

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0131016502 &
0131016506:

| | | |
|-----------------------------|---|---------------------------------|
| TERESA FLANAGAN AND SHELLEY |) | Case Nos. 1987-2014 & 1988-2014 |
| MORROW, |) | |
| |) | |
| Charging Parties, |) | |
| |) | HEARING OFFICER DECISION |
| vs. |) | AND NOTICE OF ISSUANCE OF |
| |) | ADMINISTRATIVE DECISION |
| CITY OF BELGRADE, |) | |
| |) | |
| Respondent. |) | |

* * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Teresa Flanagan and Shelley Morrow filed their respective complaints with the Department of Labor and Industry on September 23, 2013 and September 26, 2013. Their complaints alleged that the Respondent, the City of Belgrade, discriminated against each of them in their employment on the basis of sex by using a different step matrix that resulted in male employees receiving greater compensation than similarly-situated female employees in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code. Ann.

On June 6, 2014, the Department of Labor and Industry gave notice that the charges would proceed to a contested case hearing and appointed David A. Scrimm as the Hearing Officer. On July 24, 2014, the matter was reassigned to Hearing Officer Leanora Coles. On October 6, 2014, the matter was reassigned to Hearing Officer Caroline A. Holien.

On November 21, 2014, Hearing Officer Holien issued an order granting the Charging Party’s Motion to Amend the Complaint and allowed the inclusion of the legal theory of intentional discrimination. The Hearing Officer also denied the Respondent’s Motion to Limit Charging Parties’ Damages in that same order.

The contested case proceeded on December 18, and December 19, 2014, in Bozeman, Montana. Flanagan and Morrow attended and were represented by their counsel, Jennifer Dwyer. The City of Belgrade attended through its representative, City Manager Ted Barkley. The City of Belgrade was represented by their counsel, City Attorney Richard Ramler and Jordan Ramler.

Flanagan; Morrow; Michelle Clark, former City Manager's Administrative Assistant; Susan Caldwell, Administrative/Payroll Clerk; E.J. Clark, Belgrade Police Chief; Dr. Wendy Stock; Hon. Michele Snowberger; Phyllis Wernikowski, Belgrade City Finance Director; and Marilyn Foltz, former Belgrade City Finance Director presented sworn testimony.

Charging Parties' Exhibits 1-30, 32-33, 35, 36, and 45-48 were admitted into the record. Respondent's Exhibits 101-108, 112-115, 117-120, 123-134, and 135-136 were also admitted into the record.

The parties graciously provided the Hearing Officer with post hearing briefing, the last of which was timely received on March 6, 2015 and at which time the record closed. Based on the evidence and argument promulgated in this matter, the following findings of fact, conclusions of law and hearing officer decision are made.

II. ISSUES

Did the City of Belgrade violate the Montana Human Rights Act by discriminating against Teresa Flanagan and Shelley Morrow on the basis of sex by implementing a step matrix pay scale that did not cover their positions?

Did the City of Belgrade violate the Montana Human Rights Act by retaliating against Teresa Flanagan and Shelley Morrow for filing their complaint with the Human Rights Bureau?

If the City of Belgrade did illegally discriminate against Teresa Flanagan and Shelley Morrow as alleged, what harm, if any, did they sustain as a result and what reasonable measures should the department order to rectify such harm and what should the department require to correct and prevent similar discriminatory and/or retaliatory practices?

III. FINDINGS OF FACT

1. The City of Belgrade (Belgrade) is a governmental entity that is an incorporated city in Montana. Belgrade is governed by an elected mayor, deputy mayor, and six-member city council.

2. The city council appoints the City Manager, who serves as Belgrade's chief administrative officer and is responsible to the city council for the administration of all city affairs. The City Manager supervises and directs each of Belgrade's departments, agencies and offices. The City Manager prepares the budget with the assistance of the Finance Director. The City Manager is responsible for presenting the budget to the city council and executing the approved budget. The City Manager has the authority to approve or deny an employee's request for a wage increase.

3. Joe Menicucci was the City Manager for several of the years relevant to this claim. In October 2012, Menicucci fell seriously ill and Chief of Police E.J. Clark became the Acting City Manager. Clark acted in consultation with Menicucci until Menicucci passed away in May 2013, which was during the preparation of the Fiscal Year (FY) 2013-2014 budget.

4. Clark was alarmed at the state of Belgrade's finances when he assumed the duties of Acting City Manager. Clark discovered Belgrade had been operating at a deficit for several years and tax revenues were not sufficient to correct the situation. Clark worked closely with Phyllis Wernikowski, who had been hired as Belgrade's Finance Director in May 2012, to finalize the FY 2013-14 budget.

5. Belgrade's Statement of Policy sets forth its personnel policies, including its Grievance Procedure. Under Belgrade's Grievance Procedure, an employee who is unable to resolve a complaint informally can file a formal complaint with the employee's department head within five working days of the event giving rise to the grievance or when the employee reasonably would be expected to have knowledge of the event (Step I). The department head is then required to provide a written response within five working days of receiving the grievance. If the employee is dissatisfied with the response or no response is made within five working days, the employee can then file a grievance with the City Manager (Step II). If the employee is still dissatisfied, the employee can then request a review by an Independent Grievance Review Board (Review Board) appointed by the City Council (Step III). The Review Board does not have the authority to change the decision of the City Manager. If still dissatisfied, the employee can demand the grievance be arbitrated by a neutral third-party (Step IV).

6. Belgrade's sexual harassment policy forbids all forms of harassment and includes a detailed list of conduct considered to be sexually harassing conduct.

7. Belgrade's pay policy provides that "all employees receive a rate of pay commensurate to the work performed." It also provides that "[w]age adjustments and performance reviews will be made periodically at the discretion of the City."

Employees are paid on the 30th of each month and the pay period is the 25th through the 24th of the following month.

8. Belgrade currently uses a pay matrix for patrol officers in the police department, laborers in the public works department and certified water/waste water operators in the public works department. Each pay matrix is based on the length of time it takes an employee to become proficient in the performance of his or her duties.

9. Each matrix has a “top out” rate, which is the maximum wage an employee can be paid according to the pay matrix. Belgrade dictates the length of time covered by the pay matrix; the number of steps within the pay matrix; percentage increase from starting pay to top out rate; and what positions are covered under the pay matrix.

10. The police department pay matrix was established in 2006 after negotiation between Clark and Menicucci. The top out rate for police officers for FY 2013-14 is \$25.36 per hour. The starting wage under the pay matrix is \$20.00, which is 78.9% of the top out wage. It takes ten years for the police officer to reach the top out wage under the matrix. Belgrade adopted a pay matrix for police officers in an attempt to attract and to retain officers while competing with other area law enforcement agencies.

11. The public works pay matrix was established in July 2012 and was based upon a review of the certified water/waste water operators’ rates of pay. The top out rate for certified water/waste water operators for FY 2013-14 was \$25.04 per hour. The starting wage under the pay matrix is \$18.78, which is 75% of the top out wages. C.P. Ex. 10. It takes five years for a certified water/waste water operator to reach the top out wage under the matrix. An individual achieving water/waste water certification receives an immediate pay raise upon certification.

12. Susan Caldwell, Administrative Assistant to the City Manager, is responsible for payroll and benefits. Caldwell developed the public works pay matrix based, in part, on the pay matrix used for the police department to track public works’ pay rates and to ensure uniformity.

13. The top out rate for a public works laborer for FY 2014-15 is \$17.53. The starting wage under the pay matrix is \$16.28, which is 92.9% of the top out wage. C.P. Ex. 10. A public works laborer receives the top out wage after one year. Belgrade adopted the public works’ pay matrix to achieve uniformity due to the hiring of several new employees.

14. There are no female police officers, certified water/waste water operators or public works laborers working for Belgrade, thus there are no female employees included in any of the pay matrices used by Belgrade. Belgrade's female employees include two water clerks; one payroll clerk; an administrative assistant to the City Manager; an administrative assistant for the police department; two court clerks; one evidence clerk and six librarians, whose wages are set by the Library Board. The duties performed by these employees are clerical in nature and are substantially similar.

15. Every Belgrade employee is eligible for a Cost of Living Adjustment (COLA) regardless of whether the employee is included on a pay matrix.

16. Every Belgrade employee is eligible for an annual longevity bonus of \$100.00 upon completing five years of employment.

17. Belgrade participates in the Montana Public Employee's Retirement System (MPERS). According to the testimony of Dr. Wendy Stock, the contribution rates for MPERS during the periods in question were as follows:

| YEAR: | RATE: |
|-------------|--------|
| 2006/2007 | 6.8% |
| 2008/2009 | 6.935% |
| 2010 - 2013 | 7.07% |
| 2014 | 8.07% |

18. Belgrade employs two court clerks who perform various administrative and clerical duties for the Belgrade City Court. The Honorable Michele Snowberger is the supervisor for both court clerks. Judge Snowberger does not have the authority to grant wage increases for the court clerks.

19. It takes approximately one year for a court clerk to become fully proficient in the performance of his or her duties.

20. On or about September 26, 2005, Shelley Morrow began working as a part-time court clerk. Morrow was fully proficient in the performance of her job duties within a year after she began the employment. Morrow became a full-time court clerk on or about November 1, 2007. Morrow's job duties did not change significantly once she became full-time. Morrow negotiated for an increase of her hourly wage from \$10.75 to \$13.37 upon her becoming a full-time employee.

Morrow continues to work as a full-time court clerk. Morrow performs her job duties satisfactorily.

21. Morrow was initially told at the time of hire that she would be eligible for raises according to Belgrade's pay matrix system that provided step increases in wages on an annual basis. The city-wide pay matrix provided for 10 to 20 steps in an employee's rate of pay. In July 2006, Judge Snowberger learned from Menicucci during the budget planning process that the city-wide pay matrix had been discontinued and no longer covered Morrow.

22. Former Belgrade Finance Director Marilyn Foltz, who retired in April 2012, testified the city-wide matrix was implemented in approximately 1988 and had been discontinued sometime prior to 2005. Foltz recalled the pay matrix including a step increase of approximately 3.5% for each year during the employee's first ten years of service at which time the employee was considered to have topped out. The employee would then be eligible for longevity bonuses.

23. Morrow's wages have been as follows:

| DATE: | HOURLY WAGE: |
|------------|--------------|
| 09/26/2005 | \$9.75 |
| 06/25/2006 | \$10.08 |
| 01/25/2007 | \$10.08 |
| 06/27/2007 | \$10.74 |
| 11/01/2007 | \$13.37 |
| 06/25/2008 | \$13.91 |
| 06/25/2010 | \$14.27 |
| 06/25/2011 | \$14.56 |
| 06/25/2012 | \$15.00 |
| 08/28/2013 | \$15.15 |
| 08/24/2014 | \$15.30 |

24. Belgrade employed Teresa Flanagan as a part-time court clerk on or about January 22, 2008. Flanagan continues to work as a part-time court clerk. Flanagan performs her job duties satisfactorily.

25. Flanagan had significant experience in administration and applicable software at the time she accepted the position of part-time court clerk. Flanagan

became fully proficient in the performance of her job duties within a year after she began the employment.

26. Flanagan's wages have been as follows:

| DATE: | HOURLY WAGE: |
|------------|--------------|
| 01/22/2008 | \$13.00 |
| 07/24/2008 | \$13.52 |
| 08/19/2010 | \$13.88 |
| 07/26/2011 | \$14.16 |
| 08/24/2012 | \$14.58 |
| 08/28/2013 | \$14.90 |
| 08/24/2014 | \$15.05 |

27. Judge Snowberger requested wage increases for Morrow and Flanagan when submitting her annual budget request. Judge Snowberger's requests were not granted by either Menicucci or Clark and were not included in the proposed budgets presented to the city council.

28. Neither Morrow nor Flanagan have received a performance evaluation during their employment.

29. In August 2011, Flanagan filed a formal request for wage equalization between herself and Morrow for FY 2011-12 with Judge Snowberger. On August 22, 2011, Judge Snowberger informed Flanagan that Menicucci had denied the request and she lacked the authority to grant Flanagan's requests to raise her wage and retroactively adjust her wages for the year.

30. On August 24, 2011, Flanagan then attempted to file a grievance. On September 6, 2011, Menicucci denied the grievance request and cited a written opinion by City Attorney Richard Ramler that wage adjustments are made at the discretion of the City of Belgrade and are not subject to the grievance process set forth in Belgrade's Statement of Policy. Ramler noted the portion of the Grievance Procedure that states, "[t]he Arbitrator shall have no authority to alter, amend or delete any Policy of the City."

31. On May 14, 2013, Judge Snowberger submitted her FY 2013-14 budget request to Clark and Wernikowski. Snowberger requested Flanagan's wages be "normalized" with other administrative staff salaries.

32. During this period, Morrow approached Belgrade City Financial Director Phyllis Wernikowski about adjusting the pay matrix to include female staff. Wernikowski does not have the authority to adjust pay matrices without the approval of the city manager or city council. No action was taken to adjust the pay matrices to include Belgrade's female employees. Belgrade city employee Michelle Clark made a similar request during this period to Clark. Belgrade took no action to adjust the pay matrices to include Belgrade's female employees.

33. In June or July 2013, Morrow attended a city council meeting at which she requested her wages be increased. Morrow was told the city council would look into it but no action was taken to raise Morrow's rate of pay.

34. On August 28, 2013, Clark approved raising Flanagan's hourly wage from \$14.58 per hour to \$14.90. Flanagan's wage was increased after Belgrade hired Leanne Bachmeier to work as a part-time City Clerk at an hourly wage of \$14.90. Bachmeier had less professional experience than Flanagan but performed substantially similar duties. Clark also approved raising the hourly wage of Police Clerk Alexandra Ammann and Utility Clerk Christina Crow to \$14.90 to address the inequity caused by hiring a new employee at a higher rate of pay despite her lack of experience as compared to other Belgrade employees performing similar duties.

35. On August 12, 2013, Morrow and Flanagan attended a Belgrade City Council Meeting and presented their complaints about pay disparities between male and female employees. Morrow requested that her and Flanagan's pay be increased. The City Council took no action regarding their complaints.

36. In February 2014, the city council appointed Dean Barkley as its City Manager. At some point after Barkley's appointment, he met with Morrow and Flanagan about the concerns they and other female employees were not on a pay matrix. Barkley commented that it was possible their wages could be lowered if a pay matrix was implemented. The meeting itself was congenial and non-threatening.

37. Belgrade's decision to implement pay matrices for the police department and public works department had the effect of guaranteeing patrol officers and certified water/waste water operators multiple step increases to their pay from their initial pay as new hires. Belgrade's decision to implement a pay matrix for laborers had the effect of guaranteeing new hires a 7.1% increase in pay after their first year of

employment, at which point they reached top out rate.¹ Since there were no women working in any of these positions, the new hires guaranteed such increases have all been men. Neither female nor male employees working at City jobs outside of the coverage of the three matrices were guaranteed one or more annual step increases to their wages.

38. Belgrade implemented a pay matrix for the police department to attract and retain police officers in an effort to compete with area law enforcement agencies, including Gallatin County and the City of Bozeman, who are able to offer higher wages.

39. Belgrade implemented the public works pay matrix in an effort to bring greater uniformity to public works employees' wages after the hiring of several new employees.

40. Belgrade did not include Flanagan and Morrow on a pay matrix because they worked in an office of less than three employees; because Judge Snowberger did not specifically request a pay matrix be implemented; and because the court clerk positions did not require significant skills or certifications.

41. Belgrade's implementation of pay matrices for the police department and public works department did not cause Flanagan and Morrow to suffer any demonstrable harm.

42. Including Flanagan and Morrow under Belgrade's police department pay matrix would not be appropriate given the difference in duties and the amount of time and resources Belgrade invests in each police officer to ensure they are fully proficient in the performance of their duties within the first ten years of the police officer's employment.

43. Including Flanagan and Morrow under Belgrade's public works pay matrix for water/waste water operators would not be appropriate given the difference in duties and the certification water/waste water operators are required to obtain in

¹ No witness testified specifically that only new hires were entitled to the one year guaranteed raise for public works laborers, but that raise to top out rate came at about the same time when the new laborers should have become fully proficient in the performance of their duties (at about one year of working the job).

order to continue in the employment within the first five years of the water/waste water operator's employment.

44. Including the Belgrade Court Clerks in a one year matrix like that applied to public works laborers might have been appropriate, but there is no evidence that the same percentage increase as the laborers got at the end of that first year of work would have been appropriate. The one year increase in the pay matrix used for public works laborers was based upon the percentage of initial wages it took to reach the top out rate for public works laborers. For example, for July 2012 the wages for an employee on the job for less than 12 months was \$15.95. The wages for an employee on the job for more than 12 months was \$17.18. $\$17.18 - \$15.95 = \$1.23 / \$17.18 = 7.1\%$. The same holds true for July 2013 and July 2014. When Caldwell developed the public works pay matrix using the existing spread for entry level and experienced workers, she was not asked to provide such a matrix for court clerks or other clerical personnel. There is no evidence that she would have applied the same percentage increase for the one year it took for a court clerk to become fully proficient in performance of court clerk duties. There is no evidence at all from which to determine what numbers would have applied to a hypothetical matrix for court clerks.

45. Neither Flanagan or Morrow suffered any demonstrable financial loss as a result of Belgrade not including them in the one year pay matrix used for public works laborers. Had a matrix been adopted in 2012 with the other matrices, or thereafter for the court clerks, Flanagan and Morrow would not have been new hires, would already be deemed to have reached full proficiency in their performance after each worked their first full year and thus would not have been eligible for the one year raise, having already "topped out" prior to the implementation of the pay matrix. They also would not have been eligible for any subsequent raises. As a result, it cannot be determined that Flanagan and Morrow suffered a demonstrable financial loss by not being included in a pay matrix similar to that for public works laborers.

46. Belgrade did not retaliate against either Morrow nor Flanagan for engaging in protected activity (e.g. filing a Human Rights complaint). Belgrade has not taken any adverse action against either Flanagan or Morrow at the time they filed their Human Rights complaints or at any time thereafter.

47. Flanagan and Morrow did not prove by a preponderance of the evidence that Belgrade discriminated against them because of sex or retaliated against them for resisting and/or complaining of such discrimination.

IV. OPINION²

Montana law prohibits employers from “discriminat[ing] against a person in compensation or in a term, condition, or privilege of employment because of sex.” Mont. Code Ann. §49-2-303(1)(a). Montana law also prohibits retaliation against an employee by employer for engaging in protected activity. Mont. Code Ann. § 49-2-301. The provisions of the Montana Human Rights Act prohibiting discrimination mirror the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C.b § 200e et. seq.

- A. Flanagan and Morrow have not shown the City of Belgrade intentionally discriminated against them on the basis of sex.

Flanagan and Morrow offered testimony describing various instances where they were subject to offensive comments or conduct by other Belgrade employees, which they believed was due to their sex. Those instances included Flanagan and Morrow being referred to as “lesbos” by a supervisory employee from another department; Menicucci not responding adequately to requests for assistance; Menicucci removing a heater knob and maintaining control of the heat of the ladies’ room; failure of male police officers to take seriously a discrimination workshop conducted by the city; “distasteful conduct” by public works employees; a sense by another female employee that she got more “push back” from Clark when requesting pay raises for female employees; a holiday party held in 2011 that was split to allow for City employees to attend at different times which resulted in the party being attended by males and females at different times; comments by Clark referring to female employees as the “front window ladies”; and the fact Belgrade had never hired a female police officer despite having female applicants.

Each of those instances described by Flanagan and Morrow was annoying and less than professional. Nonetheless, the conduct of a few Belgrade employees in isolated instances did not constitute direct evidence of discriminatory and retaliatory treatment by the respondent. Justice O’Connor noted in a concurring opinion in *Price Waterhouse*, “direct evidence” of discrimination does not include "stray remarks in the workplace," "statements by non-decisionmakers," or "statements by decisionmakers unrelated to the decisional process." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S.Ct. 1775, 1804 - 1805, 104 L.Ed.2d 268

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

This case is clearly an indirect evidence case because the parties dispute both the reasons for the employment action and whether such action amounts to illegal discrimination. Direct evidence cases are those in which the parties do not dispute the reasons for the employer's action, but only whether such action is illegal discrimination. *Reeves v. Dairy Queen, Inc.*, 1998 MT 13 ¶ 16, 287 Mont. 196, 953 P.2d 703. When there is no agreement by the parties that adverse action was taken or no agreement as to the reason an adverse action was taken, the applicable standard of proof is the three-step standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed 2d 668 (1973). Admin. R. Mont. 24.9.610(1)-(4); *Heiat v. Eastern Mont. College*, 275 Mont. 322, 912 P.2d 787 (1996); See also, *Stuart v. First Security Bank*, 302 Mont. 431, 15 P.3d 1198 (2000). Under that burden-shifting scheme, a claimant who makes out a prima facie case of discrimination is entitled to judgment if the respondent does not come forward to rebut the prima facie case with evidence that the adverse employment action taken was done for legitimate business reasons.

Flanagan and Morrow must prove: (a) they belong to a protected class; (b) they sought and were denied the opportunity made available by the respondent; (c) they were denied the opportunity in circumstances raising a reasonable inference that they were treated differently because of their membership in a protected class. Admin. R. Mont. 24.9.610(2). If Flanagan and Morrow prove a prima facie case of sex discrimination by a preponderance of the evidence, the burden shifts to Belgrade to articulate a legitimate, non-discriminatory reason for the conduct in question. *Heiat*, 912 P.2d at 791.

If Belgrade proves legitimate, non-discriminatory reasons for the conduct in question, the burden then shifts to Flanagan and Morrow to establish "by a preponderance of the evidence that the legitimate reasons offered by [Belgrade] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). At all times, Flanagan and Morrow retain the ultimate burden of persuading the trier of fact that they have been the victim of discrimination. *Heiat*, 912 P.2d at 792.

1. Flanagan and Morrow proved a prima facie case of discrimination.

It is undisputed Flanagan and Morrow, both of whom are female, are members of a protected class. Therefore, the first prong of the McDonnell Douglas test is satisfied. The next issue is whether Flanagan and Morrow sought and were denied an opportunity for salary increases made available by the respondent to other employees.

Flanagan and Morrow argue they sought and were qualified for pay raises that Belgrade made available to other employees through its implementation of pay matrices. It is undisputed Belgrade established pay matrices for the police department and the public works department and that no female employee is covered by either pay matrix. Former Finance Director Marilyn Foltz testified Belgrade discontinued its use of a city-wide pay matrix sometime prior to 2005. Neither party offered any evidence as to why Belgrade stopped using the city wide pay matrix.

Flanagan and Morrow personally and through their supervisor, Judge Snowberger, regularly sought and were denied pay raises. Employees included on the police and public works pay matrices, who were all male, were not required to request pay raises but were guaranteed one or more step increases as defined by the pay matrices. Clerical employees, who are all female, did not enjoy that same guarantee. Thus, those employees not included on a pay matrix were subject to an adverse employment action (failure to act denying them one or more automatic step raises) by Belgrade. Flanagan and Morrow have made a prima facie case showing of discrimination. The burden is now shifted to Belgrade to rebut the prima facie case with evidence that the adverse employment action taken was done for legitimate business reasons.

2. Belgrade proved it had legitimate, nondiscriminatory reasons for not placing Flanagan and Morrow on a pay matrix.

Belgrade offered substantial and credible evidence proving it had legitimate, non-discriminatory reasons for not including Flanagan and Morrow on a pay matrix. The pay matrix for the police department was implemented due, in part, to the amount of time and resources Belgrade invests in each newly hired police officer to train them to become fully proficient in the performance of their job duties that contributes directly to the safety of not only the officer but to the community. The pay matrix for the public works department was also implemented in an effort to bring uniformity to the department as well as to recognize the amount of time it takes for the water/waste water operators, all of whom must acquire certification to maintain their employment, and the public works laborers to become fully proficient in their positions. Further, Wernikowski's testimony that Belgrade has had no difficulty attracting and retaining clerical staff without the use of a pay matrix was particularly persuasive. Therefore, Belgrade proved its legitimate, non-discriminatory reasons for not including Flanagan and Morrow on a pay matrix.

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3. Flanagan and Morrow have not proven Belgrade's proffered reasons were mere pretext for discriminatory conduct.

While the burden of production shifts between the parties under McDonnell Douglas, the burden of persuasion lies always with Flanagan and Morrow. Belgrade proved it had a legitimate, non-discriminatory reason for the conduct in question. The pendulum swings back to Flanagan and Morrow to show that Belgrade's proffered reasons are mere pretext.

"[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." Heiat at 328, 912 P.2d at 791 (quoting St. Mary's Honor Center at 515) (emphasis added). See also Vortex Fishing Sys, Inc. v. Foss, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir. 1986) (quoting Kouba v. Allstate Ins. Co., 691 F.2d 873, 876-77 (9th Cir. 1982)). "An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action." Cellini v. Harcourt Brace & Co., 51 F. Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing Billups v. Methodist Hospital of Chicago, 922 F.2d 1300, 1304 (7th Cir. 1991)). See also, Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560 (7th Cir. 1987)(noting that a reason honestly described but poorly founded is not pretext that shows discrimination and that no matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and §1981 do not interfere unless the employment decision emanates from discrimination).

Where a charging party's evidence of pretense is strictly circumstantial, he or she "must produce 'specific, substantial evidence of pretext'" in order to prevail. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983)). See also Stegall v. Citadel Broadcasting Company, 350 F.3d 1061, 1066 (9th Cir. 2004).

Each Belgrade employee who testified as to their role in the development or implementation of a pay raise was extremely detailed and credible in her or his testimony. In fact, all witnesses who testified appeared to be sincere and forthright and the Hearing Officer found no witness' credibility to be lacking. However, no evidence was offered showing Belgrade developed and implemented pay matrices with the specific intent to preclude female employees, including Flanagan and Morrow, from receiving regular pay raises beyond COLA.

The preponderance of the evidence shows Belgrade developed and implemented the police matrix and public works matrix to retrain and attract police officers and to bring uniformity to the public works department. While there may be an issue as to why there are no female police officers and no female public works laborers or certified water/waste water operators, that issue is not before the Hearing Officer. Flanagan and Morrow have failed to present substantial and credible evidence that persuaded the Hearing Officer that the legitimate business reasons offered by Belgrade for its failure to implement a pay matrix covering all of its employees was merely pretext. Flanagan and Morrow have failed to show Belgrade intentionally discriminated against them on the basis of their sex.

B. Flanagan and Morrow have not proven Belgrade's legitimate business justification for not including them on a pay matrix was pretext for unlawful discrimination based on disparate impact.

To prevail on a claim of unlawful discrimination based on disparate impact, Flanagan and Morrow must establish a prima facie case by proving that one or more of Belgrade's identified practices or policies have a significant or substantial effect on the protected class of Flanagan and Morrow. Admin. R. Mont. 24.9.612(1). If Flanagan and Morrow are successful in establishing their prima facie case of unlawful discrimination, Belgrade must prove evidence of a legitimate business justification for the challenged practices or policies. Proof of a legitimate business justification requires admissible evidence that the challenged practices or policies are job related and consistent with business necessity. Admin. R. Mont. 24.9.612(3). If Belgrade produces admissible evidence of a legitimate business justification, then the charging party must prove that the articulated justification is pretext for unlawful discrimination. Admin. R. Mont. 24.9.612(4).

Disparate impact claims challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480 (9th Cir. 1987). Unlike disparate treatment cases, "illicit motive or intent is irrelevant because impact analysis is designed to implement Congressional concerns with the consequences of employment practices, not simply the motivation." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990)(quoting *Griggs*, 401 U.S. at 432). "The focus in a disparate impact case is usually on statistical disparities, rather than specific incidents, and on competing explanations for those disparities. *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 -94, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

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1. Flanagan and Morrow proved Belgrade's pay practices had a disparate impact upon their protected class.

It is undisputed Belgrade's pay matrices did not cover Flanagan, Morrow, or any other female employee. As a result, no female employee was guaranteed a step increase to their wage that some male employees were guaranteed.

Dr. Wendy Stock, Ph.D, Department Head and Professor of Economics at Montana State University, conducted a Disparate Impact Analysis based upon data exchanged by the parties during the course of discovery. Dr. Stock determined that there was evidence showing the City's pay matrices had a disparate impact on female employees as the selection rate for female employees for pay matrix jobs was zero. Dr. Stock's analysis was based on the "four-fifths rule," which provides that a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5ths)(or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact. This guideline has been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

Belgrade argues the "four-fifths rule" only provides a method of finding a "substantially different rate" and that it fails to show the original decision was harmful or "works to the disadvantage of the members of a race, sex or ethnic group." In short, Belgrade argues it is necessary for a finding of actual harm to Flanagan and Morrow before a finding of disparate impact may be had.

The preponderance of the evidence shows Belgrade's implementation of pay matrices for the police department and public works did not include any female employees. Flanagan and Morrow have produced sufficient statistical evidence that was not rebutted by any statistical evidence offered by Belgrade to show that Belgrade's pay policies had a disparate impact upon female employees.

Belgrade argues that despite the statistical evidence showing disparate impact, Flanagan and Morrow have failed to show they were individually harmed by its pay policies. In *Sanchez v. City of Santa Ana*, the court noted that "a plaintiff must prove that the challenged employment practice caused injury to him." *Sanchez v. City of Santa Ana*, 928 F. Supp. 1494, 1505 (C.D. Cal. 1995), citing *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) ("It is not sufficient for an individual plaintiff to show that the employer followed a discriminatory policy without also showing that plaintiff himself was injured."). It stands to reason that

the denial of a step increase to an employee's wage not only affects the employee in the short-term but it has long-term effects as to the employee's overall earnings for so long as they stay in that employment and adversely affects any contributions the employer may make to the employee's public retirement account.

Dr. Stock prepared three counterfactuals estimating what damages Flanagan and Morrow may have sustained by not being included on a pay matrix. Dr. Stock's counterfactuals did not account for PERS contributions or the 10% pre-judgment interest. However, assuming that Dr. Stock's calculations are correct and Flanagan and Morrow suffered the damages noted in the counterfactuals, placing Flanagan and Morrow on those pay matrices would not be appropriate for the reasons discussed below. At this point, Flanagan and Morrow have shown Belgrade's pay policies had a disparate impact upon them based upon Dr. Stock's statistical analysis. The burden now shifts to Belgrade to show it had a legitimate business justification for failing to include Flanagan and Morrow in a pay matrix.

2. Belgrade proved it had a legitimate business justification for not including Flanagan and Morrow in a pay matrix.

Belgrade offered substantial and credible evidence showing it was necessary for the city to implement a pay matrix to attract and retain qualified law enforcement officers as law enforcement agencies in the area, including Bozeman and Gallatin County, were able to offer larger salaries and greater benefits. Additionally, a ten-year matrix is reasonable given the amount of time and resources a law enforcement agency must commit in order to ensure it has a well-trained police force.

Belgrade also offered substantial and credible evidence showing the public works matrix was developed to bring uniformity to wages being offered to public works employees. The five-year pay matrix for certified water/waste water operators is appropriate given the nature of the work performed by these employees were required to perform and the certification they were required to obtain to maintain their employment.

There was also credible testimony offered that Belgrade has had no trouble attracting and retaining clerical staff without a pay matrix being in place. Wernikowski testified she had approximately 30 applicants for two clerical positions she had advertised. A review of the various financial records offered by both parties shows there has not been a great deal of turnover in Belgrade's clerical employees. In short, there simply has never been a need to implement a pay matrix to cover all city employees not covered by the police department or public works matrices. Belgrade has shown by the preponderance of the evidence that it had a legitimate business

justification for not implementing pay matrices to cover those employees not covered by the police department or public works pay matrix. Belgrade has met its burden of production in showing it had a legitimate business justification for the practices challenged by Flanagan and Morrow.

3. Flanagan and Morrow have not met their burden of persuading the fact finder that they were denied placement on a pay matrix due to their being members of a protected class.

The burden of persuasion remains at all times with Plaintiffs "who must prove that it was 'because of such individual[s]' race, color,' etc., that [they were] denied a desired employment opportunity." *Sanchez v. City of Santa Ana*, 928 F. Supp. 1494, 1508 (1995) quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 109 S. Ct. 2115 (U.S. 1989). Even if Plaintiffs cannot meet their burden of disproving the City's business necessity defense, Plaintiffs may still prevail if they can show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]"; by so demonstrating, [Plaintiffs] would prove that '[the City was] using [its] tests merely as a pretext for discrimination.'" *Id.* at 1510 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975)).

The court in *Sanchez* went on to note:

Any alternative practices offered by Plaintiffs must be equally effective as the City's chosen practices in achieving its legitimate employment goals. *Wards Cove*, 490 U.S. at 661. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Id.* (quoting *Watson*, 487 U.S. at 998). Since "courts are generally less competent than employers to restructure business practices,' . . . the judiciary should proceed with care before mandating that an employer must adopt" a plaintiff's alternative hiring device. *Id.* (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978)).

Flanagan and Morrow have failed to persuade the Hearing Officer that Belgrade's failure to implement a pay matrix covering all Belgrade employees was based upon their gender. Further, Flanagan and Morrow have failed to show that an alternative practice, without a similar effect, exists that would effectuate the legitimate business justification offered by Belgrade.

The Hearing Officer spent a good deal of time considering the various scenarios considered by Dr. Stock and the pay matrix advocated by Flanagan and Morrow. In so doing, it is clear the pay matrices used for Belgrade's police department and public works' department are not appropriate given the credible testimony of Judge Snowberger that it takes only one year for a Court Clerk to become fully proficient in his or her duties. There was no evidence offered showing that either Flanagan or Morrow were unable to become fully proficient in her duties within one year of starting work as a Court Clerk. Placing Flanagan and Morrow on either the ten-year pay matrix for the police department or the five-year pay matrix for water/waste water operators would be inappropriate given the evidence showing each pay matrix was established based upon a determination regarding the length of time it took for a police officer and a water/waste water operator from becoming fully proficient in their duties. There was no evidence offered showing those time frames to be incorrect or otherwise invalid.

Similarly, the pay matrix used by the City of Bozeman is not appropriate in that it covers all employees and is not limited to those performing clerical duties. Presumably, the City of Bozeman based their pay matrix upon an evaluation of what steps were needed to attract and retain employees in all of its departments, including police, fire, maintenance, clerical/administrative, road crews, and administration. Given the broad scope of the City of Bozeman pay matrix, and the difference in size between the two communities, Flanagan and Morrow have not persuaded the Hearing Officer that what the City of Bozeman has done is appropriate or necessary in Belgrade for the alleged benefit of employees performing primarily clerical duties.

What is left is the portion of the pay matrix used by Belgrade public works for laborers. This particular pay matrix is for one year and is based upon a percentage of the top rate paid to water/waste water operators. While not perfect, this part of the pay matrix could be applied to the Court Clerks based upon Judge Snowberger's testimony that it takes one year for Court Clerks to become fully proficient in the performance of their duties.

In reviewing C.P. Exhibit 10, public works laborers receive a 7.1% increase in their wages upon the completion of one year of duties. Morrow received a wage increase of approximately 37% over the first 25 month of her employment according to the testimony of Dr. Stock. This was a larger pay increase given over a shorter period of time than what was received by any employee included on a pay matrix. Flanagan was hired at \$13.00, \$3.25 more per hour than what Morrow initially received. Belgrade did not adopt the pay matrix until well after Flanagan and Morrow had completed their first year of employment. Thus, had it been extended to cover clerical personnel or at least Court Clerks, Flanagan and Morrow would have

been no more entitled to a raise one year later than were the more experienced public works laborers. Thus, adoption of a one year matrix would not benefit either Flanagan or Morrow, and conversely, its absence has not harmed them.

Flanagan and Morrow rely upon a comparable market wage calculation performed by Dr. Stock that determined the comparable market wage, based on years of experience, was \$17.06 for Morrow and \$16.82 for Flanagan, as evidence of discrimination. Belgrade argues Dr. Stock's calculations, which were based upon an analysis of wages paid to Court Clerks in various parts of Montana, fails to show Flanagan and Morrow were subject to discrimination. Belgrade's argument is well taken. There was no evidence showing the job duties performed by the Court Clerks in other parts of Montana were substantially similar to the duties performed by Flanagan and Morrow. Further, there was no evidence showing specifically Flanagan and Morrow were paid less than a male Belgrade employee performing the same or similar duties. Finally, there was no evidence of whether recruiting and retaining Court Clerks across Montana was the same in all locations. On its face, the differences between locations could well be significant based upon different mixes of the economic and demographic factors for the various communities across Montana, calling into question the validity of the state wide comparisons.

Flanagan and Morrow have failed to show Belgrade's proffered reasons for not implementing a pay matrix covering employees outside of the police department or public works pay matrices was pretext for discrimination. Further, Flanagan and Morrow have failed to offer any reasonable alternatives that would achieve Belgrade's legitimate employment goals without having a disparate impact. Flanagan and Morrow have not proven Belgrade's failure to implement a pay matrix that includes all employees had a disparate impact upon them as female employees.

C. Flanagan and Morrow have not proven Belgrade retaliated against them because of protected activity.

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove a claim under the Human Rights Act by proving that (1) the charging party engaged in a protected practice, (2) thereafter the employer took an adverse employment action against the charging party, and (3) a causal link existed between the charging party's protected activities and the employer's actions. *Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; see also, Admin. R. Mont. 24.9.610(2).

By filing their claim of discrimination in September 2013, Flanagan and Morrow engaged in protected activity. Flanagan and Morrow argue they were subject to retaliation due to a comment made by the current City Manager that their wages could be reduced if they were to be placed on a pay matrix. Belgrade did not reduce the wages, benefits, or hours of work offered to Flanagan and Morrow after they filed their complaints. There is no evidence proving Belgrade took any significant adverse action against either Flanagan or Morrow after they filed their respective Human Rights complaints or during the pendency of the human rights proceedings. The comment of the current City Manager also appears to be true, according to the comparisons between Court Clerk and Public Works Laborer wage increases, and it would not have a chilling effect upon others considering opposing illegal 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. Teresa Flanagan and Shelley Morrow have failed to prove that the City of Belgrade discriminated against them illegally because of sex and retaliated against them for participating in a Human Rights complaint against their employer. Mont. Code Ann. §§49-2-303(1) and 301. For purposes of § 49-2-505(8), MCA, the City of Belgrade is the prevailing party.

VI. ORDER

1. Judgment is granted in favor of the City of Belgrade and against Teresa Flanagan and Shelley Morrow. The complaints for Flanagan and Morrow are hereby dismissed with prejudice as lacking merit.

DATED: this 27th day of May, 2015

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Jennifer Dwyer, Law Office of Jennifer Dwyer, PLLC, attorney for Teresa Flanagan and Shelley Morrow; and Richard A. Ramler and Jordan S. Ramler, Ramler Law Office PC, attorneys for City of Belgrade:

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.

Flanagan & Morrow.HOD.chp