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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 413-2019:

STACIE LOPPIE,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
GBR, INC., d/b/a SMITH'S PLACE,	)	
	)	
Respondent.	)	

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I. PROCEDURAL AND PRELIMINARY MATTERS

Stacie Loppie brought this complaint alleging GBR, Inc., d/b/a Smith's Place (Smith's Place) retaliated against her for protected activity by "changing the terms and conditions of [her] employment and then terminating [her] employment." Loppie further alleges Smith's Place retaliated against her for filing her original Charge of Discrimination on February 28, 2018 by "barring [her] from the establishment and threatening [her] with legal action." *See* Amended Charge of Discrimination (filed 03/28/2018).

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on October 23, 2019 in Helena, Montana. John Doubek, Attorney at Law, represented the Charging Party, Stacie Loppie. Gregory G. Smith and Kaitlyn J. McArthur, Attorneys at Law, represented the Respondent, Smith's Place. Mike Wieck, Smith's Place Owner, appeared as its designated representative.

At hearing, Loppie, Wieck, Denise Bartole, Paul Hewitt, Susan Bartole, Dennis Bartole, Jadyn Loppie, Tim Achter, Vickie Thomas, Tiffinie Eaves, Tayler Wellenstein Brown, Kris Brockway, and Mary Donna Schultz, testified under oath.

The parties stipulated to the admission of Charging Party's Exhibits 1through 4 and Respondent's Exhibits 101 through 1075. Charging Party's Exhibit 5, the Final Investigative Report, was not admitted into evidence.

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 on February 10, 2020. 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 Smith's Place, retaliate against Stacie Loppie in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Smith's Place, did illegally retaliate against Stacie Loppie as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Smith's Place, did illegally retaliate against Stacie Loppie as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. EVIDENTIARY ISSUES RAISED AT HEARING

A. HRB's Final Investigative Report is Not Admissible.

Smith's Place objected to Loppie including the HRB's Final Investigative Report (FIR)in her list of proposed exhibits during the final prehearing conference. The Hearing Officer reserved ruling on the objection. Loppie offered the FIR again during the cross examination of Wieck. The parties graciously agreed to address the admissibility of the FIR in post-hearing briefing.

The Montana Supreme Court was unequivocal in its ruling in *Crockett v. City of Billings*, 234 Mont. 87, 98, 761 P.2d 813, 820 (1988), that Rule 803(8)(iv), M.R.Evid., "specifcally excludes factual findings such as the reasonable cause finding of the [HRB] which directly results form an investigation of a particular complaint of discrimination." In *Stevenson v. Felco Indus*., the court held that a party did not "open the door" by questioning a party about the contents of the FIR. In doing so, the court addressed the "official" nature of the FIR and the potential for undue prjeudice

arising from admitting a probable cause finding reached by a government fact-finding body. *Stevenson v. Felco Indus*., 2009 MT 299, P 43-44, 352 Mont. 303, P 43-44, 216 P.3d 763, P 43-44.

Smith's Place rightly notes that the recitation, summary, and evaluation of the witness' statements by the investigator is double hearsay. Rule 805, M.R.Evid. The investigator was not called as a witness. The use of the investigator's summary of information provided by witnesses during the course of the investigation is not a proper method of impeachment under the Montana Rules of Evidence. Therefore, the FIR is inadmissible and has not been considered by the Hearing Officer in reaching her conclusion in this matter.

B. Dennis Bartole is not an Expert Witness

Smith's Place objected to the testimony of Loppie's step father, Dennis Bartole, regarding the physical and mental impact Loppie's employment had on her. Smith's Place argues Dennis Bartole was not disclosed as an expert witness, and his testimony should be disregarded.

Rule 701, M.R.Evid., provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Dennis Bartole testified he observed Loppie was "not feeling well" and was "anxious" during her employment at Smith's Place and after her discharge. Dennis Bartole was in a position to observe Loppie and to distinguish her behavior from when he knew her to be happy and well, and when he knew her to be upset or anxious. The testimony was "rationally based on his perception of the witness;" and was helpful in providing a clearer understanding of Loppie's testimony that she was entitled to emotional distress damages due to the mental anguish she claimed to have suffered as a result of her discharge. While there was no evidence offered qualifying Bartole as an expert witness, his testimony regarding his observations of Loppie during the period following her employment with Smith's Place is relevant and admissible as lay witness testimony under Rule 701, M.R.Evid.

IV. FINDINGS OF FACT

1. Smith's Place is a bar and restaurant located in East Helena, Montana.

2. Smith's Place is owed by Virginia Wieck, who is the mother of Mike Wieck. Virginia Wieck suffers from medical issues that render her unable to operate the business. Mike Wieck has Power of Attorney over Virginia Wieck's legal affairs and is authorized to handle his mother's financial and health issues, including the operation of Smith's Place, which he has done since approximately 2012.

3. At all times relevant to this matter, Wieck was a resident of Ellensburg, Washington, where he owns and operates a civil construction company. Wieck works full-time as a civil engineer.

4. In August 2016, Wieck hired Stacie Loppie as a server. Loppie was promoted to General Manager approximately one week later.

5. Smith's Place had a great deal of employee turnover during Loppie's employment. Exs. 757. 925.

6. Loppie's duties as a General Manager included hiring and training new employees, cleaning, inventory, and cooking when called upon. Loppie was also responsible for checking and loading the ATM and managing the business' gambling machines. Loppie was also responsible for covering the shifts of absent employees.

7. Loppie typically opened the establishment at 6:00 a.m., tended bar until approximately 9:00 a.m., and worked as a server until 2:00 p.m. Loppie's shift typically ended at approximately 5:00 p.m.

8. Loppie was expected to respond to any phone calls from staff when she was not at work. Loppie was usually called out to Smith's Place two to three nights per week. Loppie was also responsible for responding to any calls related to the alarm going off at the business.

9. Wieck worked closely with Loppie on personnel decisions due to the legal requirements that the owner be involved in business' operations, particularly with bar inventory and pricing, hours of operation, and other business operations. *See* Exs. 279 through 957.

10. Wieck relied on frequent telephone conversations and text messaging with Loppie in the management of this business. Wieck was rarely physically present in Montana and relied upon Loppie's reports as to the business operations. *See* Exs. 279 through 957.

11. Loppie's experience during her first month as General Manager was generally positive. However, Loppie's working relationship with Wieck then grew increasingly more strained and difficult.

12. Wieck made comments about Loppie's weight and appearance and often commented on the appearance of other employees. Wieck told Loppie that he wanted "boobs behind the bar," and not "dicks behind the bar." See Ex. 297, 687.

13. Wieck also had a stated preference to have a male kitchen manager rather than a female kitchen manager. Wieck questioned whether a "gal" would be able to effectively control the kitchen. Ex. 295 through 296.

14. One of Loppie's concerns was Wieck's interference in the hiring of new employees. Loppie was allowed to hire new employees with Wieck's final approval. Wieck told Loppie that hiring "c[a]me down to personality, humility, maturity, and availability/intent to stick with it." Ex. 330.

15. Many of Wieck's hiring decision regarding female applicants was based on appearance. Loppie sent pictures of applicants to Wieck, who then commented on the female's appearance. Exs. 315, 318, 321, 326, 329, 331 through 333. Wieck received at least one photo of a male applicant - Jaydn Loppie, Loppie's nephew. Ex. 327.

16. Loppie hired three men as bartenders during her time as General Manager. One of whom was her nephew Jaydn Loppie. Wieck initially objected due to Jadyn Loppie being 18 at the time, but relented after Loppie represented to him that Jadyn Loppie was in school getting his "doctor degree." Ex. 327. Wieck ultimately discharged Jadyn Loppie because he had taken three bad checks in one day that totaled approximately $1,600.00. Ex. 916-17. Wieck later learned Jadyn Loppie had never been trained on the business' check cashing policy and felt his discharge was unfair. Wieck rehired Jadyn Loppie, who quit two weeks later because he was "sick of bartending." Wieck expressed pleasure with the performance of one male bartender - Nate. Ex. 691.

17. Smith's Place hired approximately three African American men to work as cooks and as a dishwasher during Loppie's tenure as General Manager.

18. Wieck's requirements for a chef included: formal training/comparable experience; mature/clean appearance; humility; and can/wants to lead the kitchen. Ex. 303.

19. During summer 2017, Loppie informed Wieck there was conflict between two African American male cooks. Loppie complained the African American cooks often left the kitchen to mingle with customers, which Loppie contended caused customers to leave the business.

20. On August 7, 2017, the following text message exchange between Loppie and Wieck took place:

Loppie: I brought a temp cook on he is black but 0 tattoos he is from last chance casio [sic]
Wieck: I don't want two black cooks. One is great.

Loppie: I know but I needed a cook[.]
I thought it would be fine for a temp since Fred left.

Wieck: Yep. And that's cool.

Ex. 761-62.

21. Wieck later wrote:

> Ok. As bad as it sounds I do not want two black cooks. It's just reality. The guy that only wants breakfasts and no weekends? He can go fishing. We don't have time for primo [sic] Donna's.

Ex. 763.

22. Wieck believed the business' drop in revenue was attributable to the reaction of the East Helena clientele to two African American men working for the business. Wieck's belief was based upon information he received from Loppie that at least one of the cooks was mingling with the customers during his shift.

23. Loppie eventually hired an African American cook approximately one day after the text message exchange. Wieck considered him a good employee and did not interfere with his employment.

24. On August 12, 2017, Wieck asked Loppie via text message if they should rehire Fred, who was an African American cook who had previously worked for Smith's Place. Wieck noted that two customers had asked about Fred and complimented his cooking. Loppie protested and described Fred as being whiney and hard to manage. Ex. 803.

25. Later that same day, Wieck inquired about hiring Fred again noting that the restaurant profits were continuing to drop after Fred left. Loppie noted that Fred had been cooking the previous month and the restaurant was still down. Loppie also noted that another cook could not "stand him." Ex. 805. Fred returned to working for Smith's Place at some point prior to October 2017. See Ex. 928.

26. Approximately one hour later, Wieck confirmed for Loppie that she had a good crew and wrote:

> Wieck: . . . And regarding who works there they need to look and dress appropriately. No mass tattoos (basically military code) no big face jewelry, clean and neat appearance. We do not discriminate on age (as long as they can do the job) race or color."
>
> Loppie: I don't discriminate at all.
>
> Wieck: Neither does Smiths.

Ex. 806.

27. On August 13, 2017, Loppie confronted Wieck via text message that she had heard a rumor he was firing her. Wieck denied that was the case and indicated he wished to speak with her about improvements that could be made to management of the business. Wieck confirmed he wanted Loppie to work and told her that he hoped she would not quit. Exs. 811-12.

28. On October 24, 2017, Wieck informed Loppie via text message that the profits from the last year's weekly profit was $28,000.00 and the profit this year was only $18,000. Wieck also noted that the opening to hunting season was $20,000.00

the previous year and down to $16,000.00 that year. Wieck opined that the downward trend was attributable to the rumor that Loppie had gotten fired. Ex. 936.

29. Loppie again challenged Wieck to tell her if he was firing her. Exs. 936-37. Wieck told her that he was trying to avoid more change but noted she was not making money for the business. Wieck wrote, "So it's like I have no choice. It's run out of case and close or give someone else a chance at some point. Let's see what October looks like. I think I can get over there in a week or two." Ex. 938.

30. Loppie continued the exchange by offering to turn in her keys and that she would start looking for a new job. Loppie then accused Wieck of not appreciating her. Wieck assured her that was not the case and wrote, "There's only so much cash." Ex. 938-39.

31. Loppie again offered to turn in her keys and Wieck asked why she did not want to see how October went. Wieck asked if she wanted him to fire her and questioned what would be reasonable given the business' financial condition. Loppie then offered to step down and let someone else manage the business. Wieck asked Loppie to wait two weeks or to the end of October. Exs. 940-42.

32. Loppie was required to use a business owned cell phone as part of her job duties. Wieck instructed Loppie at the beginning of her employment to set up a cell phone account under the business' name with Verizon Wireless.

33. On November 18, 2017, Wieck informed Loppie that he had learned that Loppie did not set up the account in the business' name, because she needed a tax ID number. **Instead, Loppie set up the**

34 . On November 18, 2017, Wieck learned Loppie had opened the account in Hewitt's name. Wieck directed Loppie to change the cell phone account holder to GBR, Inc, the parent company of Smith's Place. Wieck noted that the accountants had told him of the cell phone issue "a while ago," and he had not brought it up because it was a "minor issue." Ex. 955.

35. Wieck suggested Loppie get her own cell phone. Loppie suggested Smith's Place did not have to pay for the cell phone. Wieck responded: "For legal reasons Smiths does have to pay for it and it needs to be in Smith's name. It was never supposed to be in your name." Ex. 955.

36. Wieck requested copies of Loppie's cell phone bills, which she never produced. On at least two occasions, Loppie sent a text message or called Mary Donna Schultz, the business' bookkeeper, to pay the bill under Hewitt's name. Schultz did as requested. Schultz paid all Verizon Wireless bills provided to her by Loppie.

37. On November 26, 2017, Loppie asked Wieck if he was "looking to replace [her]." Ex. 110. Wieck responded:

> First let's see how November looks as we talked. I have not been actively pursuing anything in that regard.
>
> Smiths has to do better as everyone agrees. So that's important. But I need to get back there and talk w[ith] you about the whole picture. I have way too much stress and it's affecting my health. The management position at Smiths is incredibly important.

Ex. 11.

38. In December 2017, Wieck informed Loppie that he would no longer be paying her cell phone bill.

39. On January 23, 2018, Loppie was on her day off, when Wieck contacted her and requested she complete the deposit that day. Denise Bartole, Loppie's half-sister and Smith's Place's assistant manager, assembled the deposit for Loppie.

40. Bartole often completed deposits for Loppie as Assistant Manager. Bartole was never required to account for the cash and was able to complete a deposit with a grand total of the cash and checks.

41. Loppie attempted to complete the deposit at the drive thru of First International Bank on North Montana in Helena. The bank teller who helped Loppie at the drive thru told Loppie that she needed to complete a deposit slip before the deposit could be completed.

42. First International Bank requires commercial deposits to include an accounting of the currency, coins, and checks, as well as a grand total. This policy is intended to ensure there are no discrepancies between the amount of cash claimed to be deposited and the amount actually deposited by the bank employee.

43. After learning she was required to complete a deposit slip, Loppie told the teller that she was going to come inside the bank and demanded to speak with a manager. Tiffinie Eaves, a bank teller who overheard Loppie's exchange in the drive thru, was the first employee to meet Loppie inside the bank. Loppie pushed the money toward Eaves and told her that it was her job to accept the deposit. Loppie used profanity when talking with Eaves. Due to Loppie's behavior, Eaves went to Branch Manager Vicki Thomas, who had overheard Eaves' exchange with Loppie from her office.

44. Thomas knew Loppie from her previous dealings with the bank on behalf of Smith's Place. Thomas had previously complained to Wieck about Loppie's failure to adhere to the bank's commercial deposit policy. Thomas also knew Loppie's fiancé, who had dated Thomas' daughter 16 years earlier.

45. Thomas reminded Loppie of the bank's commercial deposit policy. Loppie used profanity while arguing with Thomas. Loppie could be heard by other bank customers.

46. Once Loppie completed the deposit and left the bank, Thomas contacted Wieck. Thomas informed Wieck that Loppie was no longer welcome at that branch due to her behavior and the use of profanity with both her and her staff.

47. Loppie had a similar outburst later that same day while at JCCS when discussing the incident at the bank with Schultz. Loppie used profanity in front of the JCCS receptionist and JCCS customers. Schultz told Loppie to be quiet. Loppie left JCCS without further incident. Schultz reported the incident to Wieck.

48. Wieck called Loppie after speaking with Thomas. Loppie initially denied the incident but then admitted she may have used the "f-word." Loppie and Wieck argued for several minutes, with Wieck calling Loppie a liar. Wieck discharged Loppie during this telephone conversation. Loppie ended the conversation by saying, "where do you want me to drop off the keys?"

49. Loppie sent Wieck a text message asking what he wanted her to do with her keys. Ex. 148. Wieck responded via text message informing her that the Helena Police Department had notified him that a former employee wanted to press criminal defamation charges against Loppie but she was only going to be given a warning. Wieck wrote:

> In spite of this and then another complaint from Dawn, and the bank episode today you were not fired. I also knew you had lied to me about numerous things. The Budweiser sign getting broke being only one of them.
>
> In spite of all that you were not fired because at the core of it I think you wanted to do better. And you had a certain perseverance that is admirable. And I like your folks. So that is why I did not call up today to fire you though almost any other employer I know probably would have.
>
> But after everything you have said and threatened and the way you said it I don't think going down this road is going to benefit anyone and you are clearly not sounding very amenable to taking any advice. Esp[ecially] from me. Please just leave the keys at the bar. I'll call Mary to get squared away with you. I am truly sorry you feel the way you do about me but it's better to be honest and move on.

Ex. 149.

50. Loppie responded:

> Threaten you? I said you cant treat people this way you literally say no black people and no big girls that isnt[sic] right. I think everyone should have a job no matter color or gender or weight I only told u[sic] I have them in writing so you cant deny it.
> And I didnt[sic] quit.

Ex. 150.

51. Loppie continued sending text messages to Wieck the following day. In one text message, Loppie wrote, "Your[sic] harassing me and dont[sic] have my name come put[sic] out of your mouth you terminated me so leav[sic] me alone.

Ex. 151.

52. Loppie then sent Wieck text messages demanding to know about the criminal report filed and offering to perform minor tasks for the bar. Exs. 153-55. At one point, Loppie wrote, "Mike you literally fired me for saying fuck in a bank. But

your bartenders can pull people out of the bar wiyh[sic] physical restraint pass out jn[sic] bathroom" Wieck responded by denying he fired her. Loppie responded:

> You did fire me. Your exact words whoch[sic] I have were you cant continue to work for smiths with the bank ill be up there. Right thereis[sic] fire
>
> I would never quit having three kids to feed which you never cared about my family.

Ex. 155.

53. On January 27, 2018, the following text message exchange occurred:

> Loppie: With all the dirty messages you sent me not once have I don't anything with them Mike.
>
> Wieck: Dirty messages!? What are you referring too[sic]? I know of no "dirty" messages.
>
> I also never complained when you had to take kids to the hospital or you had sick kids at home. Ever.
>
> And yes, I asked how it was going to work w[ith] you not being able to go to the bank. The answer would have been Denise but you blew up in such a big way and asked where to turn in the keys. After the blowup everything was pretty much off the table.
>
> Loppie: Blow up. And messages about age gender race black people in kitchen. All kinds mike. Rompers and I guess we will see where it goes joe[1] seems to think some where as be would like my phone.

Ex. 156

[1] "Joe" is Mike Wieck's brother. Mike Wieck and his brother have had a long standing feud that has involved various members of the East Helena community. This feud appears to have been the subject of many barroom chats at Smith's Place.

54. Loppie then proceeded to send ten text messages to Wieck that went unanswered.

55. On January 30, 2018, the following text message exchange took place:

Loppie: Call me when u[sic] are free we need to to [sic] the bottom of this shit.

Wieck: . . . I saw what you posted on your FB[Facebook] page about me though so I can't say I'm a happy camper...

Loppie: About not being a nice boss

Your opinion is not necessary. I am practicing my freedom of speech and that's how I feel. If you are not happy about it please feel free to not follow my page. If you would have allowed me to run your business the way it should have been you would have made money but instead you micromanage and have a failing business. Hopefully you can give up some of that control you have to have, suck up some pride and have a succeeding business. Until then you will only fail.

Ex, 160.

56. Wieck hired Bartole as the General Manager after his conversation with Loppie. Bartole had worked at Smith's Place since January 2017.

57. On March 4, 2018, Bartole informed Wieck that Loppie was playing the machines at Smith's Place and "causing trouble with customers." Wieck directed Bartole to inform Loppie that she was "86'd" from Smith's Place.

58. Bartole was responsible for picking up the mail from the post office and delivering it daily to Schultz. Bartole never observed a mailing from HRB and learned of Loppie's complaint from Wieck a few weeks after it was filed.

59. Within a day or two of Wieck "86'ing" Loppie, he received Loppie's Charge of Discrimination, which Loppie filed with HRB on February 28, 2018.

60. Loppie has shown she engaged in protected activity by opposing Wieck's discriminatory hiring practices. Loppie has shown her discharge was an adverse employment action.

61. Loppie has failed to show a causal link between her protected activity which occurred several months prior to her discharge in January 2018.

62. Smith's Place has shown a legitimate, non-discriminatory reason for discharging Loppie based upon the poor financial performance of the business and her offensive behavior at the bank. Loppie has failed to show the reasons offered by Smith's Place were false or unworthy of credence.

V. DISCUSSION

Loppie's Charge of Discrimination and Amended Charge of Discrimination alleged retaliation for protected activity. Loppie alleges Smith's Place retaliated against her for protected activity in violation of the Montana Human Rights Act (MHRA) (Title 49, Chapter 2, MCA), and Title VII of the Civil Rights Act of 1964, as amended, by failing to pay her cell phone bill in December 2017; terminating her on January 23, 2018; banning her from Smith's Place on March 4, 2018; and threatening to file a legal action against her. Loppie made no effort to amend her complaint to include allegations of discrimination or hostile work environment. Therefore, the Hearing Officer has the authority to address only Loppie's claim of retaliation.

Montana law prohibits retaliation in both public and private employment because of protected activity. Mont. Code Ann. §§ 49-2-301 and 49-3-209. The elements of a *prima facie* retaliation case are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. *Beaver v. DNRC*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857.

In cases arising under the MHRA, the elements of a *prima facie* case of retaliation in the employment context vary, but generally consist of proof that the charging party was qualified for employment, engaged in a protected activity, and was subjected to adverse action, as well as a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of engagement in the protected activity. Admin. R Mont. 24.9.610(2).

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

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

A. Loppie has Shown she Engaged in Protected Activity

"Protected activity" means the exercise of rights under the act or code and may include aiding or encouraging others in the exercise of rights under the act or code; opposing any act or practice made unlawful by the act or code; and filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1).

Title VII protects both an "employee's participation in the machinery set up by Title VII to enforce its provisions" and an "employee's opposition to conduct made an unlawful employment practice by the subchapter." *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (citation omitted). These two parts of Title VII are referred to as "the participation clause" and "the opposition clause." *Id*.

1. *Loppie engaged in protected activity by filing a Charge of Discrimination.*

It is beyond dispute that Loppie engaged in protected activity by filing a Charge of Discrimination on February 28, 2018, and her Amended Charge of Discrimination on March 28, 2018. *See Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, P22, 326 Mont. 491, 111 P.3d 202. Therefore, Loppie has shown she engaged in protected activity, as defined under the MHRA.

2. *Loppie engaged in protected activity by implicitly opposing Wieck's discriminatory hiring practices.*

The Hearing Officer was unable to find any case in which the Montana Supreme Court directly addresses what constitutes oppositional conduct protected under the MHRA. The U.S. Supreme Court defines "oppose" as "standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 277, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009). According to the Ninth Circuit, "[o]pposition can, of course, consist of a refusal to carry out an order or policy." *Moyo v. Gomez*, 32 F.3d 1382 (9th Cir.) amended, 40 F.3d 982, 984 (9th Cir. 1994). In *Moyo*, the Ninth Circuit found that an assertion the plaintiff refused to carry out or otherwise protested the defendants' alleged policy of discriminating against a protected class was sufficient to withstand summary judgment on a retaliation claim. 40 F.3d at 985

Loppie argues she engaged in protected activity by challenging Wieck's unwillingness to hire African American employees; heavy or unattractive women; and men for bartending positions. Wieck concedes he expressed reticence in hiring at least two African American cooks and had a preference for female bartenders. Wieck testified his reticence was due, in large part, to representations by Loppie that the business was losing its East Helena clientele by having African American employees working for the business and his belief that female bartenders were a bigger draw for customers than male bartenders. Wieck denied being aware of Loppie's opposition to his hiring practices.

The evidence does not show Loppie explicitly opposed Wieck's hiring practices. However, the evidence does show an implicit opposition by virtue of the fact she repeatedly attempted to hire African Americans and other individuals who belonged to groups identified by Wieck as not meeting his hiring standards. While Wieck eventually hired African American employees and male bartenders, the evidence shows he initially resisted Loppie's efforts to hire individuals who belonged to groups he did not want to hire for certain positions. Therefore, Loppie has shown by circumstantial evidence that she engaged in protected activity both by filing a Charge of Discrimination and opposing Wieck's discriminatory hiring practices.

B. Loppie has Shown her Discharge was an Adverse Employment Action.

Unlawful retaliation may occur when a person is subject to discharge, demotion, denial of promotion, denial of benefits, or other material adverse

employment action. Admin. R. Mont. 24.9.603(2). A retaliatory action is materially adverse if it would likely dissuade a reasonable person from engaging in protected conduct. *Burlington Northern & Sante Fe Ry.,Co., v. White*, 548 U.S. 53 (2006); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174-75 (2011) (reversing, without dissent, a Sixth Circuit decision that Title VII does not permit third party retaliation claims, and reiterating that "the significance of any given act of retaliation will often depend upon the particular circumstances," as stated in *Burlington*, and is not amenable to any categorical rules).

In *Burlington Northern*, the Supreme Court provided a detailed analysis of the proper "material adversity" standard applied in retaliation cases.

> "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" [Citations omitted.]
>
> We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998); see *Faragher*, 524 U.S., at 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'"). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. *See* 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a). The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson*, 519 U.S., at 346, 117 S. Ct. 843, 136 L. Ed. 2d 808. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. Ibid. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p 8-13.

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

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, supra, at 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. Cf., e.g., *Washington*, supra, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual § 8, p 8-14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." Washington, supra, at 661.

Finally, we note that contrary to the claim of the concurrence, this standard does not require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge." *Post*, at __, 165 L. Ed. 2d, at 366, 126 S. Ct. 2405 (Alito, J., concurring in judgment). Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively

capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

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

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

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

Loppie alleges several actions by Wieck beginning in December 2017 constituted retaliation. Each of those actions will be addressed below.

1. *Wieck's refusal to pay for Loppie's cell phone was not an adverse employment action.*

Loppie contends Wieck's decision to cut off what was supposed to be an employer provided cell phone and purported refusal to pay the outstanding bills was an adverse action.

In November 2017, Wieck informed Loppie that he was aware she had failed to put her business cell phone in the business' name despite having been directed to do so at the time she got the phone. Wieck directed Loppie to change the account holder's name. After she failed to do so, Wieck told her to turn in the phone, which she did not do until after she was discharged in January 2018.

Loppie offered no evidence showing she ever presented her claimed cell phone bills prior to her discharge and even after she was directed to do so by Wieck in their November 2017 text message exchange. Schultz credibly testified she paid every bill presented to her on behalf of Smith's Place. Loppie offered no direct or circumstantial evidence showing Wieck instructed Schultz to refuse payment.

The inescapable conclusion is that if Loppie had done as she had been directed by Wieck when initially activating, every month when she got the bill, and at the time he cut off the phone, Loppie would not have suffered the damages she claimed at hearing. Loppie has failed to show Wieck's decision in December 2017 to stop paying for her cell phone was an adverse action. Clearly, Wieck's action did not stop Loppie from protesting his decisions as an employer given the nature of their text message exchanges and the fact she later filed a Charge of Discrimination. Therefore, Loppie has failed to show Wieck's decision to cut off the employer provided cell phone was an adverse action, as defined under the MHRA.

2. *Loppie's discharge was an adverse employment action.*

Unlawful retaliation may occur when a person is subject to discharge, demotion, denial of promotion, denial of benefits, or other material adverse employment action. Admin. R. Mont. 24.9.603(2).

Wieck testified Loppie quit during their phone conversation on January 23, 2018. Loppie testified she understood Wieck had discharged her, which she testified prompted her to ask where he wanted her to turn in her keys. Loppie's testimony, while questionable in most instances, was corroborated by Hewitt's testimony. Hewitt testified he could overhear the conversation while he was present with Loppie while she was talking with Wieck on her cell phone. Hewitt testified he heard Wieck call Loppie a liar. Hewitt described Loppie as cowering and crying. The evidence shows, while Wieck may not have used the term "fired" or some other similar term during his exchanges with Loppie, it is clear that he would not allow her to remain as the General Manager of Smith's Place after the events at the bank. It is therefore determined that Smith's Place discharged Loppie on January 23, 2018, which is an adverse employment action under the MHRA. Therefore, on this basis and this basis alone, Loppie has shown an adverse employment action.

3. *Wieck banning Loppie from Smith's Place after her termination was not an adverse employment action.*

Loppie alleges Wieck's decision to "86" her from Smith's Place after her termination was retaliation, as defined under the MHRA. The MHRA prohibits retaliation in both public and private *employment* because of protected activity. Mont. Code Ann. §§ 49-2-301 and 49-3-209(emphasis added). Unlawful retaliation may occur when a person is subject to discharge, demotion, denial of promotion, denial of benefits, or other *material adverse employment action*. Admin. R. Mont. 24.9.603(2)(emphasis added).

The provisions of the MHRA prohibiting retaliation mirror the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq*. Because the MHRA is patterned after Title VII of the Civil Rights Act, Montana courts look to guidance from federal court decisions when construing provisions of the MHRA. *See BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 8, 365 Mont. 359, 281 P.3d 225.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1995), the Supreme Court considered whether the term "employees," as used in § 704(a) of Title VII, included former employees. Finding the term to be ambiguous, the Court looked to other parts of Title VII. The Court noted the primary purpose of antiretaliation provisions is to maintain "unfettered access to statutory remedial mechanisms." *Id.* at 346. The Court ultimately held that former employees may state a cognizable Title VII claim for post-employment retaliation. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (finding cognizable Title VII claim for retaliation when former employer gave negative reference to a prospective employer in retaliation for the filing of a discrimination claim).

Finding Loppie, as a former employee, may state a cognizable claim for retaliation for post-employment retaliation, the next issue is what constitutes post-employment retaliation.

The majority of post-employment retaliation cases deal with issues where former employers interfere with former employees' current or prospective employment as a result of the employee's protected activity. *See*, *e.g.*, *Durham Life Ins. Co. v. Eaves*, 166 F.3d 139, 157 (3rd Cir. 1999)(post-employment actions by an employer can constitute discrimination under Title VII if they hurt a plaintiff's employment prospects); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990) (alleging former employer persuaded current employer to discharge employee for employee's participation in charge against former employer); *Rutherford v. American*

Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (advising prospective employer that plaintiff had filed sex discrimination charges).

However, some courts have found post-employment retaliation based upon the harassing conduct of the former employer. *See Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 713 (7th Cir. 2008)(former employer retaliated by spreading derogatory rumors about plaintiff).

The Hearing Officer is unable to find, nor did counsel point her to, case law addressing the banning of a former employee from a business generally open to the public. The Ninth Circuit construes "adverse employment action" broadly. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000). However, "not every employment decision [is] an adverse employment action." *Strother v. Southern Cal. Permanente Med. Group,* 79 F.3d 859, 869 (9th Cir. 1996). In *Strother*, the court held that exclusion from meetings may constitute an adverse employment action, noting that the meetings at issue in *Strother* made the plaintiff eligible for salary increases. *Id.* Making negative or offensive comments, "mere ostracism," or bad-mouthing an employee is not an adverse action. *See Somoza v. Univ. of Denver*, 513 F.3d 1206, 1219 (10th Cir. 2008) ("[I]t cannot be said that negative comments, [and] condescending looks ... produce material and adverse actions."); *Brooks v. City of San Mateo*, 229 F.3d 917, 928-29 (9th Cir. 2000) (stating that "badmouthing" an employee does not constitute an adverse employment action in context of Title VII retaliation); *Shepard v. City of Portland*, 829 F. Supp. 2d 940, 960 (D. Or. 2011) ("mere ostracism" or "offensive utterance by co-workers" does not qualify as an adverse employment action) (citing *Strother*, 79 F.3d at 860; Ray, 217 F.3d at 1243).

Loppie argues Wieck's decision to ban her from the bar on March 4, 2018, would deter a reasonable person in her position from engaging in protected activity. Loppie notes Wieck's decision to exclude her from Smith's Place, which is where many members of the Loppie family have worked and where the Loppie family regularly frequented, caused her hurt and embarrassment.

While mindful of the significant ties the Loppie family has to Smith's Place, the Hearing Officer is not persuaded by Loppie's argument. The Hearing Officer is left to question why a former employee would frequent a bar owned by a person for whom she felt had harmed her so significantly. If Loppie was eager for social interaction with members of the East Helena community, there are at least two other establishments only blocks away where she could have gone instead. Further, Wieck's decision to ban Loppie was clearly tied to her having filed a Charge of Discrimination, banning her was not an employment action. Loppie had already

been discharged from the employment more than one month earlier. Therefore, it cannot be said Loppie's banning was an adverse employment action as defined under the MHRA. Further, the Hearing Officer is unwilling to construe the terms of the MHRA so liberally as to find a private business' decision to ban an individual who the business determined to be disruptive to its operations, is a cognizable action under the MHRA. Therefore, Loppie has failed to show that banning her from Smith's Place was an adverse employment action under the MHRA.

4. *Loppie has failed to show Wieck threatened to take legal action against her.*

Loppie testified at hearing that Wieck's brother, Joe Wieck, warned her that Wieck was planning on initiating legal action against her because he was angry about her filing a complaint with HRB. Joe Wieck did not testify at hearing. Loppie offered no evidence other than this hearsay testimony.

Rule 801(c), M.R.Evid, defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Loppie's testimony meets neither of the exceptions to the hearsay rule. Further, Loppie's testimony was not corroborated by credible evidence and, therefore, lacks "circumstantial guarantees of trustworthiness." Rule 803(24), M. R. Evid. Loppie has failed to show by substantial and credible evidence that legal action was ever threatened by Smith's Place. Therefore, Loppie has failed to show an adverse employment action.

C. <u>Loppie has failed to show a causal connection between her protected activity and Wieck's decision to discharge her on January 23, 2018.</u>

Loppie has established that she engaged in protected activity by opposing Wieck's discriminatory hiring practices. Loppie has further shown her discharge in January 2018 was an adverse employment action. The next issue is whether there is a causal link between Loppie's protected conduct and the illegal employment action.

In order to establish this causal link, the evidence must show the employer's decision to terminate was based in part on knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122. "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(Causation "may be inferred from . . . the proximity in time between the protected action and the allegedly retaliatory employment decision").

See also Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)(Causation "may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision"); *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.") (internal quotations omitted).

The Supreme Court has clarified that for a plaintiff to establish causation in *prima facie* case of retaliation only on the basis of "temporal proximity between an employer's knowledge of protected activity and an adverse employment action, . . . the temporal proximity must be very close." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam) (citing cases from circuit courts holding that a three-month or four-month time lapse is insufficient to infer causation).

Loppie approached Wieck about hiring African American employees in August 2017. Loppie also approached Wieck about hiring various women and men throughout her time at Smith's Place. The evidence shows Wieck hired many of Loppie's proposed hires. There is no evidence showing Wieck interfered with any individual's employment. The text message exchanges between Loppie and Wieck regarding hiring decisions were not dramatic; nor was there any credible evidence offered showing the two engaged in a heated verbal exchange over the hiring. Loppie has failed to show Wieck's decision to discharge her was related to her opposition to his discriminatory hiring practices.

It should be noted Wieck discharged Loppie approximately 30 days prior to her filing the Charge of Discrimination. The Hearing Officer, having found Wieck's post-employment actions do not constitute adverse employment actions under the MHRA, the rebuttable presumption created by Admin. R. Mont. 24.9.603 is inapplicable in this case.

Loppie, having failed to show a causal link between the protected activity and the adverse employment action, has failed to the requisite *prima facie* of retaliation. Therefore, Loppie's claim of retaliation under the MHRA fails.

D. Smith's Place has Shown it had Legitimate, Nondiscriminatory Reasons for Discharging Loppie.

Even assuming Loppie had succeeded in meeting her burden in establishing each element of the *prima facie* retaliation case, Smith's Place has shown it had legitimate, nondiscriminatory reasons for discharging Loppie.

Once the *prima facie* case of illegal retaliation is established, the employer must provide evidence of a legitimate, nondiscriminatory reason for the adverse employment action. Admin. R. Mont. 24.9.610(3). A legitimate business reason is "neither false, whimsical, arbitrary or capricious, and it must have logical relationship to the needs of the business." *Buck v. Billings Montana Chevrolet, Inc.*, 248 Mont. 276, 281-32, 811 P.2d 537, 540 (1991). To satisfy this burden, the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 257, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78, 98 S. Ct. 2943, 2949-50, 57 L. Ed. 2d 957 (1978); *Knutson v. Boeing Co.*, 655 F.2d 999, 1001 (9th Cir. 1981). The employer bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. *Burdine*, 450 U.S. 248, 259, 67 L. Ed. 2d 207, 219, 101 S. Ct. 1089, 1097.

The charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. *Id.* The charging party must demonstrate that the reason offered by the employer is a pretext for illegal retaliation. Admin. R. Mont. 24.9.610(4). "A reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason for the adverse action." *Heiat at* 328, 912 P.2d *at* 791. "An employee seeking to defeat an employer's argument that the employee was discharged for a legitimate business reason . . . must offer evidence upon which a fact finder could determine that the reason given by the employer was false, whimsical, arbitrary, or capricious or unrelated to the needs of the business." *Delaware v. K-Decorators, Inc.*, 293 Mont. 97, 112-113, 973 P.2d 818, 829 (citations omitted). The employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact-finder could find them unworthy of credibility. *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642 (9th Cir. 2000).

Loppie argued she was qualified for the position of General Manager and was successful in that position despite Wieck's micromanagement style. Smith's Place contends Loppie was not discharged but quit during her conversation with Wieck on January 23, 2018. However, the evidence clearly establishes Wieck discharged Loppie during their telephone conversation in January 23, 2018, and confirmed he did not wish her to return as General Manager of Smith's Place in subsequent text messages.

Wieck pointed to various concerns he had regarding Loppie's performance as General Manager. Those concerns included the cleanliness of the bar and restaurant, maintenance of equipment such as beer signs and the ATM, and the staff turnover. However, the evidence shows the most likely reasons for Wieck's decision to discharge Loppie on January 23, 2018 were the financial performance of the business and the final incident at the bank. Neither of those reasons can be considered arbitrary or capricious or false. Wieck consistently voiced concerns about the business' financial performance. Replete throughout the text messages are Wieck's concerns that the business was not performing at the same level it had during the previous year. Wieck routinely questioned why the business was not performing well and expressed concern that the business could not continue with a downward trend.

Loppie argues discharging her for the bank incident was inappropriate given that it was not her primary duty and it was a duty typically performed by Denise Bartole. What Loppie's argument ignores is that she was the General Manager for the business. Her actions while performing the duties reasonably required of that role reflected on the business itself and Wieck as its owner. Loppie denied swearing at bank staff that fateful day. However, she concedes swearing in her text message to Wieck when she asked how she could be fired for using the f-word. *See* Exs. 153-55. . Loppie's demeanor at hearing, which at times was combative and aggressive, suggests it is more likely than not she acted in the fashion described by Thomas. Loppie attempted to call into question Thomas' credibility by arguing Thomas hated Hewitt based upon his actions 16 years earlier when he broke up with Thomas' daughter. It seems unlikely that Thomas, who has had a long career with the bank, would jeopardize her employment by lodging false allegations against Loppie with Loppie's employer. Further, it seems unlikely Thomas would encourage Eaves to come forward and provide false testimony at hearing. The testimony of Thomas and Eaves was clear, direct, and free of any showing of animus toward Loppie. Loppie's testimony that she did not act in the obnoxious and offensive fashion described by Thomas and Eaves in their sworn testimony is not credible.

Smith's Place has shown it had legitimate, non-discriminatory reasons for Loppie's discharge. Loppie has failed to offer sufficient evidence to show the "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the proffered legitimate reasons for her discharge that would require the Hearing Officer to find those reasons unworthy of credibility. *See Mageno*, 213 F.3d 642 (9th Cir. 2000). Therefore, Loppie has failed in her ultimate burden of persuading the fact finder that the challenged action was due to illegal retaliation.

VI. CONCLUSIONS OF LAW

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

2. Stacie Loppie failed to prove GBR, Inc., d/b/a Smith's Place retaliated against her for engaging in activity protected by the Montana Human Rights Act. Mont. Code Ann. § 49-2-301. For purposes of Mont. Code Ann. § 49-2-505(8), GBR, Inc., d/b/a Smith's Place is the prevailing party.

VII. ORDER

Judgment is granted in favor of GBR, Inc., d/b/a Smith's Place and against Stacie Loppie, whose complaint is dismissed with prejudice as meritless.

DATED: This 31st day of July, 2020.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Stacie Loppie, Charging Party, and her attorney John Doubek; and GBR, Inc., d/b/a Smith's Place, and it's attorneys, Kaitlyn McArthur and Gregory Smith:

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 appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.

Loppie.HOD.chp