

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0141016868 &  
0141016869:

BRIAN CANNAVARO,	)	Case Nos. 827-2015 & 830-2015
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
FLATHEAD INDUSTRIES, INC., AND	)	
VICKIE POYNTER, CEO,	)	
	)	
Respondents.	)	

\* \* \* \* \*

I.      PROCEDURAL AND PRELIMINARY MATTERS

On March 28, 2014, Brian Cannavaro filed a complaint with the Human Rights Bureau alleging retaliation in employment for engaging in protected activity.

On October 31, 2014, the matter was transferred to the Office of Administrative Hearings (OAH) to be set for a contested case hearing.

On March 24 and March 25, 2015, Hearing Officer Caroline A. Holien conducted a contested case hearing in this matter in Kalispell, Montana. Attorney Scott Hilderman represented Cannavaro. Attorney Daniel Johns represented Flathead Industries, Inc., and Vickie Poynter, CEO.

At hearing, Justin Bowles, M.D., Brian Cannavaro, Jennifer Henson, David Potter, Kathleen Wright, Suzanne Schmertz, Holly Ward, Rebecca Balla, Vanessa Ceravolo, Denise Frey, Vicki Poynter, Crystal Hartigan, Rhonda Vick, Sue Bonin, Shanon Malmin, Dennis Green, and Todd Hammer presented sworn testimony.

Charging Party's Exhibits 1 through 7 and 9 through 14 were admitted. Exhibits 11, 12, and 14 through 17 were also admitted. Respondent's Exhibits 1 through 17 were admitted.

The parties requested the opportunity to submit post-hearing briefs at or near the close of hearing. On April 17, 2015, an order was issued setting May 8, 2015 as the deadline for the parties' first briefs and proposed decisions and May 22, 2015 as the deadline for the parties to file their reply briefs.

On May 29, 2015, Hilderman notified OAH staff that he was waiving his client's right to submit post-hearing briefs and a proposed decision. The matter was then deemed submitted for determination. Based upon the evidence adduced at hearing and arguments presented in respondent's post-hearing brief, the following hearing officer decision is hereby rendered.

## II. ISSUE

Did Flathead Industries, Inc., and Vickie Poynter, CEO, retaliate against Brian Cannavaro by terminating his employment because of protected human rights activity in violation of the Montana Human Rights Act (Title 49, Chapter 2, Mont. Code Ann.)?

## III. FINDINGS OF FACT

1. Flathead Industries, Inc. (Flathead Industries) is a non-profit corporation that was founded in 1973. Its principal place of business is Kalispell, Montana.

2. Flathead Industries provides services to individuals with traumatic brain injuries, developmentally disabled individuals, individuals with mental health issues, and developmentally disabled adults who are considered to be non-adjudicated sex offenders, all of whom are called "consumers." Flathead Industries serves more than 140 consumers.

3. Flathead Industries is governed by a Board of Directors that has nine members. Three of those individuals serve on the Personnel Committee, which deals directly with issues affecting Flathead Industries employees. The Personnel Committee includes John Constenius, Dennis L. Green, and Todd Hammer, all of whom have served on the Board of Directors for ten years or more.

4. Medicare and Medicaid are Flathead Industries' primary sources of funding. Flathead Industries is also a contractor of the Montana Department of Health and Human Services (DPHHS).

5. Flathead Industries operates thrift stores in Kalispell, Whitefish, and Columbia Falls, Montana. Its largest thrift store is located in downtown Kalispell.

6. Flathead Industries operates six group homes in the Flathead Valley that serve approximately 47 consumers. Consumers are housed according to the level of care and supervision they require and what is allowed for under the consumer's care plan. Flathead Industries assists group home residents with daily life activities and provides specialized services based upon the consumer's needs.

7. Flathead Industries is required to adhere to the confidentiality requirements set forth in the Health Insurance Portability and Accountability Act (HIPAA). Flathead Industries uses a secure database maintained by DPHHS called Therap. Employees can enter their notes about individual consumers in the T-Log that is accessible by DPHHS and professionals working with the individual consumer. Employees can only access information in the Therap system that directly pertains to the consumer to whom they are assigned.

8. Flathead Industries' private email system is referred to as sComm and is accessible to all employees.

9. Flathead Industries requires employees to prepare General Events Reports (GER) when a resident is injured or assaulted. GERs are entered into the Therap system. Employees can not change GERs once they are submitted, but the level of severity may be changed between high and low. Employees may also add to the GER and other employees may add comments. Flathead Industries typically does not investigate issues raised in GERs until they are allowed to do so by state authorities or local law enforcement. Employees are also required to report the incident to Adult Protective Services if a consumer has been harmed.

10. Flathead Industries began providing services to consumers who are considered to be non-adjudicated sex offenders in approximately 1994. Flathead Industries and other organizations throughout the state struggled for several years to adapt programming and services to consumers with such a designation after the State of Montana began transitioning those individuals from state run facilities to local residential service programs. The State of Montana has not yet implemented specific protocols for organizations serving consumers considered to be non-adjudicated sex offenders. Flathead Industries has worked closely with DPHHS and other agencies

serving those individuals to develop programming and services that meet the needs of those individuals. Flathead Industries has served as a sort of model for other organizations throughout the state.

11. Flathead Industries' Terry Road Group Home is home to approximately six consumers who are considered to be non-adjudicated sex offenders. Crystal Hartigan, who is female, has been the Lead Trainer for the Terry Group Home for approximately five years. Hartigan has worked for Flathead Industries in various capacities for approximately eight years. Hartigan is responsible for developing protocols to ensure the safety of both the consumers and staff, as well as developing special services to meet the individual needs of the consumers. Hartigan has received extensive training in working with non-adjudicated sex offenders and is generally regarded as developing and enforcing appropriate boundaries with consumers while having good working relationships with the consumers.

12. Group home staff receive extensive training on how to work safely with consumers. Training ranges from medication passing and record keeping to how to safely restrain consumers who pose a risk to themselves or others.

13. Vickie Poynter has served as the CEO of Flathead Industries since 1997. Poynter has served in various capacities for Flathead Industries since 1981. Poynter is responsible for overseeing the daily operations of the organization. Poynter does not work directly with consumers.

14. On or about February 6, 2008, Flathead Industries hired Brian Cannavaro as an Assistant Manager for the Kalispell Thrift Store. Cannavaro was subsequently promoted to Programs Manager for all of Flathead Industries' thrift stores in 2009.

15. Cannavaro's job duties included managing the daily operations of the Kalispell Thrift Store, which included supervising Flathead Industries staff and approximately 30 consumers. Cannavaro took his job duties seriously and attempted to perform those duties to the best of his ability.

16. Cannavaro received generally positive performance reviews throughout his employment. Cannavaro's performance reviews included some criticism regarding his interactions with other employees. Cannavaro was Flathead Industries' 2012 Employee of the Year.

17. Cannavaro signed the Flathead Industries Employee Handbook at or near the time of his hire and again in 2011. The Employee Code of Ethics is included in

the Employee Handbook. All employees are required to pledge to “treat all people with dignity and respect.”

18. The Employee Handbook includes the Productive Work Environment policy, which prohibits verbal or physical conduct by an employee that harasses, disrupts, or interferes with another employee’s work performance. The policy also prohibits behavior that creates an intimidating, offensive, or hostile work environment. The Productive Work Environment policy defines bullying to include verbal, gesture and exclusion bullying and the persistent singling out of one person, shouting or raising the voice, personal insults, public humiliation in any form, public reprimands, and other behaviors. The Productive Work Environment policy is intended to ensure that employees and consumers do not feel threatened by an employee’s words, actions, attitudes, or other conduct.

19. Flathead Industries’ Productive Work Environment policy also prohibits retaliation against an individual who reports perceived incidents of discrimination, harassment, or violation of policy.

20. Flathead Industries does not provide employees or consumers who have filed complaints with the results of its investigations. Flathead Industries employees have a right to privacy. Flathead Industries has no policy requiring employees to be informed of the results of any investigations completed by administration.

21. On August 18, 2009, Cannavaro was warned that he needed to improve his attitude and behavior toward his co-workers. Several employees had complained to Poynter that Cannavaro was rude and sarcastic toward them. Poynter warned Cannavaro that he could be subject to further discipline, including termination, if she received any other complaints regarding his attitude or behavior at work.

22. On March 30, 2011, Cannavaro was suspended without pay after an employee complained Cannavaro had acted in a harassing and intimidating manner toward her. Poynter and Human Resources Manager Kathy Schenk investigated the allegation and ultimately concluded the allegation could not be substantiated.

23. On March 31, 2011, Cannavaro was informed of the results of the investigation and allowed to return to work. Cannavaro was warned that he would be subjected to further discipline if any other complaints were received that he was rude or sarcastic toward his co-workers or subordinates. Cannavaro was directed to participate in harassment training, as were six other Flathead Industries employees. Cannavaro timely completed the training.

24. In June 2012, Mike Allen, Director of Business and Operations, informed Cannavaro that all but one employee interviewed as part of a thrift store staff survey reported Cannavaro engaged in “bullying behavior” toward them or a colleague.

25. In July 2012, Cannavaro and five other employees were directed to attend a webinar pertaining to bullying behavior. The employees who attended the webinar were on safety committees throughout Flathead Industries or worked in departments where such information was pertinent. Cannavaro timely completed the training.

26. On June 14, 2013, Cannavaro filed a grievance against Poynter after he was removed from working at the thrift store and temporarily reassigned to work at the Rag Barn, where consumers tear t-shirts and other materials into rags. Cannavaro alleged the reassignment was due to his having complained about the asbestos remediation project being completed in the building where he typically worked and for his having taken a few days off to tend to his ailing mother.

27. On June 18, 2013, Schenk informed Cannavaro that his grievance had been investigated and no retaliation had been found. Cannavaro filed a protest with Schenk, who then forwarded Cannavaro’s concerns to the Personnel Committee.

28. On June 27, 2013, Green, who was then Chairman of the Personnel Committee, informed Cannavaro that the Personnel Committee had reviewed his protest and investigated the decision made by Schenk. Green informed Cannavaro that the Personnel Committee agreed with Schenk’s finding that Poynter had not retaliated against him by reassigning him to the Rag Barn.

29. Flathead Industries formed a committee called the Special Services Committee (SS Committee) sometime in 2013. The SS Committee was comprised of employees and outside professionals who worked directly with consumers who were considered to be non-adjudicated sex offenders. The SS Committee met on a weekly basis to discuss issues affecting those consumers. These meetings were often emotionally charged and deteriorated quickly into emotional spats.

30. Prior to January 2014, the SS Committee included Cannavaro; Poynter; Sue Bonin, Work Services Director; Denise Frey, Quality Improvement Specialist with Montana Developmental Disabilities Program; Crystal Hartigan, Lead Trainer for the Terry Road Group Home; Christie Hunt, Lead Trainer for Production; Diane Knutson, Lead Trainer for the Third Avenue West Group Home; Shanon Malmin, Group Homes Manager and Special Services Coordinator; Tom Murphy, Vocation Counsel/Program Analyst; Michelle Pellett, Day Service Program Manager; Diane

Sanford, Lead Trainer for the Duplex Group Home; and Rhonda Vick, Case Manager.

31. In late November or early December 2013, Hartigan informed the SS Committee that a Terry Road Group Home consumer needed to travel to eastern Montana to visit his ailing father. The consumer was approximately 28 years old at the time and required “line of sight” supervision, which meant the consumer could not be out of the sight of the professional working with the consumer. The consumer had lived at the Terry Road Group Home since 2010.

32. The SS Committee discussed how best to accommodate the consumer’s request during at least two SS Committee meetings at which Cannavaro was in attendance. The SS Committee determined Hartigan should be the one to travel with the consumer as she was the main point of contact for the family and she had developed a strong working relationship with the consumer. The SS Committee decided Hartigan and the consumer would travel together by train to Wolf Point, Montana, where they would stay two nights in one hotel room. No member of the SS Committee, including Cannavaro, voiced any concerns about Hartigan traveling with a male consumer and staying overnight in the same hotel room prior to the trip taking place. Many of the SS Committee members felt it was appropriate for Hartigan to travel with the consumer based upon Hartigan’s experience and training, as well as the potential for the consumer to be faced with difficulties associated with visiting his ailing father.

33. Flathead Industries has previously allowed employees to travel out of town with a consumer of a different gender. Gender is not the first consideration when assigning staff to such tasks. The employee’s background, training, and experience are considered, as well as the consumer’s individual needs. Flathead Industries has previously sent female staff with male consumers on out of town trips requiring overnight stays without incident.

34. During the week of December 15, 2013, Hartigan and the consumer traveled to Wolf Point. There were no issues on the trip and Hartigan felt the consumer benefitted from having time with his father, who passed away shortly after their visit.

35. On December 31, 2013, Hartigan and Cannavaro attended the SS Committee meeting, as did Rhonda Vick and Sue Bonin. The meeting was sparsely attended due to the holidays. Hartigan reported the trip to Wolf Point had been a success. Cannavaro became visibly upset and demanded to know why Hartigan was allowed to travel alone with a male consumer and to stay in the same hotel room.

Cannavaro argued it was inappropriate for Hartigan to travel alone with the consumer due to her age, gender, and appearance, which he repeated several times throughout the meeting. The matter was eventually tabled for the January 7, 2014 meeting due to Cannavaro's repeated outbursts and obvious agitation over the issue. Bonin observed Hartigan appeared hurt and upset by Cannavaro's attack and behavior at the meeting.

36. On January 7, 2014, Cannavaro again expressed outrage that Hartigan was allowed to make an overnight trip with a male consumer that required the two to share a hotel room. Cannavaro repeatedly argued that it was inappropriate for Hartigan to travel alone with a male consumer based upon her age, gender, and appearance. Vick, Bonin, Poynter, and Malmin were also in attendance at the meeting and all observed Cannavaro was visibly angry, red faced, and shouting at times. Poynter did not stop Cannavaro's attack on Hartigan out of concern that it would be construed as retaliatory due to Cannavaro having filed a grievance against her in June 2013.

37. Rhonda Vick, Poynter, Bonin, and Malmin met privately after the January 7, 2014 meeting to discuss Cannavaro's behavior at the SS Committee meetings. They decided the SS Committee needed to develop ground rules for meetings so no further confrontations occurred in the future.

38. In January 2014, Poynter learned confidential information presented during SS Committee meetings had been shared with case managers at another organization and with Flathead Industries employees who had no reason to access such information. Poynter considered this to be a breach of the confidentiality expected from the SS Committee due to the sensitive nature of the information discussed at their meetings.

39. On January 8, 2014, Poynter sent an email to SS Committee members informing them of the breach and announcing the suspension of the SS Committee. Poynter outlined changes she was making in the level of access some employees would have to consumers' personal information. Poynter also announced a "temporary" SS committee would be established with fewer members.

40. Poynter began reviewing Therap to determine the appropriate access employees should have to protect consumers' confidential information. Poynter also suspended employees' access to consumers' case records until she could determine the appropriate level of access.



41. Poynter decided to limit the SS Committee to those employees who worked directly with consumers considered to be non-adjudicated sex offenders. As a result of Poynter's decision, Cannavaro was no longer a member of the SS Committee. Poynter's decision was not retaliatory but merely intended to protect the confidentiality rightly expected by consumers and their families and required under federal and state law.

42. On or about January 20, 2014, Hartigan filed a grievance against Cannavaro based upon his behavior at the December 31, 2013 and January 7, 2014 SS Committee meetings. Hartigan had felt hurt after his attacks and began to question her own judgment and ability to perform her job duties as a result of Cannavaro's behavior. Hartigan prepared and filed her grievance on her own, without any assistance or encouragement from any member of Flathead Industries' staff or administration.

43. Poynter was not aware of Hartigan's grievance until after it had been filed. Poynter did not aid or encourage Hartigan in preparing and filing the grievance. Poynter did not discuss what had occurred at the December 31, 2013 and January 7, 2014 SS Committee meetings with Hartigan at any time prior to or after Hartigan filed her grievance.

44. On or about January 27, 2014, Cannavaro was suspended with pay pending the results of the investigation into Hartigan's grievance. Cannavaro was not told who complained or the nature of the complaint at the time he was suspended.

45. On or about January 29, 2014, Poynter contacted attorney Vanessa Ceravolo and requested she investigate Hartigan's complaint. Ceravolo had previously served as an investigator for Flathead Industries regarding an incident involving an employee several years earlier.

46. Poynter did not direct or control Ceravolo's investigation. Ceravolo did not interview Poynter. Poynter removed herself from the investigation and all discussions regarding Cannavaro's employment status to avoid the appearance of impropriety due to Cannavaro having filed a grievance against her in June 2013.

47. Ceravolo interviewed the various individuals who attended the November and December 2014 SS Committee meetings. Ceravolo also interviewed several employees suggested by Cannavaro. It was at the time of his interview with Ceravolo that Cannavaro learned the nature of the grievance.

48. Ceravolo did not record her interviews or place any of the interview subjects under oath. Ceravolo did not require the interview subjects to prepare written statements or sign off on the accuracy of the information attributed to them in her report.

49. On March 5, 2014, Ceravolo submitted her findings of fact to Flathead Industries. Poynter did not receive a copy of Ceravolo's findings of fact. Ceravolo's findings of fact did not include any credibility findings or make any specific recommendations as to Cannavaro's employment status.

50. Hammer, Green, and Constenius discussed Ceravolo's findings of fact after receiving copies from CFO Carmen Noffsinger. Hammer, Green, and Constenius decided Cannavaro should be transferred to the Whitefish Thrift Store without any reduction in his pay or benefits in recognition of his contributions to Flathead Industries. The decision to transfer Cannavaro was not intended to punish him or to retaliate against him, but to remove him from what Hammer and Green considered to be a dysfunctional workplace. Hammer and Green felt Cannavaro was an asset to the organization whose skills and talent would benefit the Whitefish Thrift Store.

51. Hammer, Green, and Constenius presented their recommendation to transfer Cannavaro to the Whitefish Thrift Store to the Board of Directors. The Board of Directors approved the transfer and the decision was communicated to Cannavaro on or about March 14, 2014.

52. Poynter had no role in evaluating Ceravolo's report or the ultimate decision to transfer Cannavaro to the Whitefish Thrift Store. The decision to transfer Cannavaro was made solely by the Board of Directors based upon the recommendation made by the Personnel Committee.

53. Cannavaro accepted the transfer and began working at the Whitefish Thrift Store on or about March 17, 2014. Cannavaro was still working at that location at the time of hearing.

54. Cannavaro's pay and benefits were not reduced as a result of his transfer. No formal discipline was included in Cannavaro's personnel record as a result of the grievance and investigation.

55. Cannavaro has access to the sComm system but no longer has access to Therap due to there not being any consumers assigned to work there that require

Cannavaro to have access to the Therap database. Cannavaro's job duties have not changed significantly as a result of his transfer.

56. In July 2014, Cannavaro received a \$0.60/hour pay raise, as did other Flathead Industries employees.

57. Cannavaro has not applied for or sought any other open positions within Flathead Industries since his transfer to the Whitefish Thrift Store.

58. Cannavaro has failed to show a prima facie case of retaliation. Cannavaro has not shown he engaged in protected activity, as defined under the MHRA, or that Flathead Industries took any adverse employment action against him based upon his engaging in such activity.

59. Flathead Industries has shown a legitimate, non-discriminatory reason for transferring Cannavaro from the Kalispell Thrift Store to the Whitefish Thrift Store.

#### IV. OPINION<sup>1</sup>

Cannavaro contended in his complaint filed with the Human Rights Bureau on March 28, 2014 that he is a “[w]histle blower with regard to improprieties and questionable legal, ethical and moral practices, within [his] organization [and was] targeted for continued retribution . . . .”

In his Contentions and Requests for Relief and Proposed Uncontested Facts filed March 8, 2015, Cannavaro by and through his attorney argued Flathead Industries retaliated against him due to his opposition to “practices that promulgated sexual harassment in the workplace.” Specifically, Cannavaro alleged the blending of consumers considered to be non-adjudicated sex offenders with other consumers, who he argues were especially vulnerable due to their developmental disabilities, resulted in unlawful incidents of sexual harassment, specifically inappropriate physical touching. Cannavaro contends Flathead Industries failed to address his concerns and “minimized and covered up numerous sexually-inappropriate incidents resulting from the blending [of the consumers].”

---

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

A. Cannavaro has not shown a prima facie case of retaliation.

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

As in a discrimination claim, a charging party alleging retaliation must present evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a prima facie case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5<sup>th</sup> Cir. 2005).

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 meets its burden, the presumption of discrimination created by the prima facie case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* The charging party 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. *Crockett v. Billings*, 234 Mont. 87, 95, 761 P.2d 813, 818, (Mont. 1988), citations omitted. At all times, Cannavaro retains the burden of persuading the trier of fact that he has been the victim of retaliation. *St. Mary's Honor Center* at 507; *Heiat v. E. Montana Coll.*, 275 Mont. 322, 328, 912 P.2d 787, 792 (1996).

1. Cannavaro has not shown he was engaged in protected activity.

“Protected activity” means the exercise of rights under the act or code and may include: (a) aiding or encouraging others in the exercise of rights under the act or code; (b) opposing any act or practice made unlawful by the act or code; and

(c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1)(a) through (c).

The MHRA provides that it is unlawful discrimination for an employer to refuse employment to a person in compensation or in term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction. Mont. Code Ann. § 49-2-303.

Cannavaro presented no evidence suggesting he aided or encouraged others in the exercise of rights under the MHRA or that he had ever before been involved in a case before the Human Rights Bureau, either as a Charging Party or as a witness, prior to filing his complaint on March 28, 2014. Therefore, the issue of whether Cannavaro engaged in “protected activity” is narrowed to whether Cannavaro opposed any act or practice made unlawful by the MHRA.

The Hearing Officer was unable to find any case in which the Montana Supreme Court directly addresses what constitutes oppositional conduct protected under the MHRA. The First Judicial District Court of Montana considered what constituted protected oppositional conduct under the MHRA in *Neer v. Human Rights Comms’n*, 1997 Mont. Dist. LEXIS 776 (Mont. Dist. Ct. 1997). In that case, the court considered whether an employee protesting sexual harassment in the workplace engaged in protected activity. The court considered three cases from other jurisdictions in which the concept of protected oppositional conduct was considered. The courts in those cases generally found that the manner in which the opposition is presented and the degree to which it interferes with or disrupts the work environment is key to determining whether the conduct is protected under the particular state’s human rights act. See *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (employer showed a legitimate, non-discriminatory reason for employee’s discharge based upon her method of protesting discrimination in the workplace interfered with the employer’s ability to conduct its business); *Rollins v. State of Fla. Dept. of Law Enforcement*, 868 F.2d 397 (11th Cir. 1989) (employer showed a legitimate, non-discriminatory reason for employee’s discharge based upon her antagonistic and hostile manner of presenting spurious claims of racial discrimination); and *EEOC v. Crown Zellerbach*, 720 F.2d 1008 (9th Cir. 1983) (employee’s protest of racial discrimination considered protected conduct as it had no impact on employees’ job performance or work environment). In *Neer*, the court found the employee was engaged in protected oppositional conduct based upon the employer’s concession that it would not have discharged the employee but for the

employee's complaint about sexual harassment and threat to sue if the sexual harassment did not stop.

In reviewing cases from other jurisdictions addressing protected oppositional conduct, the Hearing Officer found the analysis used by the U.S. District Court for the Eastern District of Pennsylvania particularly instructive. In *Pawlak v. Seven Seventeen HB Phila. Corp. No. 2*, 2005 U.S. Dist. LEXIS 4712, \*29-30, 95 Fair Empl. Prac. Cas. (BNA) 834 (E.D. Pa. Mar. 24, 2005), the plaintiff filed a complaint under the Pennsylvania Human Rights Act (PHRA) alleging he was discharged due to his employer's practice of discriminating against employees and customers based upon race. The PHRA, like the MHRA, provides that an employee engages in protected activity if he or she opposes any discriminatory practice by the employer. The court found the plaintiff had not shown he was engaged in protected oppositional conduct because he had failed to specifically complain to the employer that its decisions were discriminatory despite his contention he had protested the employer's efforts to attract white customers and to discharge an African American employee. The court noted:

The focus of a protected activity claim rests, however, with the "message . . . conveyed, and not the medium of conveyance." At a minimum, the allegedly protected activity must express, either "explicitly or implicitly," "opposition [to] discrimination on the basis of" some protected characteristic, such as race, gender, age, or disability. Complaints that are "too vague" or that make a "general complaint about unfair treatment" without alleging that the employer engaged in unlawful discriminatory conduct do not qualify as protected activity. "[A] plaintiff need not prove the merits of the underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation" of anti-discrimination laws had occurred in order to establish the existence of a protected activity.

*Id.*, citations omitted.

Cannavaro testified he complained regularly about the "blending" of consumers and the potential risk of harm it posed to other consumers. However, Cannavaro offered no credible and substantial evidence showing he ever specifically alleged Flathead Industries' practice of "blending" consumers "promulgated sexual harassment in the workplace" prior to the filing of his human rights complaint, which occurred approximately two weeks after his transfer to the Whitefish Thrift Store. While several of the incidents Cannavaro pointed to as involving consumers being

subject to inappropriate behavior by consumers considered to be non-adjudicated sex offenders are troubling, Cannavaro has failed to show that Flathead Industries' practice of "blending" consumers violated the MHRA or that he held a good faith belief that such a practice violated the MHRA prior to his filing his complaint. Therefore, Cannavaro has not shown he was engaged in protected activity when protesting the "blending" of consumers.

2. Cannavaro has not shown he was subject to a material adverse employment action when Flathead Industries transferred him to the Whitefish Thrift Store.

Unlawful retaliation may occur when a person is subject to discharge, demotion, denial of promotion, denial of benefits, or other material adverse employment action. Admin. R. Mont. 24.9.603(2).

Cannavaro argued his transfer was a material adverse employment action in that it requires him to drive an additional 15 miles each day. Cannavaro suffered no reduction in pay or benefits as a result of the transfer; nor did he suffer any demotion or change in job title. While Cannavaro's duties may have changed due to the transfer, he has not shown the change was so significant as to make his transfer a material adverse employment action. Therefore, Cannavaro has failed to show Flathead Industries took a material adverse employment action against him based upon its decision to transfer him from the Kalispell Thrift Store to the Whitefish Thrift Store.

3. Cannavaro has not shown a causal link between the adverse action and his alleged protected activity.

A charging party must prove the existence of a causal connection or other circumstance raising a reasonable inference that the charging party was treated differently because of the protected activity. Admin. R. Mont. 24.9.610(2).

Assuming *arguendo* Cannavaro had shown he was engaged in protected activity when protesting the "blending" of consumers, he has failed to show a causal link between the alleged protected activity and Flathead Industries' decision to transfer him to another store. Many of Cannavaro's complaints regarding the "blending" of consumers were made several months and years prior to the filing of his complaint with the Human Rights Bureau. The only activity that appears to be causally linked to Flathead Industries' decision to transfer Cannavaro was the

contentious SS Committee meetings held on December 31, 2013 and January 7, 2014.

Cannavaro described his behavior at those meetings as being “impassioned.” Bonin, Frey, Malmin, Hartigan, and Poynter described Cannavaro’s behavior as angry, confrontational, and hostile and described Cannavaro as being red faced, shouting, and pacing. Several of those witnesses described feeling as though Cannavaro was personally attacking Hartigan and feeling uncomfortable as they saw the effect Cannavaro’s behavior had on Hartigan. Hartigan testified she personally felt attacked by Cannavaro.

Cannavaro has not shown by a reasonable inference that the decision to transfer him to another store was based on his protesting the “blending” of consumers prior to the December 31, 2013 and January 7, 2014 SS Committee meetings. Rather, the evidence shows the decision to transfer him was based entirely upon his behavior at those SS Committee meetings. Therefore, Cannavaro has failed to show a causal link between his alleged protected activity and the decision to transfer him to the Whitefish Thrift Store.

B. Flathead Industries has shown it had a legitimate, non-discriminatory reason for transferring Cannavaro to the Whitefish Thrift Store.

If the charging party establishes a prima facie case of illegal retaliation, the employer must provide evidence of a legitimate, nondiscriminatory reason for the adverse employment action. Admin. R. Mont. 24.9.610(3). A legitimate business reason is “neither false, whimsical, arbitrary or capricious, and it must have logical relationship to the needs of the business.” *Buck v. Billings Montana Chevrolet, Inc.*, 248 Mont. 276, 281-32, 811 P.2d 537, 540 (1991). If the employer meets its burden, the presumption of discrimination created by the prima facie case disappears.

The charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* The charging party must demonstrate that the reason offered by the employer is a pretext for illegal retaliation. Admin. R. Mont. 24.9.610(4). “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 for the adverse action.” *Heiat* at 328, 912 P.2d at 791. The employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its actions that a reasonable fact-finder could find them



unworthy of credibility. *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642 (9<sup>th</sup> Cir. 2000).

“An employee seeking to defeat an employer’s argument that the employee was discharged for a legitimate business reason . . . must offer evidence upon which a fact finder could determine that the reason given by the employer was false, whimsical, arbitrary, or capricious or unrelated to the needs of the business.” *Delaware v. K-Decorators, Inc.*, 293 Mont. 97, 112-113, 973 P.2d 818, 829 (citations omitted).

Again, assuming arguendo Cannavaro has shown a prima facie case of retaliation, Flathead Industries has shown it had a legitimate, non-discriminatory business reason for transferring him to another store.

An employer has the right to expect its employees will treat each other with respect and courtesy at all times. This is particularly true where, as in this case, the employer has detailed policies regarding employee conduct. While Cannavaro may have considered his behavior to be impassioned, the testimony of the employer’s witnesses describe a situation in which one employee attacked the ability of another employee to perform her job duties based upon her age, appearance, and gender. The irony is not lost on the Hearing Officer of Cannavaro continuing to argue that Hartigan was unfit to accompany a male consumer on an overnight trip due to her age, appearance, and gender during his own human rights case.

The Hearing Officer found the testimony of Green and Hammer particularly credible when considering the employer’s argument that it had a legitimate, non-discriminatory reason to transfer Cannavaro to another store. Both Green and Hammer testified they recommended Cannavaro’s transfer after considering the many contributions Cannavaro had made to Flathead Industries throughout his employment. Both Green and Hammer testified they thought it best to remove Cannavaro from the dysfunctional workplace at the Kalispell Thrift Store and transfer him to the Whitefish Thrift Store, which was in need of his considerable managerial skills and talent.

Cannavaro presented no evidence showing the members of the Personnel Committee or the Board of Directors were aware of his previous complaints about the “blending” of consumers or that any individual member had a reason to retaliate against him. In short, Cannavaro presented no substantial and credible evidence showing Flathead Industries’ stated reasons for transferring him were merely pretext for retaliation. Therefore, Cannavaro has failed to show Flathead Industries retaliated against him for engaging in protected activity.

- C. Cannavaro has not shown Vicki Poynter retaliated against him for engaging in protected activity.

Cannavaro argued Poynter retaliated against him due to his previous complaints about the “blending” of consumers and the grievance he filed against her in June 2013. Poynter testified she immediately removed herself from the investigation after becoming aware of Hartigan’s grievance for the very reason that her involvement would create an appearance of impropriety. There is no evidence showing Poynter aided or encouraged Hartigan in preparing and filing her grievance or had any contact with Hartigan either prior to or after the grievance was filed. There is no evidence showing Poynter was involved in Ceravolo’s investigation or that she was involved in the Personnel Committee’s recommendation or the Board of Director’s decision to transfer Cannavaro. Cannavaro has failed to show Poynter retaliated against him for his having engaged in protected activity.

## V. CONCLUSIONS OF LAW

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

2. Brian Cannavaro failed to prove Flathead Industries and/or Vickie Poynter retaliated against him for engaging in activity protected by the Montana Human Rights Act. Mont. Code Ann. § 49-2-301. For purposes of Mont. Code Ann. § 49-2-505(8), Flathead Industries and Vickie Poynter are the prevailing parties.

## VI. ORDER

Judgment is granted in favor of Flathead Industries and Vickie Poynter and against Brian Cannavaro, whose complaint is dismissed with prejudice as meritless.

DATED: This 28th day of July, 2015.

/s/ CAROLINE A. HOLIEN  
Caroline A. Holien, Hearing Officer

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Brian Cannavro, Charging Party, and his attorney, Scott Hilderman, Law offices of Scott G Hilderman, PC; and Flathead Industries, Inc., and Vickie Poynter, CEO, and their attorney, Daniel Johns, Crowley Fleck, PLLP:

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 Howard, (406) 444-4356 immediately to arrange for transcription of the record.

CANNAVARO.HOD.CHD