

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

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 413-2017

CARL HIGH PINE,)	
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
)	
3G'S CONVENIENCE STORES,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

On May 26, 2016, charging party Carl C. High Pine filed a complaint with the Montana Department of Labor and Industry's Human Rights Bureau (HRB) alleging that 3G's Convenience Stores subjected him to illegal discrimination in public accommodation because of his race (Native American). Specifically, he alleged that employees in the 3G's store at 4106 State Avenue in Billings, Montana, refused to accept his Northern Cheyenne Tribe identification card (ID) as sufficient to establish his identity for purposes of purchase of a controlled substance, a beverage containing alcohol, on approximately March 15, 2016. On July 27, 2016, he signed an amended complaint with exactly the same allegations, except that the address of the store was changed to 4410 State Avenue in Billings, Montana. Both 3G's Convenience Stores were located on State Street in Billings, Montana, and in his amended complaint High Pine had changed the address of the State Street store from the store at State and Jackson Street to the store on State and Orchard Lane.

After investigation, the department's Human Rights Bureau certified High Pine's amended complaint to the department's Office of Administrative Hearings (OAH) for a contested case hearing. On January 5, 2017, Hearing Officer Terry Spear convened a contested case hearing in this matter in Billings, Montana. The hearing concluded that same day.

High Pine appeared and participated on his own behalf. He was accompanied by a lay advocate, Jennifer Perez Cole, who came to advocate for High Pine. 3G's objected that Perez Cole, not being an attorney, could not represent High Pine. High Pine, testifying under oath, said that he had a mental disability as a result of past emotional trauma (depression and memory problems). The Hearing Officer allowed Perez Cole to sit with High Pine during the hearing and assist him, but not to represent him. Specifically, the Hearing Officer instructed her that she could hand documents to High Pine and point to documents or portions of documents, but only to remind him of matters therein that he might not be remembering as he testifies, questions a witness or argues.

Eric Edward Nord, Crist Krogh & Nord PLLC, represented 3G's Convenience Stores and Dan Grosulak, Operations Officer, and Larry Grosulak, Owner, attended as designated representatives for 3G's. On a motion by 3G's, witnesses were excluded. High Pine did not object to both Larry and Dan Grosulak remaining in the hearing room during the entire hearing.

Witnesses who testified under oath were Carl High Pine, Larry Grosulak, Dan Grosulak, Tammey Mauch (a store manager for 3G's), Betina Tall Bull (High Pine's daughter-in-law and a former employee of 3G's for a very short time approximately two years before the incident at issue in this case) and Kelly Grosulak (spouse of Larry Grosulak and a management employee in 3G's). Dan Grosulak was the last witness called by High Pine and the first witness called by 3G's after High Pine concluded his case in chief. Tammey Mauch was the last witness in 3G's case in chief. Betina Tall Bull was called by High Pine as a rebuttal witness, and testified after the Hearing Officer overruled 3G's objection that she was not a proper rebuttal witness and had not been identified as a witness by the prehearing deadline set for witness disclosure. Kelly Grosulak was called as a sur-rebuttal witness by 3G's.

Exhibits 1-6 were admitted into evidence. They are contained in a sub-file within the case file labeled "Admitted Exhibits."

During the hearing, High Pine attempted unsuccessfully to get other documents into evidence. Copies of the 28 documents he brought to hearing that were not admitted appear in the OAH file as "Documents Not Admitted." High Pine provided copies of those documents to counsel for 3G's before hearing. OAH requested and obtained copies of the documents from counsel for 3G's (to save High Pine the trouble of arranging to fax them to OAH) before hearing so that an extra set would be available during the hearing. The documents consist of 27 pages (001/027 through 027/027) out of the first fax to OAH on Dec. 30, 2016, 12:49 p.m., together with the single page (001/001) of the second fax to OAH that same day at 12:53 p.m.

Page 001/027 of the first fax was a cover sheet for the fax, and page 002/027 of the first fax had some of the text obscured by a sticky note that was on the page when it was photocopied or scanned for faxing. The second fax was a duplicate of that page, without the sticky note.

It was pages 001/001 (second fax) and 002/027 that High Pine actually attempted unsuccessfully to put into evidence. The 26 pages consist of the following:

- (1) 3-page letter (001/001 and 003-4/027), dated December 12, 2007, from Gregory Petesch, Director of Legal Services, Montana Legislative Service Division, to Representative Margaret Campbell, regarding House Bill No. 789;
- (2) 4-page print-out (004-027-008/027) of screens from a government web-site (mt.gov) containing information posted on that web site describing what House Bill 789, effective October 1, 2007, “requires;” and
- (3) a 19-page complete copy of what is labeled as “Authorized Print Version – HB 789” (009/027 through 027/027) with the pages out of order according to the fax pagination.

In fact-finding, in his “Discussion” and in “Appendix I” herein, the Hearing Officer has referenced and cited all portions of the current Montana Code Annotated that include the words “tribal identification.” The Hearing Officer found those statutes through a Lexis search rather than by reference to “Authorized Print Version – HB 789” among the documents not admitted.

After Tall Bull’s rebuttal testimony was completed, High Pine requested leave to call additional rebuttal witnesses to testify by telephone that they each had experienced or witnessed refusal by 3G employees to accept tribal IDs as adequate to verify their identities and/or ages, or had been trained and required to reject tribal IDs. The Hearing Officer sustained 3G’s objections to this telephone testimony, also barring hearsay testimony by High Pine about what those proposed rebuttal witnesses had told him, offered as proof of the truth of what they had said to him.

At this point there was a brief recess of the hearing, to await the arrival of a sur-rebuttal witness for 3G’s (Kelly Grosulak, wife of Larry Grosulak). During that recess, the Hearing Officer conferred off the record with the parties, Perez Cole and counsel. The Hearing Officer reminded High Pine that this was the time (before the sur-rebuttal witness arrived) for High Pine to present any further rebuttal testimony to facts that he had wanted to present during the questioning of Mauch. High Pine told the Hearing Officer that he had no further facts he now wished to present. After the rebuttal witness arrived and was sworn, but before the testimony of a sur-rebuttal

witness, the Hearing Officer confirmed the colloquy about further rebuttal testimony by High Pine and High Pine's statement that he now had no such testimony to give.

At the conclusion of the sur-rebuttal testimony of Kelly Grosulak, the Hearing Officer confirmed that the evidentiary record was now complete, and heard closing arguments from High Pine and counsel for 3G's, and the case was deemed submitted for decision. The Hearing Officer was unable to complete the decision in time for the first "decision window" (one week every two months) for issuance of a Human Rights contested case decision, which was January 17-20, 2017 (January 16 being a holiday). Therefore the decision now issues in the present March window.

II. RECORDING OF THE HEARING; SEALING OF ORIGINAL HIGH PINE(4)

Following the conclusion of his own testimony as his first witness, High Pine indicated he wanted to call Larry Grosulak as his next witness. The Hearing Officer gave High Pine and Perez Cole time to leave the hearing room and consult. The Hearing Officer also left the room, to give counsel and the two designated representatives for 3G's an opportunity to consult. The Hearing Officer failed to turn off the digital recorder.

Counsel and the two designated representatives for 3G's had what they believed was a private conversation, which was actually being recorded, for about 4 minutes, from approximately 6 minutes 10 seconds until approximately 10 minutes 15 seconds on Original High Pine Hearing(4).

After everyone had returned to the hearing room and the hearing resumed, the Hearing Officer realized what he had done and advised the parties and counsel what had happened. Counsel for 3G's stated that he did not think anything confidential had been discussed.

Recordings High Pine Hearing(5) through High Pine Hearing(11) have been renamed High Pine Hearing(6) through High Pine Hearing(12). Original High Pine Hearing(4) has been re-recorded as follows. Original High Pine Hearing(4) 0:00 through 6:10 has been re-recorded and named High Pine Hearing(4). Original High Pine Hearing(4) 10:15 through end has been re-recorded and named High Pine Hearing(5).

The Hearing Officer hereby ORDERS that the Original High Pine Hearing(4) is SEALED from the public and from all others except (1) counsel for respondent, (2) his employees with duties to perform that require access to the sealed recording; (3) management of respondent, (4) High Pine and his lay assistant and (5) employees

of the Office of Administrative Hearings and other parts of the Department of Labor and Industry with duties to perform that require access to the sealed recording; (6) Court reporters retained by either party herein to transcribe the digital audio record of hearing, within the scope of their retention. No one with access to the recording pursuant to this order may disclose to any other person or entity without such access the contents of the sealed section, consisting of Original High Pine Hearing(4), 6:10 to 10:15, in any fashion. The original High Pine Hearing(4) has been sealed and retained because the re-recordings have more background noise and are harder to hear. Upon a petition for review or appeal of the Hearing Officer Decision, jurisdiction over this case, including the sealing order, will transfer to the adjudicative body with which the petition or appeal has been filed.

III. ISSUES

1. Did 3G's Convenience Stores subject Carl High Pine to illegal discrimination in public accommodation because of his race (Native American) by refusing to accept his tribal ID as sufficient to establish his identity for purposes of purchase of a controlled substance, a beverage containing alcohol, on or about March 15, 2016?

2. If so, in addition to an order to refrain hereafter from engaging in such discrimination, what conditions on 3G's future conduct relevant to the discrimination found, and what reasonable measures to correct the discrimination and remedy any harm caused by it should be ordered?

IV. FINDINGS OF FACT

1. Carl High Pine is a 59-year-old Native American who has lived in Billings, Montana for most of his life, having moved there with his parents when a child. His father was murdered in Billings, while High Pine was still young. High Pine, based upon his life experience, felt that Native Americans were not treated fairly. He had experienced unfair treatment. He had observed unfair treatment. He had heard of unfair treatment. He was familiar with the history of how Native Americans had been treated. He interacted cautiously with the mainstream society in Billings, which was predominantly white, because of his view of the treatment he and his people had received and were still receiving.

2. On or about March 15, 2016, High Pine drove to the 3G's Convenience Store at 4410 State Avenue, Billings, Montana, to purchase an alcoholic beverage. He shopped frequently at a 3G's Convenience Store at 702 S. 27th, which was very near his home in Billings and sometimes at other 3G's stores in Billings, as he did on

+this occasion. His 22-year-old grandson was in the car with him, and remained in the car, while High Pine entered the store and located the beverage he wanted – a single serving bottle of champagne.

3. High Pine approached the counter with his item. There were two women behind that counter. High Pine presented his item for purchase to the woman standing immediately behind the counter, who seemed to him to be a clerk, to whom he also offered his current Northern Cheyenne tribal ID, Exhibit 1. High Pine testified that the other woman, who was behind the clerk, told the clerk not to accept his tribal ID, saying “We don’t accept those.” He testified that the clerk said to him, “We don’t accept those – tribal IDs – do you have a Montana driver’s license?” High Pine testified he protested that the tribal ID was “just as good as a Montana driver’s license.” The woman who appeared to be a supervisor said “We don’t have to serve you. There’s plenty of other stores you can go to.” High Pine said, “I understand that, but I came here.”¹

4. Since his protests about refusal of his tribal ID had been ignored, High Pine produced his current Montana driver’s license, Exhibit 1 (two-sided copies of both his driver’s license and his tribal ID), as the clerk had asked him. The clerk then sold him the single serving bottle of champagne. High Pine left the store feeling that once again members of the mainstream society had discriminated against him, an experience that had been happening to him frequently during his adult life, and which he again found painful, unfair and frustrating.

5. High Pine believed 3G’s was illegally refusing to accept his tribal ID. He is not an attorney, but he did know that some years before, the Montana legislature had approved a bill modifying Montana laws to establish that tribal IDs were equivalent to Montana drivers’ licenses for identification purposes. His belief that 3G’s was breaking the law in refusing his tribal ID made the experience of refusal to accept his tribal ID as identification sufficient to buy the single serving bottle of champagne more painful and more frustrating.

6. Within days after the refusal to accept his tribal ID as proof of identity at the 3G’s Convenience Store at 4410 State Avenue, High Pine returned to that store and took a picture with his cell phone of the sign posted therein near the cash register. Exhibit 2. Under a “3G’s” logo, the sign read, “3G’s will not accept these forms of ID for the purchase of alcohol or tobacco,” with a list of the unacceptable IDs beneath the statement. The list read, “Broken or taped ID, Expired ID, Paper

¹ During his testimony, High Pine used various words to describe what the two women said. The substance of his testimony is set forth in this finding.

copies, Out of state ID, Tribal ID, Military ID.” Beneath the list the sign read, “No ID – No Sale!” Beneath that line, the sign read, “We Check IDs for Alcohol and Cigarettes.” Signs in the 3G’s stores regarding identification for purchase of alcohol or tobacco purchases will be called “ID signs.”²

7. Owner Larry Grosulak and Operations Manager Dan Grosulak each denied that 3G’s has or ever has had, over the course of 3G’s existence, a policy to refuse tribal IDs. Both testified regarding the actual “identification policy” of 3G’s with regard to sales of alcohol and tobacco, as controlled substances. At the time of 3G’s refusal of High Pine’s tribal ID, and at present, Dan Grosulak was and still is the member of management responsible for the content of 3G’s ID signs. He made the ID signs in use at the time of 3G’s refusal of High Pine’s tribal ID, as “strong as possible,” so that an employee in the store alone at night could point to the sign and tell a dissatisfied customer whose ID was being refused that it was store policy and nothing personal. Those were the ID signs in place for a considerable time before 3G’s refusal of High Pine’s tribal ID. Dan Grosulak also testified that 3G’s ID signs were not consistent with its actual identification policy.

8. Dan Grosulak was also responsible for training of new employees, for a considerable time before 3G’s refusal of High Pine’s tribal ID and until the present. He said that 3G’s policy was to back up its employees on every refusal to sell alcohol to a would-be customer. 3G’s wanted the employees to know that their employer would always support and never question a decision they make to refuse to sell alcohol based upon doubts whether it would be a legal sale. 3G’s goal in this respect was to have “zero bad sales,” even though this meant that sometimes 3G’s store might lose some “good sales” and alienate some customers. Alienating customers and losing a few sales was more acceptable than having a “bad sale” with potential monetary and sometimes criminal sanctions resulting for the employee and for 3G’s.

9. Dan Grosulak testified that 3G’s would never train new employees or allow any employees to refuse all tribal IDs for identity verification. He testified that 3G’s accepts and that he himself had accepted tribal IDs for alcohol or tobacco purchases. 3G’s policy was that any time a customer not personally known to the employee sought to buy a controlled substance, the employee should ask the customer to provide an acceptable form of identification. If the customer presented an ID with which the employee was unfamiliar or of which the employee was unaware, or which the employee was uncomfortable taking, the employee should ask for a second form of ID. Dan Grosulak also testified that training of employees regarding acceptable

² Another sign near each cash register reminded customers of the legal ages (in terms of the date the customer had to be born before) for purchase of alcohol or tobacco. Exhibit 5.

identification for purchase of controlled substances included recognition that because of the various tribal IDs produced by various tribes, an employee could be uncertain or uncomfortable with accepting a particular tribal ID. New employees were trained that when that happened, the customer should be asked for a second form of identification because of that uncertainty or discomfort.

10. After the commencement of the investigation triggered by High Pine's complaint of discrimination, Dan Grosulak testified that he had to revisit his practice of making his ID information sheets as "strong as possible" to support his employees, in light of what he called the "guilty until proven innocent" attitude of the HRB investigator. In fact, the mere presence of the "strong as possible" sign was illegally discriminatory,³ which could be the reason that Dan Grosulak thought the investigator had a "guilty until proven innocent" attitude toward 3G's. In any event, he developed a less extreme sign (Exhibit 4). No longer did the sign affirmatively state that 3G's would not accept a tribal ID for the purchase of alcohol or tobacco, as it had before (Exhibit 2). Instead, the sign now said that 3G's "reserves the right to request a second form of ID for age and identify [sic] verification," including but not limited to "Broken or taped ID, Expired ID, Paper copies, Out of state ID, Tribal ID, Military ID, Montana State ID." Exhibit 4. According to Dan Grosulak's testimony, this sign was actually a more accurate statement of the policy that had always applied in 3G's stores.⁴

11. Training new employees of 3G's involved three steps.
 - A. Interviewing prospective employees, which Dan Grosulak does.
 - B. Taking the prospective employee through a two hour skill or till test (done by Dan Grosulak or by a manager or supervisor level employee) to evaluate the prospective employee and to verify that the prospective employee has the necessary skills (counting money, using a register and so forth) for the job.
 - C. Taking the prospective employee through a four hour till test, during which the prospective employee works behind the counter for four hours, with an experienced supervisor also

³ Mont. Code Ann. §49-2-304(1)(b) reads, in pertinent part, "Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner . . . or employee of a public accommodation: . . . to . . . display [or] post . . . a written or printed communication [or] notice . . . which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race" A posted sign announcing that 3G's would not accept tribal IDs was a statement that 3G's would deny the holder of a tribal ID (necessarily a member of that tribe) sales of controlled substances based upon the presentation of that tribal ID, in violation of the law.

⁴ As stated in Finding 20, *infra*, the current ID sign is still in violation of some of the provisions of Mont. Code Ann. §49-2-304(1)(b).

behind the counter to observe, assist and train the prospective employee on using the main register, taking checks, selling controlled substances, etc. The prospective employee greets and serves the customers that come into the store, and the supervisor assists and instructs the prospective employee. This third step is intended to verify that the new hire is ready and able to understand, remember and apply 3G's policies.

12. The situation High Pine described on or about March 15, 2016 (cashier with a supervisor overseeing her work), more likely than not was a four hour till test. 3G's report that because the date was uncertain, it could not identify what four hour till test High Pine was describing, and could not identify who was working at the time. During a till test, a prospective employee is not allowed to rely on personal knowledge of the customer, and must ask every customer for an ID on sales of alcohol or tobacco, regardless of age or appearance. It appears that the supervisor doing the training during the four hour till test when High Pine's tribal ID was refused was, at the very least, emphasizing refusing an ID about which the employee had any uncertainty.

13. It is also possible that when High Pine attempted to purchase the single-serving bottle of alcoholic beverage, he misunderstood part of the training as illegal discrimination. However, High Pine's testimony under oath that the supervisor directed the clerk not to accept the tribal ID because "We [3G's] don't accept those" makes it definitely more likely than not that refusal to accept High Pine's tribal ID, consistent with the sign on the counter stating that 3G's did not accept tribal IDs, was a rejection of a facially valid tribal ID rather than a training exercise.

14. High Pine had sometimes visited with one of the store managers, Tammy Mauch, a woman who described herself as half Native American. During her 11 years working for 3G's, Mauch often worked at the South 27th Street Store and sometimes worked at the store at 4410 State. She testified that High Pine had talked to her about how Native Americans should file lawsuits over their treatment by mainstream society. This conversation was not about tribal IDs but about the demonstrations and political turmoil over the Dakota Access Pipeline, an oil pipeline at that time being built by Energy Transfer Partners to transport oil, 1,200 miles east, from North Dakota's Bakken field to a refinery in central Illinois. Mauch did not recall any particular discussions with High Pine about tribal IDs. Mauch's testimony about what High Pine said to her does not refute or call into doubt his testimony about the clerk and supervisor refusing his tribal ID on or about March 15, 2016.

15. “Responsible Alcohol Sales and Service Training,” Exhibit 6, is the manual the state provides for the use of employers (including 3G’s) to train employees regarding alcohol sales and services. Mauch reviewed page 29 of Exhibit 6, “Responsible Alcohol Sales and Service Training,” published by the Montana Department of Revenue. She agreed that a tribal ID is valid as a primary ID except when a secondary identification is appropriately requested under the circumstances described in the manual. The relevant paragraph on p. 29, “Montana Tribal Identifications” reads:

Many tribal identification cards do not use an expiration date or identification number. Some use the social security number as the identification number. Some may have a picture of the member when the person was a child. This is common and does not necessarily indicate a fake or altered identification. When this happens, ask for a secondary form of picture identification. This secondary form of identification can be any thing so long as it has a photo to help identify the person.

[Emphasis added]. The logical implication (“negative pregnant”) of the emphasized sentences is that except when the picture of the member is a childhood picture, the tribal ID is good and no secondary form of identification is required.

16. At first reading, the sentences that precede “Some may have a picture of the member when the person was a child” look like they could all be within the circumstances for which a request for secondary identification is proper. Indeed, the Hearing Officer asked Mauch about that and she agreed that except in situations involving no expiration date or identification number, or a social security number used as the identification number, or a picture of the member as a child, requesting a secondary picture ID was appropriate. However, careful consideration reveals that “when this happens” can only refer to the situation when a tribal ID has a picture of the member when that person was a child. In that situation, and only in that situation, does asking for a “secondary form of picture identification” make sense. If the tribal ID has no expiration date or identification number, asking for a secondary picture ID adds nothing. If the tribal ID uses the social security number as the identification number, asking for a secondary picture ID adds nothing. The only circumstance in which asking for a secondary picture ID makes sense is when the tribal ID has a picture of the member as a child, and the secondary picture identification showing the adult will be more useful than that childhood picture.

17. Even if Mauch was correct, and the absence of an identification number of High Pine’s tribal ID could have been a justification for requesting secondary identification, there is no evidence of record that either of the employees mentioned any reason for rejecting High Pine’s tribal ID. 3G’s argued that the patent difference

between his tribal ID and his driver's license – the two identifications showed different home addresses – justified refusing his tribal ID. However, High Pine's testimony is the only evidence about the conversation between High Pine and the two employees behind the counter. There is no evidence at all in his testimony that either of the employees behind the counter actually did more than glance at his tribal ID. There is no evidence at all of any mention of the absence of an identification number. As for the address difference, High Pine's testimony indicated that his tribal ID was rejected before his Montana driver's license was provided to the employees. Thus, it was impossible for the employees to reject the tribal ID because of the different address on the driver's license.

18. Mauch also testified she probably wouldn't card High Pine based on his appearance, and would not card him anyway because she knew him. She also testified that she would ask for his ID when he used a bank card for a purchase. High Pine tried to establish that this had only happened "recently" (i.e., after he had filed his discrimination complaint), but it was less than clear if that was true.

19. Dan Grosulak and his father, Larry Grosulak, testified that they would not and did not train or direct their employees to refuse tribal IDs that the employees were familiar with, aware of or comfortable taking. They credibly testified that it would be a bad business practice for 3G's, with the numbers of Native American customers they serve, to have and to enforce such a policy. The Hearing Officer agrees that such a policy would be a bad business practice for 3G's.

20. Nonetheless, 3G's management made public statements in their public premises (Exhibit 2) that 3G's would not accept tribal IDs for the purchase of alcohol or tobacco, until after High Pine's tribal ID had been refused and investigation into his discrimination complaint had begun. So long as those public statements remained in the stores, rejection of a customer's valid, undamaged and untaped current tribal ID as sufficient identification was disparate treatment of Native Americans, which was ratified by 3G's. Even after the signs were changed to the assertion that 3G's reserved the right to require secondary identification when a tribal ID was presented, exercise of that right despite presentation of a customer's valid, undamaged and untaped current tribal ID is still illegal. Returning again to Mont. Code Ann. §49-2-304(1)(b) p. 7, footnote 3, "Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner . . . or employee of a public accommodation: . . . to . . . display [or] post . . . a written or printed communication [or] notice . . . which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race" A posted sign announcing that 3G's reserved the right to require secondary identification despite

presentation of a customer's [apparently valid, undamaged and untaped current] tribal ID (the holder of which would necessarily be Native American) for purchase of controlled substances was still an announcement that 3G's reserved the right to discriminate against Native Americans, in violation of the law.

21. From the evidence presented by 3G's it is also more likely than not that its training of employees sent new employees a mixed message. The training materials stated that a current and valid tribal ID was a valid and appropriate means of customer identification. According to the testimony of its witnesses, what 3G's told new employees about tribal IDs was "there are lots of tribal IDs around – if you are unsure of the tribal ID or you feel uncomfortable about honoring the tribal ID, reject it." Employees uncomfortable with Native American customers could hear this to authorize rejecting tribal IDs because of discomfort with how a customer looks or talks. Indeed, an unidentified supervisor told an unidentified clerk, on or about March 15, 2016, that "We don't accept those [tribal IDs]," which the clerk then repeated to High Pine. The only customers with tribal IDs were and still are Native Americans. Race is a protected class under the Montana Human Rights Act. Refusing to accept tribal IDs as sufficient identification for purchase of alcohol or tobacco is to "refuse, withhold from or deny" persons tendering such identification equal access to some of the "services [and] goods" offered by 3G's.

22. Finally, the evidence presented by 3G's indicated it did not identify the employees with whom High Pine interacted on or about March 15, 2016, and therefore could not rebut High Pine's account. 3G's assertion was that it couldn't identify the employees without the precise date of the interaction. However, the evidence did not indicate whether 3G's kept records of when 4-hour till training was provided, or at least had the capacity to determine when there were two employees, one a supervisor, behind the counter for an entire 4-hour period. In other words, the evidence did not indicate whether 3G's, exercising due diligence, could have located the names of employees who engaged in 4-hour till training on or around March 15, 2016, and then ask them about any such interaction with High Pine. The evidence also did not indicate what, if anything, 3G's did to ascertain whether it could have located those names. There is no evidence that 3G's made a reasonably thorough search for the persons on duty when High Pine's tribal ID was refused. Thus, it is unclear whether 3G's might have identified those two employees and then contacted them. Without a better explanation of why 3G's could not identify which employees might have interacted with High Pine, little credence is given to 3G's assertions that it was intrinsically unlikely that the incident to which High Pine swore under oath ever happened. His testimony under oath was not directly contravened, and it remains unclear whether 3G's actually looked to identify employees who could be asked about the High Pine interaction.

23. High Pine suffered emotional distress from the refusal of his tribal ID. There is no evidence that his emotional distress from the refusal required counseling or medical treatment. There is ample evidence that High Pine already had emotional scars from a lifetime of experiences of demonstrable discriminatory animus directed against him, and recalled those experiences when again faced with discrimination based upon his race.

24. High Pine's situation is quite similar to that of two young black men in Billings, Montana, who were refused rental housing because of race. The present instance and the Billings instance each involved racial bias. Each instance was brief. Each instance involved little to no overt hostility expressed toward the targets of the discrimination. Each instance clearly involved violation of a right protected under Montana law. The only significant differences are (1) High Pine was a regular customer of 3G's while the two black men had only the one brief interaction with the landlady regarding the denial of the housing; and (2) High Pine had a mental disability as result of past emotional trauma, involving depression and memory problems. Both of these factors indicate that High Pine was more likely to experience stronger negative emotions and likely to be more vulnerable to those negative emotions when they resulted from illegal racial discrimination. Therefore, more likely than not High Pine suffered more emotional distress than the plaintiffs in *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Therefore, High Pine is entitled to recover the sum of \$7,000.00, which is twice the amount awarded to each plaintiff in *Johnson*. No larger award can be reasonably supported on the limited evidence of the depth of his emotional distress.

25. To address 3G's conduct in requiring secondary identification from Native American customers presenting valid, undamaged and untaped current tribal IDs, injunctive relief is required, and additional affirmative relief requiring 3G's to provide training to employees who work in the stores, to create or to modify policies and practices to conform to the law, and to modify its current ID signs to conform to the law is reasonable.

V. DISCUSSION⁵

Montana law prohibits a public accommodation from denying its services to a person because of race. Mont. Code Ann. §49-2-304(1)(a) says this, in pertinent part.

⁵ 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.

Discrimination in public accommodations. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation: (2)(a) to refuse, withhold from, or deny to a person any of its services, goods, . . . or privileges because of . . . race

A public accommodation is a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons, including but not limited to a bar, restaurant, hotel, resort, barbershop, beauty parlor or hospital and all other public amusement and business establishments. Mont. Code Ann. §49-2-101(20)(a). A store offering sales of goods and services to the public is a public accommodation. The 3G's store at 4410 State Avenue, Billings, Montana, is and at all times was a public accommodation.

There was no legitimate argument in this case that there was any reasonable grounds to reject valid tribal IDs whenever they were proffered to verify identity, whether for purchase of alcohol or tobacco or for purposes of accepting a credit or debit card. Indeed, it is contrary to the economic interests of 3G's to reject tribal IDs, and 3G's "zero bad sales" efforts are commendable.

What is not commendable is that 3G's training encouraged its new employees to look more closely and be more suspicious about tribal IDs. It is also unfortunate that all employees were told denial of such an ID because of discomfort about honoring it would be supported. It is illegal to put a sign on the counter saying that 3G's did not accept tribal IDs for purchase of tobacco or alcohol. Based upon High Pine's testimony, the long term results of that training and signage reached the point at which a supervisor training a new employee behind the counter instructed that new employee to refuse High Pine's tribal ID because "We don't accept those."

The Grosulaks knew or reasonably should have known that under Montana law, a tribal ID was, in substance, the functional equivalent of a Montana driver's licence and several other forms of identification, for multiple purposes. A Lexis search of the Montana Code Annotated for current appearances of "tribal identification" yielded a dozen different Montana statutes. Several statutes involving sale of alcohol state directly or clearly indicate this functional equivalence. A tribal ID, as well as a driver's license, a state-issued or military identification card or a valid United States or foreign passport, is an acceptable identification to buy a keg of beer. Mont. Code Ann. §16-3-322(1)(a). Also, it is illegal falsely to procure any

identification card or to alter any statements in any identification card for use in buying alcohol. Mont. Code Ann. §16-6-305(3).⁶

Another statute dealing with restrictions upon the retail sale of beer and wine provides a statutory defense to prosecution for sale of alcoholic beverages to an underage person, for a retailer like 3G's and its employees. One element of that defense is proof the purchaser both falsely claimed to be of legal age and also presented some documentary evidence "that an ordinary and prudent person would accept" as legitimate that the purchaser's claim of being of legal age was the truth. Mont. Code Ann. §16-3-301(7)(a).⁷ Obviously, such identification currently includes tribal IDs. 3G's management knew or reasonably should have known about these instances of approval of tribal IDs for purchase of alcohol.

To establish a case of public accommodation discrimination because of protected class status, High Pine could prove a prima facie case with either indirect or direct evidence. In this case, he presented direct evidence. Direct evidence is evidence in the form of testimony from a witness who actually saw or heard or otherwise witnessed in person the event at issue. Direct evidence speaks directly to the issue, requiring no support by other evidence, in itself, if true, establishing that the (in this case) discrimination occurred without resort to inference or presumption. Black's Law Dictionary, p. 460 (6th Ed. 1990); Mont. Code Ann. §26-1-102(5); *Laudert v. Richland County Sheriff's Dept.*, ¶¶25-27, 2000 MT 218, 301 Mont. 114, 7 P.3d 386.⁸

⁶ For the other ten examples, see "APPENDIX A: Additional Statutes Equating Tribal IDs with Other IDs," pp. 19-21, *infra*.

⁷ Mont/ Code Ann. §16-3-301(4)(a) states, that it is unlawful for any licensee, employee, or any other person to provide any alcoholic beverage to any person under 21 years of age. Mont. Code Ann. §16-3-301(7) states, "For purposes of 45-5-623 and this title, the establishment of the following facts by a person making a sale of alcoholic beverages to a person under the legal age constitutes prima facie evidence of innocence and a defense to a prosecution for sale of alcoholic beverages to a person under the legal age: (a) the purchaser falsely represented and supported with documentary evidence that an ordinary and prudent person would accept that the purchaser was of legal age to purchase alcoholic beverages; (b) the appearance of the purchaser was such that an ordinary and prudent person would believe the purchaser to be of legal age to purchase alcoholic beverages; and (c) the sale was made in good faith and in reasonable reliance upon the representation and appearance of the purchaser that the purchaser was of legal age to purchase alcoholic beverages." [Emphasis supplied.]

⁸ The direct evidence method of proof adopted in *Laudert* was from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (in which "a majority of the court concluded that Hopkins had submitted sufficient evidence to prove that gender stereotyping was a motivating factor in Price Waterhouse's denial of partnership." The further "mixed motive" holding of Price Waterhouse (later superseded by statute), was also adopted by *Laudert* but is inapplicable in the present case.

Since High Pine's direct evidence proved illegal discrimination, the burden of persuasion (not just the burden of production of evidence) shifted to 3G's, to prove either that the direct evidence is not credible or that any illegal motive played no role in the action taken.

If a charging party has established a prima facie case with direct evidence of unlawful discrimination or illegal retaliation, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief.

Admin. R. Mont. 24.9.610(5). 3G's had to meet this burden with sufficient proof to show a non-discriminatory legal justification or to discredit the direct evidence or the reason for the adverse action. 3G's failed to do so. Making as "strong as possible" a statement to support clerks working alone at night did not justify making an illegal statement of discriminatory intent and engaging in that illegal discrimination. The direct evidence of actual discrimination remained credible, and the publication of the illegal intent rendered the testimony that management never intended to discriminate against Native Americans nugatory. The fact of the disparate treatment of Native Americans established the illegal act.

The relief the department may award to a charging party subjected to illegal discrimination includes any reasonable measure to rectify any resulting harm he suffered. Mont. Code Ann. § 49-2-506(1)(b). *Great Falls Pub. Schools v. Johnson*, ¶¶36-37, 2001 MT 95, 305 Mont. 200, 26 P.3d 734; see also, *Vainio v. Brookshire*, 258 Mont. 273, 277, 852 P.2d 596, 599 (1993). Damages in discrimination cases are intended to ensure that the victim is made whole.⁹ *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); cf. also, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Damage awards must include compensation for emotional distress suffered as a result of the illegal discrimination when the facts show that the charging party has suffered from emotional distress. The value of this emotional distress can be proved by testimony or inferred from circumstances. E.g., *Vortex Fishing Sys. v. Foss*, ¶33, 2001 MT 312, 308 Mont. 38, 38 P.3d 836. Given the broad remedial nature of Mont. Code Ann. § 49-2-506(1)(b) the tort standard for proof in independent actions for emotional distress does not apply to civil rights cases brought pursuant to the Montana Human Rights Act. *Id.*

⁹ For example, just as it is under federal law, a charging party's back pay period may be reduced if he or she would have been unavailable for employment due to nondiscriminatory reasons and therefore would not have been able to earn the amounts claimed in any event. Recovery of back pay the charging party could not have earned would go beyond making the charging party whole and provide a windfall. A. Larson, 2 *Employment Discrimination* (ed. 1988) §55.37(a)(iii).

The factors defining the size of an award of emotional distress damages here is similar to those in *Johnson v. Hale* (9th Cir.1991), 13 F.3d 1351; cited in *Vortex* at ¶133. In *Johnson*, the plaintiffs (African-Americans) suffered emotional distress resulting from the refusal of a landlady 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 landlady's refusal to rent to them because of their race occurred with no one else present to witness their humiliation.¹⁰ 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 of Appeals increased their awards from \$125.00 to \$3,500.00 each for the overt racial discrimination, noting that the "sum would appear to be the minimum that finds support in recent cases . . ." *Id.* at 1354.

High Pine was a regular customer of 3G's while the two young men in *Johnson* had only the one brief interaction regarding the denial of the housing, and High Pine had a mental disability as result of past emotional trauma, involving depression and memory problems. In addition, High Pine's history indicates that he has lived in Billings for much of his life, and his life experience there has left its mark upon him. As a result, the facts and law support an award for emotional distress that is twice that of each of the young men in *Johnson*.

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(1)(a). Affirmative relief in the form of both injunctive relief and training to ensure that the conduct does not recur in the future is necessary to rectify the harm in this case. In this case, injunctive relief prohibits further discrimination in public accommodation. Further affirmative relief addressing 3G's future conduct requires another amendment of the ID signs, to take out tribal IDs altogether, and requires removal from the training the inappropriate conclusion that "confusion" about tribal IDs or being "uncomfortable" with reliance upon tribal ID justifies rejecting tribal IDs, as too likely to support racial bias.

VI. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1).

¹⁰ The only persons in the store with High Pine were the two employees interacting with him. His adult grandson was in the car, but did not hear (and may not have seen) the interaction in the store.

2. 3G'S Convenience Stores violated the Montana Human Rights Act when two of its employees refused Carl High Pine's tribal ID as proof for legal purchase of alcohol on or about March 15, 2016. Mont. Code Ann. § 49-2-304(1)(a) and (b).
3. High Pine is entitled to an award of \$7,000.00 for the emotional distress he suffered as a result of the illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b).
4. The circumstances of the discrimination in this case mandate imposition of injunctive and particularized affirmative relief on 3G's to eliminate risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1) and (1)(a).

VII. ORDER

1. Judgment issues in favor of Charging Party Carl High Pine and against Respondent 3G'S Convenience Stores on the claim that 3G's violated the rights of High Pine under Mont. Code Ann. §49-2-304 for refusing to honor his tribal ID without a valid reason. 3G's is liable to and must pay to Carl High Pine the sum of \$7,000.00 for High Pine's compensable emotional distress caused by the violation of his rights. Interest accrues in accordance with law on any unpaid portion of this portion of the judgment from the date of its issuance until paid.

2. 3Gs is enjoined from engaging in any further acts of illegal discrimination against Native Americans by refusing, through any of its employees and officers, to honor valid, undamaged and untaped current tribal ID as identification for tobacco and alcohol products, and only to require secondary identification with tribal IDs that are damaged, taped, expired or otherwise demonstrably invalid, stating the specifics for the refusal at the time of the refusal, and recording the particulars of the refusal and its reasons for management to preserve and provide (upon demand) to the Montana Human Rights Bureau, as often as required, for one year following the date upon which this order becomes final and no longer subject to any review or appeal.

3. 3G's is ordered promptly to consult with the Montana Human Rights Bureau (HRB) and to develop and to implement a training plan approved by the HRB, to train its officers and supervisory employees in appropriate response to proffer of tribal IDs for purchase of alcohol and/or tobacco, and in training of all other employees that spend any time working in any of its stores, in proper response to proffer of tribal IDs for said purpose. "Proper response" in this context means to respond in compliance in each and every respect with this order. 3G's is additionally ordered to incorporate this training into all training hereafter of new employees.

4. 3Gs is further ordered to alter its ID signs to remove tribal IDs as subject to the reserved right to ask for secondary identification in addition to the tribal ID

itself. 3G's is free to make any other changes to specify kinds of IDs (except specifically tribal IDs) subject to its reserved right, such as "forged" or "altered" IDs.

5. During the process of developing and implementing said training plan, the Hearing Officer urges but does not require 3G's to have a licensed Montana attorney with experience in discrimination law review its policies, procedures, signage and advertising for its stores in Montana to ensure compliance with the Montana Human Rights Act regarding discrimination because of race or national origin.

6. 3G's must bear the costs and expenses of paragraphs 2-5.

DATED this 17th day of March, 2017.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer
Office of Administrative Hearings
Department of Labor and Industry

APPENDIX A: Additional Statutes Equating Tribal IDs with Other IDs

One method of adequately identifying an individual debtor, in a financing statement documenting a Montana Uniform Commercial Code secured transaction, is to provide the individual's name as it appears on the individual's current tribal ID. Mont. Code Ann. §30-9A-503(1)(d) and (7).

A person or business conducting business in Montana and owning or licensing computerized data that includes personal information must disclose any breach of the security of the data system to any Montana resident whose unencrypted personal information was or is reasonably believed to have been acquired by an unauthorized person through a breach of the security of a computerized data system. "Personal information" means the resident's first name or first initial and last name in combination with (among other data elements) the resident's tribal ID number, if at least name or number is not encrypted. Mont. Code Ann. §30-14-1704(4)(b)(1)(B).

A licensee or insurance-support organization conducting business in Montana and owning or licensing computerized data that includes personal information must notify any individual whose unencrypted personal information was or is reasonably believed to have been acquired by an unauthorized person through a breach of the security of a computerized data system. "Personal information" means the

individual's first name, or first initial and last name, in combination with one or more of the following data elements, when the name and the data element(s) are not encrypted:

- (A) social security number;
- (B) driver's license number, state identification card number, or tribal ID number;
- (C) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account;
- (D) medical record information;
- (E) a taxpayer identification number; or
- (F) an identity protection personal identification number issued by the United States internal revenue service.

Mont. Code Ann. §33-19-321(6)(b)(i)(B).

Identity theft is a crime in Montana, and can be either a felony or a misdemeanor depending upon the value of the economic benefit gained or sought. The gravamen of the crime is the act of obtaining or attempting to obtain personal identifying information for an unlawful purpose. "Personal identifying information" includes name, date of birth, address, telephone number, driver's license number, social security number or other federal government identification number, tribal ID number, place of employment, employee identification number, mother's maiden name, financial institution account number, credit card number, or similar identifying information relating to a person. Mont. Code Ann. §45-6-332(3).

Displaying, providing or performing obscene material to minors is a crime in Montana, but this law does not apply to conduct that otherwise would break this law if the person engaging in the conduct had reasonable cause to believe the minor was 18 years old. "Reasonable cause" includes being shown a draft card, driver's license, marriage license, birth certificate, educational identification card, government identification card, tribal ID or other official or apparently official card or document indicating that the person is 18 years of age. Mont. Code Ann. 45-8-206(2)(a).

A concealed weapon permit requires permit holder identification, part of which can be satisfied with a driver's license number, state identification card number, or tribal ID number. Mont. Code Ann. §45-8-322(3).

A Montana driver's license can be suspended without a preliminary hearing upon sufficient evidence that the licensee is under 21 years of age and altered the licensee's or another's driver's license, identification card, or tribal ID to obtain

alcohol or authorized another to use the licensee's driver's license, identification card, or tribal ID to obtain alcohol. Mont. Code Ann. §61-5-206(1)(c) and (d).

It is a misdemeanor (a) to have or to use a canceled, revoked, suspended, fictitious, or altered driver's license, identification card, or tribal ID; (b) to lend the person's driver's license, identification card, or tribal ID to any other person or knowingly permit its use by another; (c) to display or represent as one's own any driver's license, identification card, or tribal ID not issued to the person; or (d) to permit any unlawful use of a driver's license, identification card, or tribal ID issued to the person. Mont. Code Ann. §61-5-302(1) through (3) and (6).

An applicant for a resident fishing, hunting or trapping must present a valid Montana driver's license, Montana driver's examiner's identification card, tribal ID, or other identification specified by the department. Mont. Code Ann. §87-2-106(1).

An applicant for wildlife conservation license must present a valid Montana driver's license, a Montana driver's examiner's identification card, a tribal ID, or other identification specified by the department. Mont. Code Ann. §87-2-202(1).

* * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Carl High Pine, Charging Party; and 3G's Stores, Respondent and its attorney, Eric Edward Nord:

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) and (4).

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

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

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

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

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

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

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

High Pine HOD.tsp