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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NOS. 657-2016, 658-2016 & 659-2016:

JOSHUA CLARK,	) HRB Case Nos. 0151017366,
	) 0151017367, 0151017368
Charging Party,	)
	)
vs.	) HEARING OFFICER DECISION
	) AND NOTICE OF ISSUANCE OF
MISSOULA COUNTY, MONTANA,	) ADMINISTRATIVE DECISION
SHERIFF TERRY MCDERMOTT, AND	)
UNDERSHERIFF JASON JOHNSON,	)
	)
Respondents.	)

* * * * * * * * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

On March 10, 2015, Charging Party Joshua F. Clark filed a complaint with the Montana Human Rights Bureau alleging Respondents Missoula County, Sheriff Terry McDermott, and Undersheriff Jason Johnson engaged in political belief discrimination and retaliation for protected activity against him. On October 2, 2015, the matter was transferred to the Office of Administrative Hearings to be set for a contested case hearing.

On June 21, 22, and 23, 2016, Hearing Officer Caroline A. Holien conducted a contested case hearing in this matter in Missoula, Montana. Attorneys Quentin M. Rhoades and Nicole L. Seifert represented Clark. Attorney Steven S. Carey represented Respondents.

At hearing, Clark; former Missoula County Sheriff Carl Ibsen; retired Missoula County Sheriff's Captain Brad Giffin; former Missoula County Undersheriff and current Missoula County Attorney investigator Mike Dominick; Traci Clark, spouse of charging party; Dr. Kevin Sheehan, M.D.; Dr. Thomas Clucas, Ph.D.; Dale Williams, CPA/BV, CVA; Steve Johnson, former Missoula County Operations

Officer; Kari Walker; Patty Baumgart, Missoula County Human Resources Director; Missoula County Sheriff Terry McDermott; and Missoula County Undersheriff Jason Johnson presented sworn testimony.

The deposition testimony of Willis Hintz and Captain David Conway was also received into evidence.

Counsel stipulated to the admission of Exhibits 1 through 13; 15 through 31 and 34 through 58. Respondents' Exhibits 32 and 33 were also admitted.

Respondents offered Exhibits 59 and 60 at the time of hearing. Ruling on the admissibility of Exhibits 59 and 60 was reserved and the parties were asked to address the admissibility of Exhibits 59 and 60 in their post-hearing briefs.

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 November 17, 2016. Having reviewed, considered and weighed the evidence of record, the proposed decisions and the briefs, the Hearing Officer now makes the following findings and conclusions and issues the following order.

A. Exhibit 59

At hearing, Respondents offered screen shots of text messages purportedly between McDermott and the Editor of the Missoulian on January 18, 2014 regarding postings made on the newspaper's website pertaining to McDermott.

Charging Party objected on the grounds that the screen shots constitute inadmissible hearsay under Rule 802, Mont.R.Evid. Charging Party also argues the images are inadmissible as Respondents failed to disclose the screen shots during the discovery process and McDermott failed to offer information regarding the offending Missoulian comments at the time of his deposition despite being asked several times if there were "any other reasons" for Clark's demotion. Charging Party notes that McDermott never mentioned the text messages until the time of hearing and Respondents had made no effort to supplement their discovery responses. Charging Party relies upon Rules 26(e)(1) and 37(c)(1), M.R.Civ.P. in support of his argument.

Respondents counter the screen shots of the text messages are admissible as an exception to the hearsay rule under Rule 803(1), M.R.Evid., which defines a "present sense impression" as "[a] statement describing or explaining an event or condition

made while the declarant was perceiving the event or condition, or immediately thereafter." Respondents further argue Clark never denied the Missoulian comments came from his campaign and the exhibit should not have been a surprise to Clark given the apparent source of the comment.

The screen shots of the text messages may constitute a present sense impression as defined under Rule 803(1), M.R.Evid. However, the screen shots of the text messages go beyond describing an "event or condition" and identify the person who allegedly posted the offending comments, which is not a "present sense impression" and falls squarely in the definition of hearsay, which is defined as, ". . . a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), M.R.Evid. The author of the text message identifying the source of the comments was not called as a witness; nor was the individual who allegedly posted the comments. Therefore, the screen shots of the text messages are not admissible under Rule 803(1), M.R.Evid., containing as they do multiple layers of hearsay.

Even if the screen shots of the text messages were admissible under Rule 803(1), M.R.Evid., the Respondents' failure properly to disclose those screen shots at any time prior to the close of hearing renders them inadmissible.

Rule 26(e)(1), Mont.R.Civ.P. provides:

> A party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its response:
> (A) in a timely manner if the party learns that in some material respect the response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
> (B) as ordered by the court.

Rule 37(c)(1), Mont.R.Civ.P., provides, in part:

> If a party fails to provide information requested in accordance with these rules or fails to disclose information regarding opinions of a witness as required by Rule 26(b)(4), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. . . . .

Respondents failed to disclose the screen shots of those text messages during the course of discovery with very little explanation. Respondents failed to disclose the screen shots as hearing exhibits in their required prehearing disclosure of hearing exhibits. See, "Final Prehearing Order," "Respondents' exhibits," pp. 21-22 (June 10, 2016). Given McDermott was able to quite handily produce them at the time of hearing, it is perplexing why the screen shots were not disclosed during discovery, disclosed as required for the prehearing order, "Order Resetting Contested Case Hearing Date and Prehearing Schedule," p. 2, Para. No. 4 (Dec. 8, 2015), or otherwise mentioned as a reason for McDermott's decision to place Clark on patrol.

Respondents argue Clark did not deny the comments included in the screen shots came from his campaign and he did not call the individuals who are alleged to have made the postings. It makes little sense that Clark would have called those individuals as witnesses at hearing since he had no prior notice of the existence of the screen shots. In addition, the burden of laying a proper foundation for the screen shots was upon Respondents, who offered them.

The screen shots of the text messages are inadmissible hearsay not subject to the exception set forth in Rule 803(1). Further, the screen shots of the text messages are not admissible due to Respondents' failure to properly disclose the existence of the text messages during the prehearing process. Therefore, Respondent's proposed Exhibit 59 is hereby excluded from the record.

B. Exhibit 60

Charging Party's proposed Exhibit 60 includes the "no cause" findings of the Montana Human Rights Bureau and Final Investigative Report (FIR) regarding the complaint of Missoula County Deputy Rebecca Birket[1] that she was discriminated against on the basis of her sex and marital status based upon the investigation of her involvement with a co-worker; the conduct of the review board; and subsequent discipline of termination that was later rescinded and suspension was imposed. Charging Party offered Exhibit 60 as evidence that Missoula County took the position that Clark had done nothing wrong during the review board hearing during the course of the Birket HRB investigation. Clark argues that Missoula County cannot now reverse course and argue Clark's behavior at the review board hearing caused McDermott to lose trust in Clark.

[1]There were two different spellings used for Birket in the record (Birket and Birkett). The hearing officer has used the spelling used in the FIR.

Respondents counter that Exhibit 60 is inadmissible because the "content of the surprise document was misrepresented" by Charging Party at the time of hearing. Respondents note the heart of Birket's discrimination claim revolved around the MCSO's "relationship" policy. Respondents also note that Missoula County did not endorse Clark's behavior during the review board hearing as evidenced by the County Board's reversal of the discipline imposed against Birket; Birket's subsequent reinstatement as a permanent employee and settlement of $60,000.00.

"All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." Rule 402, M.R.Evid. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant." Rule 401, M.R.Evid. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, Mont. R. Evid.

Rule 803(8), M.R.Evid. also provides:

> To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (I) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

The Montana Supreme Court has unequivocally held ". . . factual findings resulting from special investigation of a particular complaint, case or incident" are inadmissible hearsay" under M. R. Evid. 803(8)(iv). Styren Farms, Inc. v. Roos,

2011 MT 299, P34, 363 Mont. 41, 50 (Mont. 2011); Boude v. Union Pac. R.R. CO., 2012 MT 98, ¶ 18, 365 Mont. 32, 38(Mont. 2012). The Montana Supreme Court has further held that M. R. Evid. 803(8)(iv) "specifically excludes factual findings such as the reasonable cause finding of the [HRB] which directly results from an investigation of a particular complaint of discrimination." Stevenson v. Felco Indus., 352 Mont. 303, 310, 216 P.3d 763, 769 (Mont. 2009), citing Crockett v. City of Billings, 234 Mont 87, 98, 761 P.2d 813, 820 (Mont. 1988). The impeachment value of the FIR is that the investigator noted while reviewing the DVD, "Clark does not raise his voice or pound his fist on the table," which contradicted the testimony of Steve Johnson and McDermott that Clark had raised his voice and pounded his fist on the table. However, the investigator's fact finding is directly related to the FIR's conclusions regarding the discrimination claims of Birket, rendering the hearsay exception for public records inapplicable.

The FIR shows Missoula County took the position that Birket was not discriminated against or retaliated against in the enforcement of the MCSO's Relationships with Married Persons Policy in that she was treated the same as a similarly-situated, married, male. There is no mention that Missoula County specifically defended Clark's behavior at the board review hearing.

Proposed Exhibit 60 may be relevant to the extent that it memorializes Missoula County's position that there was no discrimination or retaliation in Birket's case. However, its probative value is clearly outweighed by the danger of unfair prejudice. Further, the FIR is undeniably hearsay under M. R. Evid. 803(8)(iv). Therefore, proposed Exhibit 60 is hereby excluded from the record.

C. Exhibit 33

Exhibit 33 was admitted at hearing under Rule 803(6), Mont.R.Evid. Both parties were asked to address the weight the exhibit should be given in their respective post-hearing briefs.

Exhibit 33 is a memorandum written by Assistant Attorney General Brant Light dated May 14, 2015 regarding the handling of what is referred to later in this decision as the Pavalone incident. Charging Party argues Exhibit 33 is inadmissible hearsay and is irrelevant as it could "have no bearing whatsoever on McDermott's intent in demoting Clark to the night patrol in December 2014."

Respondents argue that Exhibit 33 is relevant as it legitimizes McDermott's concerns that criminal charges might be brought as a result of the investigation pf the

Pavalone incident by Light's office, and that Clark could be implicated. Respondents further argue the report is not hearsay as it is a "memorandum" of Light's opinions at or near the time of his opinions and kept in the course of his regularly conducted business activity.

Rule 803(6), Mont.R.Evid. provides, in part:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

There has been no evidence offered to suggest Light's report lacks trustworthiness or that it otherwise does not meet the criteria set forth in Rule 803(6), Mont.R.Evid. As a report prepared in the regular course of business based upon an investigation completed by a separate agency, the report itself is admissible as an exception under 803(6).

However, the report itself contains very little information that is relevant to the issues at hand: was Clark discriminated against on the grounds of political belief and/or retaliated against for protected activity? Clark does not feature greatly in Light's report; nor have there been any substantial accusations made that Clark was responsible for Ibsen's decision to "handle" the Pavalone incident rather than request an outside agency investigate the matter. To the extent that the report shows the actions of McDermott and Johnson, the report will be considered. To the extent Light's report shows the potential of criminal charges being brought as a result of the investigation of the Pavalone incident by Light's office, the report has been considered. It does not make it more or less likely that Clark might have been implicated in any such criminal charges.

II. ISSUES

1. Did Missoula County, Montana, Sheriff Terry McDermott and Undersheriff Jason Johnson discriminate and/or retaliate against Joshua Clark on the basis of political belief[2] in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann. and the Governmental Code of Fair Practices, Title 49, Chapter 3?

2. If Missoula County, Montana, Sheriff Terry McDermott and Undersheriff Jason Johnson did unlawfully discriminate and/or retaliate against Joshua Clark as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Missoula County, Montana, Sheriff Terry McDermott and Undersheriff Jason Johnson did unlawfully discriminate and/or retaliate against Joshua Clark as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory/retaliatory practices?

III. FINDINGS OF FACT

1. Respondent Missoula County is a political subdivision of the State of Montana and is governed by a three-member board of County Commissioners. Missoula County has approximately 800 employees.

2. The Missoula County Sheriff's Office (MCSO) is a political subdivision of Missoula County and is the chief law enforcement agency in Missoula County. The MCSO is responsible for providing law enforcement services to the entire county. MCSO employs approximately 45 sworn officers.

3. The Sheriff is an elected Missoula County official with a four-year term. The Sheriff's duties are prescribed by Mont. Code. Ann. § 7-32-2121. The duties of a sheriff include adherence to Montana's statutory non-discrimination policy commanded by the MHRA . . .". See Edwards v. Cascade County Sheriff's Dep't, 354 Mont. 307, ¶62, 223 P.3d 893, 904.

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[2] Neither party offered authority for the idea that political belief discrimination encompasses situations such as this when the parties were political opponents in a primary and general election.

4. The Sheriff is required to appoint an Undersheriff under Mont. Code Ann. § 7-32-2102. The Undersheriff serves at the pleasure of the Sheriff and reports directly to the Sheriff. The Undersheriff's duties are prescribed by Mont. Code Ann. § 7-32-2122.

5. Individuals serving as the Undersheriff are not subject to the Collective Bargaining Agreement (CBA)that governs the rank and file of the MCSO.

6. The MCSO is a quasi-military organization with regards to rank and order. During the relevant time period, the MCSO had the following ranks: Sheriff, Undersheriff, Captain, Lieutenant, Sergeant, Corporal and Deputy.

7. Captains are appointed by the Sheriff. Captains are subject to Missoula County's human resource policies, as well as the Montana Wrongful Discharge from Employment Act (MWDEA). Captains are not covered by the CBA.

8. During the period prior to the November 2014 election, there were three Captain positions: Patrol, Professional Standards, and Detectives. Patrol, Professional Standards and Detectives were referred to as "downtown" positions as they were based at the administrative offices of the MCSO. The Detention Commander, whose office was at the jail, was also considered a senior management position.

9. The Undersheriff and Captains are considered senior positions. The Undersheriff and Captains are allowed to take home an unmarked vehicle; have an office of their own; enjoy a flexible work schedule; typically work day shift hours rather than night shift; have weekends and holidays off; and enjoy the ability to craft their own work schedule.

10. It has been the past practice of the MCSO that the Undersheriff would return to their last rank upon the election of a new Sheriff.

11. The MCSO is historically a factious working environment. MCSO and other Missoula county employees tend to choose sides in internal disputes and employee spats. This unfortunate approach is exacerbated during election cycles where teams of supporters zealously advocate for their candidate while appearing to plot against those who are "against them." This has seemingly been the approach of MCSO employees for several years regardless of who is serving as Sheriff.

12. Charging Party Joshua Clark has 22 years of law enforcement service in Missoula. Clark was generally regarded as a good officer with a commitment to performing his job duties to the best of his ability and serving the community.

13. In March 1993, Clark began working as a detention officer with the MCSO just before graduating from college.

14. From February 1994 through April 1994, Clark attended and successfully completed the Montana Law Enforcement Academy. Clark completed 12 weeks of field training with the City of Missoula Police Department (MPD).

15. From February 1994 through December 2003, Clark served as a police officer for the MPD. Clark received no discipline, reprimands or public complaints during his time as an officer for the MPD.

16. In December 2003, Clark began serving as a patrol deputy for the MCSO. Clark served as a patrol deputy for approximately five years when he was promoted to detective. Clark also volunteered for the Special Response Team, popularly referred to as the SWAT team, first as an entry officer and later as a sniper. Clark also served as deputy coroner and a firearms instructor.

17. In the fall of 2008, Clark began serving as a detective. Clark also volunteered for the search and rescue crew and continued serving as a firearms instructor.

18. During the winter of 2009 and early 2010, Clark served on the narcotics unit as a detective. Clark found the position stressful and overwhelming and sought to return to patrol, which he found to be a less vexing position. Clark returned to patrol in May 2010.

19. Clark also stopped serving as a deputy coroner around this time due to the stress of the position taking its toll on his health. Clark sought counseling, which helped him get through this period in his life.

20. Clark has been a patient of Dr. Tom Clucas, PhD., a clinical psychiatrist located in Missoula, on an intermittent basis since approximately 2004. Clark has addressed issues related to childhood trauma, as well as feelings of sadness and stress related to Clark's work.

21. Clark was also treated for long-term depression and anxiety, as well as chronic insomnia in 2010 or 2011 by Dr. Kevin Sheehan, a physician with St. Patrick's Hospital. Dr. Sheehan treated Clark with medication, which proved successful.

22. Current Missoula County Sheriff Terry McDermott began working for the MCSO at or about the same time as Clark. McDermott and Clark have basically had the same career trajectory.

23. McDermott has approximately 22 years of experience as a law enforcement officer. From 1995 through 1998, McDermott served as a police officer for the City of Anaconda. McDermott then served as a police officer for the MPD from 1998 through 2003, when he began working as a patrol deputy for the MCSO. McDermott has served as Detective I, Detective II, and Sergeant for MCSO.

24. In 2010, Carl Ibsen was elected Missoula County Sheriff after serving as a Deputy Sheriff for Missoula County for more than 20 years. Prior to that, Ibsen had previously served as a Missoula City Policy Officer for approximately 20 years.

25. Ibsen and Clark had a close working relationship having known one another for several years. Ibsen and McDermott have had a cooler working relationship, in comparison.

26. In July 2011, Ibsen appointed Clark to Captain of Professional Standards from Senior Deputy I. Clark's appointment was not a competitive promotion. Clark skipped the ranks of corporal, sergeant, and lieutenant when he accepted the appointment to Captain of Professional Standards.

27. The Captain of Professional Standards was the head of a new division created by Ibsen that was responsible for conducting internal investigations of deputies and detention officers. This was considered a unique and prestigious position that reported only to the Sheriff.

28. The Captain of Professional Standards oversaw the Public Information Officer, who has traditionally been considered the voice and the face of the MCSO. The Captain of Professional Standards was also responsible for managing the daily operations of the MCSO when Ibsen and the Undersheriff at the time were unavailable.

29. As Captain of Professional Standards, Clark investigated a number of deputies and detention officers for various allegations of professional or official misconduct. Clark recommended the discharge of a few deputies in this position. As a result of Clark's position of authority over his fellow officers, he was not a popular man at the MCSO.

30. Respondent Jason Johnson served as MCSO's first Public Information Officer (PIO) from 2011 through April 2013. Johnson generally had good working relationships with both Clark and Ibsen.

31. Johnson has served in law enforcement for approximately 20 years. Johnson joined the MCSO in 2005 where he has served in various capacities, including Patrol Deputy, SWAT team member, and Detective. Johnson currently serves as Undersheriff under Sheriff McDermott.

32. On March 3, 2013, Ibsen promoted Clark to Undersheriff.

33. Mike Dominick, who had served as the Undersheriff to Ibsen prior to Clark, requested to move to the Captain of Detectives position after the deputy who had previously held that position retired. Dominick had also served in a variety of capacities during his 19 years with the MCSO. Dominick's positions included Senior Deputy II, Senior Detective, Sergeant and Patrol Deputy. Dominick served as the Undersheriff to the previous Sheriff for approximately five years, before serving as the Undersheriff for Ibsen for approximately two years.

34. After Clark's promotion to Undersheriff, Patrol Captain Brad Giffin moved to the Captain of Professional Standards. Lieutenant Rob Taylor was promoted to Patrol Captain.

35. Giffin had served as a deputy for Missoula County for approximately 25 years. Giffin served in various capacities including trainer, Training Lieutenant, Patrol Lieutenant; Captain of Patrol and, finally, Captain of Professional Standards.

36. During this period, McDermott and Johnson met with Ibsen outside of the MCSO to discuss McDermott's plan to run for Sheriff. Clark also attended a portion of the meeting. McDermott made it clear that he intended to run for the Sheriff in the upcoming election and, if he prevailed, Johnson would serve as his Undersheriff. McDermott felt the meeting did not go well and that neither Ibsen nor Clark were receptive to the idea of his running for Sheriff.

37. Shortly after the meeting, Captain Giffin informed Johnson that he was no longer allowed to talk to the media without prior permission. Johnson was later removed from the PIO position and replaced with Deputy Paige Pavalone.

38. In June and July 2013, Captain Giffin investigated two deputies, one of whom was Rebecca Birket, for allegations of misconduct and untruthfulness. On July 18, 2013, Ibsen ordered Clark to convene a review board hearing for the deputies.

39. On July 24, 2013, the review board hearing was held at the Missoula County Administration building. Clark served as the presiding officer in his official capacity as Undersheriff. Five other deputies also sat on the review board. Giffin served as the prosecutor. An order was issued the day after the hearing imposing disciplinary action against Birket and the other deputy.

40. On September 18, 2013, the Missoula Board of County Commissioners reversed the findings of the review board; rescinded the disciplinary action imposed; and ordered all references to the disciplinary action to be removed from the deputies' records.

41. Birket subsequently filed a human rights complaint against Clark and others alleging discrimination and retaliation. One of the allegations made was that Clark acted inappropriately during the review board hearing.

42. On June 4, 2013, Johnson filed a human rights complaint against the MCSO alleging discrimination and retaliation on the basis of political belief based in part upon his removal from the PIO position.

43. On June 24, 2013, Clark signed a witness statement adverse to Johnson's complaint, denying a number of material facts cited in the complaint.

44. On August 9, 2013, McDermott filed a human rights complaint against the MCSO, then-Sheriff Ibsen and Captain Dominick alleging discrimination and retaliation on the basis of political belief.

45. On September 9, 2013, Clark signed a witness statement adverse to McDermott's complaint, denying a number of material facts cited in the complaint. Clark also made critical statements about McDermott's character and fitness in direct and candid terms in his witness statement.

46. In February 2014, Clark announced his intention to run for Sheriff. Clark had been considering the run seriously since learning in December 2013 that Ibsen did not intend to run for re-election.

47. Clark, McDermott and MCSO Deputy Bill Parcell faced off in the Democratic primary, which was contentious.

48. On June 3, 2014, McDermott won the primary and secured the Democratic nomination for Sheriff.

49. Shortly after McDermott's primary victory, he and other deputies, including Johnson, Jace Dicken, Anthony Rio and Bill Burt went to Las Vegas on what was referred to by other MCSO employees as the "promotion trip." It was generally understood that the trip attendees were supporters of McDermott's campaign and would be rewarded with job promotions after McDermott took office.

50. During the summer of 2014, rumors began circulating at the MCSO regarding the future status of Clark and those who were known to be Clark supporters during the primary. The rumor was that Rio, Burt and Dicken would be promoted to captain and Clark would be reassigned to patrol.

51. In July 2014, Clark requested to meet with Patty Baumgart, Human Resources Director, and Steve Johnson, COO, as well as the individuals currently serving as captains at the MCSO.

52. Baumgart has worked for Missoula County for more than 30 years and has served as the Human Resources Director for the last five years.

53. Steve Johnson has worked for Missoula County for 18 years, including 15 years as the Human Resources Director and then later as the Chief Operating Officer. At the time of hearing, Johnson was second in command for the City of Missoula as the Director of Central Services.

54. On July 18, 2014, Baumgart sent an email to Deputy Missoula County Attorney Marnie McClain setting forth her understanding of what happens to MCSO Captains and the Undersheriff after the election of a new Sheriff. Baumgart noted in her email that the individual serving as the Undersheriff for an outgoing Sheriff could be "un-appointed" and placed in a position he would have held prior to becoming the Undersheriff with the same rate of pay. Baumgart also indicated captains cannot be "removed from their title without requisite steps to demote them . . ." but they can

be reassigned to a different duty set provided it is not a transfer to meaningless or unproductive duties.

55. On July 30, 2014, McClain responded by forwarding an analysis prepared by Deputy Missoula County Attorney Erica Grinde, which substantively confirmed Baumgart's July 18, 2014 email. Grinde addressed the application of Mont. Code Ann. § 7-32-2102 and noted the Undersheriff serves at the pleasure of the Sheriff and his or her term ends with the conclusion of the Sheriff's term. Grinde noted the Undersheriff would resume the duties and the pay he or she would have had prior to assuming the Undersheriff position.

56. Baumgart forwarded the analysis to Steve Johnson, attorney Karl Englund, and McDermott approximately two hours after receiving McClain's email.

57. On July 30, 2014, Baumgart sent an email to McDermott with Johnson copied in, advising them of Clark's meeting request. Baumgart wrote:

> Also, TJ, Josh Clark is requesting that he and the Captains meet with Steve and I alone before I schedule a meeting that includes you and/or Jason. Surprise, surprise. He said it is "premature" to have you there. I don't know whether to interpret that as premature because they don't yet acknowledge your election and are still plotting a write in campaign, or premature because they want to vent unfettered before they have to be accountable for what they say.
>
> I explained to them that I wanted all parties present to be accountable but he feels that they should have an opportunity to meet to voice concerns without feeling it may be confrontational. I think I am going to have to allow it. However, as I told SJ, the first time someone says anything to the effect "TJ is telling people . . ." I'm going to ask them to let me call you and have you come over so you can speak for yourself without the gossip and innuendo.
>
> I think it would be better to agree to that than to totally cancel the meeting. I hope you understand. Thanks.

58. Johnson responded to Baumgart's email:

> TJ is going to call you to get clarification and to discuss the issues. We certainly don't take issue with you meeting with them alone, we just

> want to make sure we are on the same page as you guys with what is said to them. Just to be clear, TJ and I know without question that discharge from the department (being fired) or loss of pay is not something that is legal, appropriate or even something that we need to discuss. Those things are not our intentions.

59. Baumgart subsequently met with Clark and the other Captains, including Giffin, outside of the presence of McDermott and Johnson. Baumgart advised them the incoming Sheriff had the authority to appoint a new Undersheriff. The outgoing Undersheriff would return to the position held prior to the taking the Undersheriff position with the same rate of pay. The outgoing Undersheriff would retain seniority rights including length of service, vacation accumulation, and status during a layoff. Baumgart also indicated there was no guarantee the departing Undersheriff would retain a certain rank. Baumgart also advised Clark and the others of Mont. Code Ann. § 7-32-2201, which specifically addresses the status of Undersheriffs.

60. Baumgart also noted during her conversation with Clark and the Captains in attendance that there was no specific statute or rules governing the status of captains appointed by an outgoing Sheriff other than the captains are considered employees of Missoula County and are subject to the policies of the county, as well as the protections of the WDEA. Baumgart advised that captains could not be removed from their title without the proper steps being taken regarding demotion under the county's polices but they can be reassigned to a different duty. Baumgart did mention that, in a worst case scenario, captains may be subject to layoff or be placed on a standby status. Giffin stormed out of the meet upset that his many years of service to Missoula County could be so readily disregarded.

61. Baumgart and Steve Johnson, who agreed with Baumgart's assessment of the placement of captains and the approach toward the appointment of a new Undersheriff, based their opinions, in part, upon a letter of advice of the Montana Attorney General issued on August 2, 1989, which addressed the application of Mont. Code Ann. § 7-32-2102(2), which is entitled, "Undersheriff to be appointed - return to other duties." It is noted in the letter of advice that Mont. Code Ann. § 7-32-2102(2) "clearly requires that the individual who returned to the position of deputy be paid the same salary he would have received had he not taken the undersheriff position." The letter of advice goes on to provide:

> It should be noted that section 7-32-2102, MCA, addresses only salary and not any particular rank or assignment. This status therefore

requires only that the deputy in question be paid the salary of a captain; it does not require that he be assigned the rank of a captain.

62. On August 20, 2014, McDermott met privately with Clark in Clark's office at the MCSO for approximately two hours. McDermott warned Clark that he needed to control his wife, who McDermott had heard was saying disparaging things about him at the Missoula County Fair and throughout the community. McDermott also brought up the human rights complaint he had filed against Ibsen and the statement Clark filed in response to his complaint. Clark asked McDermott about rumors in the office that McDermott intended to move Clark back to patrol rather than to a Captain's position if he won the election. Clark felt McDermott evaded the question by telling Clark to not believe the rumors. McDermott asked Clark where he wanted to go in the new administration during this meeting. Clark became angry, pounded his fist on the table and said he guessed he was "going to effing patrol." They also discussed rumors that Clark was retiring and the problems the two men had during the primary election.

63. Clark subsequently made the decision to run as a write-in candidate due in part to his conversation with McDermott. Clark did not tell McDermott of his intention to launch a write-in campaign.

64. Clark and McDermott both campaigned zealously for the office. Clark openly criticized McDermott during the campaign, including questioning his ethics and character, as did Clark's wife and his campaign supporters.

65. In August 2014, Clark filed a political practice complaint against McDermott, which was later found to have merit in a decision by the Commissioner of Political Practices of the State of Montana dated October 8, 2014.

66. On November 3, 2014, Captain Brad Giffin resigned his position as Captain of Professional Standards. Giffin's resignation was based on his suspicion that he would not be treated favorably under McDermott's administration due to his support of Clark's campaign. Giffin's fears were based, in part, on a telephone call he received from McDermott at his home in January 2014 in which McDermott demanded to know whose side Giffin was on in the election.

67. On November 4, 2014, McDermott was elected as the Missoula County Sheriff with approximately 64% of the vote.

68. Shortly after the election, rumors began to spread at the MCSO that Clark was retiring and planning to move "up north."

69. McDermott, concerned about the rumors regarding Clark's departure and Clark's apparent unwillingness to move forward under his administration, met with Ibsen. McDermott asked Ibsen directly if Clark was intending to retire. Ibsen and McDermott also discussed the possibility of Clark returning to patrol where both men thought it would be less stressful for Clark and offer the potential for greater pay.

70. Willis Hintz, who served as a reserve deputy for MCSO after retiring as the Administrative Captain for the MCSO in 2011, served as a member of the selection committee for the Western Region of Montana, which is associated with the FBI National Academy Associates. The selection committee is charged with recruiting candidates to apply to attend the FBI National Academy.

71. Hintz approached McDermott shortly after the November 2014 election to inquire about Clark attending the academy since he had qualified to be placed on the waiting list. McDermott informed Hintz that he would not, as Missoula County Sheriff, support Clark attending the FBI National Academy because he would not be holding a supervisory position of lieutenant or above after McDermott took office.

72. On or about November 20, 2014, Missoula County Deputy Paige Pavalone was involved in a domestic incident at her home which resulted in injury to her hand. Pavalone took herself to Community Hospital where a friend "snuck" her in for treatment. Ibsen was contacted, who met Pavalone at the hospital.

73. Clark was out of town at the time of the Pavalone incident and learned of it days later through Ibsen. Clark advised Ibsen that he should request an outside agency investigate the matter. Ibsen did not file any police reports regarding the incident although he prepared a synopsis of the matter in case Pavalone should wish to pursue the matter in the future.

74. On November 23, 2014, Clark and Ibsen served a Temporary Order of Protection (TOP) upon Pavalone's husband. Clark completed the service of the TOP, and Ibsen served as backup. Clark did so out of concern that an officer with a lesser rank would have to deal with a potentially sensitive and private matter involving another deputy.

75. During this period, Clark picked Pavalone up from a medical appointment related to the injury she sustained on November 20, 2014 and transported her home. Clark did not ask Pavalone any questions about her injury or the earlier incident. Clark believed he was performing a service that he would have performed for any other deputy.

76. Neither Clark nor Ibsen filed any reports regarding the Pavalone incident or contacted any other law enforcement agency to investigate the incident.

77. McDermott and Johnson heard rumors of the Pavalone incident several days later and confronted Ibsen, who indicated he was handling the situation.

78. On December 2, 2014, Clark sent an email to MCSO staff referring to a rumor suggesting he was leaving the MCSO. Clark wrote:

> So in case you are wondering:
>
> 1. I ain't retiring.
> 2. I ain't moving north and/or to Kalispell. (depending on how you heard it).
>
> Apparently more lies and rumors are being spread in the last month of my time in this administration than in the rest of my career put together. Let me know if you hear any good ones.

79. On December 12, 2014, McDermott and Johnson attended the TOP hearing involving Pavalone and her husband. McDermott contacted the Missoula County Attorney's Office for advice on how to handle the situation, which he believed had been handled inappropriately by Ibsen. The Missoula County Attorney's Office advised McDermott that the matter needed to be investigated by an outside agency.

80. Johnson contacted the Montana Department of Criminal Investigation, who investigated the matter and forwarded its investigative files to the Prosecution Services Bureau (PSB) of the Montana Attorney General's Office for a review of potential charges. On May 14, 2015, the PSB declined to pursue criminal charges against Pavalone but expressed concern about the handling of the November 2014 domestic incident. Clark was not specifically mentioned in the May 14, 2015 report.

81. Prior to McDermott taking office, Ibsen hired two new entry-level deputies. Clark conducted the background check required of one of the new deputies in his role as the Undersheriff. One deputy had a disqualifier come up in his background check, which was deemed to be a discretionary disqualifier rather than a mandatory disqualifier. Clark reviewed the background checks, rewrote them and submitted them to Human Resources. Ibsen, in his discretion as Sheriff, discounted the disqualifier when making his decision to hire one of the deputies. The push to hire the deputies prior to January 2014 was due, in part, to the MCSO having two slots available at the Montana Law Enforcement Academy, which was scheduled to start on January 4, 2015. One of the two deputies ultimately failed to complete his probationary period.

82. McDermott agreed to completing the hires but had concerns about the propriety of the background checks. McDermott understood the diqualifiers were related to narcotics-based upon information he had received from Baumgart. There has been no specific allegation that Clark did anything unethical by rewriting the background checks or that the hires were wrongfully completed.

83. In December 2014, McDermott spoke with David Conway, who was serving as Patrol Lieutenant at the time. As Patrol Lieutenant, Conway was responsible for assigning personnel to the MCSO's patrol teams and managing patrol vehicles and equipment. McDermott informed Conway that Clark would be moving to patrol and Conway was to treat him fairly when assigning him to a patrol team and assigning him equipment. McDermott did not direct Conway as to what patrol unit to assign Clark or what equipment to assign to Clark.

84. Conway had not supported McDermott during the election and was known to be friends with Clark. Conway had also submitted a written statement in response to McDermott's HRB complaint at the request of Ibsen. Conway was not a member of the "promotion trip" to Las Vegas taken by McDermott, Johnson and their supporters within the department.

85. Conway reviewed his team roster after speaking with McDermott to determine which shifts had the most manpower and which shifts had the least. Conway determined Deputy Jeremiah Petersen's team was at a staffing minimum and needed additional deputies. Petersen's team was working the overnight shift at the time Clark was assigned to patrol. Conway also understood Petersen and Clark were friends.

86. On December 30, 2014, McDermott and Johnson met with Clark and informed him that he was being placed on patrol. Clark was directed to meet with Conway to find out what shift he would be placed on and to arrange for him to get the necessary equipment.

87. Conway spoke with Clark shortly thereafter to discuss Clark's placement on patrol. Clark told Conway to put him where he was needed. Conway explained the manpower issue and advised Clark that Petersen's team was at shift minimum. Conway told Clark that he could put him on another team, but that would require moving another deputy. Clark accepted the assignment knowing that he would have to bump another deputy if he chose not to accept the assignment to Petersen's team.

88. Conway's decision to place Clark on Petersen's team was based upon the needs of the MCSO. Conway also understood Clark was friends with Petersen.

89. Patrol teams rotate from days to nights and vice-versa every two months. Clark's assignment to the overnight patrol shift would not have lasted longer than two months.

90. Petersen assigned Clark a vehicle that had the necessary equipment including a WatchGuard in-car video system. The vehicle did not yet have a Mobile Data Terminal (MDT) because the county's Information Services department had not yet uploaded Clark's profile to the system, which usually takes a couple of weeks.

91. Clark's bullet proof vest was expired at the time he was assigned to patrol. The MCSO's grant application for federal reimbursement for the purchase of bullet proof vests had been denied due to the population size of Missoula County. As a result, the department was without the necessary funds to purchase new vests. It was decided that, with the election being imminent, that the decision be left to the next Sheriff as to what vendor the County would use.

92. Clark was not assigned a Taser when he was assigned to patrol because the MCSO had purchased another brand, which subsequently lost a copyright infringement lawsuit, which rendered the tools purchased by MCSO useless. At the time Clark was going to patrol, he was not certified to use a Taser and the MCSO did not have one to give him. Several officers lacked a Taser during this period.

93. Clark was not treated differently than any other deputy in regards to the issuance of a bullet proof vest and Taser.

94. Clark's firearm qualification had lapsed at the time he went to patrol. Clark could have rectified the situation by working with a Field Training Officer or another officer who was qualified as a firearm instructor.

95. Deputies are provided duty ammunition after completing the annual firearms qualification. Deputies are also provided shotgun shells upon request.

96. On December 30, 2014, McDermott announced to MCSO staff that Clark would be assigned to the patrol graveyard shift. Clark knew or should have known, based upon his conversation with Conway that day, he was being assigned to the overnight shift supervised by Petersen and it was not a permanent assignment to the overnight shift.

97. At the time of his assignment to patrol, Clark's rate of pay remained that of what he received as Captain of Professional Standards. Clark's seniority and other benefits based upon his years of service remained the same. Clark stood to be the highest paid MCSO employee even with his reassignment to patrol. Further, unlike the captain position, Clark would be eligible for overtime pay, as well as union representation.

98. Clark was concerned about being assigned to this particular patrol unit because he had previously investigated and recommended discipline against a deputy in his capacity as Captain of Professional Standards who also served in this unit. Clark did not report his concerns to Conway, McDermott, Baumgart or any other member of MCSO management or Missoula County administration.

99. On December 31, 2014, McDermott led a staff meeting where he outlined the new line of authority under his leadership. McDermott announced that the duties of the Coroner would be taken over by a new division.

100. McDermott also announced at the December 31, 2014 staff meeting that Rob Taylor would be Captain of Support Services, which oversees special teams, training, equipment, and support staff; Mike Dominick, who had previously been Captain of Detectives, would be the Captain of the Evidence Facility; Bill Burt would be Captain of Law Enforcement Operations, which oversees the patrol division; and Scott Newell would be the Lieutenant of the Detective Division.

101. McDermott also announced during this period that Anthony Rio would be the new Captain of Professional Standards.

102. Conway did not consider Rio "captain material," and believed Clark's skills in that area were superior to Rio's. Dominick also did not agree with Rio's promotion; nor did Giffin, who believed that Rio did not have sufficient administrative-level experience. Giffin also knew from his tenure as Captain of Professional Standards that Rio had suffered the most complaints of any supervisor, which caused him to face a lot of counseling. Johnson also had concerns about Rio being in a captain's role at the MCSO due to concerns he had about Rio having anger management issues. Johnson shared with McDermott his concerns that Rio was not "captain material."

103. McDermott acted within his authority to appoint Rio to the Captain of Professional Standards. As sheriff, McDermott could appoint captains at his discretion, since captains are not covered by the CBA, which governs sergeants, lieutenants, and corporals.

104. At the time Ibsen appointed Clark to the Captain of Professional Standards, he had not before served in an administrative capacity nor had he received any other promotion as a result of a competitive process.

105. Rio subsequently left the Captain of Professional Standards position and was replaced with Conway in January 2016. Conway accepted the appointment after being promised that he could continue overseeing officer training and he would be eligible for overtime pay, which had not previously been available to captains.

106. Following the election, McDermott promoted Deputy Parcell, who had run against him in the primary to Sergeant. McDermott also promoted Deputy John Stineford, who was a friend and supporter of Clark, to Corporal and then Sergeant. Respondents also reclassified several positions, which resulted in supporters of Clark, including Deb Koprivica, whose husband managed Clark's campaign, receiving pay raises.

107. Shortly after his assignment to the patrol graveyard shift, Clark began experiencing diarrhea and insomnia. Clark sought treatment from Dr. Sheehan. Dr. Sheehan observed that Clark was visibly upset when he met with him on January 12, 2015. Dr. Sheehan recommended Clark take a two-week medical leave of absence.

108. On January 13, 2015, Burt notified Johnson via email that he had received a text message from Sergeant Petersen that Clark was out on medical leave until January 29, 2015. Johnson asked what the medical issue was, and Burt

indicated he did not know and had requested Petersen give him a copy of the doctor's note. Johnson then replied, "Thank you. I posed the same question to Carol in HR. He didn't last very long on patrol. Humm . . .".

109. On January 15, 2015, Clark received a text message from an MCSO detective inquiring about why he was on medical leave. The detective subsequently informed Clark that he had heard about his medical leave from McDermott, who had shared that Clark was on medical leave with Johnson, Rio, Burt, and Petersen.

110. Clark notified Baumgart of what he had learned in an email dated January 19, 2015. Clark expressed frustration that his private, medical information was being discussed by McDermott and his staff.

111. Baumgart spoke with McDermott and Johnson about Clark's complaint. According to Baumgart's email to Clark dated January 20, 2015, both McDermott and Johnson conceded sharing with other MCSO employees that Clark was out on medical leave. Both denied knowing the reason for Clark's leave beyond that what was included in Clark's doctor's note. McDermott also conceded mentioning Clark's medical leave to the detective who contacted Clark. Baumgart then responded to Clark's email and advised Clark that Johnson and McDermott had shared the information about Clark being on medical leave, and not the specifics of the reason for his leave.

112. On January 3, 2015, the Missoulian ran an article regarding the changes being implemented at the MCSO by McDermott. Johnson was quoted as saying Clark did not want to be a detective and was going back to patrol.

113. On January 5, 2015, Clark emailed McDermott and Johnson disputing the information attributed to Johnson in the Missoulian article. Clark wrote:

> I also do not think moving me to patrol was the 'fairest decision'. I believe the fairest decision would have been to move me back to my last rank, that of Captain. I did tell you that it was obvious that I was not going to be allowed to be a Captain, so I assumed and expected you to move me to patrol, since any other move could generate a grievance for someone affected by the move and thus start your administration off on the wrong foot.

114. McDermott responded to Clark's email by acknowledging the misinformation included in the Missoulian article. McDermott wrote:

> I understand your position on your move to [sic] back to patrol. Please keep an open mind and consider putting in for one of the several transfer and/or promotional opportunities that will be becoming available soon as a result of the recent appointments.

115. On January 29, 2015, Dr. Sheehan met again with Clark, who informed Dr. Sheehan that he had made the decision to retire. Dr. Sheehan observed Clark was in a better mood.

116. On January 30, 2015, Clark retired from the MCSO. Clark had worked only three shifts on patrol at the time of his retirement.

117. Clark met with Dr. Clucas several times in January and March 2015. Clark was still struggling with the election results and concerns regarding his family's financial status following his decision to retire. While the election loss factored in Clark's depression, Dr. Clucas did not feel it was the "largest part," although Dr. Clucas found that Clark's placement on patrol exacerbated his emotional distress.

118. Respondents were aware of Clark's political beliefs based upon his having run unsuccessfully against McDermott in the 2014 primary and general elections.

119. Clark was qualified to serve as a captain at the MCSO based upon years of experience, training, and satisfactory performance in that role.

120. Respondents took an adverse action against Clark by reassigning him to patrol after the 2014 election[3].

121. Clark's reassignment to patrol was a material adverse employment action based upon the change in the terms and conditions of his employment. Not only did Clark go from working a day shift, Monday through Friday, to an overnight shift that included weekends, Clark was no longer free to set his own work schedule, was required to wear a uniform and was no longer assigned a county vehicle for personal

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[3] Respondents argue Clark was constructively discharged due to his assignment to patrol and the treatment he received from McDermott and Johnson. Charging Parties are not required to prove constructive discharge in order to prevail in a claim of employment discrimination. Mont. Code Ann. § 49-2-201 enshrines in statute the right to obtain and hold employment without discrimination. In light of Montana case law that unequivocally demonstrates that no person is expected to endure harm resulting from discrimination, it makes no sense ever to require a charging party to prove something beyond unlawful discrimination to justify quitting his job.

use. Clark also moved from a supervisory position to one that had no supervisory authority.

122. Respondents had legitimate, non-discriminatory reasons for reassigning Clark to patrol rather than a captain position. Those reasons included staffing needs, as well as the breakdown of the working relationship between Clark and McDermott caused, in part, by the rancor of the 2014 elections.

123. Respondents' proffered reasons for placing Clark on patrol were not pretext for discrimination based upon political beliefs.

124. Clark engaged in protected activity when providing adverse statements during the investigation of the human rights complaints of McDermott and Johnson.

125. Clark's reassignment to patrol occurred more than 15 months after McDermott and Johnson filed their respective human rights complaints. However, Clark's reassignment occurred within weeks of McDermott's election victory thereby raising an inference of a causal link between Clark's protected activity and Respondents' adverse action.

IV. DISCUSSION

The Montana Human Rights Act (MHRA) prohibits the state or any of its political subdivisions "to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of that person's political beliefs." Mont. Code Ann. §49-2-308(1)(c).

The Montana Governmental Code of Fair Practices Act (MGCFPA) requires state and local government officials and supervisory personnel to recruit, appoint, assign, evaluate and promote an employee based on merit and qualifications without regard to the employee's political ideas. Mont. Code Ann. § 49-3-201(1).

A. Clark Has Shown a Prima Facie Case Of Discrimination Based On Political Belief.

The government cannot discriminate against employees or prospective employees because of their political ideas or political beliefs. Taliaferro v. State (1988), 235 Mont. 23, 764 P.2d 860, 862. Taliaferro involved political belief discrimination claims under both the GCFPA and the HRA. Id. at 862-63. In

Taliaferro, the Montana Supreme Court applied the three-tier evidentiary test Montana adopted from McDonnell Douglas Corporation v. Green (1973), 411 U.S. 792; e.g., European Health Spa v. Human Rights Commission (1984), 212 Mont. 319, 687 P.2d 1029, 1032, quoting Martinez v. Yellowstone County Welfare Dept. (1981), 192 Mont. 42, 626 P.2d 242.

Under the McDonnell Douglas burden shifting analysis, Clark must first demonstrate a prima facie case of discrimination by showing that (a) Respondents knew of his political beliefs; (b) he was otherwise qualified for the position of captain; (c) Respondents took an adverse action against him; and (d) he was replaced by a person who did not share his political beliefs. See Baumgart v. State, 2014 MT 194, 376 Mont. 1, 332 P.3d 225; Ray v. Mont. Tech of the Univ. of Mont., 2007 MT 21,¶ 32, 335 Mont. 367, 152 P.3d 122; Taliaferro, 235 Mont. 23, 764 P.2d 860.

If Clark proves a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to Respondents to articulate a legitimate, non-discriminatory reason for its employment action. Heiat , 275 Mont. at 328. If Respondents meet this burden of production, the burden then shifts to Clark to establish "by a preponderance of the evidence that the legitimate reasons offered by [Respondents] were not [their] true reasons, but were a pretext for discrimination." Id.; Admin. R. Mont. 24.9.610(3). Clark 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, Clark retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. Heiat, 912 P.2d at 792.

1. Clark has shown Respondents were aware of his political beliefs.

Clark zealously campaigned against McDermott in both the democratic primary and the 2014 general election. Clark readily admits he challenged McDermott's qualifications for Sheriff, including his integrity and honesty. In fact, Respondents describe Clark as being "vehemently opposed to McDermott in the election," which would suggest Clark's campaign was less than subtle in its criticism of McDermott. Further, Clark's wife readily admits that she and others involved in Clark's campaign were free with their criticism of McDermott during the campaign. Given the apparent flow of information in Missoula County, particularly within the MCSO, it would seem that information regarding Clark and his campaign activities were known almost immediately by McDermott, Johnson and other supporters of McDermott.

Respondents argue Clark was not the victim of political discrimination because he cannot show his political beliefs were known to the Respondents. Respondents also argue Clark ran against McDermott in the democratic primary and there was no testimony offered to show what party designation he ran under when he mounted a write-in campaign in the general election. Respondents point to the court's holding in Baumgart that the plaintiff was unable to show a prima facie case of political discrimination because she failed to "provide material and substantial evidence or specific facts" that the decision maker knew of her political affiliation (Republican) at the time the employment decision was made or that she was replaced by a member of the Democratic party. Baumgart, ¶¶ 23 and 24.

While Clark and McDermott shared the same political party affiliation at the time of the primary and presumably at the time of the general election, the uncontroverted evidence shows Clark and McDermott had opposing political beliefs and political ideals - namely that the other was unfit to serve as Missoula County Sheriff. Both engaged in what was described at hearing as a contentious campaign. Clearly, McDermott, Johnson and any person reading the Missoulian and taking in local media reports knew Clark held political beliefs contrary to McDermott. Therefore, Clark has shown Respondents were aware of his political beliefs.

2. Clark was qualified to serve as Captain.

Clark has served in law enforcement in various capacities for more than 20 years, including Captain of Professional Standards and Undersheriff for the MCSO. Respondents note that Clark's promotion from Senior Deputy I to Captain of Professional Standards in 2013 was not as a result of a competitive promotion process but, rather, he was handpicked by then-Sheriff Ibsen to serve as the Captain for the newly implemented Professional Standards Division. Respondents also note Clark skipped the ranks of corporal, sergeant, and lieutenant when he accepted the appointment. Finally, Respondents note that Clark never received a competitive promotion while employed at the MCSO.

The preponderance of the evidence shows Clark was qualified to serve as a captain at the MCSO based not only upon his years of training and experience, but by virtue of his having already served as both the Undersheriff and a captain for the MCSO. While others may have been as qualified or more qualified for a captain's position at the MCSO, the issue at this point is whether Clark was qualified for the position. The evidence clearly shows that to be the case.

3. Respondents took an adverse action against Clark.

The definition of an adverse action in a claim of discrimination is less broad than the definition relied upon in retaliation claims. Title VII provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has held that "this not only covers 'terms' and 'conditions' in the narrow sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998)(internal citations omitted).

It is undisputed that Clark's rate of pay and other benefits remained the same upon his reassignment to patrol. However, Clark's work schedule and conditions of employment changed radically with the reassignment to patrol. Clark went from working 9 to 5, Monday to Friday, to working an overnight shift that included the weekends. Clark went from setting his own work schedule and to working a strict schedule subject the direct supervision of another deputy. Clark was no longer free to wear plain clothes and to enjoy the use of an unmarked county vehicle for his own use. Clark's reassignment forced him back into the ranks of uniformed deputies and to the "back of the line" in terms of rank and supervision. Clark has shown that his reassignment to patrol from administration adversely affected the terms, conditions and privileges of his employment with MCSO. Therefore, Clark has shown his reassignment to patrol was an adverse action.

4. An individual who did not share Clark's political beliefs was appointed to the position sought by Clark.

Once the battle lines were drawn upon Clark's entry into the 2014 primary, Rio was firmly on the side of McDermott. Rio campaigned on behalf of McDermott during the 2014 primary and general election and took part in the "promotion trip" to Las Vegas after McDermott's victory. Rio clearly did not share Clark's political beliefs and was appointed as Captain of Professional Standards shortly after McDermott's victory and Clark's defeat. Clark has shown Respondents appointed an individual who did not share his political beliefs to the Captain of Professional Standards position.

Since Clark established a prima facie case of political discrimination, the burden now shifts to Respondents to produce evidence of legitimate,

nondiscriminatory reasons for its decision to place Clark on patrol. See Admin. R. Mont. 24.9.610(3)

B. Respondents Have Produced Legitimate, Nondiscriminatory Reasons For Clark's Placement on Patrol.

Under this prong of the McDonnell Douglas test, the respondent's "burden is one of production - not persuasion." Ray, 2007 MT at ¶33. "That is, [respondent] does not have to persuade the court that it was motivated by the particular reasons, but, rather, it is sufficient if [respondent's] evidence raises a genuine issue of fact as to whether it discriminated against the [charging party]." Id. "The [respondent] can raise this issue of fact by clearly and specifically articulating a legitimate reason for rejecting the [charging party]." Id.

Respondents argue that McDermott was justified in his decision not to appoint Clark to a captain position due to the lack of trust between him and Clark. McDermott pointed to four issues that led to his having concerns about Clark being placed in a captain's position. The first issue was the DCI investigation into the Pavalone matter. Both McDermott and Johnson had concerns about the handling of the Pavalone matter by Ibsen. McDermott testified that the matter should have been referred to an outside agency for investigation. McDermott took issue with the testimony of Ibsen and Clark that they were not mandatory reporters and were not therefore required to report the matter as a possible domestic violence situation. McDermott also testified that he had concerns that an internal review board could be held as a result of the DCI that may lead to Clark's POST certification being placed in jeopardy due to the manner in which the Pavalone matter was handled.

McDermott also pointed to the handling of the Birket matter. McDermott, who was present for the review board hearing, described Clark's behavior as intimidating and bullying. McDermott testified that he believed Clark's behavior to be contrary to the platform he had announced during the campaign, in which McDermott promised to bring change to the MCSO. McDermott testified he spoke often during the election of having the goal of having all MCSO staff treat each other with dignity and respect.

McDermott also pointed to the handling of the background review of two deputies initially hired by Ibsen during the final weeks of his tenure. McDermott testified he was troubled at the prospect that Clark had rewritten a background review for one of the deputies that he believed improperly made the employee eligible

to work for the MCSO. McDermott conceded that he did not question it at the time or voice his concerns to either Ibsen or Baumgart.

Another concern for McDermott and Johnson was the fact that Clark was frequently absent from the office during the period prior to and following the November 2014 election. McDermott testified that Clark's absences caused him concern about the willingness of Clark to serve as a captain in his administration.

Another reason offered by McDermott was that he believed Clark hated his guts. McDermott testified that Clark was vocal during the election that he did not believe McDermott should be sheriff and that he lacked the honesty and integrity to successfully serve Missoula County. Both McDermott and Johnson testified Clark was openly hostile and did not speak to either of them during the election. McDermott testified that he did not believe that Clark could or would share in his vision for the MCSO or faithfully support his administration.

A final reason offered was the fact that Clark, when asked where he wanted to go following the election, frequently responded, "wherever you need me." McDermott testified that there were eight to ten deputies absent during the period following the election, which affected the ability of other deputies to take time off and affected staffing levels. McDermott testified Clark was needed on patrol and that he left it to Conway to place Clark on a shift where he would best be used.

The Montana Supreme Court has held that employers "have the broadest discretion when dealing with managerial employees," and that "employers [are afforded] the greatest discretion where an employee occupies a 'sensitive' managerial position and exercises 'broad discretion' in his job duties." Moe v. Butte-Silver Bow County, 2016 MT 103, ¶54, 383 Mont. 297, 371 P.3d 415 (citing Baumgart v. State, 2014 MT 194, ¶39, 376 Mont. 1, 332, P.3d 225; Sullivan v Cont'l Constr. of Mont., LLC, 2013 MT 106, ¶18, 370 Mont. 8, 299 P.3d 832).

Respondents' argument that trust is an essential factor in a Sheriff's decision to appoint captains is persuasive. In this case, two men engaged in a brutal campaign where they each attempted to position themselves as the superior candidate by often disparaging the other's performance and credibility. Clearly, there were and still are hard feelings between the two men. It cannot be said that McDermott was unreasonable in his assessment that Clark could not or would not faithfully serve as a captain in his administration.

Further, the other issues raised by McDermott rightly factored into his consideration of whether he could trust Clark in a captain position, which is a senior management position within the MCSO that has great autonomy and authority. Clearly, the Pavalone matter loomed large in McDermott's decision not to appoint Clark to a captain's position. It was not unreasonable for McDermott to be concerned about what could result from the DCI investigation into the Pavalone matter. Further, the rewriting of the background review of two deputies that McDermott understood had been disqualified for serious issues rightly raised concerns for McDermott as to whether Clark's conduct was appropriate. Right or wrong, McDermott identified enough concerns that serve as legitimate, non-discriminatory reasons for the ultimate decision to place Clark on patrol rather than in a captain position. Therefore, Respondents have met their burden in production. The burden now shifts to Clark.

C. Clark Has Not Shown Respondents' Proffered Reasons Were Pretext for Unlawful Discrimination.

Clark must now show by a preponderance of the evidence that the reasons offered by Respondents were merely pretext for discrimination. Ray, 2007 MT 21, ¶31. Clark's "burden now merges with the ultimate burden of persuading the court that [h]e has been the victim of intentional discrimination. [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1098, 67 L. Ed. 2d 207, 217 (1981). At all times, Clark retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. Crockett v. City of Billings (1988), 234 Mont. 87, 761 P.2d 813, 818.

This case was tremendously close. All of the witnesses, particularly those who had served or were currently serving in law enforcement, were effective in their testimony. The hearing officer did not find any one witness more or less credible than the next. Overall, the hearing officer is not persuaded that the reasons offered for the placement of Clark on patrol were pretext for discrimination.

Clark first attacks Respondents' offer of the Pavalone matter as a legitimate, nondiscriminatory reason for its decision to place Clark on patrol. McDermott testified that he believed both Clark and Ibsen as law enforcement officers were mandatory reporters under Mont. Code Ann. § 41-3-201 and were duty bound to report the Pavalone matter to the proper authorities. Clark argues this is merely

pretext due, in part, to McDermott's personal failure to report the matter to the Department of Public Health and Human Services (DPHHS). Clark points to McDermott's argument that he did not report it to DPHHS because he reported it to DCI as being the same argument as Clark offered - he did not report it to DPHHS because he advised Ibsen to report it to an outside agency. Clark also argues McDermott's argument that his failure to prepare a report after serving the TOP upon Pavalone's husband is without merit because deputies are not typically required to prepare a report in those situations.

McDermott testified that he was concerned about the possible ramifications of the DCI investigation and potential for review board hearings that could have affected Clark's POST certification. It was not unreasonable for McDermott, as a newly elected Sheriff, to be somewhat wary of Clark based upon his role in the Pavalone matter. While Light ultimately made no mention of Clark in his report, McDermott had the right to be concerned that Clark may have played a larger role in the matter based upon his close relationship with Ibsen. Further, given that the DCI investigation could have led to more negative publicity and public scrutiny, it stands to reason that McDermott would have considered the Pavalone matter when making his decision to place Clark on patrol. While Clark ultimately was found to be a minor player in the Pavalone matter, he has not shown that McDermott did not hold the true belief that the entire Pavalone matter had been handled improperly by the prior administration and that Clark's role in that situation was troubling to McDermott.

Clark next attacks Respondents' contention that McDermott's decision to place him in patrol was based on his behavior at the Birket review board hearing. Clark argues that Respondents are estopped from contending he acted inappropriately when they took an opposition position during the investigation of Birket's human rights complaint. "The doctrine of judicial estoppel binds a party to their judicial declarations and precludes a party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding." Stanley L. & Carolyn M. Watkins Trust v. Lacosta (2004), 321 Mont. 432, ¶33, 92 P.3d 620, ¶33 (citations omitted). "[J]udicial admission is not binding unless it is an unequivocal statement of fact. Hence, for a judicial admission to be binding upon a party, the admission must be one of fact rather than a conclusion of law or the expression of an opinion. Thus, a judicial admission applies to facts, not to legal theories or positions." Id. at ¶34 (internal quotations and citations omitted).

Clark's argument that Respondents are estopped from offering his behavior as a reason for McDermott's decision to place him on patrol must fail because the

judicial admission on which he relies is not a statement of fact but, rather, a merely a position taken during an investigation by an administrative agency. Further, McDermott was not Sheriff at the time of the Birket matter and would not have been a party to Birket's human rights complaint. Therefore, McDermott and the remaining Respondents are not estopped from offering the Birket review board as a reason for the decision to place Clark on patrol.

It should also be noted that McDermott's testimony was based upon his perception of Clark's behavior at the Birket review board hearing. Neither party offered the recording of the review board hearing mentioned at the hearing held in this matter, so the hearing officer is only left with the testimony of the witnesses to try to determine what happened at the Birket review board hearing. There is no substantial and credible evidence in the record to disprove McDermott's testimony that he believed Clark had acted inappropriately during the Birket review board hearing.

Clark also attacks the Birket review board as a legitimate, nondiscriminatory reason for the Respondents' action by arguing it was never mentioned prior to hearing. No argument of that nature was offered at hearing. Rather, a review of the record shows Clark's counsel was able to effectively cross examine McDermott on the issue suggesting that they had at least some forewarning that the Birket review board hearing would be addressed at hearing.

Clark next attacks McDermott's offer of the rewritten background review for two recruits hired by Ibsen during the final weeks as Sheriff as pretext for discrimination. Clark notes Baumgart's conflicting testimony in which she initially testified that two recruits were involved and then one, until she finally testified that she did not believe Clark had done anything improper to her knowledge. McDermott testified he understood that the disqualifiers found in one recruits background was related to narcotics. However, there was no evidence offered showing McDermott knew that for certain. Still, McDermott's testimony was based upon his impression of what had happened. Right or wrong, there has been no evidence offered showing McDermott did not honestly or truly hold the belief that Clark had improperly rewritten the background review of a recruit later unable to make it through his probationary period.

"Courts only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (internal quotation marks omitted); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1285 (9th Cir. 2000) ("That Quaker made

unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age."); Green v. Maricopa County Cmty. Coll. Sch. Dist., 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003) ("The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered. We do not sit as a superpersonnel department that reexamines an entity's business decision and reviews the propriety of the decision.") (internal quotation marks omitted).

Clark's arguments that the above reasons offered by Respondents, and specifically McDermott, were pretext for discrimination is not persuasive. No evidence has been offered to rebut the evidence that McDermott, rightly or wrongly, truly had concerns about Clark's prior behavior and his ability to serve as a captain in McDermott's administration. As noted by the court in Green, the hearing officer is not in the position to determine whether Respondent's stated reasons were "accurate, wise, or well-considered." The hearing officer can only examine whether the stated reasons were honest and, thus far, Clark has failed to prove by a preponderance of the evidence that the proffered reasons were not honest.

There are also two other reasons why Clark's argument that the reasons offered were pretext must fail. First, McDermott testified that he believed Clark hated his guts. McDermott pointed to the contentious election where Clark openly questioned his integrity, honesty and ability to successfully serve as Sheriff. Another issue pointed to by both McDermott and Johnson was the change in Clark's attitude toward them after learning McDermott intended to launch a campaign for Sheriff. Both testified Clark stopped talking to them and he was rarely in the office. While there were no personnel records offered to prove or disprove the suggestion that Clark was "MIA" prior to and following the November 2014 election, it is sufficient that McDermott and Johnson had concerns that Clark's absences suggested an unwillingness to work with McDermott and Johnson and inability to successfully serve in McDermott's administration when determining where to place him after the election. As noted above, McDermott had the right to appoint individuals to captain positions that he believed would be faithful to his goals and would faithfully serve his administration. Captains are senior management positions within the MCSO that have great autonomy and authority. McDermott had the right to appoint individuals to those positions upon whom he could rely.

Just as McDermott had the authority to appoint individuals to captain positions, he also had the authority to place Clark on patrol. Clark argues that it had been past practice to place Undersheriff's in their last rank when a new Sheriff took

office. Respondents argue that Clark cannot claim any entitlement to a captain's position under Mont. Code Ann. § 7-32-2102, which provides:

> (1) The sheriff, as soon as possible after taking office, shall, except in counties with a population of less than 750, appoint an undersheriff to serve at the pleasure of the sheriff. The undersheriff has the same powers and duties as a deputy sheriff.
>
> (2) A deputy sheriff appointed undersheriff as provided in subsection (1) shall resume other duties within the sheriff's office, while maintaining tenure and seniority, if the sheriff appoints another to succeed the deputy sheriff as undersheriff. Upon the return to the position of deputy sheriff, the person must be paid the same salary the person would have received had the person not taken the undersheriff position.

(emphasis added)

There was no serious argument offered that Clark believed that he could have or should have served as McDermott's Undersheriff. Clearly, McDermott had the authority to appoint Johnson to serve as his Undersheriff once he was sworn in as Missoula County Sheriff. Past Undersheriffs either retired or were appointed to a captain position. However, there are no rules or statutes either at the county or state level dictating such a result.

The terms "tenure" and "seniority" were the source of much consternation at the time of hearing. While not specifically defined in statute, Mont. Code Ann. § 7-32-2102 must be read in conjunction with Mont. Code Ann. § 7-32-2107(1), Tenure for Deputy Sheriffs - Grounds for Termination of Employment - Restrictions on Evaluations, which provides, "A deputy sheriff shall continue in service until relieved of employment in the manner provided in this part and only for good cause as defined in 39-2-903."

In that context and considering the testimony offered by Steve Johnson and Baumgart on behalf of the county, tenure would seem to refer to an employee's position once he or she completes the probationary period, he or she cannot be discharged without ". . . reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason . . .". See Mont. Code Ann. 39-2-903(5), Wrongful Discharge from Employment Act.

Seniority, on the other hand, would seem to refer to an employee's position vis a vis other employees in terms of years of service and rate of pay. Baumgart testified the term seniority is used under the CBA which prescribes county actions regarding rate of pay and vacation based upon the employee's years of service.

Respondents' argument that Mont. Code Ann. § 7-32-2107 does not dictate a former undersheriff's rank at the end of his or her appointment is well taken. It makes little sense that the legislature would intend for the statute to dictate a departing Undersheriff be reassigned to a certain rank given the obvious absence of the term "rank" in the statute. While the past practice of other departing Missoula County Sheriffs may have been to appoint the departing Undersheriff to a captain position, there is no law or policy that dictates such a result. Clark was entitled to retain only his tenure, seniority and rate of pay. He was not entitled to a specific rank or position. Therefore, Clark's placement on patrol is not necessarily evidence in and of itself of discrimination; nor is it evidence that McDermott acted beyond the scope of his authority as Sheriff.

The final reason why Clark's argument that Respondents' proffered reasons were pretext for discrimination must fail is that he told McDermott, Johnson, and Conway, when asked where he wanted to go after the election, to put him where ever he was needed. Clark testified that he told McDermott that he assumed he was not going to get a captain position and was going to go to patrol during the August 2014 conversation despite believing it was improper for him to be assigned to patrol. McDermott and Conway testified that there was a need for Clark on patrol and, specifically, the overnight shift. While Clark may have been placed on another shift that could have afforded him some supervisory duties, the fact remains Respondents placed him where he was needed. Further, as Clark acknowledged, placing him in another unit may have resulted in a grievance being filed because he would have to "bump" another deputy. Again, the evidence shows McDermott acted within his authority and assigned Clark to a position where he was needed. The final decision of what shift Clark would be assigned to was left to Conway, who had no apparent reason to hurt Clark.

One thing that must be addressed is the appointment of Rio to the Captain of Professional Standards. Four witnesses testified they had concerns about Rio being placed in that position, including Johnson. Conway testified Clark had more administrative experience than Rio and suggested McDermott may have been better served with placing Clark in that role. Clark, like Rio, had little administrative experience at the time Ibsen appointed him to the newly created position of Captain of Professional Standards. However, unlike Rio, Clark had a clean performance

record and a good reputation amongst his fellow deputies and superiors at the time of the appointment.

The hearing officer is not in the position to question McDermott's decision to place Rio in such an important role at the MCSO. As noted by Respondent, it was well within his discretion as Sheriff to make such a decision. See Moe v. Butte-Silver Bow County, 2016 MT ¶39 ("employers [are afforded] the greatest discretion where an employee occupies a 'sensitive' managerial position and exercises 'broad discretion' in his job duties") (citations omitted). Given Rio's reputation amongst his fellow deputies and brief tenure in the position, the evidence suggests Rio was not the best candidate for the Captain of Professional Standards position. However, the hearing officer's role is not that of a superpersonnel department that re-examines an employer's decision. Green, 265 F. Supp. 2d at 1128.

While the case was tremendously close, the hearing officer is ultimately not persuaded that McDermott, Johnson and Missoula County discriminated against Clark on the basis of political belief. Therefore, Clark's claim must fail.

D. Respondents Did Not Retaliate Against Clark for Protected Activity.

Montana Code Ann. § 49-2-301 provides:

> It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because the individual has opposed any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

Retaliation 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). Protected activity is defined under Admin. R. Mont. 24.9.603(1) as including:

> (a) aiding or encouraging others in the exercise of rights under the act or code;
> (b) opposing any act or practice made unlawful by the act or code; and

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

1. Clark has shown a prima facie case of retaliation.

A charging party can prove a claim under the Human Rights Act by proving that (1) the charging party engaged in a protected practice, (2) thereafter the employer took an adverse employment action against the charging party, and (3) a causal link existed between the charging party's protected activities and the employer's actions. Beaver v. D.N.R.C., 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; see also, Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. Univ. of Tex. South Western Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

Circumstantial evidence can provide the basis for making out a prima facie case. Where 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 does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); Strother v. Southern Cal. Permanente Med. Group, Group,, 79 F.3d 859, 868 (9th Cir. 1996). "[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." St. Mary's Honor Ctr. v. Hicks (1993), 509 U.S. 502, 515-16, 113 S. Ct. 2742, 2752, 125 L. Ed. 2d 407, 422.

a. Clark has shown his participation in the investigation of the human rights complaints filed by McDermott and Johnson in 2013 constitutes protected activity under the MHRA.

Substantial and credible evidence shows Clark engaged in protected activity by testifying and assisting in an investigation or proceeding under the MHRA in 2013. Specifically, Clark offered adverse statements against McDermott and Johnson in their human rights complaints. Therefore, Clark has shown he engaged in protected activity by participating in the investigation of the human rights complaints filed by McDermott and Johnson.

Clark also points to his campaigning against McDermott and filing a complaint with the Commission of Political Practices alleging McDermott violated Montana's campaign laws as examples of his protected activity. Neither party offered any cases either for or against the concept that "protected activity," as defined under the MHRA, is broad enough to encompass political speech, which is generally protected under the First Amendment and prosecuted under federal law. Strictly adhering to the language of the MHRA, protected activity is limited to those actions in which the Charging Party has either ". . . opposed any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter." Therefore, the hearing officer does not find that Clark's political campaign constitutes protected activity under the MHRA.

b. Clark has shown Respondents took an adverse action against him.

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 unlawful retaliation. Admin. R. Mont. 24.9.603(1). Unlawful 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). 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 unlawful 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 provided 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 Northern v. White, 548 U.S. at 68-70.

The Supreme Court also clarified the distinction between an adverse action in a disparate treatment claim versus an adverse action in a retaliation claim. 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 Northern standard).

Clark was reassigned to the patrol unit within weeks after McDermott winning the 2014 election. While Clark suffered no reduction in pay and he potentially stood to be the highest wage earner in the MCSO with the possibility of overtime, the change in the terms and conditions of his employment, including going from a 9-to-5 type shift to an overnight shift, going from a plain clothes position to a uniformed position, and going from an office job to a patrol job would be considered to be materially adverse by a reasonable employee. A reasonable employee would likely be deterred from engaging in protected activity under similar circumstances. Clark has shown Respondents took an adverse action against him.

c. Clark has shown a causal link between his protected activity and the employment action.

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).

"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 unlawful 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.") " At the prima facie stage of a retaliation case, [t]he causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the

negative employment action are not completely unrelated." Poland v. Chertoff, 494 F.3d 1174, 1180 n.2 (9th Cir. 2007) (internal quotation omitted).

Clark has not identified any direct evidence showing a causal connection between his protected activity and his reassignment to the patrol division after McDermott's election.

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.

However, 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). The Ninth Circuit has cautioned against engaging in "a mechanical inquiry into the amount of time between the [protected activity] and the alleged retaliatory action" and has rejected the application of any "bright-line rule providing that a certain period of time is per se too long to support an inference of retaliation." Anthoine v. N. Cent. Counties Consortium, 605 F.3d 740, 751 (9th Cir. 2010).

In this case, the adverse action of reassigning Clark to patrol occurred approximately 18 months after Johnson filed his human rights complaint and 16 months after McDermott filed his human rights complaint. However, the adverse action occurred only weeks after McDermott's victory in the 2014 general election. Given that McDermott lacked the authority to effectuate a significant and material change in the terms and conditions of Clark's employment until his election victory, Clark has shown there was a temporal proximity between his protected activity and the adverse action taken against him by McDermott and Johnson. See Ford v. GMC, 305 F.3d 545, 554-55 (6th Cir. 2002) (finding a causal connection although there was a five-month gap between the protected activity and the adverse-employment actions because the plaintiff was under the control of a different supervisor during the gap). Further, the appointment of Rio, who by all accounts did not engage in protected activity, to the Captain of Professional Standards supports finding an inference of a causal link between Clark's participation in the investigation of the human rights complaints filed by McDermott and Johnson and his reassignment to patrol. Clark has shown a prima facie case of retaliation for protected activity.

2. Respondents have produced legitimate, non-discriminatory reasons for Clark's placement on patrol.

The burden now shifts to Respondents to produce evidence of legitimate, nondiscriminatory reasons for the challenged action. 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. Respondents, for the reasons noted above, have shown it had legitimate, non-discriminatory reasons for its decision to reassign Clark to patrol.

3. Clark has not shown Respondents' proffered reasons for its action were merely pretext for a retaliatory animus.

Clark is now 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. Clark can show Respondents' legitimate explanation for its actions is actually a pretext for retaliation. by "directly 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." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

"[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, [Clark] '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)).

Again, the hearing officer struggled with the issue of whether Respondents retaliated against Clark for protected activity. It is undisputed Clark participated in HRB's investigation of the complaints filed by McDermott and Johnson and provided adverse statements in both cases. However, given that more than 12 months had passed between his participation and those cases, it seems unlikely that his reassignment to patrol was in retaliation for his participation in those human rights investigations. The primary and general election appear to have been the final battle between McDermott and Clark and the impetus for Clark's placement on patrol.

Clark argues that his campaigning against McDermott may serve as protected activity under the MHRA. The hearing officer was provided with no authority supporting such an expansion of the definition of "protected activity," which is specifically defined under Admin. R. Mont. 24.9.603(1) as meaning ". . . the exercise of rights under the act or code and may include:

> (a) aiding or encouraging others in the exercise of rights under the act or code;
> (b) opposing any act or practice made unlawful by the act or code; and

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

Clark has not met his burden of persuasion as to the issue of whether his placement on patrol was unlawful retaliation under the MHRA. Therefore, Clark's claim of retaliation must fail.

V. CONCLUSIONS OF LAW

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

2. Joshua Clark failed to prove that Missoula County, Montana, Sheriff Terry J. McDermott, and Undersheriff Jason Johnson discriminated against him illegally because of political belief and retaliated against him for participating in a Human Rights complaint against his employer by providing statements adverse to complaints filed by McDermott and Johnson. Mont. Code Ann. §§49-2-303(1) and 301.

3. For purposes of Mont. Code Ann. § 49-2-505(8), Missoula County, Montana, Sheriff Terry J. McDermott and Undersheriff Jason Johnson are the prevailing parties.

VI. ORDER

Judgment is granted in favor of Missoula County, Montana, Sheriff Terry J. McDermott and Undersheriff Jason Johnson and against Joshua Clark. Clark's complaint is dismissed with prejudice as lacking merit.

DATED: this 27th day of March, 2017.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Joshua Clark and his attorneys, Quentin M. Rhoades and Nicole L. Siefert, Rhoades & Siefert, PLLC,; and Respondents, Missoula County, Montana, Sheriff Terry McDermott, and Undersheriff Jason Johnson, and their attorney, Steven S. Carey, Carey Law Firm PC:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728 Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. For copies of the original transcript, please contact Jeffries Court Reporting, Inc.