session. Nightingale was balanced in its response, particularly since the voice mail recording management received seemed to indicate that a client might have been present through some of Watson's complaining and swearing. The incident did not enhance the credibility of Nightingale's witnesses, but Nightingale's handling of it was appropriate.

With regard to the Medicaid fraud issue, Nightingale presented credible evidence that it paid 15 minutes of waiting time for a caregiver who arrived for an appointment but got no response from the client, but did not train its caregivers to falsely report delivery of services so that Medicaid would pay for that waiting time, disguised as eligible services to the client. This would be Medicaid fraud. Nightingale paid its employees for waiting fifteen minutes when a client was not immediately available, and did not charge Medicaid for it. The testimony about the nature of Watson's reporting on the Service Delivery Reports and the nature of Nightingale's problems with his reporting, was confusing and contradictory, but in the midst of the confusion, it was clear that Watson admitted that he, himself, checked services on the report that he had not performed, making an untrue claim that he delivered services to a client that had never come to the door and let him in. How much time he claimed to have waited at the door, for which he made the false report of service delivery, made little difference in light of that fact.

Investigator Rhoa's conclusory testimony that Nightingale falsely told him that it had not received notice of the HRB investigation before discharging Watson was not proper evidence. It invaded the province of the trier of fact and was an improper opinion about an ultimate fact, and thus was just as inadmissible as investigative conclusions about discrimination in a Human Rights Final Investigative Report. Mahan v. Farmers Union Central Exch., Inc. (1989), 235 Mont. 410, 768 P.2d 850, 858-59 (1989) and Crockett v. City of Billings (1988), 234 Mont. 87; 761 P.2d 813, 820 (1988). Being inadmissible, it could not damage the credibility of Nightingale's witnesses.

Having decided that Nightingale's deliberate handling of Watson's racial harassment complaint was reasonable, the Hearing Officer now must look at the remarkable speed with which Nightingale handled Watson's pocket dialing and the information about possible false time reporting. On its face, the alacrity Nightingale showed in investigating and addressing problems with Watson was startlingly different from the deliberate pace at which Nightingale approached Mr. H's racial harassment.

Nightingale provided legitimate business reasons for its measured handling of Watson's request to be removed from providing care to Mr. H and also provided legitimate business reasons for the resulting reductions in his hours because he was first no longer a caregiver for Mr. H, and second no longer eligible for the Solstice Building on call phone. Nightingale also provided legitimate business reasons for the brisk resolutions of Watson's pocket dialing faux pas and his improper reporting of his service delivery.

Mr. H had multiple disabilities as a result of his cerebral palsy and its related conditions. Mr. H was also a client, over whom Nightingale had very limited power. For both these reasons, some caution in responding to Mr. H's racial harassment was appropriate.

Watson, on the other hand, was an employee of Nightingale, trained and oriented in its operations. Watson had responsibilities to conform his conduct to his employer's requirements, to respect and protect the privacy and confidentiality of the clients, and to honor his duties as a caregiver in interacting with clients and with others in the presence of clients.

The substantial and credible evidence of record indicated that Watson was getting more angry and more defiant as time passed. From his perspective, his excellent job had turned into a nightmare. He did not believe he had done anything wrong. He must have been increasingly convinced that Nightingale was discriminating and retaliating against him.

The pocket dialing incident in August appeared as a voice mail message to the Nightingale Operations Manager. There was not much investigation to be done except to talk to the two employees involved, both of whom were familiar with the scope of their responsibilities, and sanction them appropriately.

At the same time, Watson's increasing hostility towards his employer led him to tell the Operations Manager that he certainly would not go to Mr. H's room if Mr. H called him on the on call Solstice Building phone. Again, there was next to no investigation or consideration involved in taking Watson off the on call phone since he was not going to be available to one of the Nightingale clients in the Solstice

Building. The consequences to Watson were severe (loss of health insurance), but his intransigence caused those consequences. According to his most credible testimony, it had been over a month since Mr. H's last racial harassment of him, during several weeks of which he had continued to deliver services to Mr. H. Watson had to know that he was at risk of losing the on call hours once he categorically refused to respond to calls from one of the Solstice Building Nightingale clients. He refused anyway.

In terms of the Medicaid fraud, Watson appears to have been at odds by now with most of the other caregivers in the Solstice Building. Although he blamed Nightingale, his own behavior stands out as the primary cause for this divide. Based on the evidence of record, the report that Watson was not there to deliver services to a client, and that this had happened before, was true. Finding the client present but Watson not there when they got to the Solstice Building, management had very good cause to call Watson to come in and explain himself.

Watson appears, from his testimony to believe that he truly was entitled to report performing services he had not performed, to justify submitting claims for time worked that he actually had spent waiting to see if a client would tardily open the door or come home and let him in. There is no evidence in the record to justify that belief. The certification on the Service Delivery Record is very clear. Ex. 110.

Exhibit 1 Was and Is Inadmissible

Exhibit 1 was refused on hearsay grounds at the end of the hearing, after the rebuttal testimony. Nonetheless, Watson included in his initial brief a repetition of his arguments at hearing in support of admitting Exhibit 1, continuing to rely upon the declarant's self-authentication (in Exhibit 1, the out of court statement) of herself, Susan Hackworth, as Watson's "supervisor at Nightingale Nursing and Caregiving." Exhibit 1. There is no justification for revisiting the ruling made at the end of the hearing, when the objection was overruled and was not preserved.

Even if there had been a justification for revisiting the ruling made at hearing, it was and still is correct. At hearing, Nightingale presented sworn testimony that Hackworth was not a Nightingale supervisor. Hackworth did not testify at hearing, only her handwritten letter, Exhibit 1, was offered, with Watson's testimony that he thought she was a supervisor. Based upon the evidence, Exhibit 1 is not a statement by a party-opponent, under M.R.E. Rule 801(d)(2)(D), the subsection Watson is still arguing. Watson has not proved, with substantial and credible admissible evidence, that Hackworth was an agent or servant of Nightingale, who during the course of her agency or service wrote the letter about Watson's competence, attendance and job performance, nor has Watson proved that evaluation of Watson's competence, attendance and job performance was within the scope of Hackworth's (unproven)

agency for or service to Nightingale, which it would only be if she was someone whose job included supervising and evaluating Watson's work.[12] That is the actual scope of the requirement for qualifying an out of court statement as "not hearsay" under 801(d)(2)(D).

On its face the letter was hearsay, a statement (written assertion), other than one made by the declarant (Hackworth) while testifying at hearing, and this statement certainly was offered to prove the truth of the statement – that Watson was competent, that Watson showed up when he was supposed to show up to work, and that Watson did good and even excellent work. If the letter was offered for a purpose other than the truth of what Hackworth wrote, what was that purpose? Unlike Nightingale (see "(B) Exhibit 115," infra), Watson has offered no cases purportedly approving admission of this kind of hearsay for some other purpose, and hasn't even articulated any other purpose. The ruling already of record at hearing stands.

Exhibit 115 Is Inadmissible

Nightingale briefed it in its initial filing, with authorities specifically cited with regard to Nightingale's specific admissibility point.[13] Watson did not address Exhibit 115 at all in his initial brief, even though the invitation to brief it was clearly extended during the hearing. Watson did argue summarily in his reply brief that Exhibit 115 was hearsay.[14]

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[12] Watson's argument on this point, in its entirety, is that "It is undisputed that the [sic] Hackworth was a servant of Nightingale and made the statement during the existence of the relationship. Further, the comment relates to a matter within the course and scope of the agency." Sec. III, "Exhibit 1 Is Not Hearsay," fourth page [no page numbering in brief], Lines 17-20,"Brief in Support of Charging Party's Proposed Findings of Fact and Conclusions of Law" (filed Oct. 3, 2013). It was undisputed that Hackworth was employed by Nightingale, but it was unproved that she was a supervisor, although Watson testified that he considered her one. It was unproved that her service duties ("agency") included evaluating Watson's performance. As an out of court statement by another worker who had observed Watson's performance, her letter was hearsay that did not fit any cited exception to the rule excluding hearsay.

[13] Nightingale cited Jefferson v. Burger King, 2012 WL 1587741 (S.D. Fla. 2012), aff'd (unpub.), 505 Fed. Appx. 830 (11th Cir. 2013); Wolff v. Brown, 128 F.3d 682, 685 (8th Cir. 1997), and referred to ("see also") Hardie v. Cotter & Co., 849 F.2d 1097, 1101 (8th Cir.1988); Jones v. Los Angeles Comm. College Dist., 702 F.2d 203, 205 (9th Cir.1983); Moore v. Sears, Roebuck & Co., 683 F.2d 1321, 1322 (11th Cir.1982) and Mazzella v. RCA Global Communications, Inc., 642 F.Supp. 1531 (S.D.N.Y.1986), aff'd, 814 F.2d 653 (2d Cir.1987).

[14] The general argument was supported with general citations to M.R.E. Rule 802 and to Murray v. Talmage, 2006 MT 340, 335 Mont. 155, 151 P.3d 49, for the general proposition that hearsay is inadmissible except as otherwise provided by law (statutes, rules and rulings).

Nightingale's "case on point" is Jefferson v. Burger King, "Order Granting Defendant's Motion for Summary Judgment" Case No. 11-61971-CIV-COHN, slip opinion (S.D. Fla. 2012), 2012 WL 1587741, aff'd (unpub.), 505 Fed. Appx. 830 (11th Cir. 2013). The pro se plaintiff, Steve Jefferson, an African-American, had been the general manager of two Burger King stores in Sawgrass Mills Mall in Sunrise, Florida, until his discharge. He filed multiple discrimination and retaliation claims in United States District Court in Florida, alleging multiple adverse actions, including transfer and discharge, on the part of his former employer, Burger King. On cross-motions for summary judgment, Burger King, through a "declaration" (presumably an affidavit) of its personnel manager, submitted 14 written complaints from employees about Jefferson's treatment of them. Jefferson objected to admission of the statements as hearsay. The court admitted the statements under Rule 803(6) of the Federal Rules of Evidence because the statements: (1) Were made at or near the time of the events, by someone with knowledge, who signed the statements; (2) Were kept in the course of a regularly conducted activity of the defendant; (3) Were obtained in Burger King's regular practice of making written records of complaints; and (5) There was no evidence why the employees making the complaint would be untrustworthy. Slip Opinion, p. 4, footnote 3. The court granted summary judgment to Burger King on all counts, and dismissed the case.

On appeal, the Eleventh Circuit's unpublished opinion upheld the dismissal, and in its "no precedent" affirmation, approved the admission into evidence of now the written complaints (now there were 13 such complaints, according to the opinion) on the grounds that "these complaints are not hearsay because they were not offered for the truth of the matter asserted; instead, they were offered only to establish that Burger King had legitimate, non-discriminatory reasons for terminating Jefferson's employment." 505 Fed. Appx. at 836.

In a case in which the charging party asserts racial discrimination and retaliation, it is fundamentally unfair to allow hearsay evidence of wrong-doing by that charging party through written statements of coworkers who may well have bias or grudges either one that would motivate them to be untruthful. Charging party has no opportunity to cross-examine these declarants, and contrary to the conclusion of the Circuit Court there is every reason to question whether they are trustworthy. In addition, the fact that the statements were made is not good enough to qualify them as providing a legitimate business reason to take adverse action against the employee. Since he presented a prima facie case on both his claims, the employer needs more than written statements to prove a defense. Unless the written statements are true, they are worthless. Therefore, they are hearsay. Exhibit 115 is rejected.

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V. Conclusions of Law

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

2. Nightingale did not illegally discriminate against Watson in employment because of his race when it investigated and addressed his complaint of racial harassment by one of the clients to whom he provided care as a caregiver for Nightingale. Mont. Code Ann. §49-2-303(1).

3. Nightingale did not illegally retaliate against Watson for resisting illegal discrimination, but had legitimate non-retaliatory reasons for reducing his work hours and then discharging him. Mont. Code Ann. §49-2-301.

VI. Order

1. Judgment is found in favor of Nightingale Nursing Service, Inc., dba Nightingale Nursing and Caregiving ("Nightingale") and against Tarik Watson on the his charges that Nightingale illegally discriminated in employment against him because of race and illegally retaliated against him because he resisted illegal discrimination.

2. The amended complaint of Watson is hereby dismissed in its entirety.

Dated: July 30, 2014.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Daniel J. Flaherty, Attorney for Tarik Watson; and Karl J. Englund, attorney for Nightingale Nursing Service, Inc., dba Nightingale Nursing and Caregiving,

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 Office of Administrative Hearings, 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.