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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 956-2018:

WILLIAM OUTLAND, Charging Party, vs. MONTANA DEPARTMENT OF CORRECTIONS, MONTANA STATE PRISON, Respondent.	)	**HEARING OFFICER DECISION ON REMAND AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

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I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party William Outland (Outland) has alleged that his employer and Respondent herein, Montana Department of Corrections, Montana State Prison (MSP), discriminated and retaliated against him in his employment based upon his mental disability.

Prior to hearing, both parties moved for partial summary judgment. Outland argued he should be granted partial summary judgment on his claims that he was both discriminated and retaliated against when MSP extended his probationary period. MSP argued it should be granted partial summary judgment on its claims that Outland was a probationary employee at the time he was terminated from his employment at MSP. Both parties' motions were denied on the basis that genuine issues of material fact were in dispute as to all matters at issue.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter on April 17-18, 2018, in the courthouse in Deer Lodge, Montana, with the parties represented by counsel. Outland was represented by Elizabeth Griffing and Jill Gerdrum of the Axilon Law Group, PLLC, and MSP was represented by Ira Eakin and Robert Lishman.

At hearing, Cynthia Davenport, Bette Spoon, William Outland, Cynthia Outland, Michelle Steyh, Thomas Wood, Bruno Kraus, Thomas Snowden, Candice O'Brien, and Larry Nielsen all testified under oath. Nielsen's testimony was cut short because of objections from Outland's counsel and concerns of the Hearing Officer that Nielsen, who was MSP's witness and a union field representative but not an agent of MSP, was offering undisclosed expert testimony on issues that involved parol evidence and which went to MSP's intent. Rather than completely prohibit Nielsen's testimony, the parties were given an opportunity to submit legal briefs regarding his proposed testimony. Following briefing, the Hearing Officer issued an order limiting Nielsen's testimony strictly to the limited scope of Mont. Code Ann. § 1-4-102 regarding the circumstances surrounding the execution of the Collective Bargaining Agreement which Outland was subject to. Nielsen testified telephonically within the scope of that order on September 5, 2018.

The following exhibits were admitted by stipulation of the parties prior to hearing: 3, 9, 10, 15, 17, 18, 20, 25-28, 30, 38, 40, 46-48, 101-121, 123-126. Exhibit 122 was admitted initially, over objection of the Charging Party, and later admitted with the caveat that it was restricted as evidence of Davenport's state of mind. Exs. 49, 49a, 51, 52, 53, and 130 were admitted without objection during the hearing

The parties submitted post-hearing briefs and the matter was deemed submitted for determination. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following Hearing Officer issued a decision on April 5, 2019. Following issuance of the decision in this matter, the Human Rights Commission (HRC) issued a remand order on October 25, 2019, which struck conclusion of law number 5 finding that the mixed motive defense applied, and remanded the matter for a damage reward determination in favor of Outland on the discrimination and retaliation claims due to the probation extension and the termination.

Upon remand and full briefing of the parties associated therewith, and based on the arguments, authorities and evidence adduced, the Hearing Officer makes the following findings, conclusions and final agency decision, consistent with the HRC's changes.

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II. ISSUES

1. Did MSP discriminate against Outland on the basis of mental disability and/or retaliate against him in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

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

3. If MSP did illegally discriminate and/or retaliate against Outland as alleged, in addition to an order to refrain from such conduct, what should the Department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

1. William Outland was employed as a correctional officer at MSP from September 14, 2012, until April 15, 2016. Toward the end of his employment, Outland was involved in and/or witnessed an incident involving several other officers and an inmate.

2. Outland left his employment at MSP to pursue a career in Information Technology.

3. In August, 2016, Outland reapplied to return to work as a correctional officer at MSP.

4. Outland was rehired as a correctional officer at MSP on September 3, 2016.

5. The terms of Outland's employment were set forth in a letter dated August 31, 2016, signed by Outland on September 2, 2016. The letter provided that Outland was hired as “a new employee” and that he would “be required to serve a one-year probationary term.” (Ex. 101.) The letter also stated that, "As a condition of employment, Montana statute requires all Correctional Officers to attend Basic Training and following one year of employment in this position, obtain and maintain POST Basic Certification at minimum.” *Id*.

6. Outland was not required to attend Basic Training because he had quit and returned to work as a correctional officer within one year. Similarly, Outland had

already obtained POST Basic Certification, and was not required to attain additional POST certifications.

7. The terms of Outland's employment were also subject to the terms of a 2015-2017 Collective Bargaining Agreement (CBA) with the correctional officers' Union, the Federation of Montana State Prison Employees, Local #4700, MEA-MFT, AFT, AFL-CIO. (Ex. 123) The CBA states in part as follows:

> [Article 3, Employment Policy,]**Section 1. Probationary Period.** For all positions covered by this agreement other than those requiring POST Basic Certification (Correctional Officer Series) the Employer shall have six months after employing an individual to determine the individual's competency. For all positions requiring POST Basic Certification (Correctional Officer Series) the employer shall have one year after employing an individual to determine the individual's competency. The one-year probationary period shall only apply to new employees hired after the ratification of this agreement.
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> **Extension of probationary period.** The Federation agrees that on individual cases only and only by mutual assent between the Federation, the individual in question and the Employer shall any individual have his/her period of probation extended for 30 days at a time, not to exceed 90 days. The extension shall be for evaluation purposes only and does not limit the individual from receiving all wage increases due him/her, and all other benefits and provisions of the contract. The Employer shall notify the individual in question and the Federation at least five working days prior to the end of the individual's probationary period of its intention to extend the probationary period.
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> **Section 4.** Discharge, suspension, or other punitive discipline. The Employer shall furnish an employee subject to discharge, suspension, or other punitive discipline (not including oral warnings) with a written statement of the grounds and specific reason(s) for such actions. In addition, the Employer will notify the Federation of the removal of an employee.
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> * * *

> **Subsection 2.** Probationary Employees. At any time during the probationary period, an employee may be separated from service.

(Ex. 123 at 5-6 (emphasis in original).)

8. Outland was subject to a one year probationary period.

9. Outland started working as a correctional officer on September 3, 2016, and continued to work without accommodation as a correctional officer until December 28, 2016.

10. On December 28, 2016, the MSP Human Resources Department (sometimes referred to as "HR") received a Medical Status Form from Dr. Donna Smith regarding Outland. The document stated Outland was placed on modified duty effective December 28, 2016, with a date of injury listed as December 21, 2016.

11. The only comment on the form specific to Outland's work ability was the note, "hx PTSD." (Ex. 102.) The form did not specify any particular work restrictions and did not indicate an anticipated date Outland would be released to full duty.

12. It came to light that, although work in the main control cage is a regular post for correctional officers, Outland was concerned about working in the confined space of the control cage, which is a small, locked room.

13. In response to the December 28, 2016, Medical Status Form, Nicole Chandler (Chandler), a human resource generalist in HR who had been assigned to take care of transitional duty concerns for MSP, sent Outland a letter that same day. (Chandler left employment with DOC Human Resources during the first part of January, 2017.)

14. Chandler's December 28, 2016, letter advised Outland that he was being placed into a transitional light duty work assignment in the mailroom, working 8:00 a.m. to 4:00 p.m., Monday through Friday, between December 29, 2016, and January 6, 2017. The letter further stated that on January 7, 2017, Outland was scheduled to work 3rd shift in the main control cage. Both of these positions were located in the Wallace Building, which is the administration building immediately outside and connected to the fenced perimeter of the prison yard.

15. The letter also advised Outland that, pursuant to DOC Policy 1.3.3, transitional work assignments ordinarily were not longer than 30 days, but that an assignment could be for a longer period of time if the employee was steadily progressing in the healing process and prognosis of return to the time of injury position was positive.

16. Correctional officers do not work in the mailroom as part of their regular job.

17. On January 3, 2017, an updated Medical Status Form from Dr. Smith stated Outland could only work day shift and indicated it was due to his PTSD. This restriction excluded Outland from working what MSP referred to as the "3rd shift," from 10:00 p.m. to 6:00 a.m. Again, there was no end date specified.

18. Cynthia Davenport, the Secured Care Human Resources Manager (a.k.a. Secure Care Bureau Chief), responded in a letter dated January 4, 2017. Davenport was in charge of Outland's personnel issues at MSP.

19. Pursuant to the January 4, 2017, letter, Outland's light duty assignment in the mailroom was continued as an accommodation for his PTSD and inability to work evenings. Outland was no longer required to work in the control cage. The letter again advised Outland again that transitional work assignments ordinarily were not for longer than 30 days, but that the assignment could be for a longer period of time if the employee was steadily progressing in the healing process and prognosis of return to the time of injury position was positive. Outland was also informed that he would not be required to wear his uniform.

20. Moving Outland to a light duty job was a temporary accommodation of his disability until he could return to the regular duties of a correctional officer.

21. Davenport asserted that. because MSP consistently had vacancies in correctional officer positions, HR typically allowed injured or disabled employees to work for up to a year in transitional job assignments when the employees could not perform the essential functions of their job. However, Davenport also testified with a degree of emphasis that Outland's was the longest temporary accommodation they had ever had on a probationary employee. The longest previous light duty assignment Davenport could recall was 90 days.

22. Outland's mailroom assignment was not an undue hardship for MSP.

23. Associate Warden of Security Thomas Wood (Wood) received a copy of the January 4, 2017, letter and noted in response that he had never seen a medical restriction that listed work hours. Davenport responded, stating, "We have a couple work hours restrictions with pregnant women. I am just going to start the ADA process with him, he needs the ability to be around inmates, it is an essential duty of the CO position. We need to find out if this a permanent condition and address it now." (Ex. 52.)

24. When Davenport reviewed the medical forms submitted by Dr. Smith and discussed the situation with Chandler, Davenport became concerned that this was more than just a matter of dealing with a temporary light duty assignment. She was unclear about what the actual medical issues or restrictions were with respect to Outland. She knew he could not work nights, and she had been told he could not work around inmates, though could not recall at the time of the hearing where she heard that he could not work around inmates, as it was not in materials from Dr. Smith.

25. The ability to work all shifts and work around inmates are essential job duties of a correctional officer.

26. On January 19, 2017, as part of the interactive process, Davenport sent a letter to Outland scheduling a meeting for January 27, 2017, to discuss his disability and possible accommodations. It stated Wood was also going to be in attendance, and a copy of Outland's job description as a correctional officer, an essential duty form, and an ADA Accommodation Form were attached to the letter.

27. The letter was sent due to Davenport's concerns, after discussing the matter with Chandler, that Outland's situation was more than just a matter of dealing with a temporary light duty assignment. She was unclear about Outland's actual medical issues and restrictions. Davenport knew he could not work nights and had been told he could not work around inmates, and the ability to work all shifts and work around inmates were essential job duties of a correctional officer.

28. The first two paragraphs of the January 19, 2017, letter stated as follows:

> You began transitional duty effective December 28, 2016. Your medical provider noted due to PTSD you needed modified duty, you reported your PTSD was caused and exacerbated by being around inmates and requested not to work around inmates. On January 3, 2017 your medical provider noted you also could not work on 3 shift. *You are a*

> ***probationary employee*** *and we* ***cannot continue to employ you*** *without some reason to believe that you will be able to perform the essential functions of your position within a reasonable time period*. The ability to work all shifts, respond in emergencies and work around offenders are essential duties of the position of Correctional Officer.
>
> Under the Americans with Disabilities Act (ADA), reasonable accommodations must be provided to qualified individuals with disabilities to enable them to perform the essential functions of their position. Associate Warden Tom Wood and I would like to engage in the interactive process to determine if there are accommodations available to assist in your return to work. I have attached a copy of your job description, an essential duty form, and an ADA accommodation form to assist in this process.

(Ex. 106 (emphasis added).)

29. Davenport specifically added the words "you are a probationary employee" to HR's standard form letter. Outland's probationary status was significant to Davenport because, as she both testified to and stated to Outland in an interactive meeting, the collective bargaining agreement allowed up to six months transitional duty. (Davenport's reference point for six months was MSP's policy regarding workers' compensation under the CBA. (Ex. 53 at 33:10-14.))

30. Davenport's letter directly tied and conflated Outland's probationary status with MSP's duty to accommodate his disability, and threatened his job if he did not improve "within a reasonable time period," although it did not specify what was meant by a reasonable time period. (Ex. 106.)

31. Davenport gave different reasons for extending Outland's probation. In part, his probation was extended so MSP could evaluate Outland's performance as a correctional officer. It was also extended in part because it would give Outland more time for his PTSD to get better and improve. Through these reasons, Davenport affirmed that the probation extension was at least in part due to Outland's disability.

32. Davenport testified that she sent the forms with the letter so that Outland and his doctor could look at them, understand the duties and functional requirements of a correctional officer, so Outland could request necessary accommodations.

33. Prior to the meeting, Outland gave Davenport permission to talk to Dr. Smith. Davenport spoke to Dr. Smith about Outland's PTSD and work restrictions in a telephone call on January 25, 2017, and Dr. Smith summarized their discussion in a letter of the same date.

34. Dr. Smith explained in her January 25, 2017, letter that Outland was experiencing symptoms of PTSD, that further assessment with mental health was pending, and they were in the process of performing medication adjustments. Dr. Smith recommended 60 days of light duty, January 1, 2017, to March 1, 2017, and stated MSP was free to contact her with questions.

35. On January 27, 2017, Davenport and Wood met with Outland, his wife, Cynthia Outland, and a union representative, Jim Millibar, who worked with Outland in the mailroom.

36. Davenport discussed neither the scope of Outland's disability nor his ability to work around inmates at the meeting. Davenport did, however, inquire a number of times during the meeting as to whether Outland really thought he was suited to be a correctional officer, and suggested that perhaps he should look for another position that was more suitable.

37. Wood's presence at the meeting was unusual. By the time of the hearing, he did not know why he was asked to attend, had only been to one or two other such meetings, and testified that he was not aware of the accommodation being discussed (in spite of his response to receiving Davenport's January 4, 2017, letter and e-mailing with Davenport regarding the same). Davenport opined, however, that it would be normal for her to ask Wood to join a meeting such as this one because Outland had not yet been assigned a captain.

38. Davenport perceived Outland as loud, angry, and confrontational at the meeting, and testified that Outland expressed a belief that MSP management was out to get him. Outland's perceived behavior at the meeting caused Davenport some concern. It is unclear exactly when Davenport formed this concern, as it was not expressed until after Outland's termination. Davenport did not consider the role Outland's PTSD may have played with regard to his behavior.

39. Outland and his wife, Cynthia Outland ©. Outland), countered that he was not angry and did not raise his voice, but that he may have been cautious, concerned, worried, and lacking understanding of the situation. Specifically, Outland testified that the discussion about being a probationary employee and being subject

to termination if he could not resume his duties caused him to almost panic, and that he felt like he was being encouraged to do something else for a job.

40. Wood felt that Outland was tense and unhappy with the situation, but that overall the communication was fine, and that both sides were able to have a discussion about where the situation needed to go.

41. The parties to the meeting ultimately agreed that Outland's transitional light duty accommodation as recommended by Dr. Smith would continue. Outland was not informed, however, that his probationary status might be extended as a result of the accommodation.

42. Dr. Smith provided an updated medical report dated March 15, 2017, which stated that Outland had found an effective medication and was undergoing counseling with Dr. David Strube in Missoula, and that, "It is likely that he [Outland] will be able to resume his duties as a correctional officer in the future." (Ex. 108). The report also stated that a re-evaluation of Outland's status would be completed on June 1, 2017. The report did not say that Outland would be able to return to regular duties at any specific time, but also stated that MSP could contact Dr. Smith at any time if there were questions.

43. In response to the updated report from Dr. Smith, Davenport sent Wood an e-mail on March 21, 2017, which stated: "Latest update on Bill Outland is that he will likely return to CO duties but would like him to remain on light duty until June 1, 2017 when status will be reviewed. Under the ADA I would recommend that you allow his continued light duty but you can extend his probation." (Ex. 109.)

44. The idea to extend Outland's probation came from Davenport, not Outland's supervisors.

45. Wood responded to Davenport's e-mail the same day and said: "As long as we are consistent with similar cases, I am fine with the extension of both the light duty and the probationary period. I know at his recent ADA meeting we had asked for a progress report showing improvement. Sounds like we got it." (Ex. 109.)

46. The following day, March 22, 2017, Wood signed a letter, prepared by Davenport, advising Outland that his probation was being extended. The letter stated in relevant part as follows:

> Due to you being removed from your positions [sic] as a Correctional Officer and being placed on light duty from December 29, 2016 to an anticipated release to full duty the first part of June 2017 your probation as a Correctional Officer will be extended an additional 5 months to better review your ability to satisfactorily perform the duties of a Correctional Officer.

(Ex. 110.)

47. The terms of the CBA limit probation extensions to 30 day increments of up to 90 days, and require ". . . mutual assent between the Federation, the individual in question, and the Employer. . . ." (Ex. 123 at 5.) As acknowledged by MSP and discussed in more detail below, a five month probation extension violated the terms of the CBA.

48. Although the letter was signed by Wood on March 22, 2017, the letter is dated March 27, 2017. The letter was also signed as reviewed and approved by Dave Harris (Harris), Outland's union president.

49. On March 29, 2017, Outland received the letter extending his probation. Outland did not explicitly assent to the probation, and he was surprised that it was being extended since the topic was never previously raised with him in conversation. Outland was concerned about the probation extension because he felt it took away his stability and protection as an employee under the CBA.

50. Outland contacted Harris, who had signed off on the probation extension as his union representative, to discuss its details. Outland had to remind Harris of the extension, to which Harris replied to the effect of, "Oh you are the one with PTSD." Outland had never discussed his PTSD with Harris.

51. Regardless of the length of Outland's probation and the parties' dispute concerning the same,[1] it was MSP's intent to extend Outland's probationary period with the March 27, 2017, letter in part due to his light duty status.

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[1]The parties have raised disputes and a great deal of associated argument with regard to whether Outland was under a six month or one year probation (or any probation at all), and the significance of the term "rehire." For purposes of this decision, the Hearing Officer has concluded that Outland was a new hire subject to a one year probationary period.

52. Davenport testified that, in every case where she had knowledge that a probationary employee was on light duty status, the employee's probation would be extended. She testified that Outland's disability had nothing to do with the extension of his probation, but that it was a benefit to him because it would give him a full year to get better and improve.

53. Davenport testified that probationary MSP employees who take approved leaves of absence are subject to extension of their probation pursuant to Montana State Human Resources policy, and that such an extension would be consistent with State Human Resources past practices. Similarly, she testified that the union had always agreed that when an employee was on light duty for a specific time, probation could be extended for that amount of time (bearing in mind that the longest previous probation extension was 90 days). She did not, however, delineate cases in which legal accommodation of a disability was involved.

54. Outland's probation was extended in part because of his disability and concomitant inability to perform his normal job duties as a correctional officer.

55. The evidence submitted by MSP shows that, based on recent history, Outland's probation extension was an unusual event for MSP, albeit so was Outland's situation. MSP lists only six probationary employees whose probation was extended since January 1, 2014, three of whom–including Mr. Outland–had a disability. (Ex. 50 at 7-8.) Only one other probationary employee with a disability returned to work in the prior three years. Wood could not recall having signed off on any of those employees. In total, approximately 124 MSP employees were placed on light duty since January, 2016. (Ex. 125.)

56. As testified to by Davenport, had Outland continued on light duty prior to his termination, MSP likely would have extended his probation again.

57. At some point following issuance of the March 27, 2017, letter, a meeting was set up with Harris and Davenport to correct the mistake of extending the probation for five months when the CBA only permitted 90 day extensions. Davenport admitted she made a mistake by extending Outland's probation for a period of five months (instead of 90 days).

58. Davenport had determined the probation extension should be for five months because Outland had not been working as a correctional officer since the end of December, 2016, and it was anticipated he would not be able to return to the position of correctional officer until June, 2017. Therefore, she calculated that to be

a period of 5 months during which he had not worked in his hired position as a correctional officer, and that his probation should be extended for that period of time.

59. Harris talked to Outland on April 3, 2017, asking him if he would attend a meeting about the probation extension. Although the purpose of the meeting was to discuss revision of the probation extension to 90 days, Outland was not informed of this fact. Outland understood the purpose of the meeting to be an explanation of why MSP was keeping him on probation for an extended period, and believed further discussion of the issue was a moot point. Outland therefore declined to attend the meeting.

60. Davenport attributed drama and anger to Outland's refusal to attend a meeting, though did so without ever observing Outland or knowing his reason for not going to the meeting. As discussed below, Outland had already been written up with a supervisor note at this time which he deemed unjustified.

61. Later in the day on March 29, 2017–the same day after he received the letter extending his probation–between about 12:30 and 1:00 p.m., Outland left the mailroom in the Wallace Building, got into his car, and drove to a location just outside the Martz Diagnostic Intake Unit (MDIU) to pick up his wife, Cynthia Outland ©. Outland), who worked at MDIU.

62. Outland intended to pick C. Outland up from MDIU so she could accompany him to a medical appointment in Missoula.

63. A fenced sally port controls access between MDIU and Conley Lake Road, which is the road to the Wallace building.

64. MSP Officer Bruno Kraus (Kraus) was working in Tower 3 immediately adjacent to MDIU and the sally port at the time Outland went to pick up his wife.

65. C. Outland buzzed and called for Kraus to open the sally port gate, but he did not hear her.

66. Kraus saw a silver car pull into the MDIU driveway (which is outside the sally port), but he did not recognize the car or know who was driving. He could not see the driver's (i.e., Outland's) face, but he observed the driver wave.

67. Kraus had not received any notification about a car going to MDIU. It was out of the ordinary for an unrecognized vehicle to be parked outside MDIU.

68. Kraus interpreted Outland's wave to mean he wanted into the MDIU gate. In fact, Outland was waving to Kraus because Kraus had completely failed to observe C. Outland buzzing, calling from, and standing at the other side of the sally port, which she required Kraus to open in order to leave.

69. Kraus contacted the MSP Command Post, and spoke to Staff Sergeant Thomas Snowden (Snowden). He asked whether Snowden knew anything about the vehicle. Snowden said he did not, and said he would come over to MDIU.

70. C. Outland returned to MDIU to request they contact Kraus, who was oblivious to her presence, to ask him to open the sally port gates for her.

71. After Kraus spoke to Snowden, but before Snowden arrived at MDIU, Kraus received a call from the MDIU cage officer advising him that C. Outland was at the gate.

72. Kraus opened the gate, and C. Outland walked over and entered the silver car, which then left. Kraus had not seen C. Outland at the gate prior to this time.

73. When Snowden finally arrived at MDIU, Kraus explained what had happened.

74. Before Snowden left the Command Post to go to MDIU, he had contacted the MSP check point, which is a small hut that acts as the main point of entry and exit to and from the prison. Snowden asked Check Point Officer Bette Spoon (Spoon) whether she had allowed any silver cars into the prison to go to MDIU. She said she had not.

75. Shortly after Spoon spoke with Snowden, she observed a silver car approaching the check point from MDIU. When the car arrived at check point, she recognized C. Outland.

76. Spoon delayed the Outlands' departure, and asked Outland if he had been parked at MDIU. She told the Outlands that Command Post had called her asking about a silver car. Spoon jokingly told the Outlands that if the perimeter patrol car chased them, they would know why.

77. Spoon perceived Outland as being angry when he stated something in response to her to the effect of "let them chase me." Spoon also observed that Outland sped away from the check point in a manner so as to cause gravel to hit the building, and wrote an incident report regarding the matter.

78. The Outlands both testified that Outland was not angry, but that he was rushed to get to his appointment in Missoula, which had been delayed at both MDIU and the check point, and also joking back to Spoon when he responded.

79. When Outland returned to work the following day, March 30, 2017, he was called to the Command Post by Snowden. Snowden advised Outland that he could not pick up his wife at MDIU in his personal vehicle. Outland retorted that other people did the same thing. Snowden's response was that Outland was the one who got caught, and that he needed to stop taking your personal vehicle to MDIU. Snowden also advised Outland that he would be entering a supervisor note concerning the matter, and that Outland would receive a copy.

80. According to Snowden's testimony, Outland was visibly shaken and/or angry about the incident at the time and became somewhat argumentative. There is no mention in either Snowden's incident report or his supervisor note, however, that Outland was angry or acted unprofessionally. Outland was, at a minimum, stunned by Snowden's reprimand.

81. Snowden entered a supervisor note with respect to Outland which stated:

> Today I spoke to Officer Outland about picking up his wife at MDIU in his personal vehicle. I told Officer Outland he would have to wait for his wife at the Wallace Building and not drive his personal vehicle to MDIU. I explained to Officer Outland that personal vehicles parked in unauthorized areas cause alarm and should not be done. Officer Outland is aware of this supervisory note.

(Ex. 116).

82. After the meeting with Snowden, Outland e-mailed and asked that Snowden send him a copy of the supervisor note so he could file a rebuttal to be added to his file. Snowden sent a copy to Outland, and informed him that rebuttals were entered through HR.

83. A supervisor note, in and of itself, is not a form of discipline, but can be used to support progressive discipline, and therefore the presence of a supervisor note

in an MSP employee's file could be detrimental to their employment. Supervisor notes are described in the CBA as follows:

> [Article 3, Employment Policy,]**Section 3. Supervisor Notes.** Supervisor notes shall be maintained and regulated as per DOC policy 1.3.39 as revised May 16, 2012. Entries older than 12 months may be used to support ongoing progressive discipline. Such items can be used in support of disciplinary action arising from more recent employee action or is applicable to pending legal or quasi legal proceedings. Entries older than twelve months shall not be used to initiate new discipline.

(Ex. 123 at 6.)

84. Snowden also requested that both Kraus and Spoon write up incident reports regarding Outland picking up his wife. Kraus' incident report stated he interpreted Outland's pointing at his wife on the other side of the sally port as wanting to come in through the gates at MDIU. Kraus' report was filed on March 31, 2017, after the supervisor note had already been issued, and did not indicate any problems with Outland's behavior or a violation of policy.

85. Although Kraus testified at hearing that private vehicles were not allowed to park in front of MDIU, the evidence and testimony showed that this was not an enforced practice in place on March 29, 2017. As a practical matter, it was common practice for MDIU employees to be picked up at MDIU.

86. C. Outland had been picked up by Outland directly from MDIU more times than she could count without trouble. There had never been any hesitation or question about being able to open the gates to be picked up outside on the perimeter road.

87. Michelle Steyh (Steyh), a MDIU Unit Manager and C. Outland's supervisor at the time, testified that her husband had also been parking outside MDIU to pick her up, but that when she learned she was not supposed to park there (after the Outland incident), he stopped doing so.

88. On March 30, 2017, C. Outland sent an e-mail to then Associate Warden of Housing, Myron Beeson (Beeson), asking for a copy of any policy or security procedure addressing the issue of parking near MDIU. Beeson replied that he was

copying Captain Zuber (Zuber) since it had come from Command Post, and that he was unaware what procedure or policy they are talking about.

89. C. Outland sent a separate email dated March 30, 2017, to Beeson, Steyh, and Sam Casey, with a copy to Snowden, complaining that Outland had received a supervisor note about picking her up at MDIU.

90. A copy of C. Outland's e-mail was sent to Wood.

91. On March 31, 2017, Wood sent an e-mail to Beeson, Steyh, Casey, Snowden, and Zuber asking them not to respond to C. Outland because it was a confidential personnel issue between Outland and his supervisor. Wood went on to say that, "any other staff who are taking personal vehicles to MDIU should be corrected immediately as this is inappropriate." (Ex. 120.)

92. As instructed by Snowden, on March 31, 2017, Outland sent an e-mail to Davenport in rebuttal to the supervisor note and expressing disagreement that he had done anything wrong by parking outside MDIU to pick up his wife. The e-mail stated as follows:

> Cynthia,
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> Good morning,
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> While I have very little time, effort, or energy left to start yet another battle of me being treated differently than others when it comes [to] issues around here, I will make one effort to resolve this other than that I won't waste my time with this.
>
> Please be advised of the following: AW Beason sent an email to Cynthia Outland saying that to the best of his knowledge, he is unaware of any policy or procedure that I violated when I picked up my wife at MDIU outside of the gates with no demonstrated intent on my part of me trying to enter MDIU. I certainly never once entered onto perimeter road at any time. Although "I was the one who was caught" stated by SSGT Snowden in an unprofessional and belligerent manner when I commented that this is something done by numerous individuals that I have personally witnessed doing such. Upon making that comment that is when SSGT Snowden abruptly interjected his comment with an elevated tone as if I was not deserving of the same curtesy [sic],

> professionalism, and decency that would be extended to anyone else here. I have never been told it was unacceptable, in fact quite to the contrary, I was working tower 3 several years ago and witnessed an individual riding a bike on perimeter road. I called Command Post and although I can't remember who I spoke with I was told that it was fine and that "he" rides his bike to and from work and it's not doing any harm. So simply another example of how, when and for who policy is applied to.
>
> AW Beason sent an email to Capt. Zuber I believe with instructions to try to locate the said written policy / provision; if one exists, that is currently in effect and regulates my actions in this situation and subsequently may justify the sup note entry. Please follow up with Capt Zuber and provide me with a copy of the policy or procedure once located, if written policy even exists on this issue. Outside of said written policy or procedure being located then the sup note shall be removed in its entirety as that would indicate that it is simply nothing more than an opinion of someone and not enforceable policy.
>
> I await your written reply.
>
> Have a good day.

(Ex. 119.)

93. Security is both paramount and regimented at MSP. The prison uses a chain of command of experienced staff to manage the day to day operations within the institution. It was not until after the events of March 29, 2017, however, that MSP adopted a formal policy mandating that MDIU staff who had rides were supposed to be picked up at the Wallace building.

94. Outland's reaction to Snowden and e-mail to Davenport did not reflect a refusal to abide by MSP's security measures, but rather his frustration with being treated differently than other employees and for being reprimanded with a supervisor note to his file for practices regularly engaged in by other MSP employees without prohibition.

95. Outland took FMLA leave for reasons not directly related to this matter on April 4, 2017, the day after the meeting was supposed to take place between Harris, Davenport, and himself to discuss his probation extension.

96. After receiving the e-mails from both Outland and C. Outland, Wood got copies of the incident reports generated as a result of the parking incident and took those to Davenport.

97. Wood felt that, based on the March 31, 2017, e-mail, Outland had been difficult when Snowden, his supervisor, tried to give him correction in basic security procedure, and that Outland was unwilling to take accountability for that. Wood testified, though, that he was not upset by Outland's e-mail, and did not feel that Outland was causing unnecessary drama.

98. Wood and Davenport were both acutely aware that Outland was still a probationary employee and that he was presently being accommodated in a light duty position, as they had just had an interactive meeting with him on March 27, 2017.

99. Davenport met with her supervisor, Kila Shepherd, and MSP Warden Leroy Kirkegard (Kirkegard) to discuss the issues surrounding the parking incident, and the decision was made to terminate Outland without cause since he was still a probationary employee.

100. Although Davenport characterized her role as merely one of an advisor to management, as a practical matter, she–and HR generally–were de facto in charge of decision-making with regard to Outland, including the drafting of letters.

101. Wood agreed with the decision to terminate Outland, which was spearheaded by Davenport.

102. Although not intended to do so, Davenport's testimony gave the impression she was doing MSP management a favor by eliminating a problem employee while he was still on probation.

103. MSP did not provide any written record that Kirkegard ever approved Outland's termination, although no evidence was presented that his approval was either required or relevant.

104. Outland would not have been terminated solely as a result of either the events of March 29, 2017, nor his interaction with Snowden on March 30, 2017, as evidenced by the resulting supervisor note (as opposed to some other form of reprimand). To quote MSP's discovery responses, "[i]t was after he[(i.e., Outland)] sent his email to Davenport dated March 31, 2017, that the decision to terminate him was made." (Ex. 50 at 10-11.)

105. Davenport asked another employee in human resources, Holly Callarman (Callarman), to write the termination letter and sent Callarman a copy of the most recent probationary termination letter Davenport had written.

106. On April 5, 2017, Wood met with Outland, his wife, and union representative Candice O'Brien (O'Brien) for the purpose of terminating Outland. There was a brief discussion regarding the parking incident at MDIU and that MSP was choosing to terminate Outland without cause as a probationary employee.

107. Wood handed Outland a letter dated April 5, 2017, which stated that Outland was being terminated as a probationary employee.

108. The letter erroneously stated that Outland's employment was being terminated effective December 21, 2016. Davenport speculated that Callarman did not change the body of the exemplar letter Davenport had sent to her. It is unlikely that this was the case, however, since Davenport's exemplar was from a recently-terminated employee.

109. The letter was subsequently redrafted to reflect the correct date of termination, April 5, 2017.

110. Although Outland's termination was without cause since it was during his probationary period, in its discovery responses, MSP succinctly stated its reasons for terminating Outland:

> The decision to terminate Outland was based on his behavior and attitude. Specifically, Outland created drama and confrontation where none existed or needed to exist. When he left the prison on March 29, 2017 he was agitated and angry because Tower 3 would not open the gate for him at MDIU. When he was later directed not to park outside MDIU, he became unduly defensive and defiant about the matter, and he blew it completely out of proportion.

(Ex. 50 at 5.) Davenport assisted in the wording of the response. As stated above, Wood did not agree that Outland was creating unnecessary drama.

111. Wood testified that Outland's disability and request for accommodation had nothing to do with his termination.

112. Outland's wages at MSP at the time of his termination were $38,355.00 per year, excluding benefits.

113. As of the hearing, Outland had not applied for any positions related to correctional or detention facilities.

114. Although Outland testified there were a few Montana jobs for which he believed he submitted job applications, he did not identify any specific Montana businesses at which he had applied.

115. On or about June 22, 2017, Outland and his wife moved to Oregon because she had been offered a job there. Outland spent $3,979.92 in moving expenses to Oregon.

116. Outland had some transferable skills in the field of Information Technology (IT), and considered switching careers as early as the summer of 2016, when he first quit his job as a correctional officer at MSP.

117. On February 1, 2017, Outland reported to his doctor that he wanted to work in IT and discussed eventually transitioning into IT. According to the doctor's notes, he told her that he and his wife were planning to return to Portland and Seattle as things had not been going well in Montana.

118. Outland's medical records reflect that on April 12, 2017, he discussed that he and his wife were planning to move to Portland when school was out.

119. Outland now asserts he was unable to get a job in corrections without a good recommendation from MSP, and that he had to retrain as a result. He began taking classes in computer science, which takes two years at a cost of $8,800.00 per year.

120. Outland began working part-time for Walmart in Oregon in August, 2017, at the rate of $12.50 per hour. His total compensation from Walmart was $5,458.35.

121. Outland began working full time for Terra Staffing Group, in Hillsboro, Oregon, on December 19, 2017, at the rate of $13.00 per hour, and was still employed there at the time of the hearing.

122. Outland's claim that he was forced to move out of the Anaconda-Deer Lodge area due to his termination is credible, but his need to move out-of-state is not. It does not appear that Outland made any serious effort to become employed in Montana, and it instead appears that he and his wife were planning to relocate to Portland or Seattle even before he was terminated.

123. Outland's PTSD was worsened by his termination from MSP. Outland asserts he could not function or do daily tasks. He had to continue counseling on a weekly basis at a cost of approximately $4,800.00 per year.

IV. DISCUSSION[2]

A. Outland's Probationary Status

The parties have both raised issues with regard to Outland's probationary status and whether Outland was subject to a 1-year probation. MSP argues that Outland's probationary status is ultimately not dispositive to the case, which is somewhat true based on both the fact this is not a wrongful discharge case and also on the fact that MSP moved to extend Outland's probation, regardless of its initial length. Whatever the parties' arguments with regard to Outland's probationary status, the CBA is not ambiguous or silent on the issue. The Hearing Officer is therefore constrained to the language of the applicable laws and the four corners of the CBA. *See* Mont. Code Ann. § 28-2-905; *see also Winchester v. Mountain Line*, 1999 MT 134, ¶¶ 25-29, 294 Mont. 517, 982 P.2d 1024 (discussing interpretation of a CBA).

Outland had previously been a correctional officer with MSP, but pursuant to both Montana statute and rule, he was a new employee when he was rehired. By statute, a break in service from State employment is defined as, ". . . a period of time in excess of 5 working days when the person is not employed and that severs continuous employment." Mont. Code Ann. § 2-18-601(2). Similarly, "[c]ontinuous employment" means working within the same jurisdiction without a break in service of more than 5 working days or without a continuous absence without pay of more than 15 working days. Mont. Code Ann. § 2-18-601(4); *see also Laborers Int'l Union v. Great Falls*, 233 Mont. 432, 436, 760 P.2d 99, 101 (1988) (finding that a 20 day break in service for an employee subject to a CBA was substantial).

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

Article 7, section 1 of CBA addresses leave. The CBA is what specifically applies to Outland. It follows the statutory language with the following definitions:

> A. "Break in service" means a period of time in excess of five working days when the person is not employed and that severs continuous employment.
>
> B. "Continuous employment" means working within the same jurisdiction without a break in service of more than five working days or without a continuous absence without pay of more than 15 working days.

(Ex. 123 at 12.) Based on the foregoing, it is undisputed that Outland quit his employment for more than 5 working days and had a break in service. This break in service had the effect of making Outland a new employee when he was re-hired by MSP, which is consistent with Davenport's testimony.

Outland was also subject to a 1-year probationary period. To quote the CBA:

> For all positions covered by this agreement other than those requiring POST Basic Certification (Correctional Officer Series) the Employer shall have six months after employing an individual to determine the individual's competency. For all positions requiring POST Basic Certification (Correctional Officer Series) the employer shall have one year after employing an individual to determine the individual's competency. The one-year probationary period shall only apply to new employees hired after the ratification of this agreement.

(Ex. 123 at 5.) Outland's position required POST Basic Certification. As a new employee, then, Outland was subject to the 1-year probationary period. It is true that Outland was already POST certified, was treated differently than other "new" hires because of his past experience, and that HR may have been confused about the length of his probation when it moved to extend it after he requested further accommodation. These, however, are all issues outside the language of the CBA. The CBA itself does not make an exception for individuals who are already POST certified or for any other factors. To make such an exception would require making an inference and reading language into the CBA that does not exist. *See* Mont. Code Ann § 28-2-905; *see also Winchester*, ¶¶ 25-29. As such, Outland was a new hire subject to a 1-year probationary period based on the plain, unambiguous language of the CBA.

B. Discrimination

The Montana Human Rights Act (MHRA) prohibits employment discrimination based on physical disability. Mont. Code Ann. § 49-2-303(1)(a). The anti-discrimination provisions of the MHRA closely follow a number of federal anti-discrimination laws, and Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *See, e.g., Crockett v. City of Billings*, 234 Mont. 87, 92, 761 P.2d 813, 816 (1988). To establish a prima facie case of discrimination, Outland must show that: (a) he belonged to a protected class; (b) he was otherwise qualified for continued employment; and (C) MSP denied him continued employment or otherwise subjected him to adverse action in circumstances raising a reasonable inference that it was because of his disability. Mont. Code Ann. § 49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a); *see also Reeves v. Dairy Queen*, 1998 MT 13, ¶ 21, 287 Mont. 196, 953 P.2d 703 (citations omitted).

MSP argues that, in spite of his claims of discrimination, the gravamen of Outland's argument goes only to retaliation, particularly because he has not argued a failure to accommodate. The Hearing Officer agrees that most of the arguments advanced by Outland goes to whether MSP took adverse actions in response to his protected activity. Outland has also argued, however, that he was treated differently because of his disability, not merely retaliated against, and that these are separate claims. The evidence and underlying arguments are essentially identical between the two claims, but there is sufficient evidence showing both discrimination and retaliation occurred. The issue, then, turns to whether Outland has established a prima facie case of disability discrimination.

1. Prima Facie Case

To qualify as a member of a protected class under the MHRA, Outland must prove he has a "disability" within the meaning of the MHRA. "[P]hysical or mental disability" is defined as an impairment that substantially limits one or more of a person's major life activities or is regarded by the employer as such an impairment. Mont. Code Ann. § 49-2-101(19)(a). In this case, MSP has conceded Outland suffered from a mental disability, specifically PTSD, that substantially limited one or more of his major life activities, and was therefore a member of a protected class. This satisfies the first element of Outland's prima facie case.

MSP has also conceded that Outland was qualified for the position of correctional officer, albeit he was unable to perform that job for the time periods at issue because of his PTSD. Although he was not released to work in that position at

the time of either his probation extension or termination, he had been employed as a correctional officer for almost 4 years with a 4 ½ month hiatus. Outland's doctor believed he was improving and there was a good likelihood he could return to being a correctional officer in June, 2017. This satisfies the second element of Outland's prima facie case.

The only element of Outland's prima facie case not conceded by MSP is whether the adverse action was taken in circumstances raising a reasonable inference that it was because of his disability or protected activity. *See* Mont. Code Ann. § 49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a).

In order to establish the causal link between protected conduct and an illegal employment action as required to establish a prima facie case, the evidence must show the employer's adverse employment action was based in part on knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). "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").

Here, Outland's probation was extended immediately after and in direct response to Dr. Smith's March 15, 2017, medical report, which placed him on continued light duty work. The combination of timing and MSP's own admissions are enough to show that the adverse action of extending Outland's probation was taken in response to both his protected activity of requesting further accommodation and also because of his disability. Outland's termination is also connected to his protected activity. Wood himself acknowledged that the decision to terminate Outland came after and as a result of his March 31, 2017, e-mail to Davenport sent in rebuttal to Snowden's supervisor note. In that e-mail, Outland reiterated what he had voiced concern over both since he received MSP's letter in which it had emphasized he was a probationary employee and when it had extended his probation in response to his requests for accommodation. He stated that he was writing the e-mail as part of, ". . . yet another battle of me being treated differently [because of my disability] than others when it comes [to] issues around here. . . ." (Ex. 119.) These circumstances are again enough to show that the adverse action of terminating Outland's employment was taken at least partially in response to Outland's protected activity regarding his disability. Outland has thus satisfied all elements of a prima

facie discrimination claim as to both adverse employment actions, his probation extension and his termination.

2. Circumstantial and Direct Evidence of Discrimination

Once an individual has made a prima facie case of discrimination, the appropriate analysis depends on whether the claim involves circumstantial or direct evidence of discrimination. With regard to Outland's termination, this is a circumstantial evidence case, as neither of the parties agree on the reasons for Outland's termination. With regard to Outland's probation extension, however, this is a direct evidence case. See *Coghlan v. American Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005) (direct evidence typically "consists of clearly . . . discriminatory statements or actions by the employer."). Both parties agree that Outland's probation was extended because of his disability and, associated with that disability, because he was on transitional duty work.[3] The only dispute concerns whether MSP's motive in extending Outland's probation was unlawful.

Claims involving circumstantial evidence are generally evaluated using the three-part test for federal discrimination claims set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Reeves*, ¶¶ 12-16 (citations omitted). Because Outland has made his prima facie case, the burden shifts to MSP to "produce evidence of a legitimate, nondiscriminatory reason for the challenged action." Admin. R. Mont. 24.9.610(3). Under this prong of the *McDonnell Douglas* test, MSP's "burden is one of production – not persuasion." *Ray v. Mont. Tech of the Univ. of Mont.*, 2007 MT 21, ¶ 33, 335 Mont. 367, 152 P.3d 122. If MSP meets this burden, Outland must show, by a preponderance of the evidence, that the legitimate reasons offered are only a pretext for discrimination. *See Vortex Fishing Systems, Inc. v. Foss,* 2001 MT 312, ¶ 15, 308 Mont. 8, 38 P.3d 836. Outland at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Heiat v. Eastern Montana College,* 275 Mont. 322, 328, 912 P.2d 787, 792 (1996). It is not enough to support a conclusion of discrimination for a court to simply disbelieve the reason offered by the defendant for its decision; rather, the court must also be persuaded that discrimination was the real reason for the employer's action. *See St. Mary's Honor Ctr.*, 509 U.S. at 515; *Heiat,* 275 Mont. at 328, 912 P.2d at 791). The *McDonnell Douglas* elements, constituting a prima facie case, do not require a showing

[3] In his post-hearing briefing, the parties argued the probation extension was based on circumstantial evidence. It is apparent, however, from the combined arguments and the admissions of MSP that this is, in fact, a direct evidence claim.

of scienter on the part of the employer. *See Martinez v. Yellowstone Cnty. Welfare Dep't*, 192 Mont. 42, 50, 626 P.2d 242, 246-47 (1981).

Discrimination claims in involving direct evidence abandon the *McDonnell Douglas* burden-shifting analysis, and the issue that remains is whether the termination or other adverse employment action was illegal. *See Reinhardt v. Burlington N. Santa Fe R.R.*, 846 F. Supp. 2d 1108, 1112 (2012). "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 659 (9th Cir. 2002). "If a charging party has established a prima facie case with direct evidence of unlawful discrimination or illegal retaliation, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief." Admin. R. Mont. 24.9.610(5).

a. Probation Extension

In the case of Outland's probation extension, his credibility regarding the extension is not at issue and MSP has not argued that his allegations are unworthy of belief. MSP must therefore prove by a preponderance of the evidence that an unlawful motive played no role in the extension of his probation. Admin. R. Mont. 24.9.610(5). MSP did have legitimate, nondiscriminatory concerns that, independently, could have warranted an extension of Outland's probation. Davenport in particular was concerned that Outland's situation could evolve into more than just a temporary light duty assignment. Because Dr. Smith's reports were so vague, she was unclear about the lasting nature of Outland's medical issues and restrictions and how they would affect his long-term ability to perform as a correction officer–albeit Outland gave MSP the ability to contact Dr. Smith, which Davenport did. At the time Outland's probation was extended, his restrictions made it impossible for him to perform the essential duties of a correctional officer, the job he was hired to do. Outland was making progress, but there was no clear indication when or if he would be able to again perform the essential job duties of a correctional officer. In spite of these legitimate, nondiscriminatory concerns, however, MSP cannot meet its burden of showing that an unlawful motive played no role in the probation extension.

By Davenport's own admission, Outland's disability was, in part, the reason for his probation extension. She altered the standard form letter when first accommodating him to emphasize that he was a probationary employee, suggesting that his probation was tied to his disability. At the hearing, in the same sentence

Davenport stated Outland's disability had nothing to do with his probation extension, she also stated it was a benefit to him because it would give him that full year for his disability to get better and improve. Furthermore, Davenport e-mailed Wood to suggest extending Outland's probation immediately after finding out he was to remain on light duty until June 1, 2017. To quote Davenport, "*[u]nder the ADA* I would recommend that you allow his continued light duty but you can extend his probation." (Ex. 109 (emphasis added).) It was clearly MSP's intent to extend Outland's probationary period with the March 27, 2017, letter due to his light duty status. Outland's light duty status was the result of his disability, and was inseparable from that disability, and was at least part of the reason Outland's probation was extended.

Outland had already demonstrated that, but for his disability which prevented him from performing the job of a correctional officer, he was able to perform the job. As stated, given the admittedly nebulous nature of Dr. Smith's light duty restrictions, there was a genuine and legitimate question as to whether, because of Outland's disability, he could return to the correctional officer job without accommodations. Again, however, whether or not Outland would eventually be able to perform the job of a correctional officer was inseparable from the issue of his disability, and was again a clear factor in MSP's decision to extend his probation, thereby treating him differently than other, non-disabled employees.

b. Termination

Because Outland has made a prima facie case of discrimination with regard to his termination, MSP must produce evidence of a legitimate, nondiscriminatory reason for the termination (Outland has only alleged disparate treatment with regard to the termination itself, not the events leading up to it). Admin. R. Mont. 24.9.610(3). Outland was technically terminated without cause as a probationary employee, but MSP nonetheless offered several reasons for his termination. They were most succinctly set forth in MSP's discovery responses as follows:

> The decision to terminate Outland was based on his behavior and attitude. Specifically, Outland created drama and confrontation where none existed or needed to exist. When he left the prison on March 29, 2017 he was agitated and angry because Tower 3 would not open the gate for him at MDIU. When he was later directed not to park outside MDIU, he became unduly defensive and defiant about the matter, and he blew it completely out of proportion.

* * *

> Outland was not disciplined over the MDIU incident. The MDIU incident was not in and of itself a big deal, i.e., not of great importance or significance. However, Outland made it into a big deal and again created drama and tension, (by his attitude and behavior), where none was necessary. It was after he sent his email to Davenport dated March 31, 2017, that the decision to terminate him was made.

(Ex. 50 at 5, 10-11.) At the hearing, MSP, primarily through Davenport, argued that what was perceived as Outland's overall poor attitude during the interactive process was also a factor in his termination when taking into account the totality of the circumstances.

As MSP has set forth, Outland was not specifically terminated because of the incident at MDIU, nor was he specifically terminated because of his behavior at the check point. MSP's response to these incidents was for Snowden, as Outland's superior, to enter a supervisor note. It was not until after the March 30 and 31, 2017, e-mails from both Outland and his wife came to MSP management's attention that termination became a real possibility. The actual decision to terminate Outland was not made until, after receiving Outland's March 31, 2017, e-mail, Davenport took steps to bring it up with both Shepherd and Kirkegard. The question then becomes whether MSP can show it had a legitimate, nondiscriminatory reason to terminate Outland.

MSP argued for a legitimate, nondiscriminatory reason for terminating Outland when it presented Wood's interpretation that Outland had been dismissive toward Snowden of prison security protocols. It goes without saying that, at any prison, security is a key concern. MSP relies on a chain of command to manage its security, and that chain of command only works when each individual in it follows the chain. When Snowden informed Outland he would be entering a supervisor note in his file, Outland was confrontational and questioned why he was being targeted with what he viewed as an arbitrary rule regarding parking at MDIU. Afterward, Outland followed up with his March 31, 2017, e-mail that again questioned Snowden's reprimand and asked for documentation that he had violated any official MSP policies. To the extent MSP management believed Outland was intentionally disregarding the chain of command and refusing to abide by security measures with these actions, it had a legitimate, nondiscriminatory reason to terminate Outland during his probationary period.

MSP also raised the issue of Outland's overall behavior, though poor behavior was part of a shifting story from MSP that evolved into something more significant than it actually was by the time litigation began. Neither Wood nor Snowden, for example, had any particular issues with Outland's attitude. Nevertheless, according to Davenport, in addition to what occurred surrounding the MDIU incident, Outland was angry and unprofessional when dealing with individuals such as herself and Wood during the interactive process. These allegations were generally non-specific and subjective, but, when combined with Outland's perceived attitude about the supervisor note, they again amounted to a legitimate, nondiscriminatory reason to terminate him. So long as it does not do so for discriminatory reasons, an employer may terminate an employee without cause during a probationary period, leaving them with no remedy. *See Blehm v. St. John's Lutheran Hosp., Inc.*, 2010 MT 258, ¶ 16, 358 Mont. 300, 246 P.3d 1024. MSP has therefore met its burden of countering Outland's prima facie case.

Outland must now demonstrate that the reasons offered by MSP were mere pretext by showing MSP's acts were more likely based on an unlawful motive or, with indirect evidence, that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610(4); *see also Vortex Fishing Systems, Inc.*, ¶ 15; *Ray*, 2007 MT 21, ¶31. In order to prove something is a pretext for discrimination, it must be shown both that the reason was false and that discrimination was the real reason. *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 515). Outland's burden now merges with the ultimate burden of persuading the court that he has been a victim of intentional discrimination. *See Heiat*, 275 Mont. at 328, 912 P.2d at 792 (citing *St. Mary's Honor Ctr.,* 113 S. Ct. at 2752; *Burdine,* 450 U.S. at 256)

Outland made a point of the fact that he was being treated differently than other MSP employees, and this point was supported by evidence. As testified to by both C. Outland and Steyh, individuals were regularly picked up by personal vehicle directly from MDIU. This was as an ongoing, normal practice. It was not until after the events of March 29, 2017, in which Outland was "the one who got caught," that MSP even adopted a formal policy mandating that MDIU staff who had rides were supposed to be picked up at the Wallace building. The new policy made sense from a security perspective, but going so far as to reprimand Outland with a supervisor note for violating a non-existent policy was unusual at best. Snowden himself had little, if any, prior interaction with Outland before the incident, but he was aware that Outland was under his command and in a temporary, light-duty position due to a disability. All indications are that, given his highly abnormal treatment under the circumstances, Outland was given a the write-up because of the only factor that

separated him from other correctional officers: his disability status and the fact he was not performing the job he was hired to do. It was Outland's response to the supervisor note that, according to MSP, led to his termination.

Outland's March 31, 2017, e-mail in response to Snowden's supervisor note started out with the following phrase: "While I have very little time, effort, or energy left to start yet another battle of me being treated differently than others [because of my disability] when it comes [to] issues around here, I will make one effort to resolve this other than that I won't waste my time with this." (Ex. 119.) When Outland sent the e-mail to Davenport, he was doing so at Snowden's direction. Snowden told Outland that rebuttals were to be submitted through HR. Outland's e-mail to Davenport does not, on its face, reflect a refusal to abide by MSP's security measures, but rather his frustration with being treated differently than other employees and for being reprimanded with a supervisor note to his file for practices regularly engaged in by other MSP employees without prohibition. Whatever other, legitimate reasons MSP may have had for Outland's discharge, Outland was ultimately terminated because of MSP management's own frustration with having to deal with "unnecessary drama" when Outland spoke out in his e-mail against receiving disparate treatment as a result of his disability. Appropriate behavior for Outland would have apparently been to remain quiet, even if he felt he was being targeted.

C. Retaliation

1. Prima Facie Case

Montana law bans retaliation in employment because of protected activity. Retaliation can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. *See* Admin. R. Mont. 24.9.603(2). A retaliation claim is a separate action from the original discrimination suit. *See Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989). The elements of a prima facie retaliation case are essentially identical to those of discrimination except insofar as the prohibited activity specifically concerns retaliation, not general discrimination. *See* Admin R. Mont. 24.9.610(2)(a). The Montana Supreme Court has recently stated that, to establish a prima facie case of retaliation, an individual must show that: (a) he belonged to a protected class; (b) he engaged in protected activity; (C) he suffered an adverse employment action; and (d) there is a causal connection between the protected activity and the adverse action. *Bollinger v. Billings Clinic*, 2019 MT 42, ¶ 29, 394 Mont. 338, 434 P.3d 885 (citing *Rolison v. Bozeman Deaconess Health Servs., Inc.*, 2005 MT 95, ¶17, 326 Mont. 491, 111 P.3d 202); *see*

also Admin. R. Mont. 24.9.610(2)(a) (stating the elements of a prima facie retaliation case in different terms but with the same underlying meaning). As with discrimination, either direct or circumstantial evidence can provide the basis for making out a prima facie case of retaliation, and the burdens vary as already set forth above with regard to discrimination. Admin. R. Mont. 24.9.610(3)-(5); *see also Beaver v. Mont. Dep't of Nat. Res. & Conservation*, 2003 MT 287, ¶¶ 61-62, 318 Mont. 35, 78 P.3d 857 (applying *McDonnell Douglas* burden shifting to both discrimination and retaliation claims involving circumstantial evidence).

MSP argues that a "but-for" standard of causation must apply to Outland's prima facie retaliation claims. Although federal law holds that a charging party must show retaliation was the "but-for cause" of the adverse employment action (*see generally Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)), Montana has not adopted this standard, even in cases following the *Nassar* decision. *See, e.g., Bollinger*, ¶ 29 (decided in 2019); *Puskas v. Pine Hills Youth Corr. Facility*, 2013 MT 223, ¶ 47, 371 Mont. 259 307 P.3d 298 (decided approximately two months after *Nassar*); *see also* Admin. R. Mont. 24.9.610(2)(a) (noting that the elements of a prima facie case vary depending on the case, but not expressly applying a separate "but-for" causation standard to retaliation claims). Montana law is not silent on this issue. While Montana does look to federal law for guidance, it is not bound by it in interpreting the MHRA, and it has so far chosen not to follow federal law on this issue. *See, e.g., King v. Cowboy Dodge, Inc.*, 2015 WY 129, ¶ 24 n.10, 357 P.3d 755 (declining to follow *Nassar* and noting that, although federal case law is often of great assistance and persuasive force, a State is the final arbiter of its own laws). Because Montana has not adopted a heightened "but-for" causation standard post-*Nassar* via statute, regulation, or case law–and has, in fact, reiterated a less onerous standard–the Hearing Officer believes it is outside his capacity to independently apply a different standard. Thus, regardless of *Nassar's* underlying merits, the Hearing Officer will decline to apply the "but-for" causation standard in this case.

MSP has already conceded that Outland engaged in protected activity when he requested an accommodation. It also conceded that Outland was subjected to adverse employment action when his probation was extended and when he was subsequently terminated. Thus, with the exception of a slightly different causation standard, Outland has already established the elements of a prima facie case of retaliation for both his probation and termination, and the same analysis as applied for discrimination applies for retaliation. For the sake of brevity, that analysis will not be repeated here. Only the element of causation will be addressed.

With regard to a causal connection between protected activity and the extension of his probation, Outland's probation was extended immediately after and in direct response to Dr. Smith's March 15, 2017, medical report, which placed him on continued light duty work. As stated above, the combination of timing and MSP's own admissions are enough to show that the adverse action of extending Outland's probation was taken in direct response to his protected activity of requesting further accommodation, thereby establishing the necessary causal link. Outland's termination is also connected to his protected activity. Wood himself acknowledged that the decision to terminate Outland came after and as a result of his March 31, 2017, e-mail to Davenport sent in rebuttal to Snowden's supervisor note. Outland's e-mail complained of his disparate treatment, which was protected activity. As with his discrimination claim, these circumstances are again enough to show that the adverse action of terminating Outland's employment was taken at least partially in response to Outland's protected activity regarding his disability. Outland has thus again satisfied all elements of a prima facie discrimination claim as to both adverse employment actions, his probation extension and his termination.

2. Proof and Rebuttal

As with disparate treatment, because Outland established a prima facie retaliation case with regard to his probation extension which involves direct evidence, MSP must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(5). Similarly, because Outland established a prima facie retaliation case with regard to his termination which involves circumstantial evidence, the burden shifts to MSP to articulate legitimate, non-discriminatory reasons for the discharge. *Bollinger*, ¶ 29 (citing *Rolison*, ¶ 16). If MSP articulates these reasons, the burden shifts back to Outland to demonstrate the articulated reasons are a pretext for retaliation. *Bollinger*, ¶ 29 (a charging party "must show that a retaliatory reason motivated the adverse employment actions, or that the employer's reasons for discharging the employee are completely 'unworthy of credence'" (quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002)).

All of the same reasoning applies to Outland's retaliation claims as applied to his discrimination claims. As stated above, MSP did have legitimate, non-discriminatory reasons both for extending Outland's probation and for his termination. Given the admittedly nebulous nature of Dr. Smith's light duty restrictions, there was a genuine and legitimate question as to whether he would ever be able to perform the essential functions of the correctional officer job, even with

reasonable accommodations. For the reasons already stated, however, MSP cannot show that, by a preponderance of the evidence, unlawful consideration of Outland's disability played no role in MSP's decision to extend Outland's probation in response to his request for continued accommodation. Outland's disability and his request for continued accommodation clearly did factor into and, in fact, triggered MSP to extend his probation in retaliation.

There was also a legitimate, nondiscriminatory reason for MSP to terminate Outland during his probationary period in response to his March 31, 2017, e-mail. As discussed above, Outland's e-mail could have led MSP management to believe he was intentionally disregarding the chain of command and refusing to abide by security measures. In addition, MSP painted a picture–albeit an inconsistent one–that Outland's overall behavior was poor. Outland's e-mail made a point, however, that he was being treated differently than other MSP employees, and this point was supported by evidence as discussed above. Outland has shown that, regardless of MSP's legitimate reasons to terminate him, they ultimately amounted to pretext. He was ultimately terminated in response to the protected activity of sending the March 31, 2017, e-mail to complain about MSP's disparate treatment, which MSP deemed "unnecessary drama."

Again, for many of the same reasons more fully discussed with regard to discrimination, Outland has successfully shown that MSP also engaged in illegal retaliation, both when it extended his probation and when it terminated him.

D. Damages

1. Back Pay

In employment discrimination, once the charging party has established that his damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *See P.W. Berry Co. v. Freese*, 239 Mont. 183, 187, 779 P.2d 521, 523-24 (1989). Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). To defeat this presumptive entitlement, the respondent must demonstrate by clear and convincing evidence that a lesser amount of back pay is due the charging party. *Id*.; *see also Benjamin v. Anderson*, 2005 MT 123, ¶ 62, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay is also reasonable. *See P.W. Berry*, 239 Mont. at 185, 779 P.2d at 523.

The Charging Party has an affirmative duty to mitigate lost wages by using reasonable diligence to locate substantially equivalent employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). A failure to mitigate damages can reduce or completely cancel out a back pay award. *See* 42 U.S.C. § 2000e-5(g) ("interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable"); *see also, e.g., Landgraf v. Usi Film Prods.*, 511 U.S. 244, 252 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence). There is no offset for unemployment insurance benefits received against wage loss recovery resulting from illegal discrimination. *See Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 28, 308 Mont. 8, 38 P.3d 836; *see also Kauffman v. Sidereal Corp.*, 695 F.2d 343, 347 (9th Cir. 1982) (quoting *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951).)

MSP bears the burden proving that Outland failed to mitigate his damages. *Cromwell v. Victor Sch. Dist. No. 7*, 2006 MT 171, ¶ 25, 333 Mont. 1, 140 P.3d 487. To satisfy this burden, MSP must prove "that, based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which [a charging party] could have obtained, and that [the charging party] failed to use reasonable diligence in seeking one." *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994).

MSP has not produced sufficient evidence showing Outland has failed to mitigate his damages. MSP's argument rests primarily on the fact that Outland did not apply for any security-related jobs, such as at county detention facilities in the State. Given both Outland's disability and also the circumstances under which he was terminated from MSP, the Hearing Officer does not find Outland acted unreasonably in failing to apply for such jobs. The Hearing Officer does, however, find that Outland failed to mitigate damages insofar as he only applied for out-of-state positions, thus incurring potentially unnecessary moving cost. It is understood that Outland and his family had legitimate reasons to relocate to Oregon, but doing so was by choice, not out of necessity.

Outland earned between $12.50 and $13.00 per hour after his termination. Outland's wages at MSP at the time of his termination were $38,355.00 per year, excluding benefits. The wages earned by Outland should offset any back pay award. The parties dispute the value of Outland's fringe benefits and whether there was sufficient proof of their value. Damages need only be reasonably certain and not absolutely certain. *See Kerr v. Gibson Products Co. of Bozeman, Inc.*, 226 Mont. 69, 74, 733 P.2d 1292, 1295. The Hearing Officer finds MSP's arguments that the amount

and periodicity of fringe benefit payments to Outland are unclear when it is in full possession of this information as Outland's employer. It is agreed, however, that, based on the evidence, Outland's fringe benefits were approximately $528.05 per pay period, which represents the state share of health and life insurance. (Ex. 42.) Given that Outland was not vested and had already expressed interest in both changing careers and moving elsewhere when he previously voluntarily left his employment with MSP, it would be speculative to include unvested retirement contributions in fringe benefits. Thus, lost benefits amount to $13,729.30 per year.

Outland was terminated from his job with MSP on April 5, 2017, earned $5,458.35 from Walmart from mid-August, 2017, to mid-December, 2017, and $13.00 per hour at Terra Staffing from December, 2017, going forward. He has therefore shown that, as of July 31, 2020, he is entitled to back pay and fringe benefit damages in the amount of $95,734.76. This award is reasonable likely to make Outland whole for the discrimination he experienced at MSP. Outland is also entitled to interest on the lost wages and benefits through the date of the decision at the rate of 6.25% per annum (the present H.15 bank prime rate plus 3.00%), which amounts to $10,893.79, for a total of $106,628.55. *See* Addendum A.

2. Front Pay

Front pay compensates the Charging Party for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the plaintiff could return to his former position. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001). Future damages need only be reasonably certain and not absolutely certain, and of necessity are the subject of some degree of conjecture and speculation. *See Kerr*, 226 Mont. at 74, 733 P.2d at1295.

The courts have considered the following factors when determining if reinstatement is feasible:

> (1) whether the employer is still in business; (2) whether there is a comparable position available for the plaintiff to assume; (3) whether an innocent employee would be displaced by reinstatement; (4) whether the parties agree that reinstatement is a viable remedy; (5) whether the degree of hostility or animosity between the parties, caused not only by the underlying offense but also by the litigation process, would undermine reinstatement; (6) whether reinstatement would arouse hostility in the workplace; (7) whether the plaintiff has since acquired

> similar work; (8) whether the plaintiff's career goals have changed since the unlawful termination; and (9) whether the plaintiff has the ability to return to work for the defendant employer, including consideration of the effect of the dismissal on the plaintiff's self-worth.

Webner v. Titan Distrib., 101 F. Supp. 2d 1215, 1236 (N.D. Iowa 2000) (citations omitted); aff'd on other grounds, 267 F.3d 828 (8th Cir. 2001). "Because of the potential for windfall, [front pay's] use must be tempered." *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). OAH has historically followed the guidance of the Wrongful Discharge from Employment Act, which allows for recovery of lost wages for a maximum of four years from the date of discharge. *See* Mont. Code Ann.§ 39-2-905(1); *Billbruck v. BNSF Ry. Co.*, HRC Case No. 0031010549 (Aug. 3, 2004).

Neither party has suggested that reinstatement is a viable alternative. Outland asserts he is entitled to four years' front pay. Given the length of the back pay award and the uncertainty about Outland's career path regardless of the incidents herein, the Hearing Officer finds four years' front pay would be excessive. Outland previously left his employment with MSP to pursue other career alternatives, and indications are that he was still considering alternatives after returning to MSP. Thus, awarding four years' pay in light of the finding above that whether Outland would stay until his retirement vested was too speculative, is not supported by the record and would be unduly speculative as well as a windfall. The Hearing Officer does find three years to be a reasonable time period, and that Outland is entitled to an award of $75,132.90 in front pay damages, including lost fringe benefits. The present value of this award is $72,259.82. *See* Addendum A.

3. Emotional Distress

Outland suffered emotional distress damages and is due compensation as a result. The Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Outland as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages). The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See* Vainio, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See Vortex Fishing Sys. v. Foss*, 2001 MT

312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted). However, because of the broad remunerative purpose of the civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions. *Id*.

Outland provided some evidence concerning the impact that the discrimination described herein had on his life, though no testimony was offered from any of his treatment providers. Some of Outland's emotional distress also stemmed from prior incidents at MSP which gave rise to the present disability, and it is difficult to parse out the degree to which the circumstances of this case aggravated his distress. While Outland was already receiving counseling prior to the incidents herein, there is no doubt that these incidents further contributed to his emotional distress.

Outland argues that he is entitled to $200,000.00 in emotional damages. Underlying Outland's figure is the tort-based, punitive notion that emotional distress is worth $50,000.00 per incident, and he can identify four incidents of discrimination. Several causes of action can based on the same injury, but Outland's emotional damages cannot be multiplied to the point of a windfall. *See Corporate Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, 49, 345 Mont. 336, 190 P.3d 1111; *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 40, 338 Mont. 259, 165 P.3d 1079. The Hearing Officer finds that, given similar cases, a lack of legal authority supporting Outland's position, and his own assertion that his suffering mirrored that of the individuals who were awarded $50,000.00 for a violation of the MHRA, he is not entitled to damages on a per incident basis. Of the cases cited by the parties, only *Smies* involved similar facts and a termination after being placed on light duty work. *See Smies v. Town of Fairview*, OAH Case No. 723-2017. In *Smies*, the charging party was awarded $35,000.00. A $200,000.00 award would amount to a windfall not proportionate to the emotional distress suffered by Outland. Instead, the Hearing Officer finds $40,000.00 is a reasonable award for the emotional distress caused by MSP's actions, which takes into account counseling costs.

4. Affirmative Relief

The determination that a discriminatory motive played a part in MSP's actions mandates affirmative relief under the MHRA to enjoin and prevent future discriminatory acts by MSP. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring MSP's management to consult with HRB to identify appropriate training to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

2. Outland is a member of a protected class within the meaning of the MHRA on the basis of mental disability. Mont. Code Ann. § 49-2-101(19)(a).

3. The MHRA prohibits discrimination in employment based upon mental disability. Mont. Code Ann. § 49-2-303(1)(a).

4. Outland proved that MSP violated the MHRA when it both discriminated against him illegally because of his mental disability and retaliated against him for engaging in protected activity. Mont. Code Ann. §§ 49-2-301, -303(1).

5. Outland is entitled to compensatory damages. He is entitled to back pay and fringe benefit damages in the amount of $95,734.76, with interest of $10,893.79. He is entitled to front pay damages with a present value of $72,259.82.

6. Outland is entitled to damages for emotional distress in the amount of $40,000.00.

7. The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

8. For purposes of Mont. Code Ann. § 49-2-505(8) and recovery of attorneys' fees and costs, Outland is the prevailing party.

VI. ORDER

1. Judgment is granted in favor of Outland against MSP for both discriminating and retaliating against him in violation of the MHRA.

2. Within 60 days of the date of this decision, MSP shall pay to William Outland the sum of $218,888.37, representing $178,88.37 in economic losses sustained and $40,000.00 in emotional distress damages.

3. MSP must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of

complaints of discrimination that includes training for its managers, supervisors, and all human resources employees to prevent and timely remedy discrimination on the job. Under the policies, MSP's employees will receive information on how to report complaints of discrimination. The policies must be approved by the Montana Human Rights Bureau. In addition, MSP shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 31st day of July, 2020.

/s/ CHAD R. VANISKO
Chad R. Vanisko, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: William Outland, Charging Party, and his attorneys, Elizabeth Griffing and Jill Gerdrum of Axilon Law Group, PLLC, and Montana Department of Corrections, Montana State Prison, Respondent, and its attorneys Ira Eakin and Robert Lishman:

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.

Outland.Remand.HOD.cvp