

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0079012476:

MICHELLE KOWALOWSKI,	)	Case No. 1246-2008
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	
SUPER 1 FOODS,	)	
	)	
Respondent.	)	

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**I. PROCEDURE AND PRELIMINARY MATTERS**

Michelle Kowalowski filed a complaint with the Department of Labor and Industry on June 20, 2007, alleging that Super 1 Foods, her former employer, discriminated against her in employment when it discharged her in retaliation for complaining that on March 26, 2007, Tim Nestegard, a co-worker, sexually harassed her on store premises while she was working.<sup>1</sup> On January 29, 2008, the department gave notice Kowalowski's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on July 15 and 16, 2008, in Kalispell, Montana. Kowalowski attended with Dean Knapton, her attorney. Super 1 Foods attended through its designated representative, J. (Jack) Strahan, with its counsel, Tammy Wyatt-Shaw, Williams Law Firm, P.C. Kowalowski was the sole witness who testified in her case in chief. Dale Gregory, Mike (Michiel) R. Benson, Jeff Bentley, Shelly Scott, Tim Nestegard, Hope Renfro and J. Strahan testified in Super 1 Foods' case in chief. Kowalowski testified in rebuttal. Admitted exhibits were Exhibit 101, (pp. 3095-98, 3108, 3109, 3111-14 and 3116), Exhibit 102 (all except p. 3126), Exhibit 103 (all pages), Exhibit 104 (p. 3164 only), Exhibit 106 (all pages), Exhibit 107 (pp. 3232-33 and 3236-37), Exhibit 108 (in its entirety), Exhibit 109 (1 page long), Exhibit 110 (pp. 1057-59 and 1063-65), Exhibit 112 (all pages) and Exhibit 115 (1 page long).

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<sup>1</sup> This is the sole claim asserted in Kowalowski's contentions in the final prehearing order, which her counsel approved and which supersedes the pleadings.

The Hearings Bureau received the last timely post-hearing filing, Super 1 Foods' "Reply to Charging Party's Proposed Order" by e-mail on August 28, 2008, and the paper original by mail on September 2, 2008. The deadline for reply briefs, pursuant to the final prehearing order, was August 29, 2008, at which time the Hearing Officer deemed the case submitted for decision. The Hearings Bureau file docket accompanies this decision.

## II. ISSUES

The key issue is whether the termination of Kowalowski's employment was retaliatory. A full statement of the issues appears in the final prehearing order.

## III. FINDINGS OF FACT

1. Respondent Super 1 Foods hired Charging Party Michelle Kowalowski as a produce clerk for its store in Columbia Falls, Montana on or about April 17, 2006.

2. Kowalowski stated on her application for work with Super 1 Foods that she had been the produce manager at Montana Harvest in Bozeman for two years. She described her duties as including quality control, ordering, scheduling, pricing, display, hiring, firing and customer relations. Kowalowski stated that she had worked in 2000 as a produce clerk with similar duties at the Apple Barrel in Kalispell.

3. Hope Renfro was assistant general manager of the store in April 2006. She made the decision to hire Kowalowski as a produce clerk. The store had difficulty recruiting and retaining employees, particularly qualified employees, and Kowalowski indicated in her interview as well as in her application that she had significant experience working with produce and could work unsupervised. In addition, Kowalowski wanted to work evening shifts. Kowalowski preferred evening shifts because she wanted to raise her 3-year-old son without resorting to day-care and had family childcare help in the evenings.

4. Renfro knew that it would benefit the store to have an experienced produce clerk available to work evenings, since the produce department was only staffed until 9:00 p.m. and the store remained open all night. As a result, Super 1 Foods hired Kowalowski at a starting wage of \$10.00 per hour and placed her on its standard 1,000 hour probationary period. Her starting wage was \$2.50 above the usual starting wage for a produce clerk at the Columbia Falls Super 1 Foods store, and \$1.00 per hour higher than Kowalowski's requested starting wage.

5. When she was hired, Kowalowski received a copy of Super 1 Foods' employee handbook. She signed an acknowledgment of receipt of the handbook, which was placed in her personnel file.

6. Super 1 Foods consistently assigned Kowalowski the evening shifts and hours she preferred. As a result, throughout her employment Kowalowski worked part-time as a produce clerk, generally arriving no earlier than 5:00 p.m. to close the department, and typically working without supervision. At various times during her employment, scheduling demands due to other employees taking time off or other exigencies, led Super 1 Foods to offer Kowalowski longer hours or extra shifts. She generally declined those offers, because of her son.

7. When she began her employment at the store, Kowalowski often closed the produce department with the help of a temporary employee, college student Chris Eilesgary, who was working in Columbia Falls for the summer. After the summer season ended, she more frequently closed the produce department by herself.

8. In the first five months of Kowalowski's employment, Renfro, produce manager Dale Gregory (Kowalowski's immediate supervisor) and other employees in the store's produce department found that Kowalowski had failed to stock ad items<sup>2</sup> and end caps,<sup>3</sup> had failed to maintain adequate wet racks of produce and produce tables and had failed to rotate produce when stocking it<sup>4</sup>. The volume of night shoppers at the store was not high enough to cause the morning deficiencies in the sales displays, wet racks and produce tables had Kowalowski left them fully stocked when she closed the department the previous night. On several occasions when Kowalowski had been the produce department closer the previous evening, produce department employees arriving in the morning found some sales displays completely empty, even though there was sales produce in the cooler, available for stocking.

9. Deficiencies in the produce department when the morning employees arrived required them to complete the previous evening's work before starting their morning work. All of Kowalowski's co-workers, Mike Benson, Jeff Bentley, Shelly Scott, Chris Eilesgary and Tim Nestegard complained, at various times to Gregory and to Renfro, that Kowalowski was not performing her job duties. Nestegard, who regularly worked the early morning "opening" shift in the produce department, was the most vociferous critic of Kowalowski's work performance.


10. Gregory did not have authority, as produce manager, to hire, fire, or discipline employees. Therefore, he reported the various complaints about

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<sup>2</sup> "Ad items" means produce offered at sale prices and advertised as such.

<sup>3</sup> "End caps" means displays at the ends of the produce tables, stocked with either high volume selling items like bananas or ad items.

<sup>4</sup> "Rotation" means removing produce already on the table, placing new produce from the storage area on the table, then putting the "old" produce on top of the "new" produce. Failure to rotate leaves "old" produce on the bottom, resulting in faster and greater amounts of spoilage.



Kowalowski to Renfro. In late August and early September, Renfro observed the condition of the produce department on some mornings after Kowalowski had closed and confirmed conditions consistent with the complaints. She did not observe the same conditions when other produce department employees closed.

11. During her first five months of employment, Kowalowski's co-workers in the produce department also complained to Renfro and Gregory that Kowalowski, within the workplace, was making inappropriate comments, which the complaining employees found offensive or embarrassing, involving various bodily functions.

12. On September 25, 2006, Renfro and Gregory met with Kowalowski to discuss deficiencies in her job performance. They told her that she was hired at a higher rate of pay because of her stated experience with produce, but that her job performance was not what Super 1 Foods expected from someone with her experience. Renfro and Gregory reviewed job duties and priorities with Kowalowski. Kowalowski assured the two managers that she understood the priorities in the produce department and could fulfill her job duties.

13. As part of the September 25, 2006, meeting, Kowalowski was counseled to keep her conversations and comments within acceptable limits for the workplace.

14. Both Renfro and Gregory placed written documentation of the September 25, 2006, meeting in Kowalowski's personnel file.

15. At approximately the same time (late September 2006), Renfro and General Manager Ron Catron posted a reminder in the break room:

Super 1 is committed to providing a harassment-free work environment. Maintaining this type of environment is the responsibility of all employees. This includes the absence of unsolicited and offensive remarks. All employees should conduct themselves in a professional manner. This includes our conversation. Offensive and or sexual remarks have no place in the workplace. Thank you for your cooperation in this matter.

16. The evening after her meeting with Renfro and Gregory, Kowalowski completed her work appropriately, and was told the following day that she had done a "good close" and should keep up the good work.

17. Instead, almost immediately thereafter problems with Kowalowski's performance resumed. Gregory had begun, before the September 25 meeting, to provide "to-do" lists to Kowalowski, which either he or the morning produce clerk (often Nestegard) would sometimes note what Kowalowski had or had not done the previous night, including notes about both the general condition of the produce

department and particular produce Kowalowski had not stocked, rotated or culled. Gregory retained some of these lists.

18. The evidence indicated “to do” lists with dates from September 9, 2006 to May 9, 2007, with several lists from mid-March 2007. The March 23, 2007, list included a detailed summary of Kowalowski’s omissions in stocking on March 23, as compiled by Nestegard after his arrival at work at 7:30 a.m. the next day.

19. No action was taken to end Kowalowski’s employment. She was still in her probationary period and, as already noted, Super 1 Foods had difficulty recruiting and retaining employees for the Columbia Falls store. Renfro and Gregory were pessimistic about any lasting improvement in Kowalowski’s work, after the rapid return to unsatisfactory work following the September 2006 counseling, but no decision to end her employment was necessary until the end of her probationary period. Also, there was always the chance that her performance would improve.

20. No further formal management counseling sessions were held with Kowalowski. Renfro did not (a) transfer Kowalowski to another store; (b) extend her probationary period of employment; (c) reduce her wage; (d) reduce her hours; (e) issue a written warning or (f) offer a “last chance agreement.”<sup>5</sup>

21. Kowalowski worked 5:00 to 9:00 p.m. on Saturday, March 24, 2007. After her scheduled day off on Sunday, March 25, 2008, she returned to work again on Monday at 5:00 p.m. on March 26, 2007.

22. On the evening of March 26, 2007, Nestegard, who had been drinking, entered the store while off-duty to purchase groceries. He had a casual conversation with Kowalowski in the produce department where she was at work. During that conversation, Nestegard pointed out to Kowalowski that she was not rotating the apples. Nestegard told her that if she wasn’t going to do it right, she should leave it and let the morning shift do it. He left the store after conversing with Kowalowski and making his purchases.

23. Thereafter, at about 6:00 p.m., Kowalowski reported to the evening manager on shift, Kellie Hattel, that Nestegard “came by the produce department and asked her if she wanted to ‘just go into the cooler right now and do it?’”

24. Hattel documented the incident via a handwritten note for Renfro’s consideration.

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<sup>5</sup> Super 1 Stores’ normal practices and procedures allowed for all of these disciplinary steps to address performance or behavior problems with an employee.

25. Upon her return to work and receipt of Hattel's note, Renfro commenced an investigation into Kowalowski's allegations, as work schedules would permit. She interviewed Hattel, Kowalowski and Nestegard. She placed written summaries of her interviews in their respective personnel files.

26. The existing work schedule had Nestegard and Kowalowski working their customary shifts, with no scheduled work times in common. The store had no one available to cover the assigned shifts for Nestegard and Kowalowski that week on such short notice. Management followed the existing work schedule, and the two did not see each other at work after March 26, 2007.

27. Renfro interviewed Nestegard on March 28, 2007. When he was told of Kowalowski's allegations, he vehemently denied them. A short time later, he became so upset that Renfro allowed him to leave work. Before leaving Nestegard inquired about a transfer to another store, saying that he could not work in the same store as Kowalowski. Renfro instructed Nestegard not to discuss Kowalowski's complaint with her or any other employee.

28. Renfro interviewed Kowalowski on March 29, 2007. Kowalowski told her that "Tim leaned into her and asked her if she wanted to go in the cooler right now and have sex." Kowalowski said that those were Nestegard's "exact words."

29. At the end of the March 29, 2007, interview, Renfro told Kowalowski that Nestegard's behavior was unacceptable. Renfro asked that Kowalowski not speak about the incident and to let her know if any problem of any kind with anyone regarding the incident occurred.

30. On March 29, 2007, after completing the three interviews, Renfro told Nestegard that Super 1 Foods would reassign him to the Kalispell store. She specifically counseled Nestegard against retaliation. Nestegard agreed to the transfer, which resulted in fewer working hours and fewer assignments to the shift he preferred, the day shift. Super 1 Foods implemented the transfer by the end of that same week. The practical effects of the transfer were to inconvenience Nestegard by changing his work location and shift assignment and to reduce his pay.

31. Super 1 Foods required Nestegard to sign a "Last Chance Agreement" created because of Kowalowski's sexual harassment complaint.<sup>6</sup> Failure to follow the

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<sup>6</sup> The agreement included language that "any further incidents of sexual harassment" would result in immediate termination. Despite his denial of the truth of Kowalowski's complaint, Nestegard signed the agreement, as a condition of further employment with Super 1 Foods.

terms of that agreement, which basically prohibited any sexual harassment of co-workers, would mean immediate termination of Nestegard's employment.

32. There is no credible evidence that either Kowalowski or Nestegard mentioned the harassment complaint or the request for transfer to any co-workers during the remainder of Kowalowski's employment with Super 1 Foods.

33. On Nestegard's last day at the Columbia Falls store, the produce clerks on duty with him shared a small cake in the back room which Gregory purchased in the bakery. This 5-minute cake break for an employee leaving the store was traditional in the department. Gregory felt that preventing the cake break would cause curiosity and gossip about the sudden transfer, contrary to Renfro's direction to keep the harassment complaint confidential. At the time of Nestegard's transfer, members of the produce department were unaware of the reason he was leaving.

34. Although Kowalowski found the remnants of the cake in the break room and concluded that the employees who participated and the management of the store deliberately held the cake break and left the remnants to shame or blame her, there is no credible evidence of any such intention.

35. Kowalowski continued her employment with Super 1 Foods for the next two months. Nestegard's departure resulted in no change to Kowalowski's schedule, duties or job responsibilities.

36. From the date of Kowalowski's complaint to May 22, 2007, Kowalowski's performance did not improve. As the end of her probationary period of 1000 hours approached, Renfro decided not to continue Kowalowski's employment. Gregory, who had no power to make the decision, concurred.

37. There is no credible evidence that the decision to end her employment was because of her harassment complaint against Nestegard, rather than because of her continued performance at a lower level than expected and required.

38. On May 22, 2007, Super 1 Foods terminated Kowalowski's employment with the company. She was told that every employee goes through the 1000-hour probationary period to provide both the employee and Super 1 Foods with an opportunity to see how the employment relationship works. She was advised that Super 1 Foods had chosen not to continue their relationship beyond the probationary period because "it just isn't working out." On that date, Kowalowski, unable to obtain any further explanation of why her employment was being ended, assumed it wasn't working out because of her hours.

39. At no time during her tenure with Super 1 Foods did Kowalowski qualify for incentive pay, vacation pay or health insurance. Kowalowski did not log enough

hours to entitle her to these benefits, and accrued too many absences to qualify for incentive pay.

40. After her discharge, Kowalowski started work on June 1, 2007 at Meadow Lake Resort at \$10.00 per hour (the same hourly rate she had earned with Super 1 Foods), with expectations of increases in pay.

41. Kowalowski made further inquiries about the reason for her discharge. She was told again that “it was just not working out.” Super 1 Foods’ company policy is to give this answer to any inquires by a discharged probationary employee about the reasons for the discharge.

42. Upon termination of Kowalowski’s employment, Super 1 Foods gave Kowalowski her final paycheck with a copy of the company’s dispute resolution procedure stapled to it. The document offered a procedure that an “employee” could follow if she felt that she was wrongly disciplined. Kowalowski thought that the procedure did not apply to a former employee and did not pursue it.

43. Kowalowski subsequently spoke with her father about the termination. Her father suggested to her that the discharge was in retaliation over the sexual harassment complaint. Kowalowski then considered that her discharge was because of her complaint against Nestegard and filed the present complaint.

#### IV. DISCUSSION<sup>7</sup>

When there is no direct evidence of discrimination, Montana applies the three-tier burden shifting analysis found in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 328, 912 P.2d 787, 792. There is no credible direct evidence that Super 1 Foods fired Kowalowski because she complained about sexual harassment by Nestegard. Therefore, the *McDonnell Douglas* analysis applies.

To establish her prima facie case of unlawful retaliation in conformity with tier one of *McDonnell Douglas*, Kowalowski had to prove three elements: (1) that she engaged in activities protected by the Human Rights Act; (2) that Super 1 Foods subjected her to significant adverse acts and (3) that there was a causal connection between the adverse acts and her protected activities. Mont. Code Ann. 24.9.603(1).

“Protected activities” include opposition to discriminatory practices the Act forbids. Mont. Code Ann. § 49-2-301; Admin. R. Mont. 24.9.603(1)(b). The Act prohibits sexual harassment at work. Mont. Code Ann. § 49-2-303(1)(a); *see*,

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<sup>7</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.



*Shields v. Helena S.D. No. 1* (1997), 284 Mont. 138, 943 P2d 999, *following Harrison v. Chance* (1990), 244 Mont. 215, 797 P2d 200; (by definition sexual harassment constitutes sexual discrimination). Therefore, making an internal complaint of sexual harassment by a co-employee is clearly opposing a practice forbidden by the Act. Kowalowski established the first element of her *prima facie* case.

Terminating a person's employment is categorically a significant adverse act. Admin. R. Mont. 24.9.603(2)(b). Kowalowski established the second element of her *prima facie* case.

Montana has an administrative presumption that there is a causal connection between participation in a Human Rights Act proceeding and any significant adverse action taken during or within six months after conclusion of that proceeding. Admin. R. Mont. 24.9.603(3). That presumption is not available to Kowalowski because it provides a causal connection between adverse action and participation and does not address whether there is such a presumption in opposition cases. Federal case law extends a time-based presumption that there is a causal connection between protected activity and adverse action to opposition cases as well as participation cases. *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 914 (9<sup>th</sup> Cir. 2001) (applying 9<sup>th</sup> Circuit precedent about the time-based presumption to an oppositional retaliation claim).<sup>8</sup> The nature of the presumption and the proximity sufficient to give rise to such a presumption was set forth in *Little, supra*:

This close timing provides circumstantial evidence of retaliation that is sufficient to create a *prima facie* case of retaliation. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9<sup>th</sup> Cir. 2000) (noting that causation can be inferred from timing alone); *see, e.g., Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9<sup>th</sup> Cir.1989) (stating that a *prima facie* case of causation was established when discharges occurred forty-two and fifty-nine days after EEOC hearings); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9<sup>th</sup> Cir.1987) (stating that sufficient evidence existed where adverse actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after investigation ended).

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<sup>8</sup> Federal precedent can offer guidance when there are substantive similarities in the statutory language and also in the public policy considerations and there is no controlling Montana precedent. *Butterfield v. Sidney Public Schools*, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; *see also, Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947, 950-51.

Kowalowski established the third element of her *prima facie* case through evidence of the proximity in time between her protected activity (the March 26 complaint) and the significant adverse action (the May 22 discharge), entitling her to the presumption of a causal connection between the two.

In response to Kowalowski's *prima facie* case, Super 1 Foods had the burden, with regard to this indirect evidence, to show a legitimate business purpose for its termination of her employment. Without the *prima facie* case, of course, Super 1 Foods would not need to show a legitimate business reason, and was free to discharge Kowalowski, a probationary employee, without justifying the decision. Once the first tier of *McDonnell Douglas* had been provided by Kowalowski, Super 1 Foods then had to respond by meeting the requirements of the second tier, for two reasons:

[It] meet[s] the plaintiff's *prima facie* case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

*Texas Dept. of Comm. Affairs v. Burdine* (1981), 450 U.S. 248, 255-56, *see also Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212. Super 1 Foods met its burden to show a legitimate nondiscriminatory reason to fire Kowalowski with its evidence of the performance problems that Kowalowski had while employed at the store.

Once Super 1 Foods produced a legitimate business reason for the discharge, Kowalowski had the burden of proving that the business reason was a pretext. *McDonnell Douglas* at 802; *see also Martinez v. Yellowstone Co. Welf. Dept.* (1981), 192 Mont. 42, 626 P.2d 242 246. To meet this third tier burden, Kowalowski could present either direct or indirect proof of the pretextual nature of Super 1 Foods' proffered reasons:

She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

*Burdine* at 256.

Kowalowski always bore the ultimate burden of persuading the fact-finder that Super 1 Foods illegally retaliated against her. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813; 818; *Johnson, op. cit.*, 734 P.2d at 213. Although she offered some rebuttal testimony, she did not carry her ultimate burden of proof. She failed credibly to rebut the evidence of her performance problems. Kowalowski may

sincerely believe that the evidence of her performance problems was exaggerated and unfair. Her testimony that she believes she was fired for complaining of sexual harassment may be entirely true regarding what she believes. Her belief did not overcome the probative and substantial evidence that she had failed to do her job at the performance level that Super 1 Foods reasonably expected, before as well as after her internal harassment complaint, and that she was discharged for that failure.

It is irrelevant to the decision in this case whether Nestegard made the statement that Kowalowski reported him to have made on March 26, 2007. Whether he made the suggestion, either in earnest or to harass a co-employee he considered to be a problem, or not, the response of Super 1 Foods, established by the substantial and credible evidence of record, was prompt, reasonable and sufficient. Kowalowski implied in her arguments that the response was somehow inadequate, inept or reluctant due to favoritism toward Nestegard, but the Hearing Officer was not persuaded.

Likewise, Kowalowski argued (and testified on rebuttal) that the evidence of her poorer than expected performance was flawed, incredible and/or fabricated after the fact. The Hearing Officer was not persuaded, based upon the substantial and credible evidence of record, that Super 1 Foods' legitimate business reason for terminating her employment was a pretext.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case, pursuant to Mont. Code Ann. § 49-2-512(1) (2007).

2. Super 1 Foods did not illegally retaliate against Kowalowski when it terminated her employment on May 22, 2007, and therefore the complaint should be dismissed. Mont. Code Ann. § 49-2-505(3)(c).

## VI. ORDER

1. Judgment is granted in favor of respondent Super 1 Foods and against charging party Michelle Kowalowski on her charge that Super 1 Foods discriminated against her in employment when it discharged her in retaliation for complaining that on March 26, 2007, a co-worker sexually harassed her on store premises while she was working.

2. The complaint is dismissed.

Dated: September 16, 2008.



Terry Spear, Hearing Officer  
Montana Department of Labor and Industry

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### CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

DEAN KNAPTON  
139 PARK AVE  
KALISPELL MT 59901

TAMMY WYATT-SHAW  
PO BOX 9440  
MISSOULA MT 59807-9440

DATED this 16<sup>th</sup> day of September, 2008.

