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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1913-2016

SARAH MACIAG,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE**
	)	**OF ADMINISTRATIVE DECISION**
REC ADVANCED SILICON MATERIALS, LLC,	)	
	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Sarah Maciag brought this complaint alleging her former employer, REC Advanced Silicon Materials, LLC (REC), retaliated against her for filing a complaint with the Montana Human Rights Bureau in June 2013 by discharging her from her employment.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on February 27, 2018 in Butte, Montana. Scott Peterson, Attorney at Law, represented Maciag. Patrick Fleming, Attorney at Law, represented REC. Ed Stepan, Human Resources Manager, appeared as REC's designated representative.

Maciag, Stepan, Scott Brown, Shawn Fitzgerald, Casey Pesanti, Brad Salvagni, Dana Fisher, John Yount, and Shawn Berger testified under oath. Stepan and Dan Holland testified via Rule 30(b)(6), Mont. R. Civ. P., deposition designation. The parties stipulated to the admission of Charging Party's Exhibits 1 through 6 and 8 through 10 and Respondent's Exhibits 101 through 105 and 107.

At the close of Maciag's case in chief, REC moved for a directed verdict arguing that Maciag had failed to offer sufficient evidence to meet her burden in

showing a *prima facie* case of retaliation. The Hearing Officer took the motion under advisement. As discussed below, Maciag successfully offered evidence sufficient to prevail in this matter. Therefore, REC's motion is rendered moot due to the outcome in this case.

At hearing, Maciag attempted to offer testimony of employees who attended the March 27, 2014 safety meeting in an effort to show her behavior was not as objectionable as described by Fisher and Yount. Maciag argued that Rule 801(d)(2)(D), Mont. R. Evid. allows for testimony from employees about statements made during the course and scope of their employment.

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. An admission by party-opponent is not considered hearsay and includes a "statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship." Rule 801(d)(2)(D), M.R.Evid.

Maciag cites *Pappas v. Middle Earth Condo. Ass'n*, 963 F2d 534, 537 (2d Cir. 1992) for the proposition that the testimony of employees concerning what other employees said about Maciag's behavior is admissible. The court in *Pappas* held that a party seeking to admit a statement as a vicarious admission under Fed. R. Evid. 801(d)(2)(D), which is substantially similar to the Montana rule, must demonstrate: "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency." *Id*. at 538.

REC rightly argues that the key issue is whether the statements were made "within the scope of the agency or employment." Agency is defined as the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. *Restatement (Second) of Agency* § 1. Scope of employment is defined as including "the activities in which an employee engages in the carrying out of the employer's business which are reasonably foreseeable by the employer." *Black's Law Dictionary* (6th ed. 1990).

The statements Maciag seeks to admit are those purportedly made by other workers and not by members of management or those with the authority to act on behalf of and bind REC. While those witnesses are free to offer testimony about what they observed during the March 27, 2014 safety meeting, it would be improper

to allow them to testify about what they heard others say about Maciag's behavior during that meeting. Therefore, REC's objection is sustained and the testimony offered that strays beyond the permissible bounds of hearsay and its exceptions will be disregarded.

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 April 9, 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 REC Advanced Silicon Materials, LLC retaliate against Sarah Maciag for protected activity in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If REC Advanced Silicon Materials, LLC did illegally retaliate against Sarah Maciag 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 REC Advanced Silicon Materials, LLC did illegally retaliate against Sarah Maciag as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar practices?

III. FINDINGS OF FACT

1. Sarah Maciag began working for REC Advanced Silicon Materials, LLC (REC) in August 1997.

2. At all times relevant to this matter, Maciag was a resident of Butte-Silver Bow County.

3. REC is a company with its main headquarters in Butte-Silver Bow County.

4. Maciag received generally positive performance evaluations prior to 2004 when REC stopped conducting such appraisals. Maciag enjoyed her job and took great pride in her job performance. Maciag was generally well-liked and considered a good employee.

5. Maciag began her employment at REC as a Silane Operator. During most of her employment at REC, Maciag was the lone female operator.

6. Maciag later worked as a Non-Destructive Evaluation Technician (NDE Tech), which required her to judge the safety of REC equipment without causing any damage. After two of the NDE Tech positions were eliminated due to a workforce reduction, Maciag returned to working as a Silane Operator.

7. In December 2013, Maciag filed a charge of discrimination with the Montana Human Rights Bureau (HRB) alleging disparate treatment based upon sex by subjecting her to different terms and conditions of employment. Maciag's complaint was based upon her having been laid off as an NDE Tech.

8. On or about February 24, 2014, Maciag amended her HRB complaint to include an allegation of retaliation for protected activity. HRB subsequently issued a no cause finding on June 3, 2014.[1]

9. On March 27, 2014, Maciag attended a safety meeting. REC conducts monthly safety meetings so workers can review any incident reports issued during the previous month and any other safety issues that affected REC and/or its employees.

10. Maciag arrived late to the safety meeting, because she was conducting "blow downs" in Phase 1 and Phase 2 of the facility. After arriving at the meeting that had already started, Maciag was unable to find a chair or a place to sit on the back counter in the room. Maciag ended up standing near the middle of the room.

11. Maciag quickly confronted Health and Safety Manager Dana Fisher and Safety Coordinator John Yount about safety issues she had observed in the plant. Specifically, Maciag questioned the age of the Butte plant and how it compared to an REC plant in Moses Lake, Washington that had experienced an incident in 2012 that injured several REC employees. Maciag questioned whether one NDE Tech was enough to ensure the plant was being operated safely.

12. Maciag was aggressive in her questioning of Fisher and Yount, who were responsible for conducting the safety meeting. While Maciag may have felt she was voicing valid concerns about REC's commitment to employee safety, the concerns she was trying to state were lost in her combative and disruptive approach. Fisher

[1]The December 2013 HRB complaint is not at issue in this case and is currently pending before the Butte-Silverbow County District Court.

ultimately told Maciag that she was not going to argue with her anymore and abruptly ended the meeting[2].

13. Fisher was upset enough with what had occurred at the safety meeting that she quickly approached Dan Holland, who was the Silane Production Manager at the time, and told him what had happened. Fisher told Holland that she was not going to be treated like that and that he "needed to do something with her," referring to Maciag.

14. Yount did not try to intervene between Fisher and Maciag, who he described as being in Fisher's face. Yount felt Maciag's behavior "threw the meeting off." Yount reported Maciag's behavior to management following the meeting. Yount felt Maciag should have been fired based solely upon her behavior toward Fisher during the safety meeting.

15. Maciag left the meeting with another employee with the intention of returning to work. Shortly thereafter, Maciag heard her name being yelled and turned to observe Holland yelling at her that she needed to clean out her locker and be walked to the door. Maciag understood being walked to the door meant that she was being fired.

16. Maciag did as Holland instructed and took off her protective gear and cleaned out her locker. Maciag then proceeded to the office of Deanna Worley, Vice President of Human Resources. Worley informed Maciag she was not in the right frame of mind to continue working that day and she was being sent home. Worley explained to Maciag that she was being placed on Decision Making Leave (DML) due to her behavior at the Safety Meeting, and she would be contacted about when to return to work.

17. REC has a Corrective Action Process that is set forth in its employee handbook. Corrective action generally starts with a documented counseling; proceeds to a written reminder; escalates to a decision making leave/final reminder; and can result in termination. The Corrective Action Process includes the following provision that is underscored: "The Company retains the discretion to skip any or all steps in the process. Depending on the seriousness of the problem/behavior, any level of

[2]Fisher testified the testing protocol had not changed since the reduction in the number of NDE Techs and the work was still getting done. There was no evidence offered showing Fisher's testimony regarding the lack of safety issues at the plant at the time of the March 27, 2014 safety meeting to be untrue or incorrect.

corrective action may be implemented, up to and including termination, unless expressly prohibited by law." Ex. 4.

18. All corrective action is required to be documented and is retained in the employee's file. An employee's Corrective Action generally becomes inactive according to the following schedule:

> Documented Counseling - 6 months
> Written Reminder - 12 months
> Decision Making Leave - 12 months
> Final Reminder - 12 months

Ex. 4.

19. On April 4, 2014, REC provided Maciag with a letter explaining the reason for her DML. The letter read:

> It was reported to management that you conducted yourself in an unprofessional and disruptive manner during the safety meeting. The Company sent you home with pay pending an investigation of the incident. The investigation concluded that your behavior was unprofessional, disruptive, and accusatory/defamatory towards Dana Fisher in particular, and towards REC Silicon management in general. Your comments alleging 'management's lack of concern for employee safety and lives' are untrue, very destructive to morale, and counter to the objectives of employee safety meetings and Company policy. This type of behavior is in direct violation of REC Silicon's 'Code of Conduct' and 'Basic Safety, Standards, and Conduct' policy and will not be tolerated by REC Silicon management.

Ex. 5.

20. Included with the letter was an Action Plan that Maciag was required to sign and to commit to in order to continue in her employment. The Action Plan outlined what behaviors were expected from Maciag, such as agreeing to refrain from conduct that has an adverse effect on REC and/or other employees; agreeing to report complaints via REC's Complaint Procedure; and agreeing to conduct herself in a professional and respectful manner and refraining from disruptive conduct at company meetings and training sessions. The Action Plan also included the warning

that failure to comply with the terms and conditions stated in the Action Plan would result in the termination of Maciag's employment. Ex. 6.

21. Maciag initially balked at signing the Action Plan without having the opportunity to have legal counsel review the document. REC allowed Maciag additional time to obtain counsel and to allow him to review the document.

22. On April 7, 2014, Maciag and her attorney signed the Action Plan with Maciag writing on the document, "I agree to the Action Plan herein, but I do not agree that there is any basis for it or with the contents of Ed Stephen's [sic] letter of April 14, 2014." Ex. 6.

23. The term of Action Plan was indefinite and was intended to cover the remainder of Maciag's employment.

24. Maciag was more careful with her attitude while at work after being placed on the Action Plan. Maciag worked without incident until February 2015.

25. On or about February 26, 2015, Maciag inadvertently overfilled the lime silo. Maciag was scheduled to take a half day off that day and reported the incident to employees at the Operator Shack before leaving work that day. Maciag did not think it was that big of an issue and it would be easily corrected by her co-workers.

26. Brad Salvagni assisted in cleaning up the lime silo overfill. Salvagni had observed this type of incident occur before as it had happened twice the week before. Salvagni did not report the incident to his supervisor because he did not want anyone getting in trouble.

27. Holland had observed Salvagni and other silane operators in the mix room cleaning up the overfill. Holland directed the shift supervisor to prepare an incident report documenting the February 26, 2015 incident because a "high alarm" had been issued. A "high alarm" had been issued because the lime silo had been overfilled twice the previous week. At that time, Holland was not aware that Maciag was responsible for the silo being overfilled. The incident report was reviewed and cleared without disciplinary action being discussed with or taken against Maciag.

28. On March 14, 2015, Maciag reported to Shawn Berger, who was her supervisor at the time, that she had found a master log that included an incident report detailing the February 26, 2015 incident. Maciag felt it was an example of

Holland treating her differently than other employees and was upset at what she perceived to be the unfairness of the situation.

29. After talking with Berger about the incident report, Maciag began performing her assigned work duties. Salvagni observed Maciag installing a filter by herself. Filters are usually installed by two employees so Salvagni approached Maciag and offered his help. Salvagni noticed Maciag was quiet when he approached her about the filter. Salvagni had also noticed Maciag was quiet the previous day and he asked her what was wrong. Maciag accused Salvagni and Casey Pesanti of reporting the February 26, 2015 incident. Salvagni became upset at what he perceived to be Maciag calling him a rat. Maciag and Salvagni spoke in raised voices until Salvagni ultimately walked away from Maciag.

30. Salvagni found Pesanti after his confrontation with Maciag and told him that Maciag had called the two of them rats. Both Salvagni and Pesanti were upset at the prospect of a co-worker calling them rats.

31. Maciag did not call either Salvagni or Pesanti rats. However, Maciag did imply, if not outright accuse, Salvagni of reporting she was responsible for the lime silo overfill in February 2015.

32. While Salvagni and Pesanti were upset at the idea of being called rats, neither had experienced similar issues with Maciag in the past. Petty fights and disagreements were a regular occurrence amongst REC employees due to the long hours and working conditions that could often be stressful. The disagreements never lasted long and most employees got over hurt feelings and feelings of anger quickly.

33. Berger reported the incident between Salvagni and Maciag to Holland. Holland then reported the incident to Stepan. Stepan directed Holland to have Berger find out what he could regarding the incident and report to them his findings.

34. Stepan, Holland, Berger, Rich Green, Director of Operations, and Laurie Edwards, a human resources representative who reports to Stepan, met with Maciag when she returned to work. Stepan started the meeting by asking Maciag about the incident between her and Salvagni. Maciag denied there had been a confrontation with Salvagni or any type of disagreement. Holland, feeling there was no point in questioning Maciag due to her denials, called an end to the meeting, and Maciag was sent home.

35. Meetings were also held with Salvagni and Pesanti. Salvagni reported that Maciag had been upset with the incident report having been written and had accused him of ratting her out. Ex. 1.

36. After meeting with Maciag, Salvagni and Pesanti, Stepan, Holland, and Green decided to discharge Maciag after deciding that her behavior on March 14, 2015 violated the terms of her Action Plan.

37. On March 24, 2015, Maciag was given the termination letter, which outlined the reasons for her discharge. The letter was signed by Holland. Ex. 8.

38. REC imposed disciplinary action, including termination, against Maciag in retaliation for her filing a charge of discrimination with HRB. REC did not have a legitimate, non-discriminatory reason for its actions.

39. REC's retaliatory conduct has caused Maciag harm, including lost past and future wages, humiliation and emotional distress for which she is entitled to damages.

40. REC's retaliatory actions have caused Maciag harm, including lost past and future wages, humiliation and emotional distress for which she is entitled to damages.

41. Maciag would have been eligible for a raise in March 2015 that would have raised her hourly wage to $32.63. During a bi-weekly period, Maciag had eight hours of built-in overtime. Over a bi-weekly period, Maciag would have earned $2,740.96.

42. Between March 2015 and January 15, 2018 (the original date of hearing), Maciag would have had 73 bi-weekly pay periods if she had not been terminated by REC. In total, Maciag would have received $200,090.08 in base pay from REC during that period.

43. Maciag was eligible for benefits as an REC employee that had an annual value of $21,773.88. Maciag is entitled to $60,966.86 for the value of the benefits denied her as a result of REC's retaliatory conduct ($21,773.88 x 2.8 years).

44. Maciag typically had voluntary overtime in excess of the built-in eight hours of overtime. It is too speculative to award damages on the premise that she

would have or could have worked those additional overtime hours if REC had not terminated her.

45. Maciag is entitled to $261,056.94 in back pay. Maciag testified, based upon wages earned and benefits received, her offset should be $134,255.68. However, she included $12,240.00, which was the value of unemployment benefits received after her separation from REC, which are not typically used to reduce a back pay award. Therefore, Maciag's back pay award should be offset by $122,015.68 for a total of $139,041.08. Maciag is also entitled to interest on the lost wages through the date of hearing on January 25, 2018 at the rate of 10% per annum. That interest amounts to $19,732.41, for a total of $158,773.49. See Addendum A.

46. Maciag exercised reasonable diligence in attempting to seek and to obtain other employment. Maciag and her family desire to remain in Butte, Montana. Jobs offering the wages Maciag earned at REC are not readily available in that area of Montana. Maciag sought and obtained full-time employment that is not substantially equivalent to her former employment with REC in that it offers less by way of hours and compensation. Maciag has made a good faith effort to mitigate her damages since her termination from REC.

47. Maciag is entitled to an award of four years of front pay in the amount of $285,059.84, which represents her bi-weekly pay of $2,740.96 paid for 104 bi-weekly pay periods, and $87,095.52 for the value of benefits she would have enjoyed if she would have been allowed to remain in her employment at REC for a total of $372,155.36. Maciag estimated her total offsets based on her wages and benefits received from her employment with the county at $139,027.20. Maciag also included an estimate of potential overtime, which, again, is too speculative to rely upon in figuring an award of damages. Maciag is entitled to a front pay award of $233,128.16, the present value of which is $210.983.22. See Addendum A.

48. Maciag suffered emotional distress as a result of REC's retaliatory actions. $30,000.00 represents a reasonable amount of compensation for the discrimination she suffered.

49. 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.

IV. DISCUSSION

The Montana Human Rights Act (MHRA) prohibits retaliation in both public and private employment because of protected activity. Mont. Code. Ann. §§ 49-2-301 and 49-3-209. Admin. R. Mont. 24.9.603, "Retaliation and Coercion Prohibited," states, in pertinent part, the elements involved in a retaliation claim.

> (1) It is unlawful to retaliate against . . . a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation. "Protected activity" means the exercise of rights under the act or code and may include:
> . . . .
> (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code.
> (2) Significant adverse acts may include the following:
> . . . .
> (b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;
> . . . .
> (3) 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.

A *prima facie* retaliation case is established by proof that (1) the employee engaged in protected activity under MHRA; (2) the employer thereafter took an adverse employment action against that employee; and (3) there is a causal connection between the protected activity and the employer's adverse employment action. *Rolison v. Bozeman Deaconess Health Services, Inc.*, ¶16, 2005 MT 95, 326 Mont. 491, 111 P.3d 202; *Beaver v. DNRC*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. As in a discrimination claim, Maciag 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 establishing the *prima facie* case of retaliation. "Direct evidence is evidence, which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Stegall v. Citadel Broad.Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003)(citations omitted). However, a charging party rarely has direct evidence of retaliatory or discriminatory intent. *Brewer v. Bd. of Trs.*, 407 F.Supp. 2d 946, 978 (C.D. Ill. 2005). A charging party may rely upon specific and substantial circumstantial evidence when establishing the *prima facie* retaliation case. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Place, Inc. v. Costa,* 539 U.S. 90, 100 (2003)(citation omitted).

A. Maciag has Established a *Prima Facie* Retaliation Case

REC argues Maciag failed to offer even one scintilla of direct evidence in support of her claim of retaliation. Maciag readily concedes she did not offer any direct evidence of retaliation but argues she has ample circumstantial evidence to establish a *prima facie* retaliation case.

1. Maciag has shown she engaged in protected activity and suffered a materially adverse employment action.

It is undisputed Maciag engaged in protected activity when she filed a Charge of Discrimination with HRB in December 2013. Maciag suffered an adverse action when she was placed on a DML and Action Plan in April 2014 and terminated in March 2015. To be actionable, actions by the employer must be materially adverse in that the action "must be real and significant." *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1265 (10th Cir. 2007). Employees are not shielded from "trivial harms" and "petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2415 (2006). "[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id*. Thus, the issue becomes whether REC's actions were materially adverse and "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2409. *See Roberts v. Roadway Express,* 149 F.3d 1098 (10th Cir. 1998)(evidence showing plaintiff received several warnings and suspensions before being terminated, all of which were later withdrawn by the employer, sufficient to show adverse employment action).

It stands to reason that an employee facing a DML and an Action Plan that was indefinite in its term and required "strict compliance" with the plan or face immediate termination may well be dissuaded from making or supporting a charge of discrimination. One has to wonder if there is an employee in the modern workplace who could survive such terms throughout the entirety of their employment. It seems unlikely. REC essentially subjected Maciag to the proverbial sword of Damocles following what appears to have been a misguided effort to address serious and legitimate safety concerns at a mandatory ***safety meeting***. Each day Maciag reported for work she was subjected to the implied threat that this could be her last day of her employment lest she step out of line, raise her voice or speak sharply to anyone in the workplace. Any employee would fear engaging in protected activity under those circumstances. Similarly, given that termination occurred one year after the imposition of the DML and Action Plan, a reasonable employee would be dissuaded from making or support a charge of discrimination knowing that the employer was prepared to put an employee who engaged in protected activity in a situation where anything and everything could result in that employee's termination even when that employee had worked for the employee for almost 17 years with little to no performance issues. This is particularly true where, in a case such as this, the situation that gave rise to the ultimate adverse act - the termination of a 17-year career - was a petty disagreement that would have most likely resolved itself but for the draconian Action Plan put in place a year earlier. Therefore, Maciag has satisfied the first two elements of the *prima facie* case.

2. Maciag has shown a causal connection between her protected activity and the materially adverse employment action.

What remains in dispute is whether Maciag can satisfy the final element of the *prima facie* case by showing a causal connection exists between her December 2013 protected activity and REC's actions in March 2014 and March 2015.

Neither party directly addressed the application of Admin. R. Mont. 24.9.603(3) in this case. As noted above, Admin. R. Mont. 24.9.603(3) gives rise to a disputable presumption that an adverse action was taken in retaliation for protected activity 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. The preponderance of the evidence shows Stepan and other members of management had actual or constructive knowledge of Maciag's December 2013 charge of discrimination, as well as her later amended charge of discrimination in February 2014. HRB did not issue its final investigative report until June 2014. Maciag was placed on a DML and an

Action Plan that was indefinite in its terms in March 2014. Therefore, there is a disputable presumption that, at the very least, the DML and Action Plan were issued in retaliation for Maciag's protected activity.

Maciag argues that a causal connection can be found by the change in treatment Maciag experienced shortly after filing her charge with HRB. Maciag testified members of management stopped looking at her or acknowledging her while at work. However, she concedes that such conduct is not a material adverse action on its own, but contends it is evidence of the change in attitude towards her by REC management after the filing of her HRB complaint. *See Strother v. University of S. Cal. Permanante Med. Grp.*, 79 F.3d 859 (9th Cir. 1996)("Mere ostracism in the workplace is not enough to show an adverse employment decision.").

Timing of the adverse action in relation to the protected activity may serve as evidence of a retaliatory intent of the employer. "Temporal proximity between the protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Bell v. Clackamas County*, 341 F.3d 858, No. 01-35790, slip op. At 12406 (9th Cir. August 29, 2003). Proximity alone may justify an inference of retaliation, but only where the temporal proximity is "very close." *Clark County School District v. Breeden*, 532 US 268, 273, 121 S. Ct. 1508, 149 L.3d 2d 509 (2001)(citations omitted); *see also Pardi v. Kaiser Permanante Hosp., Inc.*, 389 F.3d 840, 850 (9th Cir. 1998)("When adverse employment decisions closely follow complaints of discrimination, retaliatory intent may be inferred."). However, when timing is not sufficiently close, the timing of the adverse act and the protected activity may give rise to an inference of causation. *See Stegall*,, 350 F.3d at 1067-70(nine days between plaintiff's complaints of discrimination and her termination supports finding of causation); *Nidds v. Schindler Elevator Corp*., 113 F.3d 912, 919 (9th Cir. 1996) (causation found where plaintiff was laid off four months after supervisor asked if he dropped complaint and only one month after plaintiff filed second); *Little v. BP Exploration & Oil Co.,* 265 F.3d 357, 365 (6th Cir. 2001)(termination less than one year after filing of complaint sufficient to raise inference of causation); *but see Manatt v. Bank of Am.,* 339 F.3d 792 (9th Cir. 2003)(nine months between the protected activity and complained of employer action too long to support an inference of retaliation); *Haywood v. Vincent*, 323 F.3d 524, 532 (7th Cir. 2003) (termination one year after employer learned plaintiff had filed a complaint alleging discrimination too long to raise inference of causation).

In this case, the timing of the DML and Action Plan raises at least an inference that the actions were caused by Maciag's protected activity just a few months earlier. However, the timing of the discharge, which occurred more than one year after the

initial protected activity, makes the finding of causation more dubious. Still, causation, not temporal proximity, is the element that Maciag must prove in order to succeed in establishing her *prima facie* retaliation case.

> Temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Porter v. Cal. Dep't. Of Corr., 419 F.3d 885, 895 (9th Cir. 2005)(citation omitted).

Maciag had no significant discipline in her personnel file prior to December 2013. There is evidence showing REC management had addressed concerns regarding Maciag's attitude and confrontational approach prior to her filing her initial charge of discrimination with HRB in December 2013. However, none of those issues resulted in a formal disciplinary action being taken against Maciag. Maciag had generally positive performance evaluations and it appears that many of her co-workers liked her and enjoyed working with her. Despite all of this, REC placed Maciag on a DML and implemented an Action Plan after one incident in which she challenged Fisher and Yount during a safety meeting.

REC's Corrective Action Process generally requires a documented counseling prior to more severe punishments such as DML and termination being imposed upon the employee. REC skipped over every step of its Corrective Action Process and went directly to the DML and an Action Plan when disciplining Maciag in April 2014. While its Corrective Action Process allows for management to skip any step in the progressive discipline process when it deems appropriate, it was never really explained why a DML and Action Plan was necessary to correct issues with Maciag's behavior at work. There was no previous formal discipline issued regarding similar issues and, while Maciag is clearly not afraid to confront others when she does have issues, there is no real evidence showing she regularly engaged in disruptive or offensive behavior at work. Further, there was no real explanation as to why the Action Plan needed to be indefinite in its term when REC's policies provide for other forms of discipline having finite terms.

Also troublesome are the terms of the Action Plan. REC's policy requires the employee to draft the proposed Action Plan, which must be approved by REC prior to the employee returning from a DML. Maciag did not draft, nor was she consulted,

about the terms of the Action Plan prior to its implementation, which is contrary to REC's policy. Further, the terms of the Action Plan required Maciag to be held to "strict compliance" with the plan or face immediate termination. The Action Plan was indefinite in its term and was intended to cover "the remainder of [Maciag's] time at REC" despite REC's policy allowing for disciplinary actions to "fall off" an employee's record at set intervals. The deviations from REC's Corrective Action Process raise at least an inference that the disciplinary actions issued as a result of the March 27, 2014 safety meeting resulted from Maciag filing her HRB complaint three months earlier.

Further bolstering Maciag's *prima facie* case is the fact that the discipline she received appears to be different than discipline other employees have received for similar behavior. For example, there was testimony that Holland called another employee a "fucking retard" in front of other employees. There was no evidence showing Holland received a DML and Action Plan for what is objectively offensive behavior. There was testimony from several witnesses that employees regularly have verbal disputes. However, there was no evidence showing any discipline was ever issued to employees for such behavior.

The deviations from its own polices, as well as the difference in discipline issued to employees who had engaged in disruptive or offensive behavior at work, establish the final element of Maciag's prima facie retaliation case. Maciag has met her burden using substantial and credible circumstantial evidence. Therefore, REC is now left with the burden of producing evidence of legitimate, nondiscriminatory reasons for the challenged action. Admin. R. Mont. 24.9.610(3).

3. REC has articulated a legitimate nondiscriminatory reason for its actions against Maciag.

A legitimate business reason is "neither false, whimsical, arbitrary or capricious, and it must have logical relationship to the needs of the business." *Buck v. Billings Montana Chevrolet, Inc.*, 248 Mont. 276, 281-32, 811 P.2d 537, 540 (1991). The employer's burden is satisfied if it simply explains what it has done or produces evidence of legitimate nondiscriminatory reasons for its actions. *Tex. Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 256 (1981). If the employer meets its burden, the presumption of discrimination created by the *prima face* case disappears.

REC argues that retaliation played no role in Maciag being placed on a DML and Action Plan and no role in its ultimate decision to discharge Maciag. REC points to the testimony of Fisher and Yount, both of whom were adamant that Maciag was

rude, offensive and disruptive during the March 27, 2014 safety meeting. Both Fisher and Yount testified they each requested Maciag be disciplined for her behavior. Fisher and Yount were still visibly upset when relating what had occurred at the March 27, 2014 safety meeting at the time of hearing.

REC also points to testimony of Worley and Stepan that no one spoke of Maciags's HRB complaint when management decided to place Maciag on a DML and Action Plan in March 2014. Both Worley and Stepan denied that any member of management discussed Maciag's complaint a year later when the employer ultimately terminated her employment after it was reported she got into a verbal altercation with another employee. Stepan testified the decision to discipline Maciag was due to her disruptive behavior and the impact her behavior had on employee morale.

REC also made an interesting but unpersuasive point about the March 2015 incident report. REC's counsel noted that, if REC had genuinely been interested in finding a reason to terminate Maciag, it could have relied upon the lime silo overfill incident. What makes that argument unpersuasive is the testimony of Holland and Salvagni that the lime silo has been overfilled by various employees in the past and has continued to be overfilled occasionally since March 2015. It seems unlikely that incident alone would have been sufficient to provide a legitimate reason for discipline or termination.

However, REC's argument that Maciag's behavior was disruptive and destructive to employee morale is more persuasive. An employer has the right to manage the behavior of its employees. If it finds that an employee's behavior or attitude is causing problems with other employees and thereby affecting the workplace, it does have the right and the duty to correct that behavior. In this case, there were at least three employees - Fisher, Yount, and Salvagni - expressing concerns about Maciag's behavior and the effect it had on them in the performance of their job duties. REC was required to act in the face of such complaints. Therefore, REC has articulated legitimate, nondiscriminatory reasons for its decision to place Maciag on a DML and Action Plan, as well as its ultimate decision to terminate her employment. Therefore, the burden now shifts back to Maciag to demonstrate those reasons were a pretext for retaliation. *Rolison*, ***supra***; ***see also***, Admin. R. Mont. 24.9.610(3).

4. Maciag has shown REC's proffered reasons were pretext for retaliation.

Maciag must now demonstrate that the reason offered by REC is pretext for illegal retaliation either by directly persuading the court that a discriminatory reason

more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Crockett v. Billings*, 234 Mont. 87, 95, 761 P.2d 813, 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 for the adverse action." *Heiat*, 275 Mont. a328. "An employee seeking to defeat an employer's argument that the employee was discharged for a legitimate business reason . . . must offer evidence upon which a fact finder could determine that the reason given by the employer was false, whimsical, arbitrary, or capricious or unrelated to the needs of the business." *Delaware v. K-Decorators, Inc.*, 293 Mont. 97, 112-113, 973 P.2d 818, 829 (citations omitted). At all times, Maciag retains the burden of persuading the trier of fact that she has been the victim of retaliation. *St. Mary's Honor Center*, 509 U.S. at 507; *Heiat*, 275 Mont. at 328. The trier of fact may consider the evidence used to establish the prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Reeves. v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, quoting *Burdine*, supra, at 255, n. 10.

On the first basis for establishing pretext, Maciag has not directly persuaded the hearing officer that a retaliatory purpose more likely motivated REC's actions. However, on the second basis for establishing pretext, Maciag has shown that REC's explanation is unworthy of credence. As noted above, REC deviated from its Corrective Action Process by placing Maciag on a DML without first imposing a lesser form of discipline; creating and implementing an Action Plan without Maciag's input; and imposing an Action Plan that was indefinite in its term despite its policy providing for disciplinary actions to "fall off" the employee's record at a set interval. One cannot escape the conclusion that, while Maciag's behavior most likely warranted some form of discipline, placing her on an indefinite Action Plan that required strict adherence to its terms was intended to set her up for failure.

Further, REC's decision to terminate Maciag based upon the final incident involving Salvagni is questionable. Neither Salvagni nor Pesanti reported the incident to management. It is unclear how Berger became aware of the issue, but it is clear that he is the one who reported the incident to Holland, who then reported the incident to Stepan. Salvagni testified his feelings were hurt after his interaction with Maciag but that he would have gotten over it eventually. Further, both Salvagni and Maciag testified that employees regularly had petty disagreements that would eventually resolve themselves without management getting involved.

Due to REC's deviations from its own Corrective Action Process, as well as the questionable basis for the ultimate decision to terminate Maciag and the fact Maciag received more severe discipline than someone like Holland, who was a member of management at the time he referred to an employee as a "fucking retard" in front of other employees, she has shown through substantial and credible circumstantial evidence that the reasons REC offered for her termination were pretext for retaliation. Therefore, Maciag has succeeded in showing REC retaliated against her for protected activity.

B. Damages

The department may order any reasonable measure to rectify any harm Maciag 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. Berry 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); *Berry*, ***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 her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Berry,* 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. *Berry*, 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. USI Film Prods.*, 511 U.S. 244, 253 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence). There is no offset for unemployment insurance benefits received against wage loss recovery resulting from illegal discrimination. *Vortex Fishing Sys. Inc. v. Foss*, ¶ 28, 2001 MT 312, 308 Mont. 3, 38 P.3d 836. *See also Kauffman v. Sidereal Corp.,* 695 F.2d 343, 347 (9th Cir. 1982), *quoting Nat'l Labor Rel'ns Bd. v. Gullett Gin Co.,* 340 U.S. 361 (1951).

Maciag applied for several jobs after her termination from REC. Maciag worked part-time from February through July 2015 and ultimately obtained full-time employment with Butte Silver Bow County as a Service Worker at the Butte Civic Center. Maciag's hourly wage at the time of hearing was $16.71. Compared to her final hourly salary at REC of $31.83, that is a substantial reduction in her wages. Maciag has shown she used reasonable diligence to locate substantially equivalent employment. Therefore, Maciag has shown she is entitled to back pay damages in the amount of $139,041.08, which also includes the value of her benefits. Maciag is also entitled to interest on the lost wages through the date of decision at the rate of 10% per annum, which amounts to $19,732.41 for a total of $158,773.49.

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 plaintiff's 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 (8th 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 Maciag and several of the employer's witnesses. Therefore, front pay is appropriate in this case.

Maciag 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).

Maciag made sufficient efforts to find and to obtain suitable and comparable work since being terminated by REC. While Maciag has found other work, that work is not comparable to her former employment with REC. Maciag worked for REC for approximately 17 years. Four years of front pay in addition to back pay is reasonable and supported by the credible and substantial evidence of record. Awarding four years of front pay would not be unduly speculative or unsupported by the record, and would not result in an unjust windfall for Maciag. Therefore, Maciag is entitled to an award of $159,381.00 in front pay damages, the present value of which is $210,983.22. See Addendum A.

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.

Maciag seeks $30,000.00 in emotional distress damages. Maciag and her significant other testified she has suffered from depression and has been unwilling to engage in activities she and her family had enjoyed in the past. Maciag testified she is often anxious that she will run into her former REC co-workers when she is out in public and is embarrassed by her change in financial circumstances. Maciag testified her emotional distress has interfered with her ability to actively engage with her family and with her community.

Maciag'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.

Maciag was understandably upset that her 17-year career with REC came to such an acrimonious end. Maciag's frustration and sadness coupled with the manner in which her employment ended justifies a damage award of $30,000.00 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(1)(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.

V. CONCLUSIONS OF LAW

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

2. Sarah Maciag has shown that REC Advanced Silicon Materials, LLC, retaliated against her for engaging in protected activity. Mont. Code Ann. § 49-2-301; Admin. R. Mont. 24.9.603(2).

3. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), REC Advanced Silicon Materials, LLC, must pay Maciag the sum of $139,041.08 in damages for lost wages and $19,732.41 in prejudgment interest on those damages through January 25, 2018, as well as $30,000.00 as damages for emotional distress. Maciag is also entitled to

front pay for four years that amounts to $233,128.16, the present value of which is $210,953.22.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), REC Advanced Silicon Materials, LLC, must pay Maciag the sum of $30,000.00 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).

VI. ORDER

1. Judgment is found in favor of Sarah Maciag and against REC Advanced Silicon Materials, LLC, for retaliating against Maciag for engaging in protected activity in violation of the Montana Human Rights Act.

2. REC Advanced Silicon Materials, LLC, is enjoined from discriminating against any employee on the basis of disability or retaliating against any employee for engaging in protected activity.

3. REC Advanced Silicon Materials, LLC, must pay Maciag the sum of $188,773.49, which represents the back pay award of $139,041.08 with prejudgment interest in the amount of $19,732.41, as well as $30,000.00 for emotional distress damages.

4. REC Advanced Silicon Materials, LLC, must pay Maciag $233,128.16, which represents an award of front pay for four years. The present value of this award is $210,953.22.

5. REC Advanced Silicon Materials, LLC, 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 REC Advanced Silicon Materials, LLC, 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, REC Advanced Silicon Materials, LLC, shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 25th day of May, 2018.

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

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Sarah Maciag, and her attorney, Scott Peterson, Morrison, Sherwood, Wilson & Deola PLLP; and Respondent REC Advanced Silicon Materials, LLC; and their attorney, Patrick Fleming, Fleming and O'Leary, PLLP:

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.

Maciag.HOD.chp

Maciag Interest Calculation

Backpay	Biweekly	Total
Wages:	$ 2,740.96	$ 200,090.08
Benefits:	$ 835.16	$ 60,966.68
UI:	$ 167.67	$ 12,240.00
Offset:	$ 1,839.12	$ 134,255.68
Net:	$ 1,904.67	$ 139,041.08
Biweekly Pay Periods:	73	
End Date:	1/15/2018	
Interest Rate:	10.00%	
Interest Alone:	$ 19,732.41	
Total with Interest:	$ 158,773.49	

Front Pay	
Total Award:	$285,059.84
Years:	4
Periods Per Year:	26
Periodic Payment:	($2,740.96)
Discount Rate:	2.50%
Periodic Rate:	0.09615385%
Present Value (Lump Sum):	$ 257,945.20
Discount Approx. = 10-yr. Treasury 1-yr. Avg.	

Fraction of Year	Week #	Pay Date	Net Pay	Interest
2.800000	73	Monday, March 30, 2015	$ 1,904.67	$ 533.31
2.761644	72	Monday, April 13, 2015	$ 1,904.67	$ 526.00
2.723288	71	Monday, April 27, 2015	$ 1,904.67	$ 518.70
2.684932	70	Monday, May 11, 2015	$ 1,904.67	$ 511.39
2.646575	69	Monday, May 25, 2015	$ 1,904.67	$ 504.09
2.608219	68	Monday, June 8, 2015	$ 1,904.67	$ 496.78
2.569863	67	Monday, June 22, 2015	$ 1,904.67	$ 489.47
2.531507	66	Monday, July 6, 2015	$ 1,904.67	$ 482.17
2.493151	65	Monday, July 20, 2015	$ 1,904.67	$ 474.86
2.454795	64	Monday, August 3, 2015	$ 1,904.67	$ 467.56
2.416438	63	Monday, August 17, 2015	$ 1,904.67	$ 460.25
2.378082	62	Monday, August 31, 2015	$ 1,904.67	$ 452.95
2.339726	61	Monday, September 14, 2015	$ 1,904.67	$ 445.64
2.301370	60	Monday, September 28, 2015	$ 1,904.67	$ 438.34
2.263014	59	Monday, October 12, 2015	$ 1,904.67	$ 431.03
2.224658	58	Monday, October 26, 2015	$ 1,904.67	$ 423.72
2.186301	57	Monday, November 9, 2015	$ 1,904.67	$ 416.42
2.147945	56	Monday, November 23, 2015	$ 1,904.67	$ 409.11
2.109589	55	Monday, December 7, 2015	$ 1,904.67	$ 401.81
2.071233	54	Monday, December 21, 2015	$ 1,904.67	$ 394.50
2.032877	53	Monday, January 4, 2016	$ 1,904.67	$ 387.20
1.994521	52	Monday, January 18, 2016	$ 1,904.67	$ 379.89
1.956164	51	Monday, February 1, 2016	$ 1,904.67	$ 372.59
1.917808	50	Monday, February 15, 2016	$ 1,904.67	$ 365.28
1.879452	49	Monday, February 29, 2016	$ 1,904.67	$ 357.97
1.841096	48	Monday, March 14, 2016	$ 1,904.67	$ 350.67
1.802740	47	Monday, March 28, 2016	$ 1,904.67	$ 343.36
1.764384	46	Monday, April 11, 2016	$ 1,904.67	$ 336.06
1.726027	45	Monday, April 25, 2016	$ 1,904.67	$ 328.75
1.687671	44	Monday, May 9, 2016	$ 1,904.67	$ 321.45
1.649315	43	Monday, May 23, 2016	$ 1,904.67	$ 314.14
1.610959	42	Monday, June 6, 2016	$ 1,904.67	$ 306.83
1.572603	41	Monday, June 20, 2016	$ 1,904.67	$ 299.53
1.534247	40	Monday, July 4, 2016	$ 1,904.67	$ 292.22
1.495890	39	Monday, July 18, 2016	$ 1,904.67	$ 284.92
1.457534	38	Monday, August 1, 2016	$ 1,904.67	$ 277.61
1.419178	37	Monday, August 15, 2016	$ 1,904.67	$ 270.31
1.380822	36	Monday, August 29, 2016	$ 1,904.67	$ 263.00
1.342466	35	Monday, September 12, 2016	$ 1,904.67	$ 255.70
1.304110	34	Monday, September 26, 2016	$ 1,904.67	$ 248.39
1.265753	33	Monday, October 10, 2016	$ 1,904.67	$ 241.08
1.227397	32	Monday, October 24, 2016	$ 1,904.67	$ 233.78
1.189041	31	Monday, November 7, 2016	$ 1,904.67	$ 226.47
1.150685	30	Monday, November 21, 2016	$ 1,904.67	$ 219.17
1.112329	29	Monday, December 5, 2016	$ 1,904.67	$ 211.86
1.073973	28	Monday, December 19, 2016	$ 1,904.67	$ 204.56
1.035616	27	Monday, January 2, 2017	$ 1,904.67	$ 197.25
0.997260	26	Monday, January 16, 2017	$ 1,904.67	$ 189.95
0.958904	25	Monday, January 30, 2017	$ 1,904.67	$ 182.64
0.920548	24	Monday, February 13, 2017	$ 1,904.67	$ 175.33
0.882192	23	Monday, February 27, 2017	$ 1,904.67	$ 168.03
0.843836	22	Monday, March 13, 2017	$ 1,904.67	$ 160.72
0.805479	21	Monday, March 27, 2017	$ 1,904.67	$ 153.42
0.767123	20	Monday, April 10, 2017	$ 1,904.67	$ 146.11
0.728767	19	Monday, April 24, 2017	$ 1,904.67	$ 138.81
0.690411	18	Monday, May 8, 2017	$ 1,904.67	$ 131.50
0.652055	17	Monday, May 22, 2017	$ 1,904.67	$ 124.20
0.613699	16	Monday, June 5, 2017	$ 1,904.67	$ 116.89
0.575342	15	Monday, June 19, 2017	$ 1,904.67	$ 109.58
0.536986	14	Monday, July 3, 2017	$ 1,904.67	$ 102.28
0.498630	13	Monday, July 17, 2017	$ 1,904.67	$ 94.97
0.460274	12	Monday, July 31, 2017	$ 1,904.67	$ 87.67
0.421918	11	Monday, August 14, 2017	$ 1,904.67	$ 80.36
0.383562	10	Monday, August 28, 2017	$ 1,904.67	$ 73.06
0.345205	9	Monday, September 11, 2017	$ 1,904.67	$ 65.75
0.306849	8	Monday, September 25, 2017	$ 1,904.67	$ 58.44
0.268493	7	Monday, October 9, 2017	$ 1,904.67	$ 51.14
0.230137	6	Monday, October 23, 2017	$ 1,904.67	$ 43.83
0.191781	5	Monday, November 6, 2017	$ 1,904.67	$ 36.53
0.153425	4	Monday, November 20, 2017	$ 1,904.67	$ 29.22
0.115068	3	Monday, December 4, 2017	$ 1,904.67	$ 21.92
0.076712	2	Monday, December 18, 2017	$ 1,904.67	$ 14.61
0.038356	1	Monday, January 1, 2018	$ 1,904.67	$ 7.31
0.000000	0	Monday, January 15, 2018		