

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1754-2018:

KEITH BLOUNT,)	
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
MONTANA STATE LIBRARY,)	
)	
Respondent.)	

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I. INTRODUCTION

Keith Blount filed a complaint with the Montana Human Rights Bureau alleging that his former employer, Montana State Library (MSL), discriminated against him on the basis of age in its application of the State of Montana’s Reduction in Force policy when it made the decision to terminate his employment in August 2017.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on August 16-17, 2018 in Helena. Scott Peterson and Robert Farris-Olson, Attorneys at Law, represented Blount. Jeffrey M. Doud and Katherine J. Orr, Attorneys at Law, represented MSL. MSL State Librarian Jennie Stapp appeared as the designated representative for MSL.

At hearing, Blount, Stapp, Duane Lund, Evan Hammer, Stu Kirkpatrick, Kris Schmitz, Patricia Davis and Troy Blandford testified under oath. The testimony of May Daurio was submitted via the video tape of her deposition testimony. Jim Kerins, SPHR, SHRM, SCP, testified as an expert witness on behalf of MSL.

Charging Party’s Exhibits (C.P. Ex.) 1 through 3, 5, 7 through 9, 13, 14, 16, 17, 19, 24, 25, 27, 32 through 36, 39, 40, 43, and 48 were admitted into evidence.

The Hearing Officer took judicial notice of C.P. Ex. 46 without objection. Charging Party's Exs. 21, 31, and page 4 of C.P. Ex. 19 were withdrawn.

Respondent's Exhibits (Resp. Ex.) 101 through 103, 107, 111 through 114, 116, 120 through 122 were admitted. A corrected version of Resp. Ex. 122 was admitted at hearing in lieu of the exhibit originally disclosed. Respondent's Ex. 119 was withdrawn.

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 January 18, 2019. 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 MSL discriminate against Blount on the basis of age in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If MSL did illegally discriminate against Blount as alleged, what harm, if any, did he sustain as a result and reasonable measures should the department order to rectify such harm?

3. If MSL did illegally discriminate against Blount 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. FACTS STIPULATED TO BY THE PARTIES

1. MSL employed Blount as a Geographic Information Systems (GIS) Programmer/Analyst.

2. House Bill (HB) 2 and Senate Bill (SB) 261 from the General Appropriations Act of 2017 cut nearly \$1 million from MSL's operating budget.

3. MSL was required to conduct a Reduction in Force (RIF) as a result of budget cuts. The RIF was necessary to serve the mandates of HB 2 and SB 261 and the directives of the Montana Library Commission. The lack of sufficient funding was the business reason for implementing the RIF.

IV. FINDINGS OF FACT

A. *Blount's Educational and Professional Background*

1. Blount attended the University of Montana beginning in 1989. Blount eventually received his degree in geography, with an emphasis in cartography. Blount Hrg. Tr. 172:10-19. Blount graduated with high honors and was the outstanding graduating senior in geography. Blount Hrg. Tr. 174:19-22.

2. Blount excelled in his academic studies and frequently mentored undergraduate students and graduate students with mapping. Blount Hrg. Tr. 172:23-173:1.

3. Blount began working for the U.S. Forest Service (USFS) in 1991. Blount served as an editor for its 1:24,000 quad series maps, which basically mirror the U.S. Geological Survey maps. Blount also worked for the gap analysis program and worked on the emergency gap analysis project wildlife lab on the University of Montana campus. Blount Hrg. Tr. 173:4-8.

4. While working for the USFS, Blount edited its 1:24,000 scale maps using high-resolution imagery and smaller-scale imagery. Blount was responsible for updating the transportation layer, which required him to remove abandoned roads or roads not in use and adding all new roads, logging roads and highways. Blount was responsible for classifying the roads from native surface roads to interstate highways. Blount was also responsible for upgrading locational accuracy of streams and lakes, wetlands, and lands subject to inundation. Blount also updated geodetic control. Blount Hrg. Tr. 173:11-19.

5. After graduating from the University of Montana, the USFS, eager to retain Blount due to his superior skills, offered him a one-year personal services contract. Blount Hrg. Tr. 15:2-6.

6. At the end of the USFS contract, Blount went to work for Analytical Surveys (Analytical) in Colorado Springs, Colorado, which, at the time, was one of the largest mapping companies in the country. Blount Hrg. Tr. 175:7-9.

7. At Analytical, Blount worked on converting Defense Mapping Agency's paper maps to large-format negatives or lithographs. Blount would first rasterize the negatives and then vectorize them into line work and polygons. Blount's work resulted in the creation of transportation layers, hydrography layers, flow lines for

stream networks, attribute point locations for cities, and vegetation layers based on the Defense Mapping Agency's standards. Blount Hrg. Tr. 175:16-25.

8. Analytical promoted Blount to special projects and training approximately three months after the start of his employment due to his superior skills. Blount's production level was 60% higher than the next closest employee who had worked there for five years. Blount Hrg. Tr. 176:14-177:2.

9. In September 1996, Blount began working for Butte-Silver Bow County. Blount was responsible for administrative boundaries, school districts, fire districts, and zoning boundaries. Blount was also responsible for mapping Superfund work sites, which included mapping of waste boundaries and GPS collection of mine waste dumps. Blount also did GPS collection of structure points and address points, as well as the entire transportation system for the county. Blount Hrg. Tr. 177:3-177:8.

10. In 2000 or 2001, Blount accepted a job with the Washington State Department of Natural Resources after having interviewed and receiving offers of employment from two other agencies. Blount Hrg. Tr. 177:21-178:12.

11. Blount worked with six other geologists in Washington, all of whom were responsible for mapping ancient and present landslides using hydrography, wetlands, soil types and vegetation cover. Blount's efforts were necessary for the decision of whether logging permits would be issued for harvest. Blount Hrg. Tr. 179:1-6.

12. Blount had never before worked on a geological dataset before his employment with Washington. Blount became proficient in his responsibilities within two weeks of his start date. At that point, Blount began re-writing its mapping applications. Blount Hrg. Tr. 179:17-23.

13. Blount has been successful in each of his professional ventures, quickly earning the praise and respect of his supervisors and co-workers.

14. Blount began working as a Geographic Information Systems (GIS) Analyst for the Montana Department of Administration (DOA) in 2002. Blount Hrg. Tr. 180:2-6.

15. Stuart Kirkpatrick was Blount's supervisor at DOA until Kirkpatrick's retirement in 2015. Kirkpatrick considered Blount to be the most proficient GIS analyst, with excellent problem solving, logical thinking and excellent communication skills. Kirkpatrick Hrg. Tr. 69:6-17.

16. Blount's primary responsibility as a GIS Analyst was to develop and to maintain the state's cadastral parcel database. At the time Blount began developing the database, there were no other statewide parcel databases in the United States. Blount Hrg. Tr. 180:15-21.

17. Blount quickly became recognized as an expert on the cadastral database, which is the most popular and most used database within the State of Montana. 44:1-10; 78:10-23. Blount continued to be responsible for managing the cadastral website after the merger with MSL in 2011 and until the software manufacturer took it over and "put it in the cloud." Blount Hrg. Tr. 182:8-12.

18. Blount's cadastral map service was used by the Governor's Office of Economic Development as its base map for its site selection website. Blount enhanced his cadastral map service by adding more layers and putting annotations for schools, libraries, state parks, wilderness and special management areas. Blount Hrg. Tr. 182:25-183:1-5.

19. Kirkpatrick considered Blount to be a master editor of spatial data and cartography. Kirkpatrick Hrg. Tr. 44:11-45:9. Kirkpatrick believed Blount to have an exceptional ability to improve and repair data supplied by outside sources, such as local governments. Kirkpatrick Hrg. Tr. 56:17-22.

20. Blount also designed the cartographic base map used by the Montana Department of Revenue on its website. Blount's base map was also used to build a map surface that is put out for the rest of the state agencies to use when building maps. Blount Hrg. Tr. 182:14-22.

21. Blount is considered to be "a genius manipulating GIS points, lines, and polygons on true land information systems." Blount was considered to be an "innovative thinker," who had "amazed many influential thinkers." Blount's expertise "was highly regarded [at] MSL," and he was thought to be "a big part of the reason that Montana cadastral is held in such high regard." Blount's knowledge of data manipulation . . . significantly increased productivity in PLSS adjustments" and he "brought expertise to solve complex areas of land information." Hammer Hrg. Tr. 457:22-25; 458:1, 4-35;459:1-11.

22. Blount was a "stalwart of Montana GIS in general," whose "knowledge and experience contributed significantly to the overall success of information management." Blount mentored others and shared his technical expertise. Hammer Hrg. Tr. 465:24-25; 466:1-16.

B. *The Montana State Library*

23. In 2011, the Natural Resource Information System (NRIS) and the Base Map Service Center (BMSC) merged with the Montana State Library (MSL). MSL also assumed management of the Montana Spatial Data Infrastructure (MSDI). As a result of his merger, several DOA employees became MSL employees, including Blount.

24. Jennie Stapp has been the State Librarian for approximately seven years. Stapp works under the direction of State Library Commission (SLC) to meet MSL's statutory obligations and to set MSL policy. Stapp is responsible for ensuring MSL's programs and services meet its statutory obligations and administering MSL's budget. Stapp works closely with the leadership team, which includes Kris Schmitz, Central Services Manager in Human Resources; Evan Hammer, Digital Library Administrator; and Tracy Cook, Director of the Statewide Library Resources Division. Stapp Hrg. Tr. 353:24-354:18.

25. The Digital Library is statutorily mandated to provide permanent public access to state publications by maintaining a state depository for State Government information. MSL is statutorily required to provide a Natural Resource Information System (NRIS) under Mont. Code Ann. § 90-15-101, et.seq., and a Water Information System (WIS) under Mont. Code Ann. § 90-1-401, et. seq., which is a component of the NRIS.

26. Under the NRIS statute, there is an obligation to provide for a Montana Natural Heritage Program. The NRIS is a system that collects and provides access to natural resource information about the State of Montana.

27. The WIS involves collecting standardized water information about the State of Montana and making it available in usable formats. Stapp Hrg. Tr. 354:19-355:21; Blandford Hrg. Tr. 631:19-21.

28. The Montana Land Information Act requires MSL to prepare an annual plan that outlines the priorities for the MSDI. It lays out priorities for a grant program, which is required under Mont. Code Ann. § 90-1-404. The land plan sets forth priorities for which grant applicants which might be made and the work done under those grants. Stapp Test. Tr. 356:1-16.

29. The MSDI is a set of fifteen statewide base data layers. MSL works with this set of standardized statewide date layers to make them available to GIS

practitioners throughout the state with the goal that the GIS practitioners would not have to continuously recreate those data layers. Hammer Hrg. Tr. 413:9-21. The MSL GIS analysts have complex software tools but have to develop the software that does not come with the tools. Hammer Test. Tr. 413:8-21.

30. The primary land data layers are the mapping control dataset, the cadastral dataset, boundaries dataset, structures, addressing, and transportation. The primary water-related layers are hydrography, hydrologic units, and watershed boundaries. Hammer Hrg. Tr. 414:2-415:2.

31. MSL is responsible for providing access to the National Hydrography Dataset, maintaining that dataset and working with state agencies to ensure they are using standardized data to meet their business processes. Stapp Hrg. Tr. 355:21-356:1. MSL does not manage the wetlands dataset, which is managed by the Montana Heritage Program. Blount Hrg. Tr. 86:9-13.

32. The Montana Digital Library restructured in 2015, which resulted in the creation of two specialized units for GIS - the land information unit and the water information unit. Troy Blandford is the water information lead. Michael Fashoway is the land information unit. Hammer Hrg. Tr. 414:2-415:2; 416:14-16.

33. MSL had obtained funding for its WIS, which had been understaffed for a number of years, in 2013. At that time, the legislature granted “one-time-only” monies to hire a WIS specialist. Permanent funding was received for the position in 2015. Stapp Hrg. Tr. 359:11-19.

34. In July 2015, Hammer became the Digital Library Administrator. Hammer Hrg. Tr. 412:22-25; 413:1. Hammer oversees both the water information unit and the land information unit in that role. Hammer is also MSL’s Chief Information Officer, which includes digital information management duties. Hammer Hrg. Tr. 412:14-25.

35. Hammer previously worked as MSL’s NRIS manager. As the NRIS manager, Hammer supervised four employees, primarily GIS analysts. Hammer Hrg. Tr. 412:14-25.

C. *MSL’s GIS Analysts*

36. At the time of the RIF, there were seven GIS analysts on staff and one vacant GIS analyst position. Three positions, including the vacant position, are

funded through the General Fund. The remaining five GIS analysts are funded through the MLIA. Ex. 5.

37. In addition to the cadastral application, Blount worked on mapping projects, including fire maps for the Bureau of Land Management that showed the urban and wildlife interface; wetland mitigation for the Department of Natural Resources in 2007; transportation database; cartographic base map for the Department of Revenue in 2013; enhancing the cadastral application for use on the Governor's Office of Economic Development's website. Blount Hrg Tr. 181:1-25; 182:1-25; 183:1-17.

38. Blount's work was focused primarily on the land information datasets, including cadastral, the mapping control and boundaries layers. Hammer Hrg. Tr. 415:21-25.

39. Blount had never worked on the hydrography dataset. Kirkpatrick Hrg. Tr. 103:3-5. Blount also had no direct experience working on any of the water-related frameworks currently used by MSL. Hammer Hrg. Tr. 415:25-416:2; Ex. 50 - Daurio Depo. Tr. 51:20-52:2; Kirkpatrick Hrg. Tr. 86:4-7.

40. Blount was considered a resource for other GIS Analysts, including Meghan Burns, Maya Daurio, and Duane Lund. Blount Hrg. Tr. 184:1-14; 185:1-7; 186:14-16.

41. Daurio worked with both the land and water datasets. Hammer Hrg. Tr. 415:3-6; Ex. 50; Daurio Depo.; Tr. 7:15-8:4; 49:20-50:6. Daurio was lead staff on the CadNSDI, which is a dataset that helps in adjustment of the cadastral and boundaries datasets. Daurio is considered a subject matter expert on water datasets. Hammer Hrg. Tr. 430:6-21.

42. Burns has worked with a majority of the datasets. Hammer Test. Tr. 415:12-15. Burns was considered to be a subject matter expert on water datasets and worked as the boundaries team lead. Hammer Hrg. Tr. 430:6-21.

43. Both Daurio and Burns did a significant amount of work on the Water Information Service Agreement (WISA), as well as the NRCS Agreement. Funding is provided under the agreement to help update and maintain the soils theme as well as the Watershed Boundary Dataset. Hammer Hrg. Tr. 446:6-447:5. At the time of the RIF, MSL was in the second year of a five-year agreement and its work supported specific framework themes for those agreements.

44. Daurio worked on a majority of the contracts, as did Lund. Many of the projects Lund worked on were also worked on by Daurio and Burns. Blandford Hrg. Tr. 642:1-7.

45. Both Daurio and Burns spent hundreds of hours working on contracts in both the land and water datasets. The tasks they were required to perform required a diverse number of skills to support the work required under those contracts. Stapp Hrg. Tr. 379:20-23.

46. Contracts are a source of significant funding for MSL. Stapp Hrg. Tr. 379:3-6.

47. Blount worked on one contract in 2015 for a total of 44 hours. Stapp Hrg. Tr. 383:8-10; 383:15-23. Blount did not regularly volunteer to work on contracts. Blandford Hrg. Tr. 643:14-24; Lund Hrg. Tr. 146:19-147:1.

D. *The Effect of Senate Bill 261 Mandated Legislative Reductions on MSL*

48. Montana House Bill 2 (HB2), the State budget bill for 2017-2019 biennium, included a 5% operations reduction based on the reduction proposed in the Governor's budget for all agencies and 4% vacancy savings mandated under the Governor's budget, with an additional 2% vacancy savings approved by the Legislature, for a total vacancy savings of 6%. Ex. 9, p. 2. The total budget reduction from House Bill 2 was approximately \$309,178.00. Id.

49. Senate Bill 261 (SB261), a budgetary companion bill, included additional reductions of \$681,513.00 in General Fund monies, which was 50% of the General Fund appropriation for the Digital Library in Fiscal Year (FY) 2017. The cuts mandated under SB261 were in addition to the cuts required under HB2. Ex. 9, p.3.

50. As a result of HB2 and SB261, MSL was mandated to reduce its expenditures by approximately \$990,691.00. Ex. 9, p. 3; Stapp Hrg. Tr. 391:18-19.

51. It was necessary for MSL to cut and/or merge services and implement a Reduction in Force (RIF) as a result of the budget cuts. Ex. 103; Stapp Hrg. Tr. 365:23-25; 366:1-7.

52. MSL determined it would be necessary to merge its popular Talking Book Library with the Digital Library and moved public access to the library, which

resulted in the reading room closing. These changes resulted in an estimated savings of \$334,644.00 in response to HB 2 cuts. Ex. 103, p. 2.

53. MSL determined it would need to reduce its funding for the Montana Natural Heritage Program by 25% and cut its General Fund resource-sharing budget by 50%, with the goal of the cuts being backfilled by Coal Severance Tax monies to prevent shifting the costs to local Montana libraries. Id.

54. MSL determined that implementation of the RIF would result in the loss of 12 positions, with 10 of those positions being staffed at the time of the RIF. Id.

55. Reducing funding and cutting its General fund resource-sharing budget, as well as implementing the RIF, would result in an estimated savings of \$1,055,551.00 in response to SB261. Id.

56. On April 26, 2017, Stapp met with staff to discuss the impact of SB261. The bill, at that time, provided for a reduction of approximately 25% to MSL's budget. Stapp Hrg. Tr. 365:9-20.

57. Stapp prepared a letter for the SLC outlining what MSL determined was necessary to absorb the budget cuts mandated under HB2 and SB261 for their June 14, 2017 meeting where SLC would be considering what actions it would take on the proposed programming and staffing changes proposed in Stapp's letter. Ex. 103.

58. On May 9, 2017, Hammer met with MSL managers to discuss the implementation of the RIF, as well as the possibility of voluntary retirements of MSL staff. Hammer Hrg. Tr. 417:21-25.

59. On May 10, 2017, the SLC met regarding the budget cuts. The SLC gave the direction that no programs should be eliminated and MSL staff should try to sustain what it already had in terms of programming. Hammer Hrg. Tr. 419:13-25; 420:1-4. SLC directed MSL to continue meeting its missions and the applicable statutes were used as a way to prioritize programs and services. Stapp Hrg. Tr. 368:8-14; Ex. 102; Ex. 9 at 5.

60. Following an all-staff meeting in which the budget cuts were discussed, Hammer then met with lead workers. Hammer discussed anticipated time lines for the budget cuts and what discussions he expected would occur with SLC. Hammer informed the leads that he thought the majority of the budget cuts would affect the

Digital Library as it's primary source of funding was the general fund. Hammer directed the leads to review their workgroup responsibilities, determine what things could be done better, and where there might be potential for money savings. Hammer Hrg. Tr. 418:14-25; 419:1-12.

61. On May 23, and May 24, 2017, SLC held a commission retreat as a follow-up to the May 10, 2017 meeting. The directives that came from the SLC retreat included: 1) focusing on MSL's statutory mission; 2) ensuring MSL continued to perform at a level it had previously performed; 3) continuing to serve those who are most vulnerable; and 4) positioning MSL to rebuild in the future. Ex. 102 at 6; Hammer Hrg. Tr. 432:3-15.

62. Stapp and Hammer considered it an essential priority to maintain staffing that included a diversity of knowledge and skills in order to meet SLC's directives. Stapp considered the diversity of knowledge and skill essential given that the remaining staff would be expected to perform a variety of functions with considerably less resources. Stapp Hrg. Tr. 370:12-19.

63. Hammer continued meeting regularly with group leads throughout May 2017 to seek guidance about how MSL could continue supporting all of its programs in the face of such drastic budget cuts. Hammer Hrg. Tr. 421:10-16.

64. Following his meetings with the team leads, Hammer determined that the "critical aspect of evaluating [the] GIS analysts was having staff that could work on a diversity of projects . . . [meaning] primarily the subject matter expertise in the framework layers that [MSL] support[s], that was right at the top, but right there with that was support for the other highly important projects like the NRCS contract." Hammer Hrg. Tr. 421:10-25.

65. Hammer also determined after talking with Fashoway that updating the map of Montana, which had been a goal, was now considered to be a lower priority and "pushed down on our list." Hammer Hrg. Tr. 422:9-17.

66. After speaking with the lead GIS analysts (Fashoway and Blandford), Hammer determined that cutting one of the GIS analyst positions under each team would be a potential source of budget savings. Hammer Hrg. Tr. 422:18-24.

E. *MSL's Implementation of the State of Montana's RIF Policy*

67. The State of Montana's Implementing a Reduction in Force Policy covers all employees in Montana's executive branch and is required to be followed by all state agencies. Ex. 101, p. 1.

68. The policy provides:

When reducing the workforce, agency managers shall consider the programs they administer and the staff structure that most efficiently accomplishes the agency's program objectives. Agency managers shall consider employees' skills, qualifications (including performance), and length of continuous service, among other factors, when making reduction-in-workforce decisions.

Ex. 101, p. 1.

69. As required under the RIF policy, agency managers are required to perform a skills assessment, which requires consideration of the following:

- a. employees' qualifications and experience in performing the duties of the remaining positions;
- b. employees' qualifications and experience that benefit the agency's future goals and objectives;
- c. employees' skills to perform the specific tasks assigned to the retained positions; and
- d. employees' performance history.

Ex. 101, p. 2.

70. The policy further provides:

If the skills assessment does not adequately distinguish between employees, agency managers shall then consider the employees' continuous length of service to make the decision.

Ex. 101, p. 2.

71. MSL determined that current skills, abilities and diversity of skills and knowledge were important to analyze under subsection (a) of the skills assessment,

that is, qualifications and experience in performing the duties of the remaining positions and (b) concerning employees' qualifications and experience that benefit the agency's future goals and objections. Stapp Hrg. Tr. 373:13-23; 374:23-375:24.

72. MSL further determined that the only way to fulfill the commission objectives would be to retain GIS analysts with the most diverse skill sets, from a GIS tool perspective. GIS tools are specialized tools that are maintained to support the data layers such as the parcel fabric for the cadastral application to perform adjustments on the program to create a foundational layer for the cadastral dataset, and from a diversity of experience perspective in working with the statewide data layers that MSL supports. Ex. 17, at 2; Hammer Hrg. Tr. 420:25-424:14; Blandford Hrg. Tr. 636:15-637:2.

73. Hammer was heavily involved in the RIF assessment because a significant number of the RIF's were going to come from the Digital Library. Hammer was directed to look at maintaining the programs and services currently offered, and to look toward future goals and to determine which staff had the knowledge, skills and abilities as required under the state's RIF policy. Stapp Hrg. Tr. 377:14-21.

74. Hammer had previously been involved in the implementation of a new planning process that resulted in new commission work tasks being set in January 2017. During that process, each workgroup documented their workgroup responsibilities with the goal of planning for MSL's future. The workgroup responsibilities were finalized in April 2017. As a result of this process, Hammer had a deeper understanding of the responsibilities of each workgroup. Hammer Hrg. Tr. 417:3-20.

75. One of the factors that contributed to the organization review process in 2017 was the prospect of staff retirements and the effect it would have on MSDI operations. Hammer Hrg. Tr. 474:21-25; 475:1-11.

76. When it became clear that a RIF would have to be implemented as a result of HB2 and SB261, Hammer sought guidance from the Department of Administration as to how to apply the RIF policy. Shortly after the prospect of a RIF was announced to MSL staff, Blount approached Hammer about the prospect of volunteering to retire for a buyout. Hammer had never before implemented a RIF and did not know if such an arrangement was possible under the state's RIF policy. Hammer Hrg. Tr. 433:6-35:3.

77. Ultimately, MSL did not accept volunteers for the RIF because there were concerns that the agency would be left with vacancies in key positions. Blount's inquiry about the possibility of a buyout was not a factor in MSL's decisions under the state's RIF policy. Hammer Hrg. Tr. 479:24-480:15.

78. Hammer considered the directives of the SLC when conducting the RIF analysis. Hammer Hrg. Tr. 433:2-5; referencing Ex. 102, p. 6.

79. Hammer initially considered the skills for all of the GIS analysts because there were no changes being made to the positions themselves as a result of the budget cuts. Hammer focused primarily on the skills and experience working with the tools currently being used by GIS analysts. Hammer concluded all GIS analysts were equal in that respect. Hammer Hrg. Tr. 435:5-23.

80. Hammer then looked at planning for the future and specific skills, which focused more on the specific areas each GIS analyst worked within. Hammer considered the subject matter expertise in MSL's framework layers as a primary factor in evaluating and decision-making, as well as the NRCS contract. Hammer Hrg. Tr. 435:24-25; 436:1-7.

81. The NRCS contract has traditionally been a major source of funding for MSL. Hammer considered it to be of greater importance in the face of such significant budget cuts and wanted to ensure MSL continued to have GIS analysts with the skills to support that contract. Hammer Hrg. Tr. 436:8-14.

82. Hammer was the agency project manager for grants and contracts within the NRIS. Hammer was responsible for preparing quarterly reports, which included a listing of hours worked under the contract or grant by individual GIS analysts. Hammer Hrg. Tr. 437:7-21.

83. Based upon his knowledge and experience in preparing those quarterly reports, Hammer knew that Blount had performed limited work on those contracts and agreements. Hammer knew that both Daurio and Burns had worked on a significant number of hours on an USGS grant, which was referred to internally as the NHD Geo Conflation or GEO Conflation. Hammer Hrg. Tr. 438:6-25; 439:1-11.

84. The NHD Geo Conflation or GEO conflation "is a project to pull features from Montana wetlands and riparian dataset into the hydrography dataset to

improve the hydrography features available in that dataset.” Hammer Hrg. Tr. 439:13-16.

85. Hammer was aware that Blount had previously worked on the hydrography dataset while working in Washington, which was prior to the existence of MSDI hydrography theme and related to an earlier version of the USGS dataset. Hammer, having been responsible for overseeing the hydrography theme for several years, knew Blount’s experience with the hydrography theme did not compare to his own experience and was significantly less than the experience of either Daurio or Burns. Hammer Hrg. Tr. 440:2-21.

86. Hammer did not look beyond the experience of the GIS analysts prior to their having come to work with MSL due to the development in software and tools used in their roles at MSL. Hammer Hrg. Tr. 441:22-25; 442:1-3.

87. Hammer believed that Daurio, Burns and Blount all performed their work “at a very high level in the areas where they’ve done work.” Hammer Hrg. Tr. 442:8-9.

88. Hammer understood based upon his regular meetings with Fashoway and Blandford that both Daurio and Burns worked in both water-related themes and land-related themes, whereas Blount primarily worked with land-related themes. Hammer Hrg. Tr. 445:6-7.

89. While Blount could most assuredly become familiar with and become proficient with the tools associated with the hydrography dataset, it would take some time. It took two to three months for Duane Lund, another GIS analyst subject to the RIF, to become proficient on the dataset. It took Lund another year to become comfortable using the tools associated with the dataset. Lund Hrg. Tr. 133:14-18; 143:16-20.

90. Hammer concluded that both Daurio and Burns were the GIS analysts that could best enable MSL to meet the directive of SLC and to ensure MSL was able to continue providing services in the future based upon the following factors:

- a. Daurio and Burns had worked very heavily on both the land side and water information side, which would allow MSL to maintain its statutory obligations to the MSDI, NRIS and WIS. Blount only had experience on the land side. Hammer Hrg. Tr. 446:6-12; 447:1-5.

- b. Daurio and Burns had both performed a significant amount of work under the NRCS agreement. At the time of the RIF, MSL was on the second year of a five-year agreement, which is a significant source of MSL funding. Hammer Hrg. Tr. 446:12-24.
- c. Daurio served as the boundaries coordinator and she provided direct patron support through User Services. As a result of the budget cuts, it became the last direct support position for the GIS Coordinator. The position would become critical for the 2020 census and had worked on the FirstNet agreement, which was crucial for other tasks. Daurio's background in wetlands mapping was considered critical for the hydrography dataset, which supports the State of Montana Water Plan and WIS. See. Ex. 5, p. 3.
- d. Burns' position directly supported the WIS manager, and she was experienced in working with the parcel fabric and the wetlands mapping program. Burns had put significant time on various projects, as well as supporting tasks for the Land Information Group. See Ex. 5, p. 4.
- e. Both Burns and Daurio also worked a considerable number of hours on contracts with NRCS, USGS and Fairview Industries. Stapp Hrg. Tr. 379:9019. Blount, in comparison, worked very few hours on any of these contracts. Stapp Hrg. Tr. 380:409.
- f. Blandford had observed that Daurio was willing to grow and expand her role as a GIS analyst. Daurio was willing to work on any new project and she would offer Blandford new ideas and new projects to consider. Blandford Hrg. Tr. 642:23-25; 643:2-6. Daurio provided "a lot of help" to Blandford on updating the NHD, which required the use of imagery to digitize flow lines to more accurately depict the streams, rivers, and lakes within the state, which is the biggest need for state agencies. Blandford Hrg. Tr. 637:5-13.
- g. Daurio also had a "special expertise" to do the conflation required for the NHD, which requires a coding system for the type and location of wetlands based upon aerial imagery interpretation. Blandford Hrg. Tr. 644:6-25-645:1.
- h. Blandford considered Burns' and Daurio's contemporary work with the NHD editing tools important, as they are developed by the USGS and

are extensive within the ESRI software. GIS analysts are required to use these tools when editing or updating the NHD to ensure the standards and procedures of NHD are followed. Blandford Hrg. Tr. 638:20-639:3.

- i. Based upon the breadth of their experience and knowledge, as well as their performance using current programs and tools, Daurio and Burns did not require the training Blount would have required to continue the work of MSL after the RIF. Stapp Hrg. Tr. 374:14-375:13.
- j. At the time of the RIF, Blount had never worked on the hydrography dataset and had no direct experience working on any of the current water-related framework. Kirkpatrick Hrg. Tr. 86:4-7; 103:3-5; Hammer Hrg. Tr. 415:25-416:2; Ex. 50 - Daurio Depo. Tr. 51:20-52:2.
- k. Blount was aware of the current technology being used with the NHD but had never applied the tools currently used in the program. Blount Hrg. Tr. 270:11-272:9.

91. Hammer did not compare the basic attributes of being a GIS analyst, such as figuring out workarounds to improve and repair data, to be a solid performer or to know the job inside and out. Hammer's primary concern was the GIS analysts' subject matter expertise in the Montana framework layers due to MSL's obligation to support WIS and the NRIS. Hammer Hrg. Tr. 490:3-491:1.

92. Another concern for Hammer was that the cadastral application had matured to the point where the work was more focused on maintaining the datasets rather than developing new datasets. The cadastral application requires only monthly updates and Burns has been performing those editing duties. Hammer Hrg. Tr. 447:9-448:11.

93. Despite the popularity of the cadastral application, MSL has been unsuccessful in obtaining funding to maintain the application. Stapp Hrg. Tr. 357:16-358:3; Kirkpatrick Hrg. Tr. 92:6-93:20. Funding has not been prioritized by the State Library Commission (SLC), and the Montana Legislature has not provided direct funding to maintain the cadastral application nor the positions necessary to support the application. Stapp Hrg. Tr. 357:16-358:15; Kirkpatrick Hrg. Tr. 92:6-93:20.

94. Hammer was also required to consider the loss of institutional memory versus current skills. Institutional memory refers to past history and years of experience of certain staff as compared to staff who have the current experience with current subject matter expertise. Stapp Hrg. Tr. 388:15-22.

95. On May 31, 2017, MSL notified those employees, including Blount, that they had been selected for the RIF pending public comment and final commission action on June 14, 2017. Stapp Hrg. Tr. 335:24-336:3.

96. MSL held an all staff meeting that same day to discuss the RIF determination. During that meeting, Stapp stated at the meeting, “We did look at retirement benefits and staff that are eligible for retirement, and more than half the positions we’re talking about are people who are eligible for retirement.” Stapp Hrg. Tr. 335:24-336:3; 336:13-20.

97. Stapp testified at hearing:

I considered that question to be one of concern about the staff who were going to be RIF’d. We’re a small agency, close-knit, and staff were expressing concern for their colleagues. I was attempting to reassure staff that some of the employees to be RIF’d were eligible for retirement and that they would have a kind of cushion with that eligibility.

Stapp Hrg. Tr. 391:6-12.

98. On June 1, 2017, Blount asked Hammer to explain why he was being terminated. Hammer explained by describing the nature of the budget cuts and the effect they had on MSL operations and MSL staff. Hammer explained how he followed the state’s RIF policy when considering which employees would allow for the “greatest flexibility in performing a variety of tasks across the themes that [MSL] suport[s] . . .”. Ex. 5.

99. Retirement benefits were considered “almost immediately” when MSL learned of the budget cuts. Stapp Hrg. Tr. 336:24-25; 3371-9. In order to determine the costs of implementing the budget reductions, MSL had to determine the cost of the retirement benefits for any employee subject to being RIF’d. Stapp Hrg. Tr. 337:18-25 - 338:8; 391:13-392:4.

100. Retirement benefits are not an immediate consideration under the RIF policy. See Ex. 101; Stapp Hrg. Tr. 337:16-25.

101. Stapp has never factored in age when she made management decisions on behalf of MSL. Stapp Hrg. Tr. 393:1-3.

102. As of June 2017, MSL had 42 employees. Ex. 1 at 2; Ex 43. The average age of those employees was 48 years old. Id. 30 of the 42 employees were over the age of 40. Id. 17 of the 42 employees were eligible for early or full retirement. Id.

103. Seven employees were actually terminated as a result of the RIF. Ex. 43. Two employees who would have been subject to the RIF left before it was implemented. Three other positions were left vacant after the RIF was implemented.

104. Blount was 63 years old at the time of the RIF. Two other GIS analysts were terminated as a result of the RIF - Duane Lund, who was 58 years old at the time and Diane Papineau, who was 56 years old at the time.

105. Daurio was 39 years old at the time of the RIF, and Burns was 37 years old.

106. Before the RIF, there were 11 MSL employees whose positions were funded with general funds and who were eligible for full- or early-retirement. Schmitz Hrg. Tr. 655:25-656:2.

107. The average age of the employee terminated as a result of the RIF was 56.78 years old. The average age of the retained employees was 46.93 years old. Prior to the RIF, the average age of MSL employees was 49.2 years old. Ex. 43.

108. MSL currently has 30 employees of which 60% are over the age of 40. Ex. 1 at 2; Ex. 43.

109. Following the RIF, one employee, who was 70 years old, was rehired into a vacant position. Ex. 1 at 2; Ex. 43.

110. Blount was a member of a protected class based upon his age at the time of the RIF. Blount was qualified for the position he held but was ultimately laid off while Daurio and Burns, both of whom were younger than Blount, were retained.

111. MSL had a legitimate, non-discriminatory reason for laying off Blount. The reasons offered by MSL for laying off Blount under the RIF were not pretext for age discrimination.

112. MSL did not discriminate against Blount on the basis of age when implementing the State's RIF policy.

V. OPINION¹

Blount contends MSL's decision to lay him off as a result of the RIF was due to his age. Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of age commits an unlawful discriminatory practice. Terms, conditions or privileges of employment include: hiring, promotion, upgrading, transfer, discharge, termination of employment; rates of pay and changes in compensation; job assignments, job classifications, position descriptions; and selection and support for training. Admin. R. Mont. 24.9.604(2).

Examples of conduct that may constitute unlawful employment discrimination include:

- (a) denying, qualifying or limiting a term, condition or privilege of employment because of a person's membership in a protected class;
- ...
- (g) classifying a person in a way that adversely affects employment status or opportunities because of a person's membership in a protected class; and
- (h) using standards, criteria or methods of administering or managing employment opportunities which discriminates in the terms and conditions of employment because of membership in a protected class.

Admin. R. Mont. 24.9.604(3).

Where, as here, there is no direct evidence of discrimination, the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996). *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386. Under that burden-shifting scheme, a charging party 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

¹ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661(1940).

legitimate business reasons. A formula based on *McDonnell Douglas* must be adapted to the facts of each case. See *Hagans v. Andrus*, 651 F.2d 622, 624-625 (9th Cir. 1981).

A. *Blount has established a prima facie case of age discrimination.*

A charging party establishes a prima facie case with evidence sufficient to convince a reasonable fact finder that all of the elements of the prima facie case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In an indirect evidence case, the elements generally consist of proof that (1) the charging party is a member of a protected class; (2) who was qualified for the position sought or held; (3) who was denied or who lost the position in question and (4) who was replaced by a substantially younger worker. *Clark v. Eagle Sys.*, (1996), 279 Mont. 279, 927 P.2d 995. In *Clark*, the Montana Supreme Court noted that the plaintiff's prima facie case was established by showing that the plaintiff (1) was in a protected class, (2) performed his job in a satisfactory manner, (3) was discharged, and (4) was replaced by a substantially younger worker. *Clark, supra*, 279 Mont. at 286, 927 P.2d at 999.

As noted by the Ninth Circuit in *Diaz v. Eagle Produce Ltd., P'ship*,

[g]enerally, an employee can satisfy the last element of the prima facie case only by providing evidence that he or she was replaced by a substantially younger employee with equal or inferior qualifications. The test for the prima facie case changes somewhat, however, where a discharge occurs in the context of a general reduction in the employer's workforce. In this context, circumstantial evidence other than evidence concerning the identity of a replacement employee may also warrant an inference of discrimination. The reason for this difference is that in most reduction-in-force cases no replacements will have been hired.

Diaz v. Eagle Produce Ltd., P'ship, 521 F.3d 1201, 12017 (9th Cir. 2008)

A plaintiff who was subject to a RIF is not required to show that he or she was "replaced" by a younger worker. *Wallis v. J.R. Simplot. Co.*, 26 F.3d 885, 891 (9th Cir. 1994). "Instead of showing proof of replacement, a plaintiff may establish a prima facie case of discrimination by showing 'through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination.'" *Merrick* at 1146 (internal citations omitted). "Such an inference may be established by demonstrating that an 'employer had a continuing need for [the plaintiff's] skills and services in that [his] various duties were still being

performed.” *Id.* (internal citations omitted). An inference of discrimination may also be established by “proof that respondent continued to make the employment . . . available to persons who are not members of the same protected class as charging party” or that “similarly situated persons outside the protected class were treated more favorably.” Admin. R. Mont. 24.9.610.

Ultimately, Blount must show that his protected trait (i.e., age) actually motivated MSL’s decision to lay him off under the state’s RIF policy. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). The plaintiff’s age must have “actually played a role in [the employer’s decisionmaking] process and had a determinative influence on the outcome.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000) (internal citation omitted). In determining whether a prima facie case has been established, the overriding inquiry is whether the evidence is sufficient to support an inference of discrimination. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252, 101 S. Ct. 1089, 1093-1095, 67 L. Ed. 2d 207, 215-217 (1981) In an ADEA action, that may be accomplished by producing evidence that identifies age as the “likely reason” for an adverse employment decision.” *White v. City of San Diego*, 605 F.2d 455, 458 (9th Cir. 1979) (sex discrimination).

Blount was 63 years old at the time of the RIF. *See Diaz* at 1207 (protected class includes individuals who are at least 40 years old). There is no dispute that Blount excelled as a cartographer and was a tremendous asset in the development of the cadastral program, which continues to be one of MSL’s greatest public assets. There is absolutely no doubt Blount was eminently qualified for the GIS Analyst position and was performing his duties at an exceptional level at the time of the RIF. Blount easily satisfies the first three elements of the prima facie case.

Similarly, Blount has satisfied the final element of the prima facie case. Daurio (39) and Burns (37) continue to perform the duties required of Blount’s former position within the Land Information Group in addition to their duties that focus primarily on the Water Information Group. Blount’s duties were not eliminated, rather, MSL reassigned those duties to the remaining GIS Analysts. The two GIS Analysts who were retained - Daurio and Burns were younger than Blount and under the age of 40 at the time of the RIF. Therefore, Blount has satisfied his burden of establishing a prima facie case of age discrimination.

- B. *MSL has established it had legitimate, nondiscriminatory reasons for the layoff of Blount pursuant to the RIF.*

Once a complaining party establishes a prima facie case, an inference of discrimination arises by operation of law irrespective of whether direct evidence of discrimination exists. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943 (1978). MSL now bears the burden of establishing it had legitimate, nondiscriminatory reasons for laying off Blount. *Burdine*, 450 U.S. 248, 253; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). “To suffice under *McDonnell Douglas*, an employer’s explanation must explain why the plaintiff ‘in particular’ was laid off.” *Diaz*, 521 F.3d at 1211. A workforce reduction explains why a group of employees were laid off but is not sufficient to establish why the plaintiff, in particular, was laid off. *Id.* at 1212.

MSL offered evidence showing Blount was included in the RIF for individualized, nondiscriminatory reasons. Facing significant, mandatory budget cuts, MSL was forced to evaluate what skills and abilities each GIS Analyst possessed that could best be utilized in maintaining MSL’s level of programming and customer service while preparing for MSL’s future needs. While it is wholly undisputed that Blount was a master cartographer and the major reason for the success of the cadastral program, his skills were primarily utilized in the Land Information Group. In contrast, Daurio and Burns worked not only in the Land Information Group but also the Water Information Group, which was poised to become a primary focus for GIS staff. Additionally, both Daurio and Burns worked on various contracts and grants that were a source of revenue for MSL. In contrast, Blount worked on very few contracts and grants in the years leading up to the RIF. MSL has established by a preponderance of the evidence that it acted for a legitimate, nondiscriminatory reason when it laid off Blount under the State’s RIF policy. See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (“A RIF is a legitimate nondiscriminatory reason for laying off an employee.”). The burden now shifts back to Blount to show that MSL’s articulated reasons were pretextual.

- C. *Blount has failed to show that the reasons offered by MSL for his layoff were pretext for age discrimination.*

Once an employer articulates a nondiscriminatory reason for its actions, the presumption of discrimination raised by the prima facie case is lost, and the plaintiff must then prove that the reasons proffered by the defendant are a pretext for discrimination. *Burdine*, 450 U.S. at 253 (citing *McDonnell Douglas*, 411 U.S. at 804).

Blount can establish pretext in two ways: (1) directly by proving that MSL was more likely motivated by discriminatory reasons, and (2) indirectly by showing that MSL's rebuttal theory was "unworthy of credence." *Douglas v. Anderson*, 656 F.2d 528, 534 (9th Cir. 1981). The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves*, 120 S. Ct. at 2106 (citing *Burdine*, 450 U.S. at 253). Blount's burden merges with the ultimate burden of persuading the hearing officer that he has been the victim of intentional discrimination. Blount 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. *See McDonnell Douglas*, 411 U.S., at 804-805.

In attacking an employer's explanation for the discharge, a plaintiff may not rely upon "mere personal beliefs, conjecture and speculation." *Chappell v. GTE Products Corp.*, 803 F.2d 261, 268 (6th Cir. 1986). Nor can a plaintiff prove pretext merely by asserting that a better business decision could have been made. *See Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983) ("the ADEA was designed to protect older workers from arbitrary classifications on the basis of age, not to restrict the employer's rights to make bona fide business decisions."). The evidence must produce sufficient evidence to allow for a conclusion that "age was a motivating factor" in his termination. *Merrick v. Hilton Worldwide, Inc.*, 867 F.3d 1139, 1147 (9th Cir. 2017)(internal citation omitted)

A plaintiff cannot show pretext by merely claiming that he was "better qualified" than younger employees who were retained, as an employee's evaluation of his own performance or qualification is irrelevant. *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987). So long as its reasons are not discriminatory, an employer is free to choose among qualified candidates. *Burdine*, 450 U.S. at 259. Courts have consistently declined to second guess an employer's exercise of its business judgment in making personnel decisions, as long as they are not discriminatory. *See Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits-or even the rationality-of employers' nondiscriminatory business decisions."). The protections of the ADEA were not intended to "diminish traditional management prerogatives." *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979).

In order to show pretext with regard to the relative qualifications between a plaintiff and any other employee, the plaintiff must demonstrate that defendant's business judgment "was so ridden with error that defendant could not have honestly

relied upon it." *Lieberman v. Gant*, 630 F.2d 60, 65 (2nd Cir. 1980); *see also, In re: Lewis*, 845 F.2d 624, 633 (6th Cir. 1988).

1. The Staff Justification Memo

Blount argues that evidence of MSL's discriminatory attitude and reliance by management upon age stereotypes is found in the OneNote notebook entitled, "Staff Justifications." Specifically, Blount notes the following language:

We face the loss of institutional memory regardless of our budget situation. We can plan to mitigate the impact of the loss of institutional memory but we cannot prevent the loss of institutional memory so that should not be our goal.

The decision about which GIS Analysts to retain largely came down to institutional memory vs. new and current skills. Our decision invests in new and current skills recognizing that we have the next two months to plan for the loss of institutional memory. As a long term strategy this course of action seems the wisest.

Ex. 14.

Blount argues the language used calls upon the stereotypes evinced by the adage, "You can't teach an old dog new tricks." Blount interprets the memo to suggest "institutional memory" equates to older workers and "new and current skills" equates to younger workers. Blount contends the memo shows a bias on the part of MSL that older workers are unable or unwilling to learn new skills and are more likely to retire sooner rather than later, so are therefore expendable. Blount notes there is no evidence in the record showing that Blount or any other GIS Analysts laid off or separated from their employment at or near the time of the RIF², lacked either the skills or the ability to attain the necessary skills to stay current in their profession.

MSL argues the document was an internal communication in which justifications for laying off certain staff of the RIF were outlined in response to concerns voiced by MSL Commissioner Ken Wall regarding the loss of institutional

²All of the GIS Analysts who were either laid off as a result of the RIF or voluntarily separated from their employment after the RIF was announced were over the age of 55. Those other GIS Analysts are not parties to this matter.

memory created by the RIF. MSL argues the language does not show Stapp held a discriminatory animus toward older employees and points to Stapp's testimony that she did not equate "institutional memory" and age. In Stapp's testimony, she pointed to the oldest current MSL employee having been recently hired for the Talking Book Library program and an employee who was younger but had more "institutional memory" having been an MSL employee for a longer period. Stapp Hrg. Tr. 387:16-25; 388:1-9.

MSL counters Blount's argument that the subtext of the memo is reminiscent of the addage noted above by pointing out that all GIS Analysts had ample opportunity to cross-train and to work on various programs and contracts that would have led to Blount's skill set being as diverse as that of Burns and Daurio.

The preponderance of the evidence shows that, while Blount had considerable knowledge, experience, and skill in the cadastral program, he did not have the variety of experience that Burns and Daurio had by virtue of the fact they regularly worked on a variety of programs and contracts across the spectrum of duties required of GIS Analysts. There was no indication that any member of MSL management doubted Blount's ability to attain new or more current skills but merely an acknowledgment that Burns and Daurio had demonstrated a present ability to perform a wide variety of duties using newer tools and programs than those used by Blount in maintaining the cadastral dataset. Further, a plain reading of the memo does not give rise to an automatic conclusion that Stapp's choice of language was code for running out older employees. "Institutional memory" does not necessarily mean an older employee has greater knowledge and experience than a younger employee. For instance, the employee hired by MSL after the RIF who is currently the oldest MSL employee. That employee clearly has less institutional memory than either Daurio or Burns despite being more advanced in age. It is a rather obvious observation that all agencies suffer the loss of "institutional memory" any time a long-term employee, regardless of age, leaves their employment. Therefore, the language used in the Staff Justification memo is not sufficient to establish the reasons proffered by MSL for applying the RIF to Blount was a pretext for age discrimination.

2. Stapp's Statements Regarding Blount's Skills and Consideration of Employees' Retirement Eligibility at the Time of the RIF

Blount points to various comments made by Stapp, who was a decision-maker during the RIF process, indicating that Blount's age was a factor in the decision to lay him off. Blount notes Stapp's testimony during her deposition:

Mr. Blount has great depth of experience in creating the cadastral in its original form and brings that institutional memory, but that technology changed over the course of how that information was collected, managed, and made accessible, and we need to make sure we have staff that have those current knowledge, skills, and abilities about those new technologies to continue to ensure, as I just said, the most sufficient management and delivery of that information.

Stapp Hrg. Tr. 401:14-22.

Blount also notes statements Stapp made during the May 31, 2017 staff meeting in which she stated, “We did look at retirement benefits and staff that are eligible for retirement, and more than half the positions we’re talking about are people who are eligible for retirement.” Stapp Hrg. Tr. 335:24-336:3; 336:13-20. Stapp admitted that MSL looked at retirement benefits “almost immediately,” and retirement payouts were considered as part of the RIF due to the costs that would be incurred in addition to the budget cuts. Stapp Hrg. Tr. 391:6-21; 392:1-11.

Blount’s argument is not persuasive. The comments made by Stapp at the May 31, 2017 meeting were in response to an employee’s question about whether MSL would accept volunteers for the RIF. Stapp testified, “We’re a small agency, very close-knit, and staff were expressing concern for their colleagues. I was attempting to reassure staff that some of the employees to be RIF’d were eligible for retirement and that they would have a kind of cushion with that eligibility.” Stapp Hrg. Tr. 391:6-12. There was no substantial evidence offered showing that retirement eligibility was a determinative factor in MSL’s RIF decisions.

The Ninth Circuit Court of Appeals has held that a supervisor’s “repeated retirement discussions” with the plaintiff, “despite [his] clear indications that he did not want to retire,” as well as a suggestion from the supervisor that, “if he were in [the plaintiff’s] position, he would retire as soon as possible,” did not establish a discriminatory motive.” *France v. Johnson*, 795 F.3d 1170, 1172-73 (9th Cir. 2000). There is no indication that Blount’s eligibility for retirement factored into the RIF decision. Rather, it appears to have been a concern raised at a meeting where employees were understandably concerned after learning a RIF was to be implemented. Further, it appears to have been a necessary consideration when considering the impact of retirement payouts on MSL’s budget, as well as a statement to the affected employees as to their options regarding their retirement benefits. The comments themselves show no particular animus toward individuals who were eligible for retirement or any intent to “run them out” under the guise of a RIF.

Therefore, Stapp's comments regarding retirement eligibility do not show that was a determinative factor in MSL's decision regarding the RIF; nor do those comments show an animus toward people who were retirement eligible.

3. Blount's Statistical Evidence

Blount argues that MSL's application of the state's RIF policy disproportionately affected older employees. Blount notes that the average age of those employees that were laid off from the Information Management group was 56.78. In comparison, the average age of those employees who were retained was 43.17. See Exs. 43, 48.

As of June 2017, MSL had 42 employees. Exs. 1, p.2. The average age of those employees was approximately 49. Thirty of those employees were over the age of 40. Id. Seventeen of the 42 employees were eligible for early or full retirement. Schmitz Hrg. Tr. 652:15-24. Six of those positions were federally funded and were not subject to the RIF. Id. As a result of the RIF, seven employees were actually laid off; three positions were left vacant; and two employees left their employment prior to being laid off pursuant to the RIF. Ex. 43. The average age of the employees subject to the RIF was 58.43. The average age of the employees who were retained was 46.93.

The Information Management Group was left with six employees after the RIF. Ex. 48. The average age of the retained employees was 37. The average age of the employees who were actually subject to the RIF and who did not leave their employment prior to being laid off pursuant to the RIF was 58.43. Ex. 48.

There was clearly a disparity between the ages of those employees who lost their employment under the RIF and those who were retained. MSL counters that the layoffs were mandated by the Legislature as a result of the drastic reduction to MSL's operating budget. MSL argues that age of the employees who were RIF'd was not a factor was considered when MSL was forced to eliminate or close entire functions or groups, such as the reading room, which lost all of its employees under the RIF. MSL also notes that MSL rehired one employee who was 70 years old after the RIF. Ex. 43.

“Although statistics have a place in a disparate treatment case, *see Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985), their utility ‘depends on all of the surrounding facts and circumstances’.” *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986), citing *Int'l Bhd. of Teamsters v. United States*,

431 U.S. 323, 340 52 L.Ed. 2d 396, 97 S. Ct. 1843 (1977). As noted by the court, “[D]eficiencies in facially plausible statistical evidence may emerge from the facts of particular cases.” *Carroll v. Sears, Roebucks & Co.*, 708 F.2d 183, 199 (5th Cir. 1983)(“The flaw in the plaintiff’s proof was its failure to establish the required causal connection between the challenged employment practice testing and discrimination in the work force.”).

“[S]tatistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded.” *Id.* at 1076, citing *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050, 50 L.Ed. 2d 765, 97 S. Ct. 761 (1977)(internal quotations omitted). “The problem with small labor pools is that slight changes in the data can drastically alter appearances.” *Id.* “[S]tatistics ‘must show a stark pattern of discrimination unexplainable on grounds other than age.’” *Coleman v. Quaker Oats*, 232 F.3d 1271, 1283 (9th Cir. 2000). *See also Aragon v. Republic Silver State Disposal*, 292 F.3d 654, 663 (“Aragon’s statistical evidence presents no stark pattern, nor does it account for possible nondiscriminatory variables, such as job performance. Thus, we find Aragon’s statistics insufficient to raise an inference of racial discrimination.”)

The statistics relied upon by Blount are from an extremely small universe warned against in *Carroll*. The Information Management Group had 15 employees, seven of whom were laid off. This is precisely the scenario warned of in *Sengupta* - a single change could have a drastic impact on the appearance. The small size of the group in question in this case makes its value in determining whether MSL’s explanation for laying off Blount is pretext for discrimination. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 996, 101 L.Ed. 2d 827, 108 S. Ct. 2777 (1988); *Aragon*, 292 F.3d at 663 (2002)(the sample size identified by plaintiff was too small to raise an inference that non-white employees were treated more favorably when three of the four employees laid off were white); *Stout v. Potter*, 276 F.3d 1118 (9th Cir. 2002)(affirming the district court’s dismissal of a disparate impact claim because “[a] sample involving 6 female applicants in a pool of 38 applicants is likely too small to produce statistically significant results”); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997)(refusing to give weight to an expert’s statistical evidence regarding correlation of age and retention that failed to explain the omission of other variables); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 848-49 (1st Cir. 1993) (holding that "a small statistical sample carries little or no probative force to show discrimination" and noting that statistical evidence is generally less relevant in disparate treatment cases than in disparate impact cases because the focus is on the treatment of an individual rather than on an overall pattern); *Contreras v. City of Los*

Angeles, 656 F.2d 1267, 1272 (9th Cir. 1981) (“Small sample size may, of course, detract from the value of [statistical] evidence.”).

The value of statistical evidence relied upon by Blount is lessened due to the small sample size used. Such evidence does not show that the reasons offered by MSL for Blount’s layoff was pretext for discrimination.

D. *MSL’s Reasons for Blount’s Layoff*

Blount argues MSL has provided changing explanations as to why it laid off Blount. Blount points to Hammer’s June 1, 2017 (Ex. 5) email to Blount in which he outlines the analysis employed by MSL in deciding to lay off Blount rather than Daurio or Burns. Blount argues Ex. 5 is significantly different than Stapp’s June 2, 2017 email (Ex. 14), which she prepared at the request of an MSL commissioner.

Exhibit 14 addresses concerns regarding the loss of institutional memory. In this email, Stapp notes that the loss of institutional memory is always a concern but MSL was attempting to take steps to mitigate that loss by retaining GIS Analysts based upon an assessment of the GIS Analysts’skills in working with multiple framework layers.

The explanations are not so different as to establish pretext. Exhibit 5 provides a fairly detailed explanation as to why MSL decided to lay off Blount pointing to the various duties performed by Daurio and Burns as compared to Blount’s more limited duties. Exhibit 14 addresses the inevitable loss of institutional memory and MSL’s attempt to stem that loss by retaining individuals with experience working on multiple framework layers. Although the point of each email is different, as is the intended audience, the substance of the emails are sufficiently similar that it cannot be said MSL offered differing explanations as to why it laid off Blount rather than other GIS Analysts.

E. *The Veracity of the Explanations Provided by MSL*

1. The Hydrography Dataset

Blount argues there is little to no evidence showing Burns worked on wetlands, which he notes is the responsibility of the Natural Heritage Program and no MSL employee works directly on that program. Blount also argues that Blandford’s testimony shows that only Daurio worked on wetlands, and that Burns was omitted

not only from Blandford's testimony but in the examination conducted by MSL counsel.

MSL counters that Hammer is the project manager for and is responsible for administering and overseeing the Natural Heritage Program contract. MSL notes Hammer testified that Burns' experience in mapping wetlands was critical for the National Hydrography dataset. Hammer also testified that both Daurio and Burns worked closely with the University of Montana under the Natural Heritage Program contract and were familiar with the various tools needed to perform MSL's statutorily required duties.

It is true that Blandford's testimony focused primarily on what duties Daurio performed regarding wetlands. However, the evidence shows that both Daurio and Burns performed wetlands work, as well as work for the land information group. See Hammer Hrg. Tr. 413:25-415:18; 439:6-16 ("Meghan Burns and Maya Daurio both worked a significant number of hours on a USGS grant . . . It's a project to pull features from the Montana wetlands and riparian dataset into the hydrography dataset to improve that hydrography features that are available in that dataset."). Several witnesses testified Burns worked on the water information datasets. Blandford Hrg. Tr. 634:12-14; Kirkpatrick Hrg. Tr. 107:20-24; Stapp Hrg. Tr. 375:9-13. Perhaps most important, is the testimony that Blount performed no meaningful work on the hydrography datasets. Kirkpatrick Hrg. Tr. 103:3-5; Lund Hrg. Tr. 146:19-147:1; 147:19-21; Blount Hrg. Tr. 272:10-12. Consistent with MSL's explanation that it place a premium on the variety of skill sets held by the GIS Analysts, there is no evidence pointing to Burns being the GIS Analyst who predominantly worked on wetlands. However, there is sufficient evidence showing that she had at least some experience working in that area, and, in any event, more than Blount. Blount's argument regarding Burns is not sufficient to show pretext.

2. Parcel Fabric

Blount argues his skills working with the parcel fabric tool were far superior to the skills of either Burns or Daurio, which he claims MSL disregarded in its RIF analysis. MSL concedes Blount's skills working with the parcel fabric tool were excellent. MSL argues that it was the diversity of skills held by the GIS Analysts that were the primary consideration and not the individual superiority in a single dataset or working with a particular tool.

Blount's skills with the parcel fabric were the primary basis for the creation of and continued excellence of the cadastral program. That is not disputed. However,

by Blount's own admission, he did not work with the other programs or tools. Blount Hrg. Tr. 272:10-12. Again, the substantial evidence of record shows that Burns and Daurio worked with a variety of programs and tools when compared to Blount's primary focus on supporting the land information group. Blount's argument that MSL disregarded his parcel fabric expertise is not a persuasive basis for finding MSL's stated reasons for retaining Daurio and Burns in lieu of Blount were pretext for age discrimination.

3. Priorities

The Montana Land Information Plan State Fiscal Year 2019 (Ex. 35) included a \$40,000.00 allocation for a cadastral re-write. Blount contends that this is proof that the cadastral program was a priority for MSL. MSL counters that the allocation is far exceeded by the overall budget for the other tasks performed by the Digital Library. MSL also notes the cadastral program is not subject to a legislative mandate and is not statutorily required. Finally, and most persuasively, MSL notes the \$40,000.00 allocation was intended for web design, which is not an identified task for any of the GIS Analysts.

The cadastral program was clearly an important program for MSL based upon its customers' use of the program and its obvious excellence. However, a \$40,000.00 allocation intended for web design is not sufficient to show MSL's stated reasons for laying off Blount were pretext for age discrimination. Further, Exhibit 35 lists the priorities for the Montana Land Information Advisory Council. It does not list the cadastral program as a priority per se but, rather, to review its sustainability in the face of significant budget cuts. Therefore, Blount's argument that cadastral was a primary priority of MSL is not persuasive.

4. Administrative Boundaries

Blount argues that his skills and experience working with administrative boundaries far exceeds that of Burns. Blount developed a method for adjusting boundaries that was featured in the American Survey. TR 199:22 -200:2. Blount has worked with administrative boundaries for approximately 25 years. 202:3-8. In comparison, Burns had only worked with administrative boundaries for three years but she had been named the boundaries coordinator.

MSL's argument there was no evidence offered comparing the skills of Burns and Blount is well taken. Years of experience does not necessarily translate to one having greater skills than another person. However, by all accounts, Blount's skills

are exceptional. Burns clearly also had superior skills given her responsibility of coordinating administrative boundaries work. Plus, Burns skills translated to a variety of other programs and tools whereas Blount's skills were primarily utilized in the land information group. Taken as a whole, Burns' skills, while perhaps not at the level of Blount, were sufficient for MSL to rightly consider the variety of those skills rather than the individual superiority in each skill set. Therefore, Blount's argument that his experience and talent working with administrative boundaries was superior to Burns is not sufficient to establish pretext.

F. MSL and the State's RIF Policy

The Montana Operations Manual sets forth the state's Implementing a Reduction in Force Policy, which provides:

When reducing the workforce, agency managers shall consider the programs they administer and the staff structure that most efficiently accomplishes the agency's program objectives. Agency managers shall consider employees' skills, qualifications (including performance), and length of continuous service, among other factors, when making reduction-in-workforce decisions.

Ex. 101, Section III, Procedures.

Agency managers shall first assess the skills and qualifications (including past performance) of employees when making reduction decisions. When making reduction-in-force decisions, managers should consider the following in relation to the remaining positions:

- a. employees' qualifications and experience in performing the duties of the remaining positions.
- b. employees' qualifications and experience that benefit the agency's future goals and objectives;
- c. employees' skills to perform the specific tasks assigned to the retained positions; and
- d. employees' performance history.

Ex. 101, Section III, ¶ A. Skill Assessment.

“If the skills assessment does not adequately distinguish between employees, agency managers shall then consider the employees’ continuous length of service to make the decision.”

Ex. 101, Section III, ¶B. Length of Service.

It is clear from the evidence adduced at hearing that the budget cuts mandated by the legislature were devastating for MSL. It is clear that neither Stapp nor Hammer relished the idea of reducing its staff or reducing the services and programming offered by MSL. However, the legislature’s budgetary decisions led to the cutting of MSL staff in an effort to maintain the level of programming offered by MSL for the benefit of the citizens of Montana.

In approaching the necessary RIF decisions, Hammer clearly took a thoughtful approach. After first coming to terms with the fact that the budget cuts would be particularly devastating for the Digital Library, Hammer directed his leads to determine where money savings could be had without sacrificing the quality of programming offered by MSL. Hammer Hrg. Tr. 419:5 - 420:4. Hammer then met individually with each of the program leads with the idea that MSL would retain the structure of the Digital Library to ensure it continued to operate as a user services team. 420:13-19. Ultimately, Hammer determined that the land group and the water group could continue performing at acceptable levels with one lead and one GIS Analyst in each group. Hammer Hrg. Tr. 422: 9-17. Hammer further determined that could be accomplished only by retaining those GIS Analysts that had a diversity of skills and ability to work on a variety of projects. Hammer Hrg. Tr. 421:17-25.

It became clear to Hammer in his discussions with the leads that Daurio and Burns were working “on almost all of the [data] layers” and had “a high level of subject matter expertise.” Hammer Hrg. Tr. 424:6-20. Daurio worked on the dataset in the adjustment of the cadastral and boundaries datasets, and Burns was the boundaries team lead. Both were considered to have subject matter expertise in the water datasets. Hammer Hrg. Tr. 430: 6-25.

At the time of the RIF, it was clear that Daurio and Burns had experience and skill working with the tools and programs that were important in maintaining MSL’s ability to meet its duties under various grants and contracts; as well as continuing to provide the level of programming as mandated by the MSL commission. There is no doubt as to Blount’s skills and his apparent ability to learn new tool sets and become proficient with datasets outside of those managed by the land information group.

However, the fact remains Burns and Daurio had demonstrated their ability to perform various functions within both the land information group and the water information group at the time of the RIF. MSL's argument that it needed such flexibility in the face of drastic budget cuts is logical and totally devoid of any inference of age discrimination.

Blount argues there was no need to maintain the land and water information groups as separate entities and MSL's choice to do so makes its proffered explanation incredible. Blount contends that retaining Daurio and Burns created a redundancy given their expertise in wetlands. While they both had a demonstrated skill set in the water information group, they also had the skill set in the land information group. Blount specifically takes issue with the information MSL presented about Burns' skill set. MSL established Burns was the administrative boundaries lead. Blount Hrg. Tr. 195:25:196:2. Burns worked with Blount on the parcel fabric, and she performed hundreds of hours on various MSL contracts, which included both land information and water information tasks. Stapp Hrg. Tr. 375:16-17; 379:3-23; 384:11-15; Ex. 32. Further, both Daurio and Burns worked with Lund on cross training efforts in both water and land information. Blandford Hrg. Tr. 64:1-7; Lund Hrg. Tr. 129:23-130:8.

In contrast, Blount's focus was solely on the land information group. The logic of Blount's argument is hazy. If he had been retained, his focus would have remained in the land information group while he worked to gain the skills necessary for the water information group. Would that not have required the two groups to remain distinct until he gained the proficiency in those tools and datasets? Further, a state agency cannot just operate for today but must always prepare for the future, which may bring even more drastic budget cuts. Flexibility is not a bad thing nor is it something to be avoided in favor of individuals with a specialized skill set that does not provide a broad-based benefit for the agency as a whole. The hearing officer sees no reason to second guess MSL's exercise of business judgment in the absence of any evidence showing its decision was discriminatory. The hearing officer is mindful that she cannot act as a super-personnel department that second guesses an employer's business judgments. *Hutchins v. DirecTV Customer Serv.*, 963 F. Supp. 2d 1021, 1031 (D. ID. 2013) (internal quotations omitted).

Blount argues Kirkpatrick's testimony should be given greater weight than the testimony of MSL's expert witness, Jim Kerins. Kerins' testimony was limited to his opinion as to whether MSL properly applied the RIF policy. Kirkpatrick's testimony addressed Blount's performance and the skills required of a GIS Analyst. The hearing officer appreciated the guidance each witness provided in their respective testimony.

However, each witness has their faults. Kirkpatrick's testimony was based upon dated information and information clearly provided to him by Blount or other interested persons. Kerins, as a retained expert, clearly was brought forth to bolster MSL's argument that it properly applied the RIF policy. While helpful, the hearing officer does not find that either witness' testimony was particularly determinative in her final judgment.

Finally, Blount argues MSL failed to properly account for his experience or past performance. Blount contends that experience necessarily equates to length of time on a job and cites several dictionary definitions in support of his contention. It should be noted that Merriam-Webster.com also includes the definition: "a direct observation of or participation in events as a basis of knowledge" and "the fact or state of having been affected by or gained knowledge through direct observation or participation."

It cannot be disputed that Blount developed a specialized skillset during his employment with MSL. However, it also cannot be disputed that experience encompasses the gaining of knowledge through direct observation or participation that does not necessarily require a time component.

MSL conceded it did not look at the affected GIS Analysts past performance during its RIF analysis. Hammer testified he did not feel it was necessary given the excellent performance of all those involved - all three were qualified for the remaining GIS Analyst positions. CITE. Looking to the employees' experience, the evidence of record shows that the experience of both Daurio and Burns during their employment was more varied and had a wider impact than the experience held by Blount. Looking at the second element of the RIF analysis, that distinction between the experience of the three GIS Analysts became determinative when considering whose qualifications and experience would most benefit the agency in the future. There is no evidence showing MSL's determination, which was based on several legitimate factors, including variety of skill sets; work on income producing grants and contracts; and present ability to work with several tools and datasets, was affected by the age of any of the three GIS Analysts.

Blount's argument that his length of service should have been considered is not persuasive. The RIF policy clearly states the employees' continuous length of service is to be considered when "the skills assessment does not adequately distinguish between employees." Ex. 101, p.2, ¶B. In this case, the skills assessment distinguished Daurio and Burns from Blount based upon the potential future benefit of their [qualifications and experience] at the time of the RIF. While Blount's

performance and skills are without question excellent, the fact remains he worked in predominantly one area that was not slated to be a primary focus of MSL in the future and he did not work on the variety of contracts and grants that Daurio and Burns worked on.

G. The Absence of Fashoway and Burns at Hearing

Blount argues the hearing officer should draw a negative inference based upon MSL not having called Fashoway as a witness at hearing. MSL counters that Blount's case-in-chief consumed the majority of time slated for hearing thereby causing MSL to make a judgment call as to which witnesses to call in the time they were allowed.

MSL also argues that Blount cannot meet his burden of proof through negative inferences. MSL rightly notes, "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 (6th Cir. 2000). "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. 1984)); see also *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2004).

The Ninth Circuit Court of Appeals has held:

It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch v. Archer, Cowp.* 63, 65," -- citing, also, 1 Stark. Ev. p. 54.

Waterhouse v. Rock Island Alaska Min. Co., 97 F. 466, 477 (9th Cir. 1899).

As a general matter, the "missing witness" or "uncalled witness" rule allows a party to "properly argue to the jury the possibility of drawing [an adverse] inference from the absence of a witness," provided that the party first "establish[es] that the missing witness was peculiarly within the adversary's power to produce." *Chicago College of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983). That a missing witness was "peculiarly within the adversary's power to produce" can be established "by showing either that the witness is physically available only to the opponent or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party." *Id.* However, "[i]f the uncalled witnesses are equally available to both parties, no inference should be drawn." *Bellmore v. U.S. Steel Corp.*, 983 F.2d 1065, [Full-Text Slip Opinion Reported at 1992 U.S. App. LEXIS 33660] at *1 (6th Cir. 1992) (unpublished) (citing *Harkins v. Perini*, 419 F.2d 468, 471 (6th Cir. 1969); *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990)).

Apple, Inc. v. Samsung Elecs. Co., 2012 U.S. Dist. LEXIS 114715, **23,24 (Cal. N. Dist. Ct. 2012).

The Ninth Circuit Court of Appeals has gone on to note:

We know of no rule of law "that it is incumbent upon a party to a lawsuit to produce all witnesses cognizant with the facts." Such a rule would impose upon a party the burden and expense of producing cumulative testimony, and of every witness, however slight his knowledge of the facts might be. There is no showing that the witness referred to was available, and it was entirely proper for the government to rely upon the testimony introduced, which was abundant, without going to the expense of searching for and producing such witness. It may be true that, where the evidence is vague and needs explanation, and a party has it peculiarly within his power to produce a witness whose testimony would clear up the uncertainty, or has in his possession documents which would elucidate the transaction, his failure to produce such witness or such documents would authorize the presumption referred to in the request. *Graves v. U.S.*, 150 U.S. 118, 14 S. Ct. 40, 37 L.Ed. 1021. But this is not such a case

Cummings v. United States, 15 F.2d 168, 170 (9th Cir. 1926).

While not controlling precedent, the following provides a concise synopsis of the circumstances when applying a negative inference is appropriate:

Whether to apply such an inference is fully within the discretion of the trial court. Louisiana jurisprudence has held that the trial court's failure to apply the negative inference is not an abuse of discretion under any one of these circumstances: where the witness's testimony would be cumulative; where the party seeking to avail itself of the negative inference has the burden of proof on the issue that would be addressed by the witness's testimony; and where the witness is equally available to the opposing party. As all of these circumstances are present here, and any one would have been sufficient to justify the trial court's refusal to apply the presumption, we cannot say that the court's failure to do so was an abuse of discretion.

Moretco, Inc. v. Plaquemines Parish Council, 112 So. 3d 287, 296-97 (La. App. 4th Cir. 03/06/2013).

The hearing officer declines to apply a negative inference due to the failure of MSL to call either Fashoway or Burns as witnesses at hearing. Time was constrained and there has been no argument offered suggesting that either Fashoway or Burns would offer new or different evidence than that what was offered by Blandford, Hammer, Stapp, the deposition testimony of Daurio, and Blount himself. Further, Blount bears the burden of proving not only his prima facie case but pretext. Allowing him to do so through negative inference would relieve him of his burden of offering substantial and credible evidence in support of his case, which is impermissible. Finally, there has been no showing that Fashoway or Burns were not equally available to both parties at the time of hearing.

H. *Conclusion*

Blount has failed to show that MSL's decision to lay him off pursuant to the RIF was due to his age. While Blount's job duties were assumed by employees who were younger than him, he has not produced sufficient evidence to permit a rational inference that MSL's motive was actually discriminatory. *See Merrick* at 1150 (internal quotations and citation omitted). There was not substantial evidence offered showing age was a factor in the MSL's decision making. Considering the drastic budget cuts mandated by the Montana Legislature, the resulting merger of MSL programs and reduction of MSL services, and the business reasons offered by

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Keith Blount, Charging Party, and his attorneys, Scott Peterson and Robert Farris-Olsen; and Montana State Library, Respondent, and its attorneys, Jeffrey M. Doud and Katherine J. Orr:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(C) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, 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 original transcript is in the contested case file.

Blount.HOD..chp