

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1755-2017:

TRACY LENHARDT, )  
 )  
 Charging Party, )  
 ) **HEARING OFFICER DECISION**  
 vs. ) **AND NOTICE OF ISSUANCE OF**  
 ) **ADMINISTRATIVE DECISION**  
 SYSCO CORPORATION, )  
 )  
 Respondent. )

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**I. PROCEDURAL AND PRELIMINARY MATTERS**

On September 21, 2016, Tracy Lenhardt filed a complaint with the Montana Human Rights Bureau alleging Sysco Corporation discriminated against her on the basis of gender by subjecting her to different terms and conditions of employment as compared to her male co-workers; not offering her comparable employment after her job was eliminated; and paying her less in wages/salary throughout her career.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on October 17, 2017 at the Law Offices of Cashmore and Grant in Billings, Montana. Charles Cashmore, Attorney at Law, represented Lenhardt. Joshua Kirkpatrick, Attorney at Law, represented Sysco.

At hearing, Lenhardt and Rebecca Abbate, Sysco Lead Human Resources Business Partner, testified under oath. Charging Party's Exhibits 1 and 1A were admitted, as were Respondent's Exhibits 103, 104, 105 and 109.

At the close of Lenhardt's case, Sysco moved for judgment as a matter of law pursuant to Rule 50, Mont. R. Civ. P., arguing that Lenhardt had not met her burden in proving disparate treatment under the Montana Human Rights Act. The parties' arguments were taken under advisement. It is unnecessary to address Sysco's motion due to the ultimate finding in this case.

After the close of hearing, Lenhardt filed a Motion to Supplement the Record seeking the admission of Exhibit 3. On November 30, 2017, the Hearing Officer issued an order denying the request.

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 December 18, 2017. 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 Sysco Corporation discriminate against Tracy Lenhardt on the basis of gender (female), in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.

2. If Sysco Corporation did illegally discriminate against Tracy Lenhardt as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Sysco Corporation did illegally discriminate against Tracy Lenhardt 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. FINDINGS OF FACT**

1. Sysco Corporation (Sysco) is an international distribution services company. Sysco sells, markets, and distributes food products and supplies to restaurants, healthcare and educational facilities, lodging establishments, and other customers who prepare meals outside the home.

2. Sysco Montana is an independent Operating Company, which Sysco refers to as an "OpCo."

3. From June 20, 1994 through November 2012, Lenhardt worked for Sysco Montana. Lenhardt worked a variety of positions with her final position being Vice President of Merchandising and Marketing.

4. In 2012, Sysco created eight new Marketing Merchandising Vice President (MMVP) positions. Initially, two females, including Lenhardt, and six males were

selected as MMVPs. Each of the original candidates had worked as Vice Presidents at different OpCos around the country.

5. Alan Hasty, Sysco Senior Vice President of Field Operations, selected Lenhardt and the other individuals for the MMVP position. Hasty remained Lenhardt's direct supervisor throughout her employment as a MMVP. Hasty supervised all MMVPs.

6. Hasty and Lenhardt had a generally positive working relationship. Hasty routinely gave Lenhardt positive performance reviews. However, Hasty, on at least two occasions made belittling comments about females. One occasions involved Hasty commenting that women should remain home "barefoot and pregnant." The other situation involved Hasty making disparaging comments about the Women's Foodservice Forum.

7. Hasty did not have the authority to set compensation for MMVPs without the approval of Sysco's Human Resources department.

8. The compensation structure for the MMVP position consisted of base pay, short-term incentives and long-term incentives.

9. The MMVP has a pay grade assigned to it to establish base pay. The pay grade consists of a pay range including a minimum, midpoint and maximum. Factors considered in setting MMVP base pay include: salaries from prior employment, location, performance (including results and approach), skills (including critical and breadth), recent pay adjustment, job movement, and length of service. Base pay changes are effective in September of each year.

10. When people with less experience are hired, Sysco typically pays them between the minimum and midpoint in the pay grade.

11. Short-term incentive pay is equal to 40% of a MMVP's base pay, assuming an on-target performance. 75% of the short-term incentive pay is based upon Sysco's financial performance. Within that 75%, 50% is based upon the MMVP's individual market performance and 25% is based upon Sysco's overall performance. The remaining 25% of the short-term incentive pay is based upon the MMVP's completion of certain strategic business objectives (SBO's). The same short-term incentive structure existed from 2014 through 2016. Based upon their individual performance, MMVPs could receive different short-term incentive pay. Short-term incentive pay is paid in August of each year.

12. Long-term incentive pay is a bonus in the form of restricted stock units (RSUs) and was fixed at 30% of the MMVP's base salary. Sysco's corporate board approves RSUs in February of each year and vests 1/3 of the RSU grant per year for three years.

13. Actual compensation consists of what an employee actually receives. Target compensation consists of what an employee is eligible to earn based upon on-target performance and employment through the RSU vesting date.

14. Sysco employed the following MMVPs in 2014, 2015 and 2016:

<u>NAME</u>	<u>GENDER</u>	<u>BEGINNING DATE</u>	<u>ENDING DATE</u>	<u>LOCATION</u>
Mark Kleiman	Male	12/07/15	Present	Ohio
Charles Baldwin	Male	5/13/13	Present	Michigan
Ruth Warthen	Female	11/19/12	Present	Maryland
Kevin Sloan	Male	11/19/12	Present	Washington
Tracy Lenhardt	Female	11/19/12	7/2/16	Montana
Elizabeth Miles	Female	1/18/16	Present	Texas
Eric Zeilor	Male	11/19/12	7/2/16	Connecticut
William Turner	Male	7/1/12	Present	Tennessee
Robert Mondragon	Male	11/12/12	1/1/16	Pennsylvania
Bobby Rose	Male	11/19/12	1/1/16	Texas

15. The base pay for the MMVPs in 2014 ranged from \$147,084.00 to \$170,914.32. Eric Zeilor received the lowest base pay, and William Turner received the greatest base pay. Lenhardt's base pay in 2014 was \$147,804.96.

16. The base pay for the MMVPs in 2015 ranged from \$150,761.02 to \$178,605.54. Again, Zeilor received the lowest base pay, and Turner received the greatest base pay. Lenhardt's base pay in 2015 was \$151,500.04.

17. The MMVPs received a wide range of total compensation in 2014. Total compensation ranged from \$226,289.92 to \$280,601.94. Again, Zeilor received the lowest total compensation. Robert Mondragon received the greatest total compensation. Lenhardt's total compensation for 2014 was \$226,587.92.

18. The MMVPs received a wide range of total compensation in 2015. Total compensation ranged from \$242,314.30 to \$307,625.77. Lenhardt received the

lowest total compensation in 2015, with Turner receiving the greatest total compensation.

19. The MMVPs received a wide range of total compensation in 2016. Total compensation ranged from \$288,049.93 to \$326,995.19. Ruth Warthen received the least total compensation for 2016. Charles Baldwin again received the greatest total compensation.

20. Zeilor was the lowest paid MMVP in 2014. Lenhardt was the lowest paid MMVP in 2015 due, in part, to a decrease in her short-term incentive compensation caused by the poor performance of her market. In some years, Lenhardt received less bonus than her target compensation.

21. In 2015 and 2016, Elizabeth Miles, a female, was the second highest paid MMVP.

22. Each MMVP supervised a different number of OpCo's. Each MMVP was located in a different geographic region and had different performance levels, different years of service, and different skill levels.

23. The MMVPs were not similarly situated despite being hired at the same time for the newly created position in 2012. Sysco set the pay of each MMVP according to the factors outlined in Finding of Fact No. 9. Those factors were different for each MMVP hired in 2012 and contributed to the differences in the pay of each MMVP.

24. Sysco did not rely upon the MMVP's gender when setting their base pay in 2012; nor did Sysco rely upon the MMVP's gender when determining short-term or long-term incentives each year.

25. In April 2016, Sysco decided to eliminate the positions of Lenhardt and Zeilor as part of an overall corporate restructuring<sup>1</sup>. The determination to eliminate Lenhardt's and Zeilor's positions was because the two had scored the lowest on Sysco's Work-Force Planning document, which reflected their respective performances in their roles.

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<sup>1</sup>Lenhardt is not making "a claim for discriminatory or otherwise wrongful elimination of her position." Lenhardt Resp. Brief, p. 5 (Filed Dec. 18, 2017).

26. Upon the elimination of her MMVP position effective July 2, 2016, Sysco offered Lenhardt a new position with its Intermountain OpCo in Salt Lake City, Utah. The new position offered Lenhardt the same salary but would be a demotion. The new position would also have required her family to move from Billings where they had lived since 1994. Lenhardt declined the offer.

27. Lenhardt felt the Vice President of Merchandising, whom she supervised and whom she would have to displace if she were to remain in the Billings market, was a good performer. Lenhardt felt it would have been unfair to remove him to create an opportunity for her in the Billings market.

28. Lenhardt had told three other Sysco employees that she would be prepared to move for a promotion.

29. Zeilor, whose MMVP position was also eliminated, was offered the choice of two other positions at his same salary, both of which were demotions in rank. One of the offered positions, which Zeilor accepted, allowed him to remain in his home city because Sysco was prepared to move another employee from that position.

30. Sysco did not discriminate against Lenhardt on the basis of gender with respect to her pay or with respect to its offer of employment after the elimination of her MMVP position.

#### IV. DISCUSSION

Montana law prohibits employers from “discriminat[ing] against a person in compensation or in a term, condition, or privilege of employment because of sex.” Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.604(2). Montana law also prohibits retaliation against an employee by employer for engaging in protected activity. Mont. Code Ann. § 49-2-301. The provisions of the Montana Human Rights Act prohibiting discrimination mirror the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e et. seq.

Lenhardt does not argue discrimination based upon disparate impact. Rather, Lenhardt argues Sysco deliberately treated her differently than her male colleagues due to her gender. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978). “Proof of discriminatory motive is required under a disparate treatment theory, although such motive may be inferred in some situations from the mere fact of differences in treatment.” *Foster v. Arcata Associates*,

*Inc.*, 772 F.2d 1453 (9<sup>th</sup> Cir. 1985)(citing *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 335-36 n. 15, 97 S. Ct. 1843, 1854 n. 15 (1977)).

This case is clearly an indirect evidence case because the parties dispute both the reasons for the employment action and whether such action amounts to illegal discrimination. In contrast, direct evidence cases are those in which the parties do not dispute the reasons for the employer's action, but only whether such action is illegal discrimination. *Reeves v. Dairy Queen, Inc.*, 1998 MT 13 ¶ 16, 287 Mont. 196, 953 P.2d 703. Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas*.<sup>2</sup> *See, e.g., Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984). Under that burden-shifting scheme, a claimant who makes out a *prima facie* case of discrimination is entitled to judgment if the respondent does not come forward to rebut the *prima facie* case with evidence that the adverse employment action taken was done for legitimate business reasons.

In order to establish her *prima facie* case of discrimination, Lenhardt must prove: (a) she belongs to a protected class; (b) she was qualified for the opportunity afforded by the respondent; and (c) she was denied the opportunity in circumstances raising a reasonable inference that she was treated differently because of her membership in a protected class. Admin. R. Mont. 24.9.610(2). Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If Lenhardt proves a *prima facie* case of discrimination by a preponderance of the evidence, the burden shifts to Sysco to articulate a legitimate, non-discriminatory reason for the conduct in question. *Heiat v. Eastern Mont. College*, 912 P.2d 787, 791 (1996).

If Sysco succeeds in proving the existence of legitimate, non-discriminatory reasons for the conduct in question, the burden then shifts to Lenhardt to establish "by a preponderance of the evidence that the legitimate reasons offered by [Sysco] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6<sup>th</sup> Cir. 2000). "[T]he plaintiff must produce sufficient

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<sup>2</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him." *Id.*, citing *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003). At this point, the burden of production then merges with the burden of "persuading the court that she has been the victim of intentional discrimination. She 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." *Burdine*, 450 U.S. at 256. See also *Heiat*, 912 P.2d at 792.

A. Lenhardt Has Not Shown Sysco Discriminated Against Her On The Basis Of Gender When Setting Her Pay

Lenhardt became a MMVP in 2012 when Sysco created nine new MMVP positions. Lenhardt was one of two females hired for this newly created position. Lenhardt continued as a MMVP until her position was eliminated in July 2016. At that time, Lenhardt was one of three female MMVPs. There were five male MMVPs at the time of Lenhardt's separation.

Lenhardt proved she was at least as qualified as her colleagues for the MMVP position based upon her professional training and experience, as well as her years of service with Sysco. Further, the evidence suggests Lenhardt performed the job duties of the MMVP position competently. The relevant difference between Lenhardt and the other higher paid MMVPs was gender. Sysco, during Lenhardt's tenure as a MMVP, paid the majority of Lenhardt's male colleagues more for comparable work than they did her. Lenhardt carried her burden of proving her *prima facie* case with respect to the wage disparity between her and other male MMVPs.

Lenhardt's *prima facie* case under *McDonnell Douglas* raised an inference of discrimination with respect to the wage disparity issue. The burden then shifted to Sysco to produce "... a legitimate, non-discriminatory reason for the pay disparity." *Burdine*, 450 U.S. at 255-56. Sysco bears only "... the burden of production of a legitimate nondiscriminatory reason." *Crockett*, 761 P.2d at 817. The employer satisfies its burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 2748, 125 L. Ed. 2d 407 (1993). The employer need not prove that the tendered reason actually motivated its behavior, as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff. See *Burdine*, 450 U.S. at 253, 254, 256. The determination of whether



a defendant has sustained its burden of production involves no credibility assessment. *St. Mary's Honor Ctr.*, 509 U.S. at 509.

Sysco sets a pay grade for a particular position that reflects what other companies pay for a similar type of job. Sysco sets employee pay according to a variety of factors, including salary from prior employment, location of the position, individual job performance, skills, recent pay adjustment, job movement and length of service. Sysco's executive team sets a salary range for a particular position and then determines pay for an individual hired for a particular position based upon the factors noted above. Sysco has met its burden of articulating legitimate, nondiscriminatory reasons for its actions with respect to Lenhardt's wages. Therefore, the burden returns to Lenhardt to establish by a preponderance of the evidence that the proffered justifications are actually a pretext for gender-based discrimination. See *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11<sup>th</sup> Cir. 1992).

Lenhardt must now show that a discriminatory reason more likely than not motivated Sysco to pay her less or that Sysco's proffered explanation is not worthy of belief. "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Heiat*, at 328, 912 P.2d at 791 (quoting *St. Mary's Honor Center* 509 U.S. at 515). See also *Vortex Fishing Sys, Inc. v. Foss*, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). "An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action." *Cellini v. Harcourt Brace & Co.*, 51 F. Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing *Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991)). See also, *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987)(noting that a reason honestly described but poorly founded is not pretext that shows discrimination and that no matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and §1981 do not interfere unless the employment decision emanates from discrimination)

If the charging party succeeds in proving a *prima facie* case of disparate treatment and the fact-finder rejects or disbelieves the defendant's proffered reasons for its actions, the fact finder is permitted but is not compelled to infer that the defendant intentionally discriminated against plaintiff. *St. Mary's Honor Ctr.*, 509 U.S. at 511, 113 S. Ct. at 2749. This is because burden of persuasion remains always

with the charging party. This burden of persuasion requires Lenhardt to "prove that it was 'because of such individual[s] race, color,' etc., that [she was] denied a desired employment opportunity." *Sanchez v. City of Santa Ana*, 928 F. Supp. 1494, 1508 (1995) quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 109 S. Ct. 2115 (U.S. 1989). Where a charging party's evidence of pretext is strictly circumstantial, he or she "must produce 'specific, substantial evidence of pretext'" in order to prevail. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). See also *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004).

Lenhardt contends that she and the other individuals named MMVPs in 2012 are equal by virtue of the fact that they all started in new positions at the same time. Lenhardt argues that the work required of each MMVP is substantially similar and all MMVPs should be paid at the rate of the highest paid MMVP.

Sysco counters that all MMVPs had different performance levels and skills, which are factors Sysco considers when setting an employee's pay. Sysco argues the MMVPs do not supervise the same number of OpCos and that some of the OpCos have employees that are more difficult to supervise. Sysco argues the MMVP's rates of pay vary because they do not all have the same years of experience in their industry or even with Sysco itself. Sysco also points to the fact that MMVPs are located in different geographical areas, which affects the employee's rate of pay.

The only "specific, substantial evidence of pretext" are spreadsheets Lenhardt prepared using information she believed or assumed to be correct. Exhibit 1 is a spreadsheet showing the alleged pay disparity between Lenhardt and other MMVPs from September 21, 2014 through July 1, 2016. Exhibit 1-A is a spreadsheet prepared by Lenhardt that shows her purported loss in total compensation during that same period. Exhibit 1-A is, as Lenhardt put it, what she would have made if she had Turner's salary.

Lenhardt conceded at hearing that Exhibit 1 included individuals who were not in the MMVP position during the entirety of the relevant period and she guessed at the individual's salaries. Lenhardt also testified she believed Zeilor made \$4,000.00 more per year than what was reflected in Sysco's payroll information based upon an uncompleted personnel change form she had seen. Lenhardt conceded that Exhibit 1 excludes the second highest paid MMVP for 2015 and 2016, who is a female and included Lenhardt's speculation about the compensation of Kevin Sloan and Eric Zeilor. Exhibit 1-A includes Lenhardt's calculations of what she would have been paid if she had the same base pay as other MMVPs and achieved the same level of

performance. Basically, the only evidence Lenhardt produced was created according to her own assumptions and conclusions rather than any factual evidence that would have allowed the hearing officer to fully assess the propriety of Sysco's pay structure.

Clearly, male MMVPs and female MMVPs received different pay during the period in question. However, there was also a difference in pay amongst male MMVPs and amongst female MMVPs during that period. For example, Ruth Warthen, a female MMVP, earned more than Lenhardt in 2014 and 2015, and there is a wide range of salaries for the male MMVPs during that period. Further, Zeilor, a male employee, was frequently the lowest paid MMVP. These facts weaken Lenhardt's claim that Sysco paid her less than other MMVPs due to her gender.

To bolster her position, Lenhardt points to remarks made by Hasty, who was her supervisor, which she contends shows the disparity between her pay and the pay of other MMVPs was due to an unlawful discriminatory motive. Lenhardt testified that Hasty, in response to a dispute involving Lenhardt and another female employee, commented, "Tracy, that's why women should be barefoot and pregnant and stay at home." Lenhardt also testified that Hasty was critical of the Women's Foodservice Forum and described Lenhardt's desire to invite male employees to that forum as being ridiculous.

Hasty's comments were clearly boorish and offensive. However, Lenhardt did not report either comment to Sysco's Human Resources and the comments do not appear to have negatively impacted her working relationship with Hasty, which she described as generally positive. The evidences shows Hasty's comments were isolated instances, and he was not a decision maker when it came to Lenhardt's compensation. Comments by non-decision-makers are insufficient to establish pretext. See, e.g., *Mondero v. Salt River Project*, 400 F.3d 1207, 1213 (9th Cir. 2005); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 646 (9th Cir. 2003).

Lenhardt has failed to show the reasons offered by Sysco for the differences in the pay rates of its MMVPs were false or otherwise unworthy of belief. Lenhardt has failed to show Sysco's pay decisions regarding its MMVPs were influenced in any way by the MMVP's gender. Therefore, Lenhardt has failed to show Sysco discriminated against her due to her gender when setting her pay.

B. Lenhardt Has Not Shown Sysco Discriminated Against Her On The Basis Of Gender With Respect To The July 2016 Offer Of Employment.

Lenhardt does not argue that Sysco's decision to eliminate her position was discriminatory. Rather, Lenhardt contends Sysco's offer of employment was discriminatory as compared to the offer of employment extended to Zeilor after their respective positions were eliminated.

Again, Lenhardt has not offered any direct evidence in support of her contention. Therefore, the three-tier standard of proof articulated in *McDonnell Douglas* also applies to this portion of her claim.

Lenhardt was at least as qualified as Zeilor and the only relevant difference between Lenhardt and Zeilor was gender. Therefore, Lenhardt has established a *prima facie* case, which, therefore, raises the presumption that Sysco unlawfully discriminated against her in making an offer of employment to her that was different than what it offered to Zeilor. Sysco must now offer a legitimate, non-discriminatory reason for the difference in the offers made to Lenhardt and Zeilor.

Sysco argues the offers extended to Lenhardt and Zeilor were based upon a consideration of various factors, including the availability of jobs within Sysco, individual employee performance, employee location, and the employee's willingness to relocate, as well as the performance of the potentially displaced OpCo employee's performance. Sysco concedes the offers extended to Lenhardt and Zeilor required Lenhardt to relocate from Billings to Salt Lake City, Utah and did not require Zeilor to relocate. Sysco points to Lenhardt having told three other employees that she was willing to move for her job and her testimony that the employee she would have had to displaced if she was to remain in Billings was a good performer.

Again, Sysco's burden at this point is a light one. Sysco has articulated legitimate, nondiscriminatory reasons for its actions with respect to Lenhardt's claim that the difference in the offers made to her and Zeilor after the elimination of her position was discriminatory. Therefore, Lenhardt must now show Sysco's proffered reasons are actually pretext for gender-based discrimination.

Lenhardt argues Abbate was unable to testify with any specificity as to why the offers extended to Lenhardt and Zeilor were different. Lenhardt argues she and Zeilor were similarly situated but Zeilor was treated more favorably than she in the terms, conditions, and privileges of employment relative to their respective offers.

As noted above, where the charging party's evidence of pretext is strictly circumstantial, he or she "must produce 'specific, substantial evidence of pretext'" in order to prevail. See *Wallis*, 26 F.3d at 890. Lenhardt has failed to meet both her burden of production and her burden of persuasion. Lenhardt and Zeilor were clearly presented with offers of similar employment but one required location while the other did not. Lenhardt offered no evidence showing that the employee Zeilor displaced in his home market was a decent performer or at least as good of a performer as the employee she would have had to displace in the Billings market. While Lenhardt and Zeilor may have been similarly situated in terms of performance and experience, there is no evidence showing that the markets where they wished to remain were so similarly situated. The hearing officer is not persuaded that the offer Sysco extended to Lenhardt, which required her to relocate to Salt Lake City, was due to her gender and not the business reasons offered by Sysco. Therefore, Lenhardt has failed to show that Sysco discriminated against her on the basis of gender with respect to the offer extended to her after the elimination of her MMVP position.

## V. CONCLUSIONS OF LAW

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

2. Tracy Lenhardt has failed to prove that Sysco Corporation discriminated against her on the basis of gender with respect to her rate of pay and the offer of alternative employment made to her after the elimination of her MMVP position. Mont. Code Ann. §§ 49-2-303(1).

3. For purposes of Mont. Code Ann. § 49-2-505(8), Sysco Corporation is the prevailing party.

## VI. ORDER

Judgment is granted in favor of Sysco Corporation and against Tracy Lenhardt. Lenhardt's complaint is dismissed with prejudice as lacking merit.

DATED: this 20th day of March, 2018.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Tracy Lenhardt, and her attorney, Charles Cashmore, Cashmore & Grant PC; and Respondent Sysco Corporation, and its attorney, Josh Kirkpatrick, Littler, Mendelson 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)©

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. For copies of the original transcript, please contact Big Sky Reporting in Billings, Montana.

Lenhardt.HOD.chp