

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

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0141016978:

LESLEY COONEY,)	Case No. 1254-2015
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
MISSOULA SPARTAN, LLC, d/b/a)	
SUBARU OF MISSOULA,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Lesley Cooney brought this complaint alleging her former employer, Missoula Spartan, LLC, d/b/a Subaru of Missoula (Missoula Spartan), discriminated against her on the basis of age when it demoted her and reduced her pay.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on June 9, and June 10, 2015 in Missoula, Montana. Ryan Shaffer and Ali Guio Archual, attorneys at law, represented Cooney. Joe Seifert, attorney at law, represented Missoula Spartan.

Cooney, Thomas Walker, Bill Davidson, Taylor Bolster, Chelsea Chirinos, Jill Hetzel, Don Jones, Craig Butler, and Tyler Bowles, Michael Forrest, Michael Springer, and Kevin Knie, testified under oath. Charging Party's Exhibits 1 through 9 were admitted. Respondent's Exhibits 101 through 118 were also admitted.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received on July 31, 2015. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUE

Did Missoula Spartan, LLC, d/b/a Subaru of Missoula discriminate against Lesley Cooney on the basis of age in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code. Ann.?

III. FINDINGS OF FACT

1. The Charging Party, Lesley Cooney, was at all times material to this case a 66-year-old female residing in Missoula, Montana.

2. Searles Pontiac Cadillac Subaru (Searles) hired Cooney as an accounts receivable clerk in 1977. 4 Seasons Subaru (4 Seasons) took over Searles' operations in 1980.

3. Cooney's job duties while office manager for Searles and 4 Seasons included the following:

- a. Processing payroll - first by hand and later through ADP and Reynolds & Reynolds software programs.
- b. Training and supervising employees, including the title clerk, warranty clerk, cashier and receptionist.
- c. Balancing the chart of accounts of the dealership, which showed assets, liabilities, new car sales, used car sales, service sales, and parts sales.
- d. Entering new and used car sale data into the ledgers and later into ADP and Reynolds & Reynolds.
- e. Entering manufacturer incentives, including rebates, hold backs, and credits, into the appropriate schedules to ensure proper payment to the dealership.
- f. Preparing month-end financial statements prior to Kendall's ownership and then collecting and submitting dealership-specific data for month-end financial statements prepared by Kendall's central office.

- g. Tracking revenue from each department so different costs would be charged to the correct department.
- h. Supervising the title clerk and filling in when he or she was out of the office.
- i. Preparing the DMV and title guide for training purposes at the request of Kendall management.
- j. Reviewing and reconciling the dealerships' bank statements.
- k. Maintaining vehicle inventory schedule for the dealership, which listed all new and used cars owned by the dealership at any given time.
- l. Preparing monthly reports for the owner and/or general manager and daily operating condition reports when requested.
- m. Completing all workers' compensation filing and reporting requirements; as well as completing all information related to state, federal, unemployment and workers' compensation taxes.

4. Cooney received multiple awards from the various manufacturers throughout her career in recognition of her prompt and accurate submission of manufacturer statements.

5. Cooney had not received any warnings regarding her job performance at any time in her 37 year career. Cooney was generally considered to be a good employee who was able to perform her job duties satisfactorily.

6. From 1983 to 2007, Owner and General Manager Thomas Walker relied upon Cooney to perform the duties of a full charge office manager and had no concerns about her ability to perform her job duties satisfactorily.

7. Bill Davidson, who had worked with Cooney throughout much of her career, considered her able to perform her job duties satisfactorily.

8. Kendall Auto Group (Kendall) purchased 4 Seasons in 2010. Kendall, which is based in Eugene, Oregon, owns several automobile dealerships throughout the Pacific Northwest. Dave Blewett owns Kendall.

9. Kendall utilizes a centralized business model that has many dealership bookkeeping and accounting functions performed from its Eugene office. As a result, many of Cooney's job duties were removed from the Missoula dealership and transferred to the Eugene office. Cooney essentially performed clerical work during Kendall's ownership of the dealership.

10. The Respondent, Missoula Spartan, LLC, is a Montana limited liability company that is owned by the Spartan Group. Don Jones is the principal owner of the Spartan Group, which owns six automobile dealerships in the western United States including the Missoula Subaru dealership and a Ford dealership in Laurel, Montana. Spartan Group's corporate office is located in Ashland, Oregon.

11. The Spartan Group's business strategy includes acquiring underperforming dealerships, which typically requires a complete change in dealership management and an overhaul of the underperforming dealership's processes.

12. Prior to owning the Spartan Group, Jones was Senior Vice President of Retail Operations for Lithia Group, which owns approximately 100 automobile dealerships and employs approximately 7,000 employees nationwide.

13. Jones came to know Jill Hetzel while working at Lithia Group. Hetzel worked for approximately 13 years in acquisitions of automobile dealerships for Lithia Group. In her role at Lithia Group, Hetzel was responsible for managing the transition of ownership prior to and after an acquisition of a dealership. Hetzel subsequently left Lithia Group to work as Spartan Group's Vice President/Controller. Hetzel and Jones also came to know Michael Forrest while working at Lithia Group. Forrest began working for Spartan Group as its Staffing Manager.

14. In the summer of 2013, Jones and Blewett began discussing the sale of the Missoula dealership to Missoula Spartan. Jones and Blewett were business acquaintances who frequently discussed issues affecting the auto business. Jones and Blewett discussed what would need to happen in terms of staffing if Missoula Spartan were to acquire the Missoula dealership. Jones understood, based upon his conversation with Blewett, that he would need to hire a "full charge" office manager, because Cooney would not be able to perform the work required of a "full charge" office manager due to the differences between the centralized business models used by Kendall and the Spartan Group.

15. The Spartan Group utilizes a decentralized business model, which leaves the majority of administrative, accounting, and human resources duties to be

completed at the individual dealership rather than at the Spartan Group's corporate office.

16. In December 2013, Hetzel and Forrest began recruiting for a "full charge" office manager for the Missoula dealership. A full charge office manager is considered to be an individual who is capable of fully administering an independent dealership and overseeing the activities of the administrative staff. A full charge office manager is also responsible for providing administrative support to the dealership's sales and service departments.

17. On December 19, 2013, Jones sent an email to Hetzel regarding the need to recruit a "full charge" office manager. The email stated:

They have an office manager there working. This is the person who was at the dealership when they [Kendall] bought it. Dave [Blewett] says she is not capable as an office manager. He seems to think we only need an office manager and there are enough support staff there.

18. Forrest did some "soft recruiting" prior to the acquisition actually being completed by searching through online resume databases in an effort to find someone qualified for the office manager position who lived in the Missoula area.

19. Jones, Hetzel and Forrest had not yet met or even seen Cooney prior to beginning their recruiting efforts.

20. In January 2014, Jones directed Forrest to search more aggressively for a full charge office manager for the Missoula dealership. Forrest began by posting advertisements on craigslist.org and careerbuilder.com and making cold calls.

21. On or about January 27, 2014, Hetzel interviewed Jean Sauter for the office manager position. Missoula Spartan flew Sauter to its Ashland offices where she met with Hetzel and Jones. Hetzel and Jones decided it was not going to be a good fit because Sauter lacked the "hands on" experience required for a full charge office manager. Sauter was approximately 60 years old at the time.

22. On or about March 5, 2014, Hetzel interviewed Sue Crawford for the office manager position after she was referred to her by Forrest. Hetzel conducted a telephone interview with Crawford, who ultimately took another job in California. Crawford had approximately 25 years of experience in the automotive sales industry at the time she was considered for the Missoula dealership's office manager position.

23. In April 2014, Forrest suggested Hetzel and Jones interview Gary Thomas, who he had discovered through careerbuilder.com. Thomas had most recently been the controller at Bretz RV & Marine in Missoula (Bretz) for approximately eight years. Thomas had more than 30 years of experience in the automotive sales industry. Thomas decided to move to Washington to be closer to his family before Hetzel and Jones were able to interview him for the office manager position.

24. On April 2, 2015, Jones and Hetzel made their first official visit to the Missoula dealership. This was their first opportunity to meet the dealership's employees including Cooney. Jones conducted an employee meeting that day during which he described the transition schedule for the acquisition and explained the Spartan Group's decentralized office structure. Jones also introduced Mike Springer, who had recently been hired to be the new business manager for the dealership. Springer was approximately 60 years old at the time.

25. Cooney was initially excited about the prospect of the accounting duties being returned to the dealership. Cooney felt it would be a better use of her skills and training than what she had experienced with Kendall.

26. On April 9, 2014, Missoula Spartan completed its acquisition of Kendall.

27. Cooney organized and attended several employee meetings after the acquisition had been completed. Cooney understood Missoula Spartan's policy applied to her as a new employee of Missoula Spartan. During these meetings, it was discussed that Kendall employees were new employees of Missoula Spartan and would be required to complete a six-month probationary period. Missoula Spartan's policy, which was provided to the Kendall employees, stated:

All new, transferred, and/or rehired employees work on a probationary basis during the first six (6) months of employment. An employee's absence from work for five or more consecutive work days shall automatically extend the probationary period by the length of the absence.

The probationary period is intended to give new, transferred, and/or rehired employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets both employee's and employer's expectations. Either the employee or the company may end the employment

relationship at will at any time during the probationary period, with or without cause or advance notice.

28. From April 8, 2014 through April 18, 2014, Hetzel remained at the dealership to oversee the final transition. Hetzel worked closely with Cooney during this period. Hetzel and Cooney have two distinctly different personalities. Hetzel is very direct, hard charging and result oriented. Cooney is more passive and less inclined to confrontation.

29. Hetzel never gave Cooney a specific list of expectations regarding her job performance. Hetzel was aware Cooney appeared nervous during her time with Hetzel. Hetzel did not offer any assistance or give Cooney the “benefit of the doubt” when observing Cooney struggling with performing what Hetzel considered to be simple tasks.

30. Hetzel was of the opinion Cooney would not be able to meet the needs of Missoula Spartan if she were to remain in the office manager position. Hetzel observed Cooney had difficulties performing what Hetzel considered to be basic duties such as calculating employee payroll; processing DMV documents; recording new car inventory; and posting car deals in the dealership’s accounting system.

31. Cooney attempted to perform her job duties to the best of her ability during the transition. Cooney had difficulties meeting Hetzel’s expectations because she had not performed many of the duties required of a full charge office manager for several years during Kendall’s ownership. Cooney had previously been able to perform those job duties without issue but had trouble meeting the pace and the demands imposed by Hetzel.

32. On April 25, 2014, Jones sent an email to Hetzel and Springer reminding them that they needed to be mindful to completing payroll for that period. Hetzel was concerned that the employees would be upset if payroll was done incorrectly for the first payroll period under Missoula Spartan leadership. Hetzel responded via email that she had to re-figure the pro-rated employees’ payroll due to Cooney’s errors. Hetzel wrote, “Not a surprise, but I wanted to see if she could tackle something that she said she felt comfortable with. Couldn’t do it.” Jones responded via email, “I think we need to mover [sic] her let go date.”

33. During this period, Hetzel and Jones decided to hire Chelsea Chirinos as an assistant office manager. Thomas, who had previously worked with Chirinos at Bretz, recommended Chirinos for the position.

34. Chirinos had worked in accounting for Bretz for approximately five years before being hired by Missoula Spartan. Chirinos completed payroll; tax reporting; new hire paperwork; bank reconciliations; and supervised a staff responsible for accounts payable/receivable, inventory, and sales processing. Chirinos had previously worked as an office manager for a financial company; a customer service representative for a national insurance company; and office manager for Sportsman's Warehouse. Chirinos had never before worked for an automobile dealership.

35. Hetzel thought Chirinos would eventually grow into being a full charge office manager based upon her prior work experience. Hetzel and Jones decided to give Chirinos approximately 12 months of training and support in order for her to be able to become a full charge office manager. Hetzel continued performing the job duties of office manager while training Chirinos. Missoula Spartan subsequently promoted Chirinos to office manager after approximately four months.

36. On May 7, 2014, Hetzel and Jones met with Cooney and informed her that they had decided to hire Chirinos as an assistant office manager. Cooney was given an outline of her new job duties, one of which was to "develop" Chirinos into a full charge office manager. Cooney was also informed her rate of pay would be reduced from \$4,800.00 per month to \$3,000.00 per month. The changes were set to take effect the next day. Cooney did not immediately accept the offer and asked for some time to consider her options.

37. On May 8, 2014, Cooney returned to the dealership and cleared her belongings out of her office. Cooney encountered Springer while clearing out her office. Springer encouraged Cooney to stay.

38. On May 9, 2014, Cooney informed Hetzel via email that she was still considering the job offer. Cooney also requested a written job description for the full charge office manager.

39. Jones responded to Cooney's email later that evening and urged her to remain at the dealership. Jones denied Cooney's request for the full charge office manager job description and wrote, ". . . I see no purpose in discussing why you cannot be my office manager?[sic]".

40. On May 14, 2014, Jones sent Cooney an email advising her that her employment status with Missoula Subaru was "suspended without pay." Jones directed Cooney to inform Missoula Subaru of her intention to accept the changed job duties no later than May 21, 2014.

41. Hetzel spoke with Cooney over the phone that same day. Hetzel asked Cooney if she had read Jones' email and if she had any questions. Cooney said she had read the email and had no questions. Hetzel then asked Cooney to notify them by the end of the week if she intended to return to work. Hetzel sent Jones a summary of her telephone conversation with Cooney that same day.

42. Cooney subsequently accepted an offer of employment at Bretz. Cooney worked for Bretz for approximately two months before she was discharged. Bretz paid Cooney approximately \$3,000.00 per month.

43. On or about May 28, 2014, Chirinos began working as an assistant office manager based upon the recommendation of Thomas. Chirinos was approximately 31 years old at the time she began working for Missoula Spartan.

44. In June 2014, Cooney returned her work shirts to Missoula Spartan. Missoula Spartan learned during this period that Cooney had started work for Bretz.

IV. OPINION¹

A. Cooney Has Shown a Prima Facie Case of Age Discrimination.

Cooney contends Missoula Spartan's decision to change her job duties and decrease her wages was due to her age. Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of age commits an unlawful discriminatory practice. Terms, conditions or privileges of employment include: hiring, promotion, upgrading, transfer, discharge, termination of employment; rates of pay and changes in compensation; job assignments, job classifications, position descriptions; and selection and support for training. Admin. R. Mont. 44.9.604(2).

Examples of conduct that may constitute unlawful employment discrimination include:

- (a) denying, qualifying or limiting a term, condition or privilege of employment because of a person's membership in a protected class;
- (g) classifying a person in a way that adversely affects employment

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

status or opportunities because of a person's membership in a protected class; and
(h) using standards, criteria or methods of administering or managing employment opportunities which discriminates in the terms and conditions of employment because of membership in a protected class.

Admin. R. Mont. 24.9.604(3).

Where, as here, there is no direct evidence of discrimination, the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996). *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386. Under that burden-shifting scheme, a charging party who makes out a prima facie case of discrimination is entitled to judgment if the respondent does not come forward to rebut the prima facie case with evidence that the adverse employment action taken was done for legitimate business reasons.

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

An inference of discrimination can be established by "proof that respondent continued to make the employment . . . available to persons who are not members of the same protected class as charging party" or that "similarly situated persons outside the protected class were treated more favorably." Admin. R. Mont. 24.9.610. In age discrimination cases, such an inference arises in the employment context if the charging party is replaced by a "substantially younger worker." *Payne v. Northwest Corp.*, 185 F.3d 1068, 1073 n.10 (9th Cir. 1999)(applying the requirements of the Montana Human Rights Act).

If Cooney presents a prima facie case, the burden then shifts to Missoula Spartan to show legitimate business reasons for its actions. Clark, supra. Should Missoula Spartan carry that burden, Cooney must then “prove by a preponderance of the evidence that the legitimate reasons offered by [Missoula Spartan] were not its true reasons, but were a pretext for discrimination.” Id.; Admin. R. Mont. 24.9.610(3). Cooney at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. St. Mary’s Honor Center, 509 U.S. at 507; Heiat, 912 P.2d at 792. At a minimum, Cooney must show that she is in a protected class, that she performed her job satisfactorily and that she suffered adverse employment action under circumstances giving rise to an inference that she was discriminated against because of age.

1. Cooney has shown she is in a protected age group.

At all times material to this case, Cooney was a 66-year-old woman. Section 29 U.S.C. 14, § 631(a) of the Age Discrimination in Employment Act (ADEA) provides that the protected age group for discrimination purposes is age 40 and over. Therefore, Cooney is a member of a protected class for purposes of age discrimination.²

2. Cooney has shown she was qualified for the full charge office manager position.

Missoula Spartan argues Cooney was not capable of performing her job duties in a satisfactory manner. Missoula Spartan points to various concerns voiced by Hetzel as evidence that Cooney was unable to continue in her position under ownership of Missoula Spartan.

It is undisputed Cooney had more than 30 years of experience as an office manager at the time Missoula Spartan acquired the dealership. Cooney performed the duties required of a full charge office manager throughout most of her career without issue. Cooney was not required to perform those duties during the period of Kendall’s ownership, which left her performing primarily clerical duties for approximately three years. It stands to reason that an employee not regularly performing those duties would struggle in her performance under the watchful eye of

² The Montana Human Rights Act does not contain a minimum age requirement as a criterion of membership in a protected class regarding age. In some contexts that difference might be significant, but given the difference in age between Cooney and Chirinos, use of the ADEA criterion is appropriate here.

a new owner. Cooney did not have sufficient time to become reacquainted with those duties before there could be a full and fair assessment of her ability to continue on as a full charge office manager for Missoula Spartan. Cooney has shown she had performed the duties of a full charge office manager in a satisfactory manner and was capable of performing those duties as a full charge office manager for Missoula Spartan.

3. Cooney has shown Missoula Spartan discharged her when it removed her from the full charge office manager position.

Missoula Spartan denies discharging Cooney and argues it merely decided to “remove” Cooney from the full charge office manager position and place her in a different position that included fewer duties and less pay. Cooney argues Missoula Spartan’s decision to “remove” her is no different than if Missoula Spartan had discharged her outright. Despite the apparent dispute over the word “remove,” the more important term used by Missoula Spartan is the term, “let go.” It is undisputed Jones sent an email to Hetzel in response to her email dated April 25, 2014 outlining her concerns about Jones’ performance in which he wrote, “I think we need to mover[sic] her let go date.”

The commons use of the term, “let go,” is in situations where the employer makes the decision to end the employment of an employee. Attempts to parse the term and give it a different and more convoluted meaning by Missoula Spartan were not persuasive. Clearly, Jones and Hetzel had made the decision to end Cooney’s employment as the full charge office manager and to offer her a new position with different duties and a reduced rate of pay.

The Montana Supreme Court addressed a similar issue in *Howard v. Conlin Furniture No. 2, Inc.*, 272 Mont. 433 (Mont. 1995). In *Howard*, the court refused the employer’s argument that it merely demoted an employee who had been terminated from the store manager position and offered a sales position. The court held, “This case does not involve a lateral transfer, nor a minor change in job description. This case involves absolute and final termination from a managerial position, followed by an offer of employment in a functionally different, and substantially inferior, position with the same employer.” *Howard* at 438. The court noted the employee was offered a position with substantially different duties and wages that were less than 25% of the employee’s previous wages.

In this case, Cooney’s duties as an office manager were taken from her and she was given duties that were less managerial and more clerical in nature. Further, the

position paid \$1,800.00 less than the office manager position, which was a reduction in pay of approximately 37%. Cooney's refusal of the new position may affect her duty to mitigate her damages. However, Missoula Spartan clearly discharged Cooney when she was "let go" from the office manager position.

4. Cooney has shown Missoula Spartan took an adverse employment action against her when it changed her job duties and reduced her rate of pay by more than 37%.

Even if it was not determined Missoula Spartan discharged Cooney, the evidence shows it took an adverse employment action against her by changing her job duties and reducing her pay by approximately 37%. Adverse employment action includes "rates of pay or compensation and changes in compensation." Admin. R. Mont. 24.9.604. Therefore, Cooney has shown Missoula Spartan discharged her or, in the alternative, took an adverse employment action against her by changing her job duties and reducing her rate of pay.

5. Cooney has shown she was replaced by a substantially younger worker.

Evidence establishing a reasonable inference of discrimination based on protected class status includes: "(I) proof that respondent continued to make the employment . . . available to persons who are not members of charging party's class and (ii) proof that similarly situated persons outside the protected class were treated more favorably" Admin. R. Mont. 24.9.610(2)(b).

Cooney was approximately 66-years-old at the time Missoula Spartan made the decision to change her job duties, reduce her pay and replace her with Chirinos, who was approximately 31-years-old at the time Missoula Spartan hired her for the full charge office manager position. Cooney has shown she was replaced by a younger worker who was more than 30 years her junior.

- B. Missoula Spartan Has Shown it had Legitimate Business Reasons for its Actions.

Once a complaining party establishes a prima facie case, an inference of discrimination arises by operation of law irrespective of whether direct evidence of discrimination exists. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943 (1978). Missoula Spartan must now show under the burden shifting scheme set forth in *McDonnell Douglas Corp.* that it had legitimate business reasons for

changing Cooney's job duties, reducing her pay and replacing her with a younger worker.

Hetzel had serious concerns about Cooney's abilities to perform the duties required of a full charge office manager. General Manager Mike Springer and Parts Manager Kevin Knie also had concerns about Cooney's ability to adequately perform those duties. Knie testified Cooney appeared "overwhelmed" and did not "have all the tools" required for the position.

Hetzel's testimony regarding Cooney's performance during the period of time Hetzel worked closely with her to complete the turnover from Kendall to Missoula Spartan seemed exaggerated at times. For instance, Hetzel testified Cooney had to ask for the number of days in a year. While Cooney may have very well asked the question, which is doubtful, Hetzel provided no context or any explanation as to why a competent and well spoken individual would ask for such basic information. Hetzel also pointed to Cooney's apparent failure to follow up on the switchover of utilities as a concern. Hetzel conceded that the issues with the switchover may have rested with the utility company rather than with Cooney.

However, Hetzel raised several legitimate concerns about Cooney's ability to perform the duties of the full charge office manager according to the expectations of Missoula Spartan. For example, Cooney had to speak to a non-employee about DMV processes, which she should have been familiar with based upon her years of experience in supervising and performing the administrative functions of an automobile dealership. Another example offered by Hetzel was Cooney not feeling comfortable with entering inventory for the dealership. While Cooney may have been "rusty" on that process, one would assume that someone with her years of experience would have been willing and able to observe one or two entries by Hetzel or another employee and would have been able to assume those duties. Hetzel also offered concerns she had about Cooney's willingness or ability to take charge of the administration of the dealership. Hetzel was in a unique position, based upon her years of experience in dealership acquisitions, to assess Cooney's performance and to determine whether Cooney had the skills necessary to perform to the level Missoula Spartan expected of her as a full charge office manager. While portions of Hetzel's testimony appeared exaggerated, as noted above, the majority of her testimony appeared sincere, direct and credible about her having legitimate concerns regarding Cooney's ability to take over as the full charge office manager.

Missoula Spartan's argument that an employer has the right to make day-to-day employment decisions for its business is well taken. Hetzel's extensive

experience in managing the transition of dealerships after an acquisition makes her uniquely qualified to determine whether an employee will be a good fit for the Spartan Group and its business model. While Hetzel may not have been sensitive as to what Cooney may have required to be able to successfully show her skills and abilities, Hetzel's instinct is due some deference. Missoula Spartan has, therefore, shown that it had legitimate business reasons for its decision to change Cooney's job duties, reduce her pay and replace her with another worker.

C. Cooney Has Not Shown the Legitimate Reasons Offered by Missoula Spartan Were a Pretext for Discrimination.

The burden now shifts to Cooney to show those reasons offered by Missoula Spartan were not its true reasons but were merely a pretext for discrimination. Cooney, at all times, retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination.

Cooney argues Missoula Spartan denied her employment opportunities due to her age. Cooney denied age ever being mentioned during her discussions with Hetzel and Jones. Cooney's witnesses denied she ever mentioned age being a reason for her separation from Missoula Spartan. No witness testified Cooney's age was ever mentioned throughout her time with Missoula Spartan. Cooney testified she began to suspect her age was the reason for Missoula Spartan's decision to change her job duties after she quit the employment and after she received Missoula Spartan's communications to the Human Rights Bureau.

Cooney further argues Missoula Spartan's willingness to train and "develop" Chirinos as a full charge office manager despite her having no automobile dealership experience as evidence of Missoula Spartan's decision to change her duties being based upon age. Cooney notes Chirinos was given a detailed job description, as well as 12 months to grow in the full charge office manager position, all of which was denied to Cooney. Cooney also points to the admissions of Jones and Hetzel that neither of them provided Cooney with a list of job expectations or any support during the transition.

Hetzel and Jones adamantly denied their decision to change Cooney's duties and to hire Chirinos was based upon Cooney's age. The search for a new full charge office manager began before either Hetzel or Jones met Cooney or had an opportunity to review her employment records. Missoula Spartan offered credible evidence showing it pursued other candidates for the full charge office manager position who were in the fifties and sixties. Hetzel and Jones, themselves, are over 40

years old and Springer is approximately 60 years old. Missoula Spartan also offered evidence showing that many of their workers at other dealerships are in their forties, fifties and sixties. Cooney argues the efforts of Hetzel and Jones to locate a new office manager prior to the acquisition being completed is not relevant as to whether she was discriminated against on the basis of age after Missoula Spartan took over ownership. However, the evidence of the results of their search show that age was not a determining factor as to which candidates they considered. Further, the evidence goes to show that Jones was intent on finding a new full charge office manager without any consideration of Cooney's age or tenure with the business. While Jones may have relied upon a mistaken understanding of Blewett's statements regarding Cooney's abilities, the evidence shows that neither Jones nor Hetzel at any time prior to the acquisition being completed asked for or considered Cooney's age in making the decision to seek a new full charge office manager. The decision to seek a new full charge office manager was based entirely upon the desire to find a full charge office manager that fit within the Missoula Spartan business model.

Cooney has not shown that Missoula Spartan's decision to change her job duties, reduce her pay and replace her with Chirinos was due to her age. While Chirinos is significantly younger than Cooney, Chirino's attitude and demeanor at hearing was similar enough to the attitude and demeanor of Hetzel and Jones as to make it understandable why they felt more comfortable with her in the full charge office manager position than they did with Cooney. It appears Hetzel's assessment of Cooney and her abilities as a full charge office manager was based more upon a conflict between the individual's personalities and approach to business rather than any concerns about Cooney's age. Cooney has not offered substantial evidence to persuade the fact finder that Missoula Spartan's decision to change her job duties, reduce her pay and replace her with Chirinos was motivated by concerns regarding Cooney's age. Therefore, Cooney has not shown the legitimate business reasons offered by Missoula Spartan for changing her job duties, reducing her pay and replacing her with a younger worker was pretext for age discrimination.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. §49-2-509(7).
2. Lesley Cooney failed to prove Missoula Spartan, d/b/a Subaru of Missoula discriminated against her illegally because of age. Mont. Code Ann. §§49-2-303(1). For purposes of § 49-2-505(8), MCA, Missoula Spartan, d/b/a Subaru of Missoula is the prevailing party.

VI. ORDER

1. Judgment is granted in favor of Missoula Spartan, d/b/a Subaru of Missoula and against Lesley Cooney. Cooney's complaint is dismissed with prejudice as lacking merit.

DATED: this 21st day of August, 2015.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Lesley Cooney and her attorneys, Ryan Shaffer and Ali Guio Archual, Meyer, Shaffer & Stepan; and Missoula Spartan, LLC, d/b/a Subaru of Missoula, and its attorney, Joe Seifert, Keller, Reynolds, Drake, Johnson & Gillespie PC:

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 original transcript is in the contested case file.

COONEY.HOD.CHP