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

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0141016908:

KATHY CHAVIS,	) OAH Case No. 1112-2015
	)
Charging Party,	)
	) HEARING OFFICER DECISION
vs.	) AND NOTICE OF ISSUANCE OF
	) ADMINISTRATIVE DECISION
	)
DPHHS/MONTANA CHEMICAL DEPENDENCY CENTER,	)
	)
Respondent.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Kathy Chavis brought this complaint alleging her employer, the Montana Chemical Dependency Center (MCDC), which is a facility operated by the Montana Department of Public Health and Human Services (DPHHS), retaliated against her for engaging in protected activity during the period of November 2013 through February 2014.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on July 20, July 21, and July 22, 2015 in Butte, Montana. The contested case hearing was reconvened on August 24, and August 25, 2015 in Butte. Timothy C. Kelly, attorney at law, represented Chavis. Mary Tapper and Vicki Knudsen, attorneys at law, represented DPHHS.

Chavis, Dennis Unsworth, Sharon Cunningham, Sherri Stuber, Dale Good Gun, Robin Lester Hardtla, Mike Tracy, Mike LeFever, Kathie Lincoln, Kevin Stewart, Davonna Ryan, and Derrek Shepherd, all testified under oath. Charging Party's Exhibits 7 through 14; 17 through 20; 22, 23, 27, 28, 38, 46 through 49, 51, 53 through 57, 59, 60, and 62 through 64 were admitted. Respondent's Exhibits 101 through 134 were also admitted.

During the hearing, the charging party offered for admission Exhibits 44 and 45, which included the Rule 30(b)(6) deposition of the respondent, DPHHS, taken on June 10, 2015, as well as Exhibits 29 through 36, which included Contact Memos prepared by the DPHHS EEO Officer Derek Shepherd. Respondent objected to the offers of those exhibits. The parties submitted post-hearing briefs on the issues raised by those exhibits. On October 16, 2015, the hearing officer issued an order admitting the exhibits.

Pursuant to a request under Rule 201 of the Montana Rules of Evidence, the hearing officer took notice of the administrative complaint in Human Rights Case No. 0121015301, Kathy Lasky v. Montana Chemical Dependency Center, filed by the charging party on December 22, 2011.

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 December 7, 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. ISSUES

1. Did DPHHS/Montana Chemical Dependency Center take adverse action against Kathy Chavis in retaliation for her having engaged in protected activity during the period of November 2013 through February 2014 in violation of Mont. Code Ann. §§ 49-2-301 and 49-3-209?

2. Did DPHHS/Montana Chemical Dependency Center breach any of its affirmative duties in violation of the rights of Kathy Chavis as a public employee in violation of Mont. Code Ann. §§ 49-3-201 or 49-3-205?

3. If DPHHS/Montana Chemical Dependency Center did retaliate against Kathy Chavis, as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

III. FINDINGS OF FACT

1. At all times material to the matter at issue, Kathy Chavis, previously known as Kathy Lasky, was a resident of Butte Silver Bow County.

2. Chavis is Native American and is an enrolled tribal member.

3. The Montana Chemical Dependency Center (MCDC) is one of six facilities administered by the Montana Department of Public Health and Human Services (DPHHS) and one of three facilities operated under the auspices of the Addictive and Mental Disorders Division of DPHHS.

4. DPHHS is a governmental agency and department of the state, an employer, and a person as defined under Mont. Code Ann. §§ 49-2-101 and 49-3-101.

5. DPHHS Policy # 200 sets forth Guidelines for Employee Conduct, which addresses on-the-job conduct; off-the-job conduct; and provides a partial list of unacceptable conduct. "Failure to maintain a courteous, productive, respectful and otherwise acceptable working relationship with fellow workers and the general public," is considered unacceptable conduct. DPHHS Policy # 200 does not set forth any procedures required for investigating such a complaint.

6. DPHHS Policy No. 5.1.016 (former HR Policy #300) sets forth the employer's Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention Policy. The responsibilities of the Civil Rights/EEO Specialist are outlined, which include conducting internal investigations; developing written nondiscrimination action plans; and ensuring training to achieve non-discrimination in the workplace. The policy also outlines the steps for filing and investigating an internal complaint and provides information on how to file an external complaint.

7. DPHHS Policy NO. 5.1.016 defines "retaliation" as "any adverse or hostile action, expressed or implied, including but not limited to, intimidation, threats, coercion, or discrimination against an individual because he or she has made a complaint of unlawful discrimination or testified, assisted or participated in any manner in an investigation or proceeding associated with a complaint of unlawful discrimination."

The policy also states, in pertinent part:

VII. Retaliation

A. "Retaliation against individuals exercising rights under these procedures is strictly prohibited. Employees who retaliate against individuals exercising their right to report perceived unlawful

discrimination or retaliation are subject to disciplinary action, up to and including termination of their employment with DPHHS."

. . .

C. "DPHHS managers who perceive retaliatory behavior must notify the Office of Human Resources Director of the DPHHS Civil Rights/EEO Specialist as soon as possible but no later than two (2) working days after the manager becomes aware of the retaliatory behavior."

. . .

IX. Employee Responsibilities

"Employees who believe they or others have been subjected to unlawful discrimination or retaliation must report the incident(s) or action(s) to their immediate supervisor or to the DPHHS Civil Rights/EEO Specialist. Failure to report an incident or action may subject the employee to disciplinary action."

8. MCDC is located in Butte, Montana. MCDC is the only state in-patient residential treatment facility for the disease of addiction with special regard for low income and indigent residents of Montana.

9. MCDC provides intensive in-patient treatment for individuals with substance abuse and co-occurring mental health issues. MCDC utilizes an interdisciplinary approach that utilizes the skills and services of physicians, nurses, treatment technicians, addiction counselors, mental health therapists, care managers and other staff as needed. MCDC follows the American Society of Addiction Medicine (ASAM) Guidelines for a 3.5 and 3.7 level of treatment, which includes clinical and medical monitoring of in-patient services. As a comparison, Warm Springs State Hospital is considered a 4.0, which is the highest level under the ASAM guidelines.

10. A substantial number of individuals served by MCDC, averaging approximately 25-30%, are Native American.

11. MCDC has been plagued by extensive staff turnover for several years, particularly in its administration. Since 2010, MCDC has had four different Administrators and two different Interim Administrators. Since 2012, MCDC has had four different Case Manager Supervisors and four different Clinical Supervisors/Behavioral Health Supervisors.

12. In July 2005, MCDC hired Chavis to work as a Treatment Specialist.

13. On November 8, 2010, Chavis began working as a Treatment Technician.

14. In December 2011, Chavis filed a complaint of discrimination with the Human Rights Bureau (HRB) against DPHHS (HR Case No. 0121015301). Chavis' complaint alleged, among other things, that she was subjected to harassment by her supervisor and coworkers and her supervisor treated her differently than her coworkers when it came to discipline and supervision.

15. In July 2012, Chavis and DPHHS entered into a Voluntary Resolution Agreement and Release of Claims with payment of $3,000 to Chavis to resolve her December 2011 HRB complaint. In exchange for a release of claims, DPHHS agreed, among other things, to (I) establish a Program Committee at MCDC for the purpose of addressing the needs of Native American patients at MCDC, including spirituality, cultural issues, barriers to recovery and family issues; (ii) draft a program proposal, through the Committee, to address the specific needs of Native American patients at MCDC for review, recommendation and potential implementation by the DPHHS director; and (iii) place a Native American staff member on the Utilization Review Committee, selected by the DPHHS director.[1]

16. Between August and October 2012, MCDC developed a new position for Chavis as Care Coordinator/Case Manager that "was to serve as a bridge between people experiencing life problems with traditional Native American mentors and Native and non-Native service providers." Ex. 104.

17. In September 2012, a Program Committee was formed ". . . to explore, determine and recommend components of a program specific to the needs of the Native American patients at MCDC. . . ." pursuant to the Voluntary Resolution Agreement. CP Ex. 101, p.1.

18. On October 3, and October 4, 2012, the Cultural Relevance in the MCDC Treatment Modality Conference was held pursuant to the Voluntary Resolution Agreement.

19. On October 8, 2012, the Program Committee submitted its program proposal to Anna Whiting Sorrel, who was then Director of DPHHS, for ". . . review,

[1] On January 10, 2013, DPHHS notified HRB that the parties had completed the terms of the Voluntary Resolution Agreement. Ex. 106.

recommendations and potential implementation." MCDC subsequently established the Cultural Relevance Committee to implement the recommendations submitted by the Program Committee.

20. From July 2012 through June 2013, Chavis actively participated in the Cultural Relevance Committee.

21. On November 8, 2012, Chavis was promoted to the new Care Coordinator/Case Manager position at MCDC.

22. The position description for the MCDC Care Coordinator/ Case Manager position included the following:

> Job Overview: The Care Coordinator/Case Manager serves as a bridge between people experiencing life problems with traditional Native American mentors and Native and non-Native service providers. This position also works with patients to develop a recovery plan based on their overall strengths and weaknesses to promote overall wellness. The Care Coordinator /Case Manager provides a place of trust and where people are comfortable.
>
> Essential Functions (Major Duties or Responsibilities):
>
> A. Care Coordinator
>
> Facilitates and supports the client's transition between providers.
>
> Reviews assessments obtained from the service providers to develop a recovery plan based on the patient's overall strengths and weaknesses to promote overall wellness.
>
> Establishes working relationships within the community, public, private and voluntary allied service providers to assist with patient care.
>
> Makes, manages and monitors referrals.
>
> Schedules and fulfills commitments to the client for meetings and phone calls.
>
> Monitors Spiritual ceremonies such as Talking Circle, and Smudging.

Ensures grant requirements for Rocky Mountain Tribal Access Recovery program are met. Collects and reports Government Performance Results Act (GPRA) data.

B. Case Management

Consults with patient, treatment team, family, and community providers to determine the most effective means to achieve successful community placement.

Assesses patient needs in the areas of housing, finances, education, employment, social support, and outpatient mental health, substance abuse follow-up services.

Consults with the patient, patient's family, and treatment staff to identify specific needs of the patient.

Acts as part of an interdisciplinary treatment team to formulate goals, objectives, and interventions designed to address the problems identified by patient assessments.

Documents in the clinical record as appropriate to reflect progress towards the objectives of the treatment plan.

Completes a written aftercare plan and treatment summary to be sent to community providers, to ensure continuity of services.
Ex. 104.

23. In April 2013, MCDC sent Chavis, Dale Good Gun, and Peggy Dean to a Wellbriety training workshop entitled, "Medicine Wheel and the 12 Steps" with the intention of implementing the program at MCDC. However, MCDC ultimately did not implement the program due to budget constraints.

24. On April 15, 2013, MCDC submitted a Plan of Correction to DPHHS following an evaluation by DPHHS' Quality Assurance Division identifying deficiencies in the facility's operations. The Plan of Correction included improving documentation and providing ". . . ASAM training for all Clinical Staff identified as needing this training." Ex. 131, pp. 2-3.

25. On April 23, 2013, MCDC hired Robin Lester-Hardtla as the Clinical Services Supervisor. The Clinical Services Supervisor is responsible for supervising the Licensed Addiction Counselors (LAC), Mental Health Therapists, and Chavis as the Care Coordinator/Case Manager. (Joint Demonstrative Exhibit, Supervisory Summary 2010 - Present).

26. Lester-Hardtla was not aware of Chavis' prior human rights complaint or the voluntary resolution agreement. Lester-Hardtla was aware that cultural awareness and sensitivity was important and she was responsible for arranging for some type of training or programming for staff on those issues. Lester-Hardtla found a video addressing overall cultural sensitivity that she felt would sufficiently address cultural relevancy issues at the facility.

27. Lester-Hardtla was overwhelmed in her new position and relied upon Rona McOmber, who was then the Facilities Administrator at the time, to identify and prioritize tasks for her during the first few weeks of her employment. Lester-Hardtla was also contending with personal and family issues at the time, which contributed to her sense of being overwhelmed. Lester-Hardtla responded emotionally at times when interacting with Chavis.

28. In early May 2013, Lester-Hardtla, Lincoln, Chavis and other MCDC employees attended a training focused on cultural awareness. Lincoln commented that she should bring in a priest so everyone could be training on Catholicism. Chavis thought Lester-Hardtla, Lincoln and others acted inappropriately at the training by talking and laughing during the presentation.

29. In May 2013, Lester-Hardtla removed a poster that had been created by MCDC patients outlining the Native American Code of Ethics from the MCDC Men's Community Room after discussing with McOmber their desire to transition to only professional artwork in the area. Lester-Hardtla checked with other employees to determine the origin of the poster before ultimately deciding to remove the poster. Lester-Hardtla did not remove any other poster or sign hanging in the area. Lester-Hardtla did not remove the poster out of animus toward Chavis or Native American people or culture.

30. On May 15, 2013, Chavis protested the removal of the Native American Code of Ethics poster during the Cultural Relevance Committee meeting. Chavis argued it was improper to remove the poster as other posters and signs that included references to prayer and God were allowed to remain hanging in the MCDC Men's

Community Room. There was a confrontation between Chavis and Lester-Hardtla at the meeting, which left both women having hard feelings toward the other.

31. On May 15, 2013, McOmber sent an email to Chavis that she characterized as a follow up to concerns Chavis had voiced during a Cultural Relevance Committee regarding staff making offensive comments and gestures. McOmber asked Chavis to report such behaviors so they could be addressed by the supervisors.

32. On May 16, 2013, Lester-Hardtla filed a complaint against Chavis with MCDC Human Resources due to the confrontation they had at the previous day's Cultural Relevance Committee meeting. Lester-Hardtla withdrew her complaint the next day because she hoped to address the issue informally.

33. On May 21, 2013, Chavis met with Clark Miller, who was then her supervisor, for a performance evaluation. Lester-Hardtla also attended the meeting. Chavis thanked Miller and Lester-Hardtla before she left the office. Lester-Hardtla told Chavis that she did not hear her response. Chavis told Lester-Hardtla she had said thank you and left the office.

34. Chavis immediately went to McOmber's office after leaving Miller's office. Chavis reported her confrontations with Lester-Hardtla in Miller's office and during the Cultural Relevance Committee. Lester-Hardtla came into McOmber's office while Chavis was there and McOmber informed Lester-Hardtla of what Chavis had just reported. Lester-Hardtla explained she has difficulty hearing and had not heard Chavis before she left the meeting with Miller. Again, both women left the meeting in McOmber's office, with hard feelings and greater suspicions regarding the motivations of the other.

35. McOmber met with Chavis in Chavis' office later that same day. McOmber informed Chavis that two employees were considering filing complaints against her based upon her activities on the Cultural Relevance Committee but would not provide the specifics of the complaints when pressed by Chavis. McOmber later told Chavis that an employee was filing a complaint with the EEOC due to Native American training being forced on MCDC employees after Chavis' human rights complaint.

36. On June 14, 2013, Chavis resigned from the Cultural Relevance Committee due to concerns she had that she was being targeted due to her activities

on the committee. McOmber scheduled several meetings with Chavis to discuss the reasons for Chavis' resignation, all of which McOmber cancelled.

37. In early July 2013, DPHHS hired Derrek Shepherd as the Civil Rights/EEOC Specialist. Shepherd works out of the Helena Office of Human Resources. Shepherd previously worked in law enforcement and as an HRB investigator for two years.

38. DPHHS did not train Shepherd on how to investigate a complaint of discrimination.

39. In July 2013, Sherri Stuber, Medical Records Technician, informed Chavis that McOmber had directed her not to talk to Chavis. Chavis regularly worked with Stuber to process medical records as part of her job duties. McOmber did not give Stuber a reason as to why she should not be talking to Chavis. Chavis had complained to Stuber on several occasions about McOmber and Stuber understood the two women had a strained working relationship.

40. Stuber approached Kathie Lincoln, who dealt with human resources issues at MCDC at the time, shortly after receiving McOmber's directive. Lincoln also suggested to Stuber that she should not talk to Chavis as warning to Stuber not to get involved in battles that were of no concern to her. Lincoln had no supervisory authority over Stuber.

41. Stuber continued talking to Chavis despite the comments made by McOmber and Lincoln. Stuber was never disciplined for talking to Chavis.

42. On or about July 11, 2013, Chavis walked into a meeting and heard Sharon Cunningham, who was then an LAC, encouraging LAC Kevin Stewart to do his "Indian imitation." Chavis understood Stewart was being asked to mimic a Native American and complained to McOmber. Cunningham later apologized to Chavis for the incident after being spoken to by McOmber. Stewart was never disciplined for this behavior.

43. Stewart previously worked as a disc jockey and prides himself on his ability to do impressions. Stewart regularly performed impressions of Latinos; people from India; African Americans; and people from other cultural backgrounds while at work. Stewart was well aware of the offense some individuals might take regarding his impressions, including patients of MCDC, but continued to perform his impressions for his co-workers.

44. Chavis had previously voiced concerns at the imitation of Native Americans done by another MCDC employee, Elisabeth Fandrich, during a staff meeting when talking about a Native American patient. Chavis thought Fandrich's behavior was derogatory and demeaning of Native Americans.

45. On July 16, 2013, Chavis contacted HRB regarding the Voluntary Resolution Agreement and noncompliance by DPHHS. Chavis sent a follow-up email to the HRB on August 5, 2013. Chavis subsequently gave her permission to HRB to forward her concerns to DPHHS' legal counsel.

46. After receiving DPHHS' response to Chavis' concerns, HRB advised Chavis that she would have to file a complaint in District Court if she believed DPHHS had failed to comply with the terms of the VRA. Chavis, to date, has not filed any such complaint with the District Court.

47. On August 14, 2013, Chavis contacted Travis Tilleman, Assistant Human Resources Director, and reported concerns she had about the conduct of McOmber and Safety Officer Frank Fitzpatrick. Chavis reported her belief that McOmber and Fitzpatrick had acted in an offensive and threatening fashion toward her by walking by her office and staring in; watching her when she had people in her office; and generally glaring at her throughout the work day. Chavis complained that Fitzpatrick, on at least one occasion, physically blocked Chavis from using the facility's time clock. Tilleman informed Chavis that Shepherd would be assigned to investigate her complaint.

48. Chavis later learned that Fitzpatrick had been married to Lester-Hardtla's aunt, who had passed away more than eight years earlier. Fitzpatrick was McOmber's significant other during the period in question. Lester-Hardtla did not consider either Fitzpatrick or McOmber to be close relatives and had very little interaction with them outside of work. Fitzpatrick retired shortly after Lester-Hardtla began working at MCDC.

49. On August 19, 2013, Shepherd interviewed Chavis. At the time, Shepherd had been on the job for approximately one month. Chavis reported the problems she experienced with both McOmber and Lester-Hardtla and complained of possible retaliation. Chavis also reported concerns she had about Lester-Hardtla's removal of the Native American Code of Ethics and her angry response when Chavis voiced her concerns during the May 2013 Cultural Relevance Committee meeting; Lester-Hardtla's objection to the term "Great Spirit;" a cancellation notice sent to Dale Good Gun regarding the Cultural Committee meeting in May 2013; the

warning from McOmber days later that two unnamed co-workers had filed complaints about Chavis for "things she had said during the meeting;" her resignation from the Committee out of fear she was "being accused of something without being told what it was;" her concerns that McOmber was telling co-workers not to talk with her; the decision not to implement training that had been recommended by the Cultural Committee; statements by supervisors about putting an end to the “N.A. crap;” Fandrich, mimicking and mocking Native American speech patterns; and Native American patients possibly being treated differently than non-Native American patients.

50. Shepherd prepared a Contact Memo after his interview with Chavis in which he outlined Chavis’ concerns and complaints. Shepherd also spoke with Lester-Hardtla and conducted a site visit. Shepherd observed there were posters still hanging on the wall pertaining to Native American spirituality and Christian concepts. Shepherd determined the removal of the Native American Code of Ethics was not discriminatory.

51. Shepherd did not investigate the issue about training not being offered because he understood that issue had occurred six or seven months earlier which he thought too remote for investigation. Shepherd also did not investigate Chavis’ complaints about Native American patients being treated less favorably than non-Native American patients because he considered that to be a “historical perspective of what she saw as going on.” Depo; 50: 1- 4.

52. DPHHS/MCDC did not produce any investigatory notes made by Shepherd during the course of his investigation into Chavis’ August 2013 complaints either because they never existed or they were destroyed. Neither party offered any evidence as to how or why the investigatory notes were not produced when requested.

53. On August 21, 2013, Chavis approached Lester-Hardtla with questions she had about scheduling. Lester-Hardtla replied, “Don’t you people know how to read?” Lester-Hardtla said this in front of Melissa Bache, who worked in human resources. Chavis told Bache she wanted to make a complaint and Bache told Chavis that she would talk to Lester-Hardtla.

54. On September 4, 2013, Lester-Hardtla announced her resignation to a group of employees at the regular morning meeting. Lester-Hardtla was upset at the time and she found it difficult to inform the staff that she was leaving her employment. Lester-Hardtla personally found the work environment at MCDC

difficult and determined the job was not working for her personally or professionally. Chavis perceived Lester-Hardtla's comments as being an effort to blame Chavis for her resignation.

55. On September 5, 2013, Chavis complained to Shepherd that a certain LAC was discriminating against Native American patients. The record is not clear as to which LAC Chavis claimed was discriminating against Native American patients.

56. On September 6, 2013, Shepherd met with Davonna Ryan, who was then the Nursing Supervisor, to discuss Chavis' complaints regarding the LAC and MCDC's admission process.

57. Ryan had been called upon to serve as Interim Administrator from November 30, 2013 through April 19, 2014 and again in March 2015.

58. On September 13, 2013, Shepherd notified Chavis by telephone and later in a letter dated September 23, 2013 that he had found no violation of DPHHS Human Resource Policy #300, Nondiscrimination Policy and Procedures, after investigating her complaints. Shepherd concluded that several of the issues raised by Chavis were not based on racial animus but, rather, a personal dislike of Chavis. Shepherd concluded that several employees ". . . felt they could do no right. That whatever they did, whatever they said would be interpreted differently by [Chavis]." Depo. 53: 4-7. Shepherd advised Chavis of her appeal rights in the September 23, 2013 letter. Chavis chose not to appeal the decision.

59. On September 21, 2013, Chavis requested permission to attend the annual Rocky Mountain Tribal Access to Recovery meeting in Billings, Montana. Lester-Hardtla denied Chavis' request without explanation.

60. On or about September 29, 2013, McOmber left her employment with MCDC. Joan Cassidy assumed the duties of Administrator until Ryan was appointed Interim Administrator in November 2013.

61. On October 5, 2013, Lester-Hardtla's resignation became effective.

62. On or about October 30, 2013, Chavis completed and submitted a DPHHS Discrimination Complaint Resolution Form alleging a male employee discriminated against her by making comments of a sexual nature while at work. The complaint was investigated, found to be substantiated and the employee was disciplined for his behavior.

63. On or about November 1, 2013, Cunningham was appointed Clinical Services Manager. Cunningham's duties as Clinical Services Manager included supervising the LAC's, Mental Health Therapists and Chavis as the Case Manager/ Care Coordinator.

64. Cunningham had worked in various capacities for MCDC since November 2000. Cunningham had previously worked as the Behavioral Health Supervisor and as an LAC. Cunningham's previous professional experience includes working as a supervisor and/or counselor in various clinical settings.

65. Cunningham was not aware of Chavis' December 2011 HRB complaint or the voluntary resolution agreement. Cunningham was also not aware of the complaints lodged by Chavis in August, September, and October 2013.

66. On November 5, 2013, Ryan forwarded an email sent by Shepherd applauding the work of MCDC staff. Shepherd had interviewed a small group of patients none of whom were Native American and had received generally positive feedback about the work of MCDC staff. Shepherd did not intend his email to be a rebuke or an insult directed to Chavis.

67. On November 13, 2013, a Native American patient informed Chavis that MCDC staff had taken his sage and sweetgrass and told him that he was not allowed to have those items with him at the facility.

68. The burning of sage and sweetgrass is generally referred to as smudging. Smudging is central to many Native American religious, spiritual and healing practices and is an important part of Native American culture. MCDC has traditionally allowed smudging to take place as part of the recovery process. Chavis reported the patient's concerns to Cunningham that same day.

69. Cunningham was not familiar with MCDC's protocol regarding sage and sweetgrass and requested legal advice from John Koch, an attorney for DPHHS. Cunningham instructed staff to remove sage and sweetgrass from patients' rooms while she awaited legal advice from Koch.

70. On or about November 13, 2013, Chavis voiced her concerns about the taking of sage and sweetgrass from Native American patients during a morning staff meeting. Chavis had received complaints from other Native American patients, who were also denied access to sage and sweetgrass. Chavis argued at the meeting that sage and sweetgrass were considered sacred objects that Native American patients

were guaranteed a right to possess under the American Indian Religious Freedom Act of 1978. Cunningham informed Chavis and the staff that she was awaiting a legal opinion on whether Native American patients were allowed to possess such items while at MCDC.

71. During this same meeting, Stewart commented about the possible return of a Native American patient to his home, which is located on a reservation. Both Stewart and Cunningham commented that it was a shame he was returning to the reservation. Both Chavis and Good Gun had heard similar comments in the past and were offended at the generalization. Stewart has found that a patient's return to their home environment may often be detrimental to the patient's recovery and prospects for long-term sobriety.

72. During this period, Stewart, Cunningham and Chavis discussed the possible placement of a non-Native American man, referred to as Patient K, at Blue Thunder Lodge in Great Falls, Montana[2].

73. Blue Thunder Lodge is a cultural-specific recovery based support home for Native American men. Blue Thunder Lodge is part of the Residential Treatment Expansion Consortium (RTEC), which is managed by Boyd Andrew Community Services. Blue Thunder Lodge has only eight beds. Blue Thunder Lodge is eligible for assistance under the Rocky Mountain Tribal Access Recovery program, which offers financial assistance for costs associated with the placement of a Native American patient at the facility.

74. MCDC has a protocol in place for placing individuals at Blue Thunder Lodge. That protocol requires MCDC staff to not only contact Blue Thunder Lodge staff directly but to also obtain final approval from Mike Ruppert, CEO of Boyd Andrews Community Services. Both Cunningham and Stewart knew or should have known of this protocol based upon their years of experience as LACs at MCDC.

75. Chavis informed Stewart and Cunningham of her concerns about Patient K's placement at Blue Thunder Lodge, which included the concern that a Native American man could potentially be denied placement at Blue Thunder Lodge due to limited availability of beds at the facility. Chavis understood at the end of this conversation that Stewart and Cunningham were in agreement that Stewart would pursue placement of Patient K at another facility.

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[2] Documents making reference to Patient K's full name have been redacted to protect the patient's privacy rights, which outweigh the public's right to access information related to this case.

76. On November 13, 2013, the Blue Thunder Lodge House Manager called Stewart and asked if he had anyone available for placement at her facility. The House Manager explained that the facility had four beds available and wanted to fill the beds as soon as possible. Stewart mentioned Patient K and advised the House Manager that he was not Native American. The House Manager indicated that would be fine and asked to interview the patient for placement, which she did shortly after speaking with Stewart. The House Manager ultimately approved the placement of Patient K at Blue Thunder Lodge knowing he was not Native American.

77. Chavis approached Patient K later that same day about interviews he had scheduled for placement at other facilities. Patient K appeared confused when talking with Chavis and informed her that he was going to Blue Thunder Lodge because he had a girlfriend who lived in Great Falls.

78. On the morning of November 14, 2013, Chavis sent an email to Cunningham, which included a progress note entered by Stewart on Patient K's medical record. Stewart's progress note, which was entered Wednesday, November 13, 2013 at 1:54 p.m., stated:

> "Counselor received a call from BTL house manager, Jamie J., stating that she has 4 open beds and that she would very much like to interview [Patient K] for possible residence at BTL. It was explained to Jamie that [Patient K] is white and may not be the best fit for the house. Jamie stated that race is no object and that she wanted to speak to [Patient K] to screen him to help her make a decision about placement. [Patient K] was brought to this writer's office and the interview was conducted via speaker phone. [Patient K] was accepted for residence at the end of the interview based on his responses to the questions and the information he provided. Jamie indicated that she would like to have [Patient K] in Great Falls on 11/18/2013, but this writer explained that 11/19/2013 would work better. Jamie agreed to this date as did [Patient K]."

79. In her email to Cunningham, Chavis questioned the placement of Patient K and referenced the previous meeting with Stewart and Cunningham. Chavis wrote, "At no time did Kevin tell me that [Patient K] was accepted at Blue Thunder and would be transitioning to that program on 11/19. I just now found this when I went in to enter a progress note in [Patient K's] file about his TLF interview today."

80. Chavis attended the morning staff meeting shortly after sending her email to Cunningham. Chavis confronted Stewart about the placement of Patient K at Blue Thunder Lodge at the start of the meeting and in front of their co-workers. Chavis spoke directly to Stewart. Chavis did not yell at Stewart or otherwise act in an offensive and hostile manner toward him despite his feelings that he was being attacked. The discussion lasted only a few minutes.

81. Stewart returned to his office after the morning meeting and learned Chavis had filed a complaint against him. Cunningham later approached Stewart and asked how he was doing. Stewart told Cunningham that he felt Chavis was targeting him at the meeting and twisting his words to later use against him.

82. Treatment Specialist Mike Tracy also complained to Cunningham about Chavis' behavior at the meeting. Tracy complained that "other people get into trouble for 'being rude and disrespectful and why did nothing happen to Kathy." Fandrich also shared similar concerns with Cunningham.

83. Tracy had previously complained to Cunningham about "all this Native American stuff" prior to her becoming a supervisor. Tracy expressed concerns about "focusing a lot on Native Americans" and not on other cultures.

84. Cunningham sent Chavis and Stewart an email shortly after the meeting that stated:

> "It sounds like there was a lot of confusion around this but ultimately both of you are focusing on what is best for [Patient K] which is not Blue Thunder which is always the goal so I appreciate both of your focus on this to not let him split the two of you. Kathy, I appreciate your follow up with Dan Krause as it is understood this is not a good placement for him as he has the other options of TLF and Miles City RETC. I also appreciate, Kevin that you touched base yesterday on this with agreeing this isn't the best place for him but feeling pressured by Blue Thunder. Ultimately the plan is a good one for [Patient K] and that's what we're all about. Thanks to both of you."

85. On November 18, 2013, Cunningham contacted Shepherd and reported the confrontation between Chavis and Stewart at the November 14, 2013 meeting. Cunningham reported Stewart and others in attendance appeared to be uncomfortable. As a result of this conversation, Shepherd initiated an investigation

of Chavis for allegedly violating DPHHS Policy # 200. Shepherd never notified Chavis of the investigation.

86. Shepherd investigated the complaint filed by Cunningham by interviewing Cunningham, Fandrich, Stewart and Tracy. Shepherd prepared Contact Memos that included his summaries of the information he gleaned from the interviews.

87. Tracy denied at hearing that he told Shepherd that Chavis "went after" Stewart; that Chavis "kept antagonizing Stewart by calling him a liar;" that Chavis was "demeaning toward Stewart; and that he was uncomfortable at the meeting. Tracy also denied telling Cunningham that Chavis' behavior "had to be addressed."

88. Stewart testified he was sitting at the end of a large conference table when approached by Chavis. Stewart testified Chavis was yelling at him while continuing to stand. Stewart testified he felt attacked and did not respond to her accusations. Stewart denied at hearing having any previous conflicts with Chavis or that their working relationship was anything other than professional.

89. DPHHS offered no substantial or credible evidence showing Shepherd's approach to investigating the allegation that Chavis violated DPHHS Policy # 200 was consistent with his approach to similar allegations made against non-Native American employees.

90. DPHHS previously had in place Policy # PRP35, which outlined what due process was owed to an employee if he or she was the subject of a complaint regarding his or her behavior at work. DPHHS also had a Standard Operating Procedure (SOP) #PRP35P, which outlined the specific steps that needed to be taken once such a complaint is received by management. Policy Number #PRP35 and SOP #PRP35 were rescinded in 2011.

91. Currently, MCDC staff are required to notify their supervisor if they have a complaint about another employee's behavior. If the complaint is about the employee's work performance, the supervisor is generally able to deal with that issue without first contacting Human Resources. If the behavior is beyond the scope of the employee's duties, the supervisor is required to first notify the Administrator before contacting Human Resources. Shepherd is currently the primary point of contact at Human Resources.

92. It is the practice of MCDC to provide notice to an employee against whom a complaint has been filed before initiating an investigation. In this case,

Chavis was not provided notice of any complaints having been filed against her prior to Shepherd initiating in his investigation.

93. On November 15, 2013, two days after Cunningham informed Chavis and the staff that she was awaiting a legal opinion on whether Native American patients were allowed to possess such items while at MCDC, Chavis again requested the sage and sweetgrass be returned to the Native American patients. Cunningham denied Chavis' request.

94. On November 27, 2013, Cunningham went to Chavis' office and asked Chavis how everything was going. Chavis expressed concerns about the sage and sweetgrass issue that had yet to be resolved. Chavis informed Cunningham that the issue should have been addressed by the Cultural Relevance Committee as part of a previous HRB complaint she had filed, of which Cunningham denied having any knowledge. Chavis explained to Cunningham why sage and sweetgrass was important to Native American patients and why she thought MCDC should recognize Native American Heritage Month. Chavis complained that she thought Native American patients were not being treated fairly by MCDC staff. Cunningham stated she did not think that was the case before leaving Chavis' office. Chavis warned Cunningham that she was intending to file complaints on the issues raised during their conversation.

95. On November 27, 2013, Chavis attended a clinical staff meeting at which American Society of Addiction Medicine (ASAM) books were given to most employees at the meeting but not Chavis. Cunningham had failed to order an adequate amount of books, which resulted in other employees besides Chavis not receiving the books. More books were later ordered and one was given to Chavis. The failure to order sufficient training books was simply a mistake and not intended to harm or to demean Chavis.

96. On December 4, 2013, Cunningham gave Chavis a Due Process Letter that had been prepared by Shepherd. The Due Process Letter indicated it was being issued for "failure to interact with a co-worker in a courteous, productive, respectful, and otherwise acceptable manner." The letter stated Cunningham was considering disciplinary action against Chavis based upon her behavior at the November 14, 2013 staff meeting. Chavis was given the opportunity to offer a written response to the letter.

97. On December 10, 2013, Cunningham announced to staff that sage and sweetgrass would be stored in plastic bins pursuant to legal advice.

98. On December 11, 2013, Chavis submitted her written response to the Due Process Letter. Chavis protested the vagueness of the allegations and apparent retaliation of MCDC against her due to her having voiced complaints regarding the treatment she and Native American patients had received from MCDC staff. Chavis also alleged Stewart had violated MCDC's medical records policy by faxing medical records. Shepherd did not investigate Chavis' allegation that Stewart had violated the MCDC's medical records policy.

99. Based on Chavis' response to the Due Process Letter, Shepherd contacted Chavis and Good Gun. Shepherd made repeated attempts to speak with Vicky Wood, another MCDC employee, but was unable to do so. On December 17, 2013, Shepherd interviewed both Chavis and Good Gun. This was the first time Shepherd spoke with Chavis regarding the complaint filed against her that led to the issuance of the Due Process Letter.

100. In her interview with Shepherd, Chavis questioned whether the Due Process Letter she had received from Cunningham would be kept on the shared drive that is accessible by other MCDC employees. Shepherd told Chavis that he thought her question was disrespectful. Chavis reported to Shepherd that she thought she was being retaliated against due to her protest of the treatment of Native Americans including the issue regarding the possession and use of sage and sweet grass by Native American patients at MCDC.

101. Good Gun denied witnessing anything inappropriate or offensive in Chavis' interaction with Stewart at the November 14, 2013 meeting when interviewed by Shepherd.

102. After speaking with Chavis and Good Gun, Shepherd spoke with Cunningham about her supervisory options. Cunningham decided not to take disciplinary action against Chavis. As a result, a copy of the Due Process Letter was not placed in Chavis' personnel file.

103. On December 18, 2013, Cunningham asked Stewart to sign a continued stay review that Chavis had prepared. An LAC or other clinical staff must sign off on the continued stay review. A Care Coordinator/Case Manager is not authorized to sign off on the continued stay review.

104. A continued stay review is part of the assessment performed when a patient is nearing the end of his or her treatment at MCDC. The LAC typically prepares the transition plan, which includes six dimensions. The first two dimensions

are completed by medical staff; the third dimension is completed by a mental health professional; the fourth dimension addresses the patient's preparedness or willingness to change his or her behaviors as part of the patient's recovery plan; and the sixth dimension is regarding the patient's recovery plan.

105. Chavis was responsible for completing the sixth dimension of the continued stay reveiw as the Care Coordinator/Case Manager. Chavis was able to add to the other dimensions but could not complete the first five dimensions by herself as the Care Coordinator/Case Manager. The sixth dimension addresses where the patient is intending to go after leaving MCDC, such as to a recovery home, and what the patient needs to support his or her recovery process.

106. On January 2, 2014, Cunningham provided Chavis with a Letter of Expectations outlining improvements she expected to see in Chavis' interactions with her co-workers. The letter also noted that Chavis was expected to abide by DPHHS Human Resources Policy #200, which required her to "maintain courteous, productive, respectful, and otherwise acceptable working relationships with fellow works and with the general public." The letter also stated, "The purpose of this letter is only to notify you of my expectations. A copy of this letter will not be placed in your personnel file."

107. On January 9, 2014, Cunningham gave each employee she supervised a document entitled, "Expectations for Clinical Staff and Care Coordinator/Case Manager." The document outlined expectations Cunningham had regarding staff interactions, use of flex time, overtime, and job performance. Chavis acknowledged receiving the document by her signature dated January 9, 2014.

108. During this period, Cunningham informed Chavis several times that she did not consider Chavis to be clinical staff because she did not hold a license as did the LAC's and Mental Health Therapists. Cunningham had a good faith belief based upon her knowledge and experience that Chavis' job duties were not clinical in nature. Chavis believed Cunningham's distinguishing her from other clinical staff was an attempt to demean her in front of her co-workers.

109. "Clinical" is a term used by the Montana Statewide Accounting, Budgeting, and Human Resources System (SABHRS) for purpose of identifying work locations within the state and includes positions such as custodial staff. "Clinical," as used by SABHRS, is not intended to describe the individual employee's duties and has no relation to the employee's actual duties.

110. On January 16, 2014, Chavis asked Cunningham if she could attend a biopsychosocial training that was being offered to MCDC clinical staff on January 22, 2014. This training had been scheduled as part of the corrective action outlined in the April 2013 Quality Assurance report. Chavis thought it would be necessary for her to attend the training as it appeared to involve her duties in completing her portion of a patient's continued stay review. Cunningham denied Chavis' request because she considered the training to be necessary for only clinical staff. The January 22, 2014 training was not specifically necessary for Chavis' job duties.

111. An LAC typically completes a patient's discharge from MCDC. However, once all the dimensions have been completed by the appropriate MCDC staff, an R.N. or medical doctor can complete the discharge. A Care Coordinator/Case Manager does not have the authority to complete a discharge without an LAC being present.

112. On January 22, 2014, Mona Summer, who had been contracted by the State of Montana to conduct the biopsychosocial training for MCDC staff, asked Chavis if she was going to be attending the training program. When Chavis told her that Cunningham had denied her request, Summer told Chavis that she would speak with Cunningham because she thought the training was necessary for Chavis. Cunningham later informed Chavis that she could attend the training program.

113. On February 1, 2014, Cindy Stergar was hired as MCDC Administrator. Stergar served as the Administrator from February 1, 2014 through March 3, 2015.

114. On February 3, 2014, MCDC moved into newly constructed buildings in Butte. Chavis, who was the only Care Coordinator/Case Manager at the time, was initially given an office in the women's building. Chavis' request to move to the men's building was subsequently granted, and she moved into a similar office in the men's building.

115. In May 2014, Michael LeFever was promoted to the Care Coordinator/Case Manager position. Chavis continued working as a Care Coordinator/Case Manager after LeFever's promotion.

116. According to her performance evaluation on May 21, 2013, Kathy Chavis' performance "exceeded" DPHHS standards in terms of the "Quality of Work," "Knowledge of Job," and "Cooperation with Others" (including co-workers and supervisors). Ex. 56. According to her evaluation in October 2014, Kathy Chavis

met or exceeded expectations in terms of her performance, including her work as part of the treatment team. Ex. 55.

117. Chavis recently earned her degree, which allows her to work as an LAC. As of the date of hearing, Chavis was working as an LAC for MCDC and had received a pay increase of approximately $2.00 per hour.

118. Chavis engaged in protected activity during the following instances:

- In December 2011, when she filed her human rights complaint;

- In August and September 2013, when she complained to Shepherd about the treatment of Native American patients by MCDC staff and the removal of the Native American Code of Ethics;

- In October 2013, when she complained of an inappropriate comment made by a male employee;

- In November 2013, when she complained of Native American patients being denied access to sage and sweetgrass in November 2013 and when she protested comments made by MCDC employees about Native American patients returning to the reservation and the potential for failure in their recovery; and

- In December 2013, when she filed her written response to the Due Process letter outlining alleged discrimination and retaliation and when she was interviewed by Shepherd in response to her response to the Due Process Letter.

119. Chavis was not engaged in protected activity when she protested the placement of Patient K at Blue Thunder Lodge during the November 14, 2013 staff meeting.

120. Chavis was not discharged, demoted, denied a promotion, nor were her pay or hours reduced after she engaged in protected activity.

121. DPHHS/MCDC took adverse action against Chavis by not adequately investigating her complaints in that a worker would be reasonably deterred from participating in or protesting a violation of the MHRA under similar circumstances.

122. There is a causal connection between Chavis' protected activity and the failure of DPHHS/MCDC to adequately investigate her complaints.

123. Chavis has shown a prima facie case of retaliation.

124. DPHHS/MCDC showed it had a legitimate, non-discriminatory reason for the adverse action in that the failure to adequately investigate Chavis' complaints was simply due to a mistake and no retaliatory animus.

125. Chavis has not shown through substantial and credible evidence that the reason offered by DPHHS/MCDC was pretext for retaliation.

126. Chavis is the prevailing party in this "mixed motive" case.

IV. OPINION[3]

Chavis argues MCDC retaliated against her for protected activity in violation of the Montana Human Rights Act (Title 49, Chapter 2, MCA), the Governmental Code of Fair Practices (Title 49, Chapter 3, MCA), and Title VII of the Civil Rights Act of 1964, as amended. DPHHS/MCDC denies Chavis was retaliated against for protected activity and contends she suffered no adverse action.

Montana law prohibits retaliation in both public and private employment because of protected activity. Mont. Code Ann. §§ 49-2-301 and 49-3-209. The elements of a prima facie retaliation case are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. Beaver v. DNRC, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857. In cases arising under the Montana Human Rights Act (MHRA), the elements of a prima facie case of retaliation in the employment context vary, but generally consist of proof that the charging party was qualified for employment, engaged in a protected activity, and was subjected to adverse action, as well as a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of engagement in the protected activity. Admin. R Mont. 24.9.610(2).

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

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

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. When the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent meets its burden, the presumption of discrimination created by the prima facie case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. Id. The charging party may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Crockett v. Billings, 234 Mont. 87, 95, 761 P.2d 813, 818, (Mont. 1988), citations omitted. At all times, the charging party retains the burden of persuading the trier of fact that she has been the victim of retaliation. St. Mary's Honor Center at 507; Heiat v. E. Montana Coll., 275 Mont. 322, 328, 912 P.2d 787, 792 (1996).

A. Chavis has shown she engaged in protected activity beginning in December 2011 and thereafter.

"Protected activity" means the exercise of rights under the act or code and may include aiding or encouraging others in the exercise of rights under the act or code; opposing any act or practice made unlawful by the act or code; and filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1).

It is undisputed Chavis engaged in protected activity when she filed her human rights complaint in December 2011; when she complained to Shepherd about the treatment of Native American patients by MCDC staff and the removal of the Native American Code of Ethics in August and September 2013; when she complained of an inappropriate comment made by a male employee in October 2013; and when she complained of Native American patients being denied access to sage and sweetgrass in November 2013.

In addition to the undisputed protected activity noted above, the evidence shows Chavis was engaged in protected activity when she protested comments made by MCDC employees about Native American patients returning to the reservation and the potential for failure in their recovery in November 2013; when she filed her written response to the Due Process letter outlining alleged discrimination and retaliation on December 11, 2013; and when she was interviewed by Shepherd in response to her response to the Due Process Letter on December 19, 2013. In each instance, Chavis was protesting conduct prohibited under MHRA, namely

discrimination against a protected class and conduct by MCDC staff that Chavis reasonably believed was in retaliation for her protected activity.

1. Certain events occurring prior to November 2013 are relevant as to whether MCDC retaliated against Chavis for protectee activity.

Chavis argues that events occurring prior to November 9, 2013 are directly relevant to the extent those events provide relevant background evidence in support of her claim of retaliation. Typically, evidence regarding events that occurred prior to the relevant period of inquiry is not admissible. However, there are some instances in which such evidence is admissible as background evidence.

The Supreme Court has held that the statute of limitations for filing a claim under Title VII of the Civil Rights Act of 1964 does not "bar an employee from using the prior acts as background evidence in support of a timely claim." Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Other courts have held that evidence of prior discriminatory or retaliatory acts or statements occurring prior to the relevant period for filing a similar claim is relevant as background evidence in support of a timely claim. See Smothers v. Solvay Chemicals, Inc., 740 F.3d 530, 543 (10th Cir. 2014) (failure to consider prior discriminatory or retaliatory acts or statements that would support finding of employer's unlawful animus in taking adverse action is reversible error); Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 176 (2d Cir. 2005) (district court "impermissibly barred [claimant] from relying on the time-barred adverse employment acts as background evidence to support the actionable claims"); Contreras v. UAL Corp., 2014 U.S. Dist. LEXIS 48580, **5-8 (N.D. Cal. 2014) (rejecting defendants' argument that evidence of discriminatory or retaliatory events occurring two years or more prior to the complaint at issue is not properly admissible as background to support finding regarding employer's motives).

Chavis contends that her having filed a human rights complaint in December 2011 and subsequent resolution of the complaint are relevant to the inquiry of whether she was retaliated against for protected activity during the period of November 2013 through February 2014. Chavis' argument is well taken. Chavis was clearly engaged in protected activity when she filed her human rights complaint and when she and DPHHS entered into the voluntary resolution agreement. However, it is important to note that few people who were involved in the December 2011 complaint and subsequent settlement were involved in the events during the period of November 2013 through February 2014, which the parties identified as being the relevant period of inquiry at the time of hearing. Those individuals who could be presumed to have knowledge of the December 2011 complaint and subsequent

settlement, such as McOmber, were separated from their employment, either voluntarily or otherwise, and, therefore, lacked the ability to penalize Chavis for engaging in the protected activity.

Chavis also argues that other incidents occurring prior to November 2013 are relevant as background evidence in support of her claim that she was retaliated against for protected activity. Those incidents include Chavis' protest of Lester-Hardtla's removal of the Native American Code of Ethics from the MCDC men's community room in May 2013; Chavis' protest of Stewart's mimicking of Native Americans at the request of Cunningham in July 2013; and Chavis' first contact with Tilleman to file a complaint of discrimination and retaliation on August 14, 2013. The evidence further shows Chavis was engaged in protected activity when she reported her concerns to Shepherd during their interview on August 19, 2013. Chavis' concerns included the conduct of McOmber and Lester-Hardtla; Lester-Hardtla's angry response to Chavis' report at the May 2013 Cultural Committee concerning the removal of Native American Ethics poster; Lester-Hardtla's objection to the term "Great Spirit;" the cancellation notice sent to Dale Good Gun regarding the Cultural Committee meeting in May 2013; the warning from McOmber days after that meeting that two unnamed co-workers had filed complaints about Chavis for "things she had said during the meeting;" Chavis' resignation from the Committee because of the fear of "being accused of something without being told what it was;" her concerns that the MCDC administrator (McOmber) was telling co-workers not to talk with her; the decision not to implement training that had been recommended by the Cultural Committee in meeting the settlement of her prior human rights complaint; statements by supervisors about putting an end to the "N.A. crap;" actions by at least one staff member, specifically Fandrich, mimicking and mocking Native American speech patterns; and possible different treatment of Native American patients by MCDC staff.

The evidence shows Chavis in each instance was reporting reasonable and good faith concerns she had about possible discrimination against herself and Native American patients, as well as her perception that she was being retaliated against for her complaints. The events noted above are relevant to the inquiry of whether Chavis was retaliated against for protected activity in that they show Chavis' attempts to address concerns she had regarding the treatment she and Native American patients received from MCDC staff, as well as providing a more complete picture of Chavis' interactions with Shepherd. Therefore, while those incidents are time barred and cannot serve as a basis for Chavis' most recent human rights claim, those incidents will be considered as background evidence for her claim of retaliation in this matter.

2. Chavis has not shown she was engaged in protected activity when she disputed Stewart's placement of a non-Native American man at Blue Thunder Lodge.

DPHHS/MCDC argues Chavis was not engaged in protected activity when she protested the placement of Patient K, who is a non-Native American male, at Blue Thunder Lodge. The record is not clear as to what act or practice made illegal by the MHRA or other relevant statute or rule Chavis was protesting when she confronted Stewart about the Blue Thunder Lodge placement. The evidence shows Stewart made the placement after the Blue Thunder Lodge House Manager notified him there were four beds available and requested his assistance in finding a patient for placement at Blue Thunder Lodge. The evidence further shows Blue Thunder Lodge interviewed Patient K and approved him for placement knowing he was not Native American. While the placement was less than ideal given the stated purpose of Blue Thunder Lodge, the placement was made at its request and approved by its House Manager, who presumably knew the procedures that must be followed and what population Blue Thunder Lodge was intended to serve. There is no evidence showing such a placement impaired or impinged upon the rights of a Native American patient or of Chavis or that such a placement violated the MHRA or any other law or administrative rule. Further, given Chavis' demonstrated knowledge of the MHRA, it seems unlikely she had a good faith belief that Stewart's actions violated the MHRA. Therefore, Chavis was not engaged in protected activity when she protested Patient K's placement at Blue Thunder Lodge.

B. Chavis has shown she was subject to adverse action for protected activity.

Chavis offers three arguments in support of her contention that she was subject to adverse action due to her engaging in protected activity. The first argument is that the failure of DPHHS/MCDC to adequately investigate Chavis' claims denied Chavis her fundamental right to be free of discrimination or retaliation in the workplace under DPHHS' policy #300 and the MHRA. The second argument is Shepherd's investigation of the complaint he received from Cunningham in November 2013 regarding Chavis' protest of the placement of a non-Native American male at a facility offering programming specifically for Native American men and the "attempted improper placement" of the December 4, 2013 Due Process Letter in her personnel file constituted adverse action. The final argument is Cunningham's exclusion of Chavis from the roster of clinical staff was an adverse employment action. Each argument will be addressed in turn.

A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation. Admin. R. Mont. 24.9.603(1). Illegal 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 retaliatory action is materially adverse if it would likely dissuade a reasonable person from engaging in protected conduct. Burlington Northern & Sante Fe Ry.,Co., v. White, 548 U.S. 53 (2006); Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 174-75 (2011) (reversing, without dissent, a Sixth Circuit decision that Title VII does not permit third party retaliation claims, and reiterating that "the significance of any given act of retaliation will often depend upon the particular circumstances," as stated in Burlington, and is not amenable to any categorical rules).

In Burlington Northern, the Supreme Court affirmed a Sixth Circuit decision finding that a temporary suspension was sufficient evidence to support a jury verdict against the employer for illegal retaliation under Title VII, even though the employee was fully reinstated with back pay after the internal investigation was completed despite the employer's contention that the employee suffered no material harm. The Supreme Court provide a detailed analysis as to the proper "material adversity" standard to be applied in retaliation cases.

> "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" [Citations omitted.]
>
> We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see Faragher, 524 U.S., at 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'"). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman,

Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. Robinson, 519 U.S., at 346, 117 S. Ct. 843, 136 L. Ed. 2d 808. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. Ibid. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p 8-13.

We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, e.g., Suders, 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." Oncale, supra, at 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. Cf., e.g., Washington, supra, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual § 8, p 8-14. Hence, a legal standard that speaks in general terms rather than specific

> prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." Washington, supra, at 661.
>
> Finally, we note that contrary to the claim of the concurrence, this standard does not require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge." Post, at __, 165 L. Ed. 2d, at 366, 126 S. Ct. 2405 (Alito, J., concurring in judgment). Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.
>
> Burlington v. White, 548 U.S. at 68-70.

In short, “Whereas an adverse employment action for purposes of a disparate treatment claim must materially affect the terms and conditions of a person's employment, an adverse action in the context of a retaliation claim need not materially affect the terms and conditions of employment so long as a reasonable employee would have found the action materially adverse, which means it might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination’.” Id. at 68; see also Thompson v. North American Stainless, LP, 562 U.S. 170, 131 S. Ct. 863 (2011) (applying Burlington standard).

The totality of the circumstances determines whether one or more employment actions would dissuade a reasonable person from engaging in protected activity. Id., 548 U.S. at 69 (“Context matters. ‘The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.’”) That imposes an obligation not only to look at each action as a separate and distinct instance of material adversity, but to review the events as a whole to determine whether the cumulative weight of the actions constitute retaliation.

In Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000), the Ninth Circuit adopted an expansive definition of adverse employment action and held that "an action is cognizable as an adverse employment action if it is reasonably likely to deter

employees from engaging in protected activity." Id. at 1243 (adopting the EEOC's interpretation of adverse employment action).

1. Chavis has shown a reasonable worker would be dissuaded from making or supporting a charge of discrimination based upon the failure of DPHHS/MCDC to adequately investigate her complaints of discrimination and retaliation.

Chavis contends Shepherd failed to adequately investigate her complaint of possibly racially antagonistic attitudes of white MCDC staff members regarding training in Native American culture; Lester-Hardtla's removal of the Native American Code of Ethics and response to Chavis' protest of the action; the exclusion of Good Gun, the only Native American member of the Cultural Relevance Committee, from a committee meeting; Stuber having received an order from management not to talk to Chavis; and the mocking and disparaging of Native Americans by MCDC staff members. Chavis contends her claim is supported by Shepherd's dismissal of her complaints as providing only a "historical basis" and concluding the issues at MCDC were due to people not liking Chavis. Chavis further contends Shepherd's investigation was deficient on its face and racially selective in that Shepherd did not interview any Native American patients during his site visit in September 2013.

The U.S. Court of Appeals for the Second Circuit addressed such an issue in Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 2010 U.S. App. LEXIS 9881, 109 Fair Empl. Prac. Cas. (BNA) 467, 93 Empl. Prac. Dec. (CCH) P43,885 (2d Cir. N.Y. 2010). In Fincher, the court noted that there are no "bright-line rules" as to what constitutes an adverse employment action for the purposes of a retaliation claim. Id. at 721. The court determined that an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint thereby adopting the view of other courts in their circuit. The court explained:

> An employee whose complaint is not investigated cannot be said to have thereby suffered a punishment for bringing that same complaint: Her situation in the wake of her having made the complaint is the same as it would have been had she not brought the complaint or had the complaint been investigated but denied for good reason or for none at all. Put another way, an employee's knowledge that her employer has declined to investigate her complaint will not ordinarily constitute a

> threat of further harm, recognizing, of course, that it would hardly provide a positive incentive to lodge such a further challenge. Id. at 721.

However, it has been found that an employer's failure to investigate an employee's complaint of discriminatory or retaliatory behavior can constitute an adverse employment action in certain cases. In Rochon v. Gonzales, 438 F.3d 1211, 370 U.S. App. D.C. 74 (D.C. Cir. 2006), the D.C. Circuit concluded that an employer's failure to investigate a complaint of a death threat against an employee that followed a complaint of discrimination by the same employee was sufficient to state a claim of retaliation under Title VII, id. at 1219-20. But in Rochon, the refusal to respond to the employee's complaint of a death threat was allegedly in retaliation for his separate and earlier complaint of discrimination. The employee contended that if he had never complained of discrimination, his complaint of a death threat against him would have been investigated. Id. Making the initial complaint allegedly resulted in the separate retaliatory failure to investigate a subsequent complaint. See id. at 1220 ("[A] reasonable FBI agent well might be dissuaded from engaging in activity protected by Title VII if he knew that doing so would leave him unprotected by the FBI in the face of threats against him or his family").

While there is no case on point in Montana regarding the issue of whether a failure to investigate an employee's complaints of discrimination constitutes adverse action, the U.S. District Court for the District of Hawaii considered the implications of Fincher and Rochon and held:

> As a preliminary matter, the Court rejects the EEOC's argument that a failure to investigate upon receipt of a complaint constitutes an adverse employment action. The cases relied upon by the EEOC support the proposition that in certain very specific factual situations not present here, failure or refusal to investigate a complaint or claim may constitute an adverse employment action if the refusal is in retaliation for earlier protected activity. In Rochon v. Gonzales, the D.C. Circuit held that an employer's failure to investigate a death threat made against an employee after the employee complained of discrimination constituted an adverse employment action. In Fincher v. Depository Trust & Clearing Corp., the Second Circuit refused to rule out the possibility that an employer's failure to investigate a complaint could be considered an adverse employment action "if the failure is in retaliation for some separate, protected act by the plaintiff," as in Rochon. However, the

> Second Circuit also noted that Rochon involved a very unusual set of facts and held that "in a run-of-the-mine case," a failure to investigate cannot be considered an adverse employment action.

United States EEOC v. Global Horizons, Inc., 2012 U.S. Dist. LEXIS 146968 (D. Haw. Oct. 9, 2012)(citations omitted).

In this case, Chavis has shown she was engaged in protected activity prior to Shepherd's investigation of her complaints beginning in August 2013 through December 2013. While Chavis was clearly not dissuaded from voicing her complaints despite Shepherd's dismissal of her complaints in August 2013 and apparent failure to investigate her December 2013, Chavis cannot serve as the standard for a reasonable worker. Chavis clearly possesses a sophisticated knowledge of the MHRA and HRB's procedures and has a demonstrated willingness to avail herself of those procedures. Therefore, while Chavis was not dissuaded from making or supporting a charge of discrimination, a reasonable worker without Chavis' knowledge and expertise could well be dissuaded based upon the employer's apparent inaction upon receiving a complaint for discrimination. Therefore, Chavis has shown the failure of DPHHS/MCDC to adequately investigate her complaints constituted an adverse action for her prior protected activity.

2. Chavis has shown a reasonable worker would be dissuaded from making or supporting a charge of discrimination after receiving a Due Process Letter without any prior notice or opportunity to be heard prior to the issuance of the Due Process Letter.

It is undisputed that Chavis was given a due process letter on December 4, 2013 and Cunningham ultimately decided not to place the letter in Chavis' personnel file. Chavis argues she was treated differently than non-Native American workers who may have faced similar allegations in that the due process letter included "ultimate findings against [her] with no prior notice, no opportunity to dispute the allegations, no opportunity to challenge the credibility of the persons making any such complaint, no identification of any of the persons who were making the allegations, and [the letter] was contrary to the express written thanks of [Cunningham] who had addressed the matter in an email [sent] immediately after the staff meeting at issue."

Human Resource Policy #200 states no procedure that must be followed upon the receipt of a complaint that an employee has violated the policy unlike Human Resource Policy #300 which clearly outlines the procedures that are to be followed

upon the receipt of and investigation of a complaint. However, the practice of MCDC was to notify an employee with any issues regarding the employee's performance. While DPHHS/MCDC failed to provide Chavis with advance notice and an opportunity to be heard prior to the issuance of the Due Process Letter, the fact remains the letter was never placed in Chavis' personnel file. However, a reasonable, average person in Chavis' position, after voicing several complaints about potential acts of discrimination and retaliation, would be dissuaded from making or supporting a charge of discrimination or retaliation under similar circumstances.

3. Chavis has not shown she suffered adverse action due to Cunningham's distinguishing her from her co-workers whom Cunningham considered to be clinical staff and failing to provide Chavis with training materials in a timely fashion.

Chavis argues Cunningham's effort to distinguish her from other staff whom Cunningham considered to be clinical staff occurred only after she submitted her written response to the Due Process Letter. Chavis argues that as a result of Cunningham's actions, she was denied training opportunities and was "demeaned" in front of other staff.

DPHHS/MCDC offered evidence showing "clinical" is a designation used by SABHRS, the time keeping program used by the State of Montana, which is intended to only show where that particular employee is working. Cunningham testified she considered only those individuals who were licensed to be clinical staff. Cunningham testified she did not consider Chavis clinical staff because she did not hold any license or certification at the time she served as Chavis' supervisor.

Cunningham's testimony regarding this particular issue is deemed credible. It seems reasonable that a supervisor, who was herself an LAC, would take issue with a non-licensed employee being treated as clinical staff. Cunningham's actions, while upsetting to Chavis, were not patently unreasonable given Cunningham's professional background and training. Further, the only evidence Chavis offered to show she was clinical staff was her testimony that the term clinical appeared on her paycheck and that SABHRS categorized her as clinical. However, the evidence shows that the term clinical, as used by SABHRS, is not indicative of the employee's actual duties but rather is used to categorize where the employee actually works.

Chavis also contended she was denied training materials during this same period. Testimony was offered from several witnesses showing MCDC frequently mis-ordered training materials and was required to order additional materials. It

appears Chavis ultimately received the training materials at issue - just not at the same time as other staff. Therefore, Chavis has not shown she suffered an adverse employment action as a result of Cunningham segregating her from clinical staff or the failure of MCDC to provide her with training materials.

C. Chavis has shown a causal link between her protected activity and the adverse action of DPHHS/MCDC failing to adequately investigate her complaints of discrimination and retaliation.

The final element of a prima facie case of retaliation is the showing of a causal connection between the protected activity and the adverse employment action. Proof of a causal connection between a protected activity and a material adverse action can be established with evidence of a close proximity in time between the protected activity and the adverse action, different and more favorable treatment of persons who did not engage in protected activity, departures from established rules or procedures, proof that the respondent intended to take adverse action because of the protected activity or other proof that the adverse action was motivated in whole or in part by the protected activity. Mont. Admin. Rule 24.9.610(2)(b).

The Ninth Circuit has held that causation "may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987); Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000) ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.") (internal quotations omitted). The Supreme Court, however, has clarified that for a plaintiff to establish causation in prima facie case of retaliation only on the basis of "temporal proximity between an employer's knowledge of protected activity and an adverse employment action, . . . the temporal proximity must be very close." Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam) (citing cases from circuit courts holding that a three-month or four-month time lapse is insufficient to infer causation).

"Proof that an unlawful consideration played a motivating role in an adverse employment decision is sufficient to prove that an employer engaged in a discriminatory practice." Laudert v. Richland County Sheriff Dept., 2000 MT 218, ¶ 38 (2000), citing and adopting the analysis in Price Waterhouse v. Hopkins, 490 U.S. 228, 241-242 (1989). A charging party need not prove that an adverse action

would not have been taken "but for" the retaliatory or discriminatory motive to prove unlawful discrimination or illegal retaliation. See also: Vega v. Hempstead Union Free Sch. Dist., __F.3d__, 2015 U.S. App. LEXIS 15572, **27-28 (2nd Cir. Sept. 2, 2015) ("An adverse action is 'because of' [a protected class characteristic] where it was a 'substantial' or 'motivating' factor contributing to the employer's decision to take the action" and a plaintiff in a Title VII case need not prove "'but for' causation.")

Chavis contends both direct and circumstantial evidence supports her assertion that she was retaliated against for protected activity. Direct evidence is "evidence, which if believed, proves the existence of a fact in issue without inference or presumption." Black's Law Dictionary, p. 460 (6th Ed. 1990). See also, Laudert v. Richland County Sheriff's Department, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. In MHRA cases, direct evidence relates both to the adverse action and to the employer's discriminatory intention. Elliot v. City of Helena, HRC Case No. 8701003108 (June 14, 1989) (age discrimination). Where the charging party presents evidence of statements of a decision maker which in themselves reflect unlawful discrimination and which are related to the challenged action, then the case is a "direct evidence" case. Laudert ,¶25.

In this case, there is no direct evidence showing a causal connection between Chavis' protected activity and the failure of DPHHS/MCDC to adequately investigate her complaints of discrimination and retaliation. Chavis argues statements attributed to Tracy and Fandrich by Shepherd during the course of his investigation following her confrontation with Stewart at the November 14, 2013 staff meeting is evidence of a discriminatory animus. However, given the contradictions between the testimony of Tracy and the Contact Memo authored by Shepherd, the reliability of that evidence is questionable. Chavis also argues the language used in the due process letter indicating there had already been a conclusion made as to whether Chavis engaged in conduct prohibited under HR Policy # 200 is direct evidence of discrimination. However, that conclusory language was ultimately abrogated by Cunningham's choice not to pursue any discipline.

However, circumstantial evidence does support a finding of a causal connection between Chavis' protected activity and the failure of DPHHS/MCDC to adequately investigate her December 2013 complaints.

Chavis' strongest argument in support of a finding of a causal connection arises from the proximity in time between her protected activity and the employer's failure to adequately investigate her allegations of discrimination and retaliation. It is undisputed that Chavis engaged in protected activity at various times during the

period beginning when she filed her first human rights complaint in December 2011 and ending when she filed her second human rights complaint on May 8, 2014. In this case, there is no substantial and credible evidence showing that the parties mentioned in Chavis' complaints knew or had a reason to know about her December 2011 complaint and the subsequent settlement of that complaint. Those who presumably may have had knowledge such as McOmber were separated from their employment at some point after Chavis first complained to Shepherd in August 2013. The near constant turnover in managerial staff during the period in question at MCDC tends to weaken Chavis' argument that the December 2011 complaint or the settlement of that complaint was the proximate cause of any adverse action she may have suffered during the period of her most recent complaint. However, beginning with Chavis' complaints in August 2013, Shepherd was at least aware of Chavis' concerns and the fact she engaged in protected activity by seeking redress for those complaints. Further, that protected activity would have become known to others based simply upon Shepherd interviewing Chavis' co-workers and supervisors. Therefore, the proximity in time between Chavis' protected activity in August 2013 and the failure of DPHHS/MCDC to adequately investigate her complaints establishes the requisite causal connection.

The departure from established rules or procedures in the taking of and investigation of Chavis' complaints gives further support of Chavis' contention of causal connection. Under HR Policy No. 5.1.016 (formerly HR Policy # 300), there are formal procedures outlined for the taking of such a complaint and the investigation required. In this case, there is no evidence showing Cunningham reported Chavis complaints, specifically the complaints about the removal of sage and sweetgrass from Native American patients, to the Office of Human Resources Director of the DPHHS Civil Rights/EEO Specialist as required under the policy. But, there is no evidence showing complaints that Shepherd did receive as the investigating officer, such as Chavis' August and September 2013 complaints and the complaints listed in Chavis' response to the due process letter, were properly investigated. Particularly troubling is the complete absence of any investigative reports prepared by Shepherd in response to those claims. If Shepherd investigated the August and September 2013 complaints as he testified, he should have been able to produce his investigative file not only at hearing but during his Rule 30(b)(6) deposition.

Chavis' less convincing argument is the allegation that persons who did not engage in protected activity received different or more favorable treatment. Chavis points to the failure of DPHHS/MCDC to adequately investigate her allegation that Stewart had faxed private medical records in violation of the agency's Record

Security policy that requires medical records personnel to be the only staff allowed to fax or mail requested information. If Stewart engaged in such behavior, and there was no substantial and credible evidence offered showing that he had, it is doubtful it would require the investigation that occurred upon the allegation that an employee violated HR Policy # 200, which goes directly to the daily operations of the agency due to the need of employees to engage in respectful and courteous communications with one another and the public. This is particularly true where, as in this case, the environment was plagued with employees spending a good deal of work time reporting on one another and apparently forming alliances with the intent to best other employees. Once a workplace deteriorates to the point that employees are filing and then withdrawing formal complaints and then engaging in a course of conduct intended to "punish" another employee, an investigation into the matter is properly in order and some resolution should be sought that allows the employees to get back to the work for which they have been hired to perform on behalf of the citizens of Montana.

The preponderance of the evidence shows Chavis engaged in protected activity, the employer took adverse action against her for that protected activity, and a causal connection exists between the protected activity and the adverse action. Because Chavis' case is based upon circumstantial evidence, the burden now shifts to DPHHS/MCDC to produce evidence of legitimate, nondiscriminatory reasons for the challenged action.

D. DPHHS/MCDC has produced substantial and credible evidence showing it had legitimate, nondiscriminatory reasons for failing to properly investigate Chavis' complaints of discrimination and retaliation.

To satisfy this burden, the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978); Knutson v. Boeing Co., 655 F.2d 999, 1001 (9th Cir. 1981). The employer bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. Burdine, 450 U.S. 248, 259, 67 L. Ed. 2d 207, 219, 101 S. Ct. 1089, 1097.

DPHHS/MCDC argues any failure on the part of DPHHS/MCDC to properly investigate Chavis' complaint was, at most, "a mistake with no ill intent to retaliate."

DPHHS/MCDC does not offer any other reasons why Shepherd failed to adequately investigate Chavis' complaints other than mistake.

Shepherd, at the time, was a relatively new investigator who had not yet established his own procedures for the intake and investigation of a complaint of discrimination or retaliation. Cunningham, who was also relatively new in her supervisory position at the time, had not received any training or direction regarding the agency's procedures for addressing an employee's complaint of discrimination or retaliation. The argument of DPHHS/MCDC that the failure to act was due to mistake is well taken and supported by the evidence.

For example, once Shepherd received Chavis' written response to the December 4, 2013 due process letter, he dutifully followed up with Chavis, interviewed Good Gun and attempted to interview another witness offered by Chavis, Vicky Wood, who was inexplicably unreachable. It seems unlikely Shepherd would have continued investigating the matter if he was truly intent on punishing Chavis for engaging in protected activity. Cunningham's decision to not place the due process letter in Chavis' personnel file after learning of Chavis' written response suggests Cunningham was not motivated by any desire to punish Chavis for engaging in protected activity. Again, it seems unlikely Cunnigham would have made that decision if she was seeking to punish Chavis for voicing concerns about possible discrimination or retaliation. Finally, evidence shows that the agency did, for the most part, act timely when addressing many of Chavis complaints. For instance, in October 2013, Chavis' complaint regarding a male employee's offensive comment was investigated and the employee was punished. In another instance, Cunningham sought a legal opinion when she learned of Chavis' concerns about the denial of sage and sweetgrass to Native American patients. While Chavis may not have been pleased with the timeliness of the response, the fact remains Cunningham acted appropriately in an effort to address Chavis' concerns.

Upon reviewing the evidence and considering the testimony of the witnesses, all of whom appeared sincere and genuine in their testimony, the hearing officer is left with the impression that the DPHHS policies and procedures were not consistently adhered to or enforced at MCDC. The evidence suggests the failure was due to the high staff turnover and the lack of consistent leadership at the facility. It is clear that neither Shepherd nor Cunningham had a firm grasp on what their duties in their respective roles entailed or had a clear understanding of the employer's policies and procedures. Cunningham appeared to be ill-suited for her position and acted in a fashion that suggests she was more interested in being liked by her staff rather than in acting as a supervisor. Shepherd, on the other hand, appeared to be

interested in conducting a fair investigation but seemed to lack the knowledge or the experience in what DPHHS policies required of him as an investigator. In short, the evidence shows Cunningham and Shepherd made a series of missteps that resulted in Chavis' complaints not being adequately investigated. The Hearing Officer is persuaded that this failure was not due to retaliatory animus toward Chavis.

E. Chavis has not shown the reasons proffered for the challenged action were likely motivated by a discriminatory reason or that the explanation is unworthy of credence.

Once an employer meets the burden of producing evidence of legitimate, non-retaliatory reasons for the challenged action, the charging party is left with the ultimate burden of showing a retaliatory reason motivated the employer or that the employer's reason was not the true reasons for its action or that the reason offered is pretext for retaliation. Crockett v. Billings, 234 Mont. 87, 95, 761 P.2d 8132, 818 (Mont. 1988), citations omitted. "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." Heiat, 275 Mont. 322, 328, 912 P.2d 787, 791 (quoting St. Mary's Honor Center, 509 U.S. at 515). See also Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶15, 38 P.3d 836, ¶15. "[T]o establish pretext, [Chavis] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the] proffered legitimate reasons for its actions that a reasonable [fact finder] could rationally find them unworthy of credence." Mageno v. Penske Truck Leasing, Inc., 213 F.3d 642 (9th Cir. 2000)(quoting Horn v. Cushman & Wakefield Western, Inc., 72 Cal. App. 4th 807 (1999)).

The evidence shows the failure to investigate was due to a series of missteps by both Cunningham and Shepherd rather than any concerted action intended to harm Chavis for engaging in protected activity. Chavis' contention otherwise is undercut by her having received generally positive performance evaluations throughout her employment; a promotion and a substantial raise after she filed her human rights complaint in May 2014; and the fact Cunningham ultimately decided not to place the due process letter in Chavis' personnel file. Chavis' contention is further undercut by the fact Shepherd continued his investigation into the allegation that Chavis violated HR Policy No 200 by interviewing both her and Good Gun after receiving her written response to the due process letter. Therefore, Chavis has failed in her ultimate burden of persuading the fact finder that the challenged action was due to illegal retaliation.

F. Chavis has shown a “mixed motive” case.

An unlawful employment practice is established when the complaining party demonstrates an impermissible consideration has been a substantial or motivating factor for any employment practice, even though other factors may have also motivated the practice. Desert Palace, Inc., v. Costa, 539 U.S. 90, 94-95 (2003), explaining the burden to prove unlawful employment discrimination after the Civil Rights Act of 1991 and the adoption of 42 USC § 2000e-2(m). Where other considerations are involved, it is a "mixed motive case," and the employer has available a limited affirmative defense, which does not avoid liability but only restricts the remedies available to the complaining party if the employer can prove "it would have taken the same action in the absence of the impermissible motivating factor." Id.

The Department's administrative regulations adopted this same "mixed-motive" or "motivating factor" standard by administrative regulation in 1996. Admin. R. Mont. 24.9.611(1) states:

> “When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case. In a mixed motive case, the commission will order respondent to refrain from the discriminatory conduct and may impose other conditions to minimize future violations, but the commission will not issue an order awarding compensation for harm to the charging party caused by an adverse action that would have been taken by the respondent regardless of an unlawful discriminatory or retaliatory motive.”

Application of the "substantial or motivating factor" standard to prove causation, i.e., proof of a mixed motive case, is not dependent on "direct" evidence of discrimination or retaliation. In order to prevail, charging party "need only present sufficient evidence...to conclude, by a preponderance of the evidence, that [discrimination or retaliation] was a motivating factor for any employment practice." Desert Palace, Inc., v. Costa, 539 U.S. 90, 101 (2003) (affirming en banc decision of the Ninth Circuit). In Costa, the U.S. Supreme Court explained that the ordinary civil standard applies when the legislature is silent in imposing any kind of "heightened" burden of proof on a party.

> [S]ilence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "conventional rule of civil litigation that generally applies in Title VII cases." Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989). That rule requires a plaintiff to prove his case "by a preponderance of the evidence," ibid. using "direct or circumstantial evidence," Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714, n. 3, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983). We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000), we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination." Id., at 147, 147 L Ed 2d 105, 120 S Ct 2097 (emphasis added). The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957).
>
> Costa, 539 U.S. 90, 99-100.

As a matter of law, no recovery for the charging party is possible in a “mixed motive” case. Even though an unlawful employment action has been proven, it is impossible to say that "but for" the discriminatory motive, the action would not have been taken. Take away the discriminatory motive altogether, there is sufficient evidence showing DPHHS/MCDC had a nondiscriminatory reason for the action taken. No harm to Chavis resulted from the discrimination--the same result would have occurred without it--and there is nothing to rectify.

The idea of "mixed motive" cases serves solely the public interest. The charging party receives no recovery. The determination that a discriminatory motive played a part in the decision mandates affirmative relief under the Act, to prevent future discriminatory action by the respondent. For Chavis, the "mixed motive" decision accords her neither relief nor complete vindication.

However, Chavis’ request that DPHHS/MCDC implement and take the actions set forth in the plan of action that it adopted as part of the settlement of Chavis’ December 2011 human rights complaint is well taken. The original agreement between the parties provides a sufficient outline of remedies that serves

the public interest in ensuring that MCDC implements training and/or programming pertaining to cultural relevance and/or sensitivity. Such training will ensure that MCDC staff are aware of and equipped to deal effectively with cultural differences amongst themselves and the diverse population that they are charged to serve.

In addition to the cultural relevance and/ sensitivity training, DPHHS/MCDC shall be required to review its policies, particularly HR Policy #200, to ensure that its disciplinary procedures are clearly outlined so as to avoid a situation such as this in the future. It is not ordered but strongly recommended that DPHHS/MCDC work to ensure that its employees, particularly those newly hired for management positions, receive sufficient training on the agency's policies and procedures with a special focus on those policies and procedures that relate to employee conduct and employee discipline.

V. CONCLUSIONS OF LAW

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

2. DPHHS/MCDC illegally retaliated against Kathy Chavis. §49-2-303(1)(a), §49-3-201(1) MCA.

3. The circumstances of the illegal retaliation mandate particularized affirmative relief.

VI. ORDER

1. Judgment is awarded in favor of Kathy Chavis, formerly known as Kathy Lasky, and against the Department of Public Health and Human Services/Montana Chemical Dependency Center (DPHHS/MCDC) in the matter of Chavis' complaint that DPHHS/MCDC illegally retaliated against her for protected activity. Mont. Code Ann. §§ 49-2-301 and 49-3-209. Because DPHHS/MCDC proved a legitimate business reason for its actions, no damages are awarded, since the same result would have occurred without the unlawful employment action.

2. DPHHS/MCDC is ordered to do the following:

A. Within 60 days of this order, DPHHS/MCDC shall reestablish the Program Committee. The Program Committee shall be chaired by DPHHS Director Richard Opper. In his stead, MCDC Administrator

Kyle Fouts may also serve as the Chair of the Program Committee. Chavis shall be appointed to serve on the Program Committee. Director Opper shall take into consideration Chavis' recommendations as to who should serve on the Program Committee and will appoint individuals to serve on the Program Committee as he deems appropriate. At least half of the Program Committee members shall be Native American professionals with experience and/or understanding in the area of chemical dependency/substance abuse recovery needs of Native American individuals.

B. Within 90 days of the establishment of the Program Committee, the Program Committee shall present its program proposals to MCDC Administrator Kyle Fouts for review, recommendations and potential implementation. Those proposals should address programming necessary to address the specific needs of Native American patients, including spirituality, cultural issues, barriers to recovery, and family issues. The Program Committee shall also explore and recommend programming for MCDC staff that address cultural differences and/or cultural sensitivity.

3. DPHHS/MCDC is ordered to review its policies and procedures to ensure that any policy or rule that can result in employee discipline clearly outlines the measures that will be taken by the agency at the time of the complaint, during any investigation that is conducted and in deciding the form of discipline, if any, that could be issued.

4. DPHHS/MCDC is ordered not to violate any of the rights of its employees or the patients it serves as protected under the Montana Human Rights Act.

DATED this 10th day of February, 2016.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
Hearing Officer

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Timothy C. Kelly, attorney for Kathy Chavis; and Mary Tapper and Vicki Knudsen, attorneys for DPHHS/Montana Chemical Dependency Center:

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, Mont. Code Ann. § 49-2-505 (4), 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.