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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1581-2017:

ROBERT HEALY IV,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE**
	)	**OF ADMINISTRATIVE DECISION**
PIERCE COMPANIES GRP, INC.,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Robert Healy brought this complaint alleging that his former employer, Pierce Companies Group, Inc., discriminated against him in employment on the basis of race (Native American) and retaliated against him for protected activity.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on November 29, and November 30, 2017 in Billings, Montana. Bryan Spoon, Attorney at Law, represented Healy. Kelly Varnes and Cody Atkins, Attorneys at Law, represented Pierce. Ann Eyler, Human Resources Specialist, appeared as Pierce's designated representative.

Healy, Eyler, Russ Mahan, Dean Dassinger, Andrew Moulaison, and Fred Keller all testified under oath. The parties stipulated to the admission of Charging Party's Exhibits 2 through 7 and 9 through 15 and Respondent's Exhibits 101 through 108; 110; 111; and 116.

After the hearing concluded, Healy filed a motion for sanctions under Rule 37, M.R.Civ.P. After the parties had an opportunity to brief the issue, the Hearing Officer issued an order granting the motion for sanctions and finding certain facts that are outlined below as being established as true in this matter.

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 in the Office of Administrative Hearings on May 21, 2018. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did Pierce Companies discriminate against Robert Healy IV on the basis of race and/or retaliate against him in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Pierce Companies did illegally discriminate and/or retaliate against Robert Healy IV 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 Pierce Companies did illegally discriminate and/or retaliate against Robert Healy IV as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. EVIDENTIARY ISSUES BRIEFED BY THE PARTIES

A. Healy's Proposed Exhibit B is Admissible as Rebuttal Evidence

Healy's proposed Exhibit B includes an email from his probation officer indicating Healy was free to travel within the State of Montana without a travel permit, so long as Healy provided him with prior notice and gave him specific information as to the location and where he would be staying. The email goes on to state that Healy would need to have a travel permit to travel out of state and would have to provide him with more than 72 hours notice.

The parties are not required to disclose rebuttal or impeachment evidence prior to hearing. See Amended Order Setting Contented Case Hearing Date and Prehearing Schedule. The exhibit was not offered in his case in chief and was not the subject of a discovery request. Eyler testified there had been issues about Healy's freedom to travel as a result of his probation status. Clearly, that was not the case and the email was properly offered to rebut Eyler's testimony and to impeach her as a witness. Therefore, Healy's proposed Exhibit B is hereby admitted.

B. The Testimony of Andrew Moulaison is Inadmissible

Pierce contends the testimony of Andrew Moulaison should be excluded as inadmissible hearsay. Healy called Moulaison as a witness to establish that Ebel had made racist comments toward or about Healy on other job sites. Healy counters that Moulaison's testimony was not offered to prove the out of court statements made by Ebel were true but merely that the statements were made.

Hearsay 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. If a statement is not offered to prove the truth of its contents, but to show whether the statement was made, the statement is not hearsay under the definition. *Jim's Excavating Serv., Inc. v. HKM Assoc.*, 264 Mont. 494, 507, 878 P.2d 248, 255-56 (1994)(citing Commissioner's Comments to Rule 801(c), M.R.Evid.).

Healy's argument is not persuasive. Moulaison's testimony was clearly offered to prove not only that the statements were made but to prove the truth of the matter asserted, namely that Ebel's conduct was sufficiently egregious or pervasive as to sufficiently alter Healy's working conditions to render it a hostile working environment.

Healy argues, in the alternative, that Moulaison's testimony is admissible under Rule 804(a)(5), M.R.Evid, which provides an exception to hearsay when the declarant "is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." Healy further argues Ebel's statements are statements against interest under Rule 804(b)(3) and are attributable to Pierce.

Again, Healy's argument is not persuasive. There has been no showing that there were any attempts by Charging Party to procure Ebel's attendance by process or other reasonable means. While Pierce requested a subpoena for Ebel on November 2, 2017, there is no evidence that it was ever served. During the hearing, it was fairly apparent that Ebel was working in Red Lodge, Montana and his whereabouts were generally known by the witnesses who appeared. Therefore, Pierce's motion to exclude the testimony of Moulaison is hereby GRANTED.

C. The Rebuttal Testimony of Ann Eyler is Stricken

Healy argues that Eyler's testimony in response to Moulaison's testimony was improper and was an attempt to impeach Moulaison. Pierce counters that Healy was not prejudiced by allowing Eyler to testify after Moulaison.

Eyler's testimony was in response to allegations Moulaison made during his testimony regarding Pierce's actions toward its employees. Much of Eyler's testimony was hearsay as she attempted to recount issues she had encountered with Moulaison during his brief employment with Pierce. As her testimony raised no new issues or much by way of relevant evidence, Healy's motion to strike Eyler's rebuttal testimony is GRANTED.

IV. FINDINGS OF FACT

1. Robert Healy IV is a Native American male who is an enrolled member of the Fort Belknap, Assiniboine and Gros Ventre Tribes. At all times relevant to this matter, Healy was a resident of Montana.

2. Pierce Companies Group, Inc. (Pierce) is a Montana Corporation. Its principle place of business is located in Billings, Montana. Pierce operates seven flooring stores, three recreational vehicle dealerships, four manufactured housing locations and two locations for leasing of mobile commercial offices and storage containers. In total, Pierce has approximately 240 employees.

3. As part of its manufactured housing operation, Pierce sells and installs various types of modular and manufactured homes that the set-up crews prepare for occupancy at the buyer's home site. Frequently, the work is performed outside of Billings.

4. On or about June 6, 2016, Healy began working as a carpenter for Pierce on a set-up crew. Healy worked approximately 40 hours per week, with an hourly wage of $15.00. Healy was eligible for overtime, which resulted in his total wages ranging from $337.60 to $450.00 per week.

5. Healy was on probation at the time he began working for Pierce. Healy was free to travel within Montana and out of state with the prior notice and permission of his Probation Officer. Ex. B.

6. At the time of Healy's hire, new employees were subject to a 90-day probationary period. Ex. 101, p.8. The handbook that was in effect at that time provided:

> The probationary period is intended to give new, transferred and rehired employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets both the employee's and the employer's expectations. Pierce uses this period to evaluate employee capabilities, work habits, and overall performance. Either the employee or the company may end the employment relationship at-will at any time during the probationary period, with or without cause or advance notice. **Probationary employees do not have access to the internal grievance process.**
>
> Any significant absence shall automatically extend a probationary period by the length of the absence. If Pierce determines that the designated probationary period does not allow sufficient time to thoroughly evaluate the employee's performance, **the probationary period may be extended for a specific period, not to exceed an additional ninety (90) days,** to give the employee an opportunity to achieve satisfactory performance.
>
> During the probationary period, new, transferred and rehired employees are eligible for those benefits that are required by law, such as worker's compensation insurance and social security. Employees may be eligible for other company provided benefits, subject to the terms and conditions of each benefit program. Employees shall be informed of the details of specific benefit programs, as they become eligible.

Ex. 101, pp. 8-9 (emphasis in original).

7. The handbook also included an anti-discrimination policy:

> In order to provide equal employment and advancement opportunities to all individuals, employment decisions at Pierce will be based upon merit, qualifications, skills and abilities. Pierce does not discriminate in employment opportunities or practices on the basis of race, color, religion, sex, national origin, age, marital status, military status, physical or mental disability, or any other characteristic protected by law.

Ex. 101, p. 6.

8. The handbook also provided:

> All forms of harassment are prohibited, including any form relating to religion, age, disability and national origin. It is specifically emphasized that sexual harassment in any form is expressly prohibited. No sexually harassing conduct of any kind by a supervisor, employee, vendor or customer will be tolerated. It is your responsibility to report any harassing or sexually harassing behavior as soon as possible to Ron Pierce or Jon Pierce, a representative of our Human Resource Department in Billings or your store manager. All reports of harassing or sexually harassing behavior shall be investigated. If an employee witnesses behavior that he/she suspects to be of harassment nature, it is that employee's responsibility to contact Pierce management as directed above. If the employee believes that the initial management response to the complaint is insufficient, it is the employee's responsibility to report to another member of the Pierce management team for further review. Such reports can be made without fear of reprisal. All reports of harassing or sexually harassing behavior shall be investigated and kept as confidential as possible.
>
> Sexual harassment of employees, customers or any other persons is prohibited. It is Pierce's policy to provide employees with a work environment free of sexual harassment.

Ex. 101, p.6.

9. The handbook also set forth Pierce's discipline policy as follows:

> Discipline is at the discretion of the company and shall be decided on a case by case basis. If you disagree with any disciplinary action, you are required to follow the internal grievance procedure.

Ex. 101, p. 17.

10. Pierce typically gives employees three warnings prior to termination.

11. All new Pierce employees are required to view a 22-minute video on workplace harassment as part of an hour long on-board training program during

which the employer's policies and procedures are covered with the new employees, including its non-discrimination and anti-harassment policies. Supervisors receive additional training on Pierce's policies and procedures, as well as training on how to handle employee complaints.

12. Pierce updated its employee handbook effective October 1, 2016. The most recent handbook outlines prohibited activity such as sexual harassment:

> Harassment on the basis of any other protected characteristic is also strictly prohibited. Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, national origin, age, disability, citizenship status, marital status, creed, genetic predisposition or carrier status, sexual orientation, or any other characteristic protected by law or that of his/her relatives, friends or associates and that: (I) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities.
>
> Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes and display or circulation in the workplace of written or graphic material that denigrates or shows hostility or aversion toward an individual or group (including through any and all electronic devices).

Ex. 108, pp. 6,7.

13. The current handbook also includes the following:

> Pierce prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports. Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action.

Id., p. 7.

14. The complaint procedure is also set forth in the handbook as follows:

> Pierce strongly urges the reporting of all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Individuals who have concerns about such matters can, if comfortable, address the situation directly to the offender themselves. Individuals can also file their complaints with their immediate supervisor or to the attention of one of the other Pierce designated representatives identified as the Store Manager, Human Resources Specialist, Chief Financial Officer, President or General Manager.

Id.

15. The handbook further provides:

> Any reported allegations of harassment, discrimination or retaliation will be investigated promptly, thoroughly and impartially. The investigation may include individaul interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge.
>
> Confidentiality will be maintained throughout the investigation process to the extent consistent with adequate investigation and appropriate corrective action.

Id., p. 8.

16. On July 28, 2016, Healy filed a Charge of Discrimination with the Montana Human Rights Bureau (HRB) alleging Pierce refused to permit him a reasonable accommodation to allow him to wear his hair long in accordance with his Native American religious beliefs[1].

17. Ann Eyler, Pierce's Human Resources Specialist, learned of Healy's HRB complaint on August 4, 2016. Eyler notified Pierce's owner/vice president, as well as the general manager and Healy's direct supervisor.

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[1]Healy's July 28, 2016 HRB complaint is not at issue in this case.

18. At the time of Healy's employment, there were two set-up crew chiefs, one of whom was Seth Ebel. Healy primarily worked on Ebel's crew. Ebel had the authority to assign Healy work while at the job site, but he did not have the authority to hire, fire or affect Healy's hourly wage or benefits.

19. Ebel referred to Healy as a "lazy drunken Indian," and mention that Healy "should just go back to the re[z]" when talking to another employee at a job site located in Hardin, Montana. Ebel also used the term "drunken Indians" several times while working at the job site and said "they need to go get jobs." Ebel's voice was loud enough for Healy to be able to hear these offensives slurs.

20. Ebel also referred to another employee at the job site as "another lazy Indian." Ebel also used other racial epithets while on the job. Ebel often referred to Healy as "Pocahontas" and "prairie nigger" and told him that he was only good for "picking up trash." Healy was usually in a position to be able to hear Ebel when he used these slurs.

21. Healy was upset and offended by Ebel's repeated use of racial epithets toward him. Healy felt degraded as a result of Ebel's conduct. Healy was hesitant to complain about Ebel's conduct because he did not believe Pierce would believe him over Ebel, who had worked for Pierce for several years.

22. Ebel's conduct as Healy's supervisor was sufficiently severe and pervasive so as to negatively affect Healy's working environment. Ebel's conduct created a hostile working environment for Healy not only due to the epithets Ebel hurled at Healy, but the offensive and rude comments Ebel made about other races and cultures while at the job site.

23. In late August 2016, Healy and Russ Mahan traveled to White Sulphur Springs, Montana for a service call. Ebel was the crew chief. It was supposed to be a short job, but it ended up taking longer than expected due to the quality of the work previously performed on the home. Healy and other workers quickly became frustrated at the amount of work that was required.

24. Ebel again called Healy "Pocahontas." Ebel also referred to Healy as a "prairie nigger." Mahan also observed Ebel's behavior and encouraged Healy to complain to Pierce management. Healy decided to file a complaint after learning Mahan would support him if he did so.

25. On August 30, 2016, Healy and Mahan went to dinner at a local bar after completing work that day. Ebel entered the bar and sat near the door. When Healy and Mahan moved to leave the bar, Ebel motioned to Mahan to join him. Healy stayed by the door where he was able to hear their conversation. Healy overheard Ebel told Mahan that he had to pick a side. Healy understood that Ebel was telling Mahan that his employment would be in jeopardy if he sided with Healy in any dispute involving Ebel.

26. Mahan also understood Ebel's comments to be an attempt to bully him in choosing sides against Healy. Mahan was offended that Ebel attempted to jeopardize his employment.

27. The next day Healy and Mahan reported to the job site. Ebel yelled at Mahan to come over to where he was standing. Ebel told Mahan to load up the trailer because they were going home. Continuing work was available at the job site that Healy and Mahan were not allowed to perform due to Ebel's decision to send them back to Billings.

28. Ebel contacted Dean Dassinger, who was the Setup Manager at the time, to report that he had sent Healy and Mahan home. Ebel told Dassigner that he sent Healy home because he wasn't working and he was on his cell phone constantly. Ebel did not report the comments he had made to and about Healy to Dassinger, or the fact that he had implicitly threatened Mahan's employment.

29. On September 1, 2016, Healy complained to Dassinger about Ebel's use of the terms "drunken Indian," "Pocahontas," and "Tonto" while at the White Sulphur Springs job site.

30. Dassinger assigned Healy to work on the lot to avoid further interactions with Ebel. Healy worked on the lot for approximately two weeks.

31. Dassinger assigned Healy, rather than Ebel, to work on the lot because Ebel was able to drive the trucks used for out of town jobs. Dassinger also felt Ebel, who had worked for several years without complaint, was best left in the field.

32. Pierce did later send Healy out to a job in Ten Sleep, Wyoming after reassigning him to the lot. Healy was required to work with Ebel, who again targeted Healy due to his race and began hurling racial epithets at him.

33. Employees working on the lot generally have less opportunity for overtime than those working in the field. Employees working in the field get paid their hourly rate, plus a per diem, and Pierce pays for the employee's housing when on the road.

34. Healy's hourly wage and other benefits were not affected by his assignment to the lot. Healy did not like working on the lot because he had been hired to work as a carpenter and felt his skills were better used in the field. All Pierce employees work on the lot at one time or another.

35. After speaking with Healy about his concerns regarding Ebel's behavior, Dassinger orally reported Healy's complaint to Eyler. Dassinger and Eyler then called Mahan in and had him write a statement. Mahan wrote his statement outside of the presence of Dassinger and Eyler and turned it into Eyler.

36. Mahan[2], who also worked as a carpenter on the set up crew, provided Dassinger with a written statement indicating he heard Ebel refer to Healy as "Pocahontas" and a "prairie nigger." Ex. 3. Mahan also reported that Ebel told him that Healy was pulling him down and that he needed to choose a side. *Id*. Mahan concluded his statement with, "In that convers[a]tion Seth told me that Robert is done to drive him back after clean up!" *Id*.

37. Mahan worked with Ebel and Healy at the same job site on two to three occasions. Mahan heard Ebel refer to Healy as "Pocahontas" on two occasions, and "prairie nigger" on one occasion. Mahan was not sure Ebel was talking directly to Healy when he used those terms, because Mahan had observed Ebel directed similarly offensive terms to everyone.

38. Eyler formed an "Investigative Committee" to investigate Healy's complaint. The committee included Eyler, Dassinger and Keller. Eyler never interviewed Healy or obtained a written statement from him or any other witnesses. Eyler investigated the complaint as reported to her by Dassinger.

39. Fred Keller, who was Dassinger's supervisor, decided to extend Healy's probationary period, in part, due to Healy's complaint against Ebel. Keller Dep. 46, 47. Keller believed extending Healy's probationary period was necessary given his observations of Healy's job performance, which he considered less than average.

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[2]Mahan also complained Ebel referred to him as "coon ass," which was Mahan's call sign when he served as a naval aviator. Mahan took it as a joke but expressed some annoyance at Ebel's use of that term.

Keller also thought it was necessary to extend Healy's probationary period because he thought it would be unfair to rely on information provided by Ebel due to Healy's allegation that Ebel had discriminated against him based upon his race. Keller Dep. 45:5-24. But for Healy's complaint of discrimination, Keller would have terminated him rather than extend his probationary period. Keller Dep. 47:22-24.

40. Dassinger completed Probationary Employee's Progress Reports for Healy on a weekly basis throughout his employment. Healy's performance is marked as being average on the forms. Healy was also marked as being occasionally or repeatedly late, as well as having occasional or repeated justified absences. Ex. 104. Dassinger primarily relied upon information provided by Ebel and the other set up crew chief when completing these forms.

41. On September 6, 2016, Keller informed Healy that his probationary period was being extended 60 days.

42. On September 9, 2016, Keller, Dassinger and Eyler issued a written warning to Ebel regarding his conduct toward Healy. Ex. 6. The written warning did not address Ebel's conduct toward Mahan[3].

43. On September 12, 2016, Dassinger issued Healy an employee warning notice for attendance noting that Healy had been late for work on September 2, 6, 7, 8 and 12. The employee warning notice was marked as a first warning.

44. On September 12, 2016, Eyler conducted a refresher course regarding harassment and Pierce's policy regarding harassment. Ex. 106. The refresher course was offered, in part, due to Healy's complaint.

45. On October 3, 2016, Keller, Dassinger, and Eyler met with all employees individually as a follow up to the September 12, 2016 training, including Healy. During their meeting with Healy, he indicated he thought he was hated and limited in his opportunities at Pierce due to his complaint against Ebel. Keller assured Healy that Pierce was not looking for a reason to terminate him.

46. Eyler completed a "talking points" work sheet while talking with each employee. The work sheet included the following:

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[3]Ebel submitted his resignation September 18, 2016. Ebel's last day of work was September 30, 2016.

> The company position is all employees are valued the same. All employees' rights should be respected. Pierce Companies has a ZERO tolerance policy for any harassment, bullying, or discriminating behavior. This type of behavior presents a serious liability for the company and will not be tolerated. Any participation in such behavior and/or retaliation against someone who participates in a claim of harassment, bullying, or discrimination will be grounds for immediate dismissal.

Ex. 107.

47. On October 4, 2016, Eyler emailed Associated Employers, a human resources training company, about Healy's allegations. Eyler wrote:

> The decision has been made to let Robert Healy go under the terms of his (extended) probation period. See attached notes.
>
> We have besn walking on eggshells with this kid due to his EEOC discrimination suit filed 08/01 (made a Native American cut his hair).
>
> Consequently he has been employed a lot longer than the Pierce's would have normally kept someone with this level of poor performance.

Ex. 13.

48. On October 7, 2016, Keller discharged Healy while Dassinger was on vacation. Keller had observed Healy while he was working on the lot. Keller believed it was taking Healy too long to perform general tasks such as janitorial, painting and cleaning of units. Ex. 5. Dassinger was surprised to learn Keller had discharged Healy without first consulting him.

49. While Healy suffered harassment due to the discriminatory behavior of his supervisor, Ebel, Pierce took reasonable measures to remedy the situation. Healy did not suffer any further racial discrimination after Pierce moved him to the lot and separated him from Ebel.

50. Pierce retaliated against Healy for engaging in the protected activity of filing an HRB complaint and protesting the discriminatory behavior of Ebel by taking an adverse action against him by extending his probationary period, issuing him a written warning and subsequently terminating his employment.

51. Healy exercised reasonable diligence in attaining and maintaining comparable or equivalent employment following his discharge from Pierce. Healy has attained subsequent employment that pays $5.00 less per hour and does not consistently offer full-time hours. Healy has made a good faith effort to mitigate his damages since his termination from Pierce.

52. Healy typically had overtime each week when he worked out of town for Pierce. However, it is too speculative to award damages on the premise that he would have or could have worked those additional overtime hours if he had not been terminated by Pierce. Therefore, Healy's weekly wage loss was $600.00.

53. Healy worked for Pizza Hut for approximately two months following his termination from Pierce beginning in February 2017. Healy's hourly wage was $10.00, and he worked an average of 40 hours per week. Healy earned approximately $3,200.00 from his employment at Pizza Hut.

54. Healy obtained subsequent employment beginning October 16, 2017 at Burger King. Healy works approximately 12 to 15 hours per week, with an hourly wage of $10.00.

55. Healy is entitled to $36,342.86.00 in back pay. Healy's back pay award is offset by the $3,200.00 he earned from his employment at Pizza Hut for a total of $33,142.86. Healy is also entitled to interest on the lost wages through the date of hearing on November 29, 2017. That interest amounts to $1,837.30, for a total of $34,980.16. *See* Addendum A.

56. Healy is entitled to an award of one year of front pay in the amount of $31,200.00, which represents his weekly pay rate at Pierce, paid from 52 weeks. Healy did not yet have health insurance benefits through Pierce at the time of his separation. Therefore, he is not entitled to the value of those benefits in his front pay award. Further, it is too speculative to use his estimation of the overtime he may have been able to work if he had continued to be employed by Pierce when calculating his front pay award. As such, Healy is entitled to a front pay award of $31,200.00, the present value of which is $30,460.28, if paid in a lump sum. *See* Addendum A.

57. Healy suffered emotional distress as a result of Pierce's discriminatory and retaliatory actions. $25,000.00 represents a reasonable amount of compensation for the discrimination he suffered.

58. Imposition of affirmative relief, which requires REC to ensure that its employees are throughly trained with respect to prohibitions against retaliating against those who have engaged in protected activity and appropriate methods of dealing with such situations, is appropriate.

V. DISCUSSION[4]

The Montana Human Rights Act (MHRA) prohibits discrimination in employment based upon race, Mont. Code Ann. §49-2-303(1)(a), and retaliation based upon opposition to discrimination prohibited by the MHRA, Mont. Code Ann. §49-2-301. Healy alleges he was discriminated against on the basis of race due to the treatment he received from his supervisor. Healy further alleges he was retaliated against when he was called back to the lot after reporting his supervisor's conduct to Pierce management.

A. Healy has Shown a Prima Facie Case that Pierce Allowed a Hostile Working Environment due to Ebel's Discriminatory Conduct.

Montana law prohibits employment discrimination based on race. Mont. Code Ann. §49-2-303(1). The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

A charging party establishes a *prima facie* case of a hostile working environment with proof that he was subject to "conduct which a reasonable person would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *McGinest v. GTE Service Corp.,* 360 F.3d 1103, 1116 (9th Cir. 2004); s*ee also Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). The abusive work environment must be both subjectively and objectively hostile. *McGinest, supra,* 360 F.3d at 1113. "Harassment need not be severe and pervasive to impose liability; one or the other will do." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted).

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

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. *at* 23; *see also Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998).

The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).* The objective severity of a charging party's claim of a hostile working environment must be assessed from the perspective of a reasonable person belonging to the racial group of the charging party. *McGinest, supra* at 1114. *See also, Ellison*, *supra at* 879.
The alleged conduct need not cause mental harm, but it is enough "if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." *Id*. at 1112-13 (quoting *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994)). The harassing comments need not be directed at Plaintiff in order to create a hostile work environment. *See Monteiro v. Tempe Union High Sch. Dist*., 158 F.3d 1022, 1034 (9th Cir. 1998). A work environment is racially hostile where an employee is surrounded by racial hostility and is subjected directly to some of it. *McGinest*, 360 F.3d at 1117 (citation omitted). The fact the perpetrator consistently abused both black and white employees makes the perpetrator's conduct more outrageous, not less so. *McGinest*, 360 F.3d at 1118.

An employer incurs vicarious liability for its employees' unlawful conduct when it fails to take reasonable steps to protect an employee from a discriminatory hostile working environment created by an employee.. *Altmaier v. Haffner*, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. *Snell v. Montana-Dakota Utilities Co.*, 198 Mont. 56, 643 P.2d 841 (1982). An employer cannot avoid liability for its employees' harassment when "it utterly fails to take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F. 3d 965, 978 (7th Cir. 2004).

The MHRA defines "employer" to include "an agent of the employer." Mont. Code Ann. § 49-2-101(11). In general, an employer is vicariously liable for a hostile environment created by a supervisor. *Faragher*, 524 U.S. at 780; see also *Vainio v. Brookshire*, 258 Mont. 273, 279, 852 P.2d 596, 600 (1993) (Under the theory of

respondeat superior, employers are liable for the intentional sexual harassment in which supervisory personnel engage in the course of their employment).

Healy's uncontroverted testimony demonstrates that Ebel's conduct in using terms such as "prairie nigger," "Pocahontas,""Tonto," and "drunken Indian" in reference to Healy was subjectively perceived as hostile. The fact that both Healy and Mahan complained of Ebel's conduct to Dassinger demonstrates this. Ebel's conduct clearly upset Healy and other Pierce employees who observed his behavior.

The credibility of the witnesses in this matter is critical to determining whether certain events happened, whether certain words were used, whether discrimination occurred and what remedies, if any should be imposed. Healy described multiple events where Ebel would use terms such as, "Pocahontas," "drunken Indian, and "prairie nigger" within his earshot and, at times, directly to him. Neither party called Ebel as a witness. Pierce offered little substantial and credible evidence to call Healy's testimony into question. Rather, Healy's testimony was consistent with the testimony of Mahan, who had no reason to lie to or mislead the fact finder. Therefore, Healy's testimony regarding the events in which he was subjected to hostile and racist conduct by his supervisor is deemed credible.

Ebel's conduct was objectively offensive. It is beyond question that the terms used by Ebel are highly offensive and demeaning. This is shown by both Ebel's and Mahan's highly credible testimony. Ebel's repeated use of terms that were derogatory and insulting and intended to demean a Native American man were clearly intended to hurt and to offend Healy. Ebel's conduct was not done with Healy's consent nor was his conduct some form of friendly banter between the two. Ebel clearly intended to discriminate against Healy based upon his race.

The discriminatory conduct here was exacerbated by the fact that Healy not only had to tolerate the use of those discriminatory terms while on the job but he had to tolerate them being hurled at him by his supervisor. Ebel's conduct was clearly severe and pervasive enough that other employees noticed and became upset at his behavior toward Healy. Ebel's discriminatory conduct altered the terms of Healy's employment and created a hostile working environment for Healy. Healy's testimony about the harassment both explicitly and implicitly confirms that the conduct was pervasive. Even if, however, the use of the terms "prairie nigger," "Pocahontas,""Tonto," and "drunken Indian" was not pervasive, their use amounts to the type of severe conduct that in and of itself constitutes discriminatory conduct. The only basis for their use by Ebel was to single out and humiliate Healy because of his race. They were not errant slips of the tongue but were designed first and

foremost to discriminate against Healy because of his race. Healy has, therefore, proven by a preponderance of the evidence that he was subjected to a hostile working environment due to the racist and offensive conduct of his supervisor, Seth Ebel.

B. Pierce has not Shown it Took Reasonable Steps to Remedy the Situation Once it Received Notice of Ebel's Discriminatory Conduct.

The question that remains is whether Pierce took reasonable steps to correct the problem. A defending employer may raise an affirmative defense to liability when a victimized employee has stated an actionable claim of a hostile working environment created by a supervisor. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id*.

Healy argues his assignment to the lot after complaining about Ebel's conduct was an undesirable reassignment due to his not having the ability to work overtime as easily as he would on a job site; his not receiving a per diem, which he estimated cost him approximately $50.00 to $60.00; and the nature of the duties he was required to perform on the lot, which included janitorial, painting, and other duties as assigned. Pierce counters that all employees are required to work on the lot at one time or another and all employees would be required to perform similar duties. Pierce also argues that Healy could have found ways to work overtime while assigned to the lot.

Healy's assignment to the lot did not result in a reduction in his hourly wage. While Healy may have had perks working out of town such as per diem and possible overtime, the evidence does not show the differences in the wages he received from working out of town as opposed to working on the lot was so great as to render the assignment undesirable. The evidence does not show that Ebel's conduct toward Healy culminated in a tangible employment action. Therefore, Pierce is able to raise an affirmative defense to liability stemming from Ebel's conduct. In *Ellerth*, the Court outlined the affirmative defense available to an employer:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need

> for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 524 U.S. at 765.

Remedies implemented by the employer should be "reasonably calculated to end the harassment." *Ellison v. Brady* (9th Cir. 1991), 924 F.2d 872, 882(citation omitted). "An employer's remedy should persuade individual harrassers to discontinue unlawful conduct." *Id.* (citation omitted). Not all harassment warrants dismissal, but the remedy imposed "should be assessed proportionately to the seriousness of the offense." *Id.*(citations omitted). "[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harrassers to refrain from unlawful conduct . . . punishments that do not take into account the need to maintain a harassment-free working environment may subject the employer to suit by the EEOC." *Id.*

In *Ellison*, the court found the employer's response to an employee's claim of sexual harassment by a co-worker was inadequate because the employer "did not express strong disapproval of [his] conduct, did not reprimand [him], did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination." *Id.* Noting that Title VII requires more than "a mere request to refrain from discriminatory conduct," the court found the employer's response was insufficient due to its failure to take "even the mildest form of disciplinary action" after being put on notice of the employee's harassing behavior toward a female co-worker. *Id.*

In this case, Pierce issued a reprimand to Ebel that informed him that his behavior toward Healy was unacceptable. Once Pierce management had actual knowledge of allegations of harassment perpetrated by Ebel, it acted to correct the situation. However, Ebel's discriminatory conduct continued while Healy was assigned to work on the Ten Sleep job. The evidence shows that Healy continued dealing with Ebel's discriminatory behavior despite his having complained to Pierce

management. Because Healy has proven a hostile working environment existed and because Pierce failed to act reasonably to remedy the situation, Healy has proven that Pierce discriminated against him on the basis of race.

C. Healy has Shown a Prima Facie Case That Pierce Retaliated Against him for Protected Activity.

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. Mont. Code Ann. § 49-2-301.

The elements of a prima facie retaliation case are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. *Beaver v. DNRC*, 2003 MT 287, ¶71, 318 Mont. 287, 78 P.3d 857. In cases arising under the MHRA, the elements of a prima facie case of retaliation in the employment context vary, but generally consist of proof that the charging party was qualified for employment, engaged in a protected activity, and was subjected to adverse action, as well as a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of engagement in the protected activity. Admin. R Mont. 24.9.610(2). As in a discrimination claim, a charging party alleging retaliation must present evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a prima facie case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005).

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. When the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent meets its burden, the presumption of discrimination created by the prima facie case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* The charging party may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Crockett*, 234 Mont. 87, 95, 761 P.2d 813, 818, (Mont. 1988)(citations omitted). As in a

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

1. *Healy has shown Pierce took an adverse action against him after he engaged in protected activity.*

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

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

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

experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a). The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson*, 519 U.S., at 346, 117 S. Ct. 843, 136 L. Ed. 2d 808. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. Ibid. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p 8-13.

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

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

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

Burlington v. White, 548 U.S. at 68-70.

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

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

It is undisputed that Healy engaged in protected activity when he reported Ebel's conduct to the employer. The next issue is whether Pierce's actions against Healy's employment constitute adverse action.

The actions taken by Pierce following Healy's complaint of Ebel's behavior would reasonably be likely to deter employees from engaging in protected activity. Pierce's actions of extending Healy's probationary period, after assigning him to work on the lot, and issuing him two written warnings just a few weeks prior to this discharge, would be considered to be materially adverse by a reasonable employee. The cumulative effect of Pierce's actions would lead a reasonable employee in Healy's position to believe he was being retaliated against for engaging in protected activity. Therefore, Healy has shown he was subjected to an adverse action after engaging in protected activity. Healy is now left to establish the final element of a prima facie case of retaliation by showing a causal connection between his protected activity and the adverse employment action taken by Pierce.

2. *Healy has shown a causal connection between his protected activity and the adverse actions taken against him by Pierce.*

When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity. Admin. R. Mont. 24.9.603.

Proof of a causal connection between a protected activity and a material adverse action can also 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. R. 24.9.610(2)(b). *See also Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(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"); *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).

Pierce had actual notice of Healy's HRB complaint as early as August 4, 2016. Healy subsequently complained about Ebel's conduct, which was corroborated by Mahan and the employer's investigation, on September 1, 2016. Within a span of approximately six weeks after filing his HRB complaint and less than two weeks after complaining about Ebel's conduct, Healy received one written warning regarding his attendance, had his probationary period extended by 60 days and was subsequently discharged by Pierce on October 6, 2016. The proximity in time between the protected activity and adverse action is sufficient to establish the requisite causal connection.

Healy can also rely upon the employer's different responses to policy violations. While attendance is clearly important, the question that begs to be asked is why tardiness by Healy warranted an extension of his probationary period and ultimate discharge when Ebel's conduct, which is objectively and subjectively repugnant, warranted only a warning. Further concerning is the testimony of Keller, who at his deposition indicated his decision to extend Healy's probationary period was based almost entirely on his having complained about Ebel. However, at hearing, Keller changed his testimony and suggested the decision had been made in advance of Healy's complaint. The change in Keller's testimony is suspect at best and creates the impression that Pierce's actions regarding Healy's employment was related directly to his complaining about Ebel.

Also troubling was the testimony of Eyler. Eyler prepared a time line of events surrounding Healy's employment that was made available to members of Pierce management prior to their depositions and prior to hearing. Eyler's notes include comments such as, "statement to [Jim] Davison from Healy: no marriage to 2 kid's mother/just more kids he makes the bigger his tribe check." This notation was dated October 14, 2016, which was one week after Healy's termination.

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

D. Pierce has Shown it had Legitimate, Nondiscriminatory Reasons for its Actions Toward Healy.

At hearing, the parties stipulated that four witnesses - Mike Nordlum, Layne Stenberg, Richard Benjamin and Jim McFall - would testify that they believed Healy's work or job performance was substandard. The stipulation also included two witnesses - Stenberg and Benjamin - would testify they observed Healy using his cell phone in a manner inconsistent with Pierce policy and two witnesses who would testify they were unaware of any racist comments as alleged by Healy.

Keller testified he observed Healy working on a model home when he was reassigned to the lot. Keller testified Healy had been assigned to paint two areas of a modular home, which took him two weeks. Keller testified the work subsequently had to be redone after Healy was discharged.

Eyler prepared a summary using time records that were not offered as evidence showing Healy had been tardy for work several times. Mahan testified Healy was frequently late for work, which would result in the crew being delayed in leaving for offsite work. Dassinger also noted Healy's attendance issues in the Probationary Employee Progress Notes.

Keller, Dassinger, and Eyler testified about concerns they had regarding Healy's attitude, which was described as defiant. However, testimony regarding attitude is inherently subjective. Further, if Healy did display a negative or defiant attitude, it was reasonable given his working conditions with Ebel as his supervisor. However, given the other issues pointed to by the witnesses, Pierce has succeeded in meeting its burden of offering a legitimate, non-retaliatory reason for the employment actions. Therefore, the presumption of discrimination created by the prima facie case disappears and Healy is now left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse employment actions.

E. Healy has Shown the Reasons Offered by Pierce for the Challenged Actions Were Likely Motivated by a Retaliatory Reason and its Explanation is Unworthy of Credence.

Once an employer meets the burden of producing evidence of legitimate, non-retaliatory reasons for the challenged actions, Healy is now left with the ultimate burden of showing a retaliatory reason motivated the employer or that its reason was not the true reasons for its action or that the reason offered is pretext for retaliation.

Crockett v. Billings, 234 Mont. 87, 95, 761 p.2d 8132, 818 (Mont. 1988), citations omitted. "[a] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Heiat,* 275 Mont. 322, 328, 912 p.2d 787, 791 (quoting *St. Mary's Honor Center*, 509 U.S. at 515). *See also Vortex Fishing Sys., Inc.. v. Foss,* 2001 MT 312, ¶ 15, 308 Mont. 8, ¶15, 38 p.3d 836, ¶15. "[t]o establish pretext, [Healy] '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)).

Healy points to various inconsistencies in the testimony offered by Eyler and Keller. Eyler testified a committee was formed to investigate Healy's complaint and that committee included Dassinger. Dassinger denied being involved in any committee responsible for investigating Healy's complaint. Eyler testified, as did Keller, that Dassinger was involved in the decision to discharge Healy. Dassinger testified he was surprised when he returned from vacation to find Keller had discharged Healy without consulting him. Eyler testified that Healy was not allowed to travel for work due to his probationary status. However, evidence was produced showing that was not the case. Dassinger testified the travel permit issue only came up after Healy filed his complaint against Ebel on September 1, 2016. Further, Keller testified at his deposition that Healy's probationary period was extended due to his complaint against Ebel but denied that at hearing.

Also troubling is Eyler's approach in investigating Healy's complaint. Eyler never interviewed Healy and limited her investigation to only talking with Ebel and Mahan. Eyler testified Mahan "retracted" the statement he provided to Dassinger. Mahan denied retracting the statement and indicated he stood by the accuracy of the statement at hearing.

Finally, Eyler's October 4, 2016 email to Associated Employers indicating Pierce had been "walking on eggshells" due to Healy's EEOC complaint, which suggests a certain animosity toward Healy. This is particularly true given the tenor of her "notes" in her time line referring to the number of children Healy had and the effect it would have on his "tribal check."

Healy has shown the reasons offered by Pierce for the challenged action were likely motivated by a retaliatory reason or that the explanation is unworthy of

credence. Therefore, Healy has shown Pierce retaliated against him for protected activity.

F. Healy is Entitled to Damages

The department may order any reasonable measure to rectify any harm Healy suffered as a result of illegal discrimination. Mont. Code Ann. §49-2-506(1)(b). Damages are awarded to make the victim whole. **E.g.**, *P. W. Beny v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523. ***See also,*** *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830. To be compensable, the damages must be causally related to making the victim whole, i.e., must come out of the discriminatory acts. Mont. Code Ann. §§ 49-2-506(1)(b); *Beny*, ***supra; see also***, *Village of Freeport Park Commission v. New York Division of Human Rights*, 41 A.D. 2d 740, 341 N.Y.S. 2d 218 (App. 1973)(loss of earnings which did not flow from the discriminatory act is not compensable as it does not flow from the discrimination). Damages include emotional distress endured as a result of unlawful discrimination. *Vortex Fishing Syst*. at 33.

1. *Back Pay*

In employment discrimination, once the charging party has established that his damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Beny*, 779 P.2d at 523-24. Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). To defeat this presumptive entitlement, the respondent must demonstrate by clear and convincing evidence that a lesser amount of back pay is due the charging party. Id.; see also, *Benjamin v. Anderson*, 62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay (10% per year simple) is also reasonable. *Beny*, 779 P.2d at 523.

The Charging Party has an affirmative duty to mitigate lost wages by "us[ing] reasonable diligence" to locate "substantially equivalent" employment, *see Ford Motor Co. v. EEOC,* 458 U.S. 219,231 (1982), and a failure to mitigate damages can reduce or completely cancel out a back pay award. *See* 42 U.S.C. § 2000e-5(g) ("interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable"); e.g., *Landgraf v. US! Film Prods.*, 511 U.S. 244, 253 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence). A claimant has a duty

to exercise reasonable diligence in attaining and maintaining substantially similar employment. *Brady v. Thurston Motor Lines, Inc*., 753 F.2d 1269, 1278 (4th Cir. 1985)(the duty to mitigate includes an obligation "to make reasonable and good faith efforts to maintain that job once accepted.")

However, defendants have the burden of proving that the plaintiff failed to mitigate her damages. *Sangster v. United Air Lines, Inc*., 633 F.2d 864, 868 (9th Cir. 1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2048, 68 L. Ed. 2d 350 (1981). To satisfy this burden, Defendants have to prove "that, based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which [the plaintiff] could have obtained, and that [the plaintiff] failed to use reasonable diligence in seeking one." *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994) (emphasis in original). *See also Edwards v. Occidental Chem. Corp*., 892 F.2d 1442, 1449 (9th Cir. 1990); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978).

Healy applied for several jobs after his termination from Pierce in October 2016. Healy did not find gainful employment until February 2017. Healy became unemployed again after only two months **and** was unemployed until just before the hearing in November 2017. Healy has shown he used reasonable diligence to locate substantially equivalent employment. However, there is little evidence as to why Healy's subsequent employment with Pizza Hut ended. Given that Pierce failed in its burden of proving Healy failed to use reasonable diligence in either attaining or maintaining employment, Healy is entitled to a back pay award of $33,142.86, which is based upon his weekly wage of $600.00 following his separation from Pierce and before his obtained employment at Burger King. This award is reasonably likely to make Healy whole after suffering discrimination and retaliation in his employment with Pierce. Healy is also entitled to interest on the lost wages through the date of decision at the rate of 10% per annum, which amounts to $1,837.30, for a total amount of $34,980.16.

2. *Front Pay*

Front pay compensates the Charging Party for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the plaintiff could return to her former position. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001). Future damages need only be reasonably certain and not absolutely certain, and of necessity are the subject of some degree of conjecture and speculation. *Kerr v. Gibson Products Co. of Bozeman, Inc*., 226 Mont. 69, 74, 733 P.2d 1292, 1295.

The courts have considered the following factors when determining if reinstatement is feasible:

> (1) whether the employer is still in business; (2) whether there is a comparable position available for the plaintiff to assume; (3) whether an innocent employee would be displaced by reinstatement; (4) whether the parties agree that reinstatement is a viable remedy; (5) whether the degree of hostility or animosity between the parties, caused not only by the underlying offense but also by the litigation process, would undermine reinstatement; (6) whether reinstatement would arouse hostility in the workplace; (7) whether the plaintiff has since acquired similar work; (8) whether the plaintiff's career goals have changed since the unlawful termination; and (9) whether the plaintiff has the ability to return to work for the defendant employer, including consideration of the effect of the dismissal on the plaintiffs self-worth.

Webner v. Titan Distrib., 101 F. Supp. 2d 1215, 1236 (N.D. Iowa 2000) (citations omitted); *aff'd on other grounds*, 267 F.3d 828 (8 th Cir. 2001).

Reinstatement appears not to be a viable remedy in this case given the hard feelings between the parties and the apparent hostility between Healy and several of the employer's witnesses. Therefore, front pay is appropriate in this case.

Healy seeks front pay award equal to four years. "Because of the potential for windfall, [front pay's] use must be tempered." *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). OAH has historically followed the guidance of the Wrongful Discharge from Employment Act, which allows for recovery of lost wages for a maximum of four years from the date of discharge. *See* Mont. Code Ann.§ 39-2-905(1); *Billbruck v. BNSF Ry. Co.*, HRC Case No. 0031010549 (Aug. 3, 2004).

Healy made sufficient efforts to find and to obtain suitable and comparable work since being terminated by Pierce. While Healy has found other work, that work is not comparable to his former employment Pierce. Healy worked for Pierce for approximately four months. Four years of front pay in addition to back pay is not reasonable and would be unduly speculative and unsupported by the record. Further, awarding four years of front pay would result in an unjust windfall for Pierce. One year of front pay is reasonable under the circumstances. Therefore, Healy is entitled to a front pay award of $31,200.00, the present value of which is $30,460.28.

3. *Emotional Distress*

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. As already noted under "Constructive Discharge," Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Vainio*, p. 16, fn. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828. Medical evidence is not required to establish emotional distress damages, and such damages may be established by testimony or inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991). "[N]o evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted." *Id.*

Vortex Fishing Syst. ***at*** ¶33, succinctly explains emotional distress awards:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3d Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz* v. *Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden*, in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman*, 107 F.3d at 385.

Healy seeks $25,000.00 in emotional distress damages. Healy testified he was upset after his termination from Pierce and had difficulty finding work, which distressed him greatly being a father to young children.

Healy's emotional distress is somewhat like that of the plaintiffs in *Johnson*. In that case, the plaintiffs (African-Americans) suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. The plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the court increased their awards from $125.00 to $3,500.00 each for the overt racial discrimination.

In *McDonald*, the hearing officer awarded the Charging Party $10,000.00 for emotional distress damages after finding the employer had discriminated against the Charging Party when it failed to accommodate her disability. *McDonald*, 2009 MT. 209, 34.

Healy was understandably upset with the manner in which his employment ended at Pierce. Healy's upset and frustration at losing his employment justifies a damage award of $25,000.00 for emotional distress.

4. *Affirmative Relief*

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(I)(a). Affirmative relief in the form of both injunctive relief and training to ensure that such conduct does not reoccur in the future is necessary to rectify the harm in this case.

VI. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Mont. Code Ann. § 49-2-509(7).

2. Robert Healy IV has shown that Pierce Companies Grp., Inc. discriminated against him on the basis of race and retaliated against him for engaging in protected activity. Mont. Code Ann. § 49-2-30 I; Admin. R. Mont. 24.9.603(2).

3. Pursuant to Mont. Code Ann.§ 49-2-506(l)(b), Pierce Companies Grp., Inc., must pay Robert Healy IV the sum of $33,142.86 in damages for back pay and $1,837.30 in prejudgment interest on those damages through November 29, 2017,

for a total of $34,980.16. Healy is also entitled to front pay for one year, which amounts to $31,200.00, the present value of which is $30,460.28.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Pierce Companies Grp., Inc., must pay Healy the sum of $25,000.00 as damages for emotional distress.

5. The circumstances of this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann.§ 49-2-506(1).

6. For purposes of attorneys' fees, the Charging Party is the prevailing party. Mont. Code Ann. § 49-2-505(8).

VII. ORDER

1. Judgment is found in favor of Robert Healy IV and against Pierce Companies Grp., Inc., for discriminating against Healy on the basis of race and retaliating against him for engaging in protected activity in violation of the Montana Human Rights Act.

2. Pierce Companies Grp., Inc., is enjoined from discriminating against any employee on the basis of disability or retaliating against any employee for engaging in protected activity.

3. Pierce Companies Grp., Inc. must pay Healy the sum of $34,980.16, which represents the back pay award of $33,142.86, with prejudgment interest in the amount of $1,837.30, for a total of $34,980.16.

4.. Pierce Companies Grp., Inc., must pay Healy the sum of $25,000.00 for emotional distress damages.

5. Pierce Companies Grp., Inc., must pay Healy $31,200.00, which represents an award of front pay for one year. The present value of this award is $30,460.28.

6. Pierce Companies Grp., Inc., must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for its employees to prevent and timely remedy disability discrimination. Under the policies, the employees of Pierce Companies Grp., Inc. will receive information on how to report complaints of discrimination. The plan and policies must be approved

by the Montana Human Rights Bureau. In addition, Pierce Companies Grp., Inc., shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 27th day of July, 2018.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Robert Healy IV, and his attorney, Bryan L. Spoon, Spoon Gordon Ballew PC; and Respondent Pierce Companies Grp, Inc., and its attorney, Kelly J. Varnes, Hendrickson 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, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

Human Rights Commission
c/o Annah Howard
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 ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the

appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

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

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.

Healy.HOD.chp