

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011722:

KIM STEARNS,)	Case No. 2239-2006
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
POLAR ELECTRIC,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Charging Party Kimberly Stearns filed a human rights complaint alleging that the respondent Polar Electric, Inc., discriminated against her in violation of the Montana Human Rights Act because Polar's owner, Joe Wolfe, subjected her to a sexually hostile work environment and retaliated against her for engaging in protected conduct. This matter was originally assigned to Hearings Examiner Terry Spear who subsequently recused himself. The matter was then reassigned to Hearings Examiner Gregory L. Hanchett who held a contested case hearing in this matter on September 28 and 29, 2006 in Helena, Montana. Peter Michael Meloy, attorney at law represented Stearns. Joe Seifert, attorney at law, represented Polar Electric. Stearns, Wolfe, Pat Spaulding, Rachael Stearns, Betty Barbour, Connie Sauer, Jade Vaile, Robert Holmes, Ray Brumfield, Roy Murray, Terry Lamping, Mitch Hegam, Bill Bentley, and John Balzarini all testified under oath. Charging party's exhibits 1,2, 3, 4, 5, 8 and 10 and respondent's exhibits 110, 113, 118, 119, and 120 through 123 were admitted into evidence.

Counsel for each party submitted post-hearing briefs, the last of which was received on November 13, 2006. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

A complete statement of issues appears in the final pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. FINDINGS OF FACT

1. Polar employed Stearns beginning in 1995 when she was an electrical apprentice.
2. At its main office, Polar maintains a notice, prepared by the Montana Department of Labor and Industry Human Rights Bureau (HRB), advising employees that sexual harassment is unlawful. It also advises employees that they may contact the HRB if they believe they have been subjected to sexual harassment. In addition, Polar Electric had a “zero tolerance” policy against sexual harassment. Exhibit 1.
3. As is true with all apprentice employees, Polar provided Stearns with all of her electrical tools necessary for her to perform the job. Stearns eventually passed her journeyman’s electrician’s licensing test and became licensed in Montana as a journeyman electrician.
4. Wolfe’s and Stearns’ working relationship was normal until 1999. Things began to change in May, 1999. Wolfe called Stearns and asked her to report to the Polar office. Stearns went to the office and she and Wolfe were alone in the office. Wolfe told Stearns that he wanted to nominate her for employee of the year. At that time, Wolfe also told Stearns that he would like to be with her. Wolfe’s statement caught Stearns off guard and shocked her. Stearns told Wolfe that she had to leave and she immediately left.
5. Following a Christmas party in December, 1999, Wolfe mentioned to Stearns that she looked nice at the party. Wolfe also told Stearns that he had been thinking about her all weekend. In 2000, Wolfe asked Stearns to reconsider being with her. Stearns declined.
6. Wolfe chose Stearns to act as the job foreman on the Bon Marche project during 2001. While Stearns served in this capacity, Bon Marche provided a gift card to Wolfe to pass along to the job foreman because of the good work being done at the site. Wolfe in turn passed this on to Stearns. This was the only Bon Marche card that Wolfe gave to Stearns.
7. Wolfe also gave Stearns a pair of boots. Stearns needed the boots. Wolfe had seen Stearns working in tennis shoes on the job site and her feet were soaking wet. Wolfe had earlier purchased coats for all of his crew. In addition, Wolfe also purchased a pair of tennis shoes for Ron Lamping because he needed them.
8. In June, 2002, Stearns stopped by the office to pick up her paycheck. She and Wolfe were alone in the office. Wolfe stated to Stearns that his wife would be out of town that weekend and asked if Stearns could stop by his house. Stearns declined, saying “no,” she would not do that. Wolfe continued to try and hug Stearns and on many occasions he succeeded in

doing so. Wolfe would preface his hugs with the statement that Stearns “looked like she needed a hug” and he would then proceed to hug her. Stearns did not like this conduct.

9. On another occasion in 2002, while Stearns was working for Polar on the Great Northern Project in Helena, Wolfe called her on her cell phone and asked her not to be angry with him. Wolfe also told Stearns that he loved her.

10. While working on the Dearborn Ranch project in 2002, Stearns and the other Polar employees often had to work alone. While Stearns at the time of hearing attributed her segregation to Wolfe’s desire to segregate her from other male employees, such was not the case. The exigencies of the job often required Polar employees to work alone at the ranch site.

11. In October, 2002, Stearns spoke to another Polar employee, Skip Gee, and asked him to make sure that she was not left alone with Wolfe. Soon after, Wolfe transferred Stearns to the Unipro building project in Helena. Later that month, Wolfe while on site at the project, approached Stearns and spoke to her. He told her that he had been watching a Victoria’s Secret television commercial and that he thought she looked better than the women in the lingerie and that he had fantasies about the things Stearns could do for him in the bras and panties they were wearing.

12. In November, 2002, Wolfe , while at the Unipro Building, hugged Stearns. As Stearns pulled away, Wolfe’s hand ran across her breast. Stearns had not asked for a hug and was offended at his unsolicited conduct.

13. Later during the month of November, 2002, Wolfe met with Stearns to discuss her performance on the Independent Record job site. They met at a Hardee’s restaurant in Helena. Wolfe told Stearns that they were meeting “because you’re screaming sexual harassment.” He then stated that if his wife found out about this he would lose everything. Later in the conversation, Wolfe stated “I say I love my truck but you don’t see me trying to stick my dick in it.”

14. In 2004, while at a job located in Sheridan, Montana, Stearns was putting away a CAT V electrical tester in a job site trailer when Wolfe approached her. Wolfe told her that she looked like she needed a hug. Stearns told her that she did not need a hug but Wolfe nonetheless proceeded to put his arms around her

15. In late 2004, while Polar was working on the Helena Airport expansion project, Wolfe showed up at the job site and found Stearns alone. Wolfe walked up to Stearns, put his arm around her, and told her that he would like to spend some time with her.

16. In January, 2005, Stearns had to take time off from work in order to have carpal tunnel surgery. After recovering, Stearns went into the shop on February 5, 2005 to discuss with Wolfe her return to work. Wolfe told Stearns that the offer to spend time with him was still open.

17. In early May, 2005, Stearns was working in the basement of airport expansion project with co-worker Bill Brustkern. When Wolfe arrived, he observed Brustkern and Stearns leaning against their respective ladders talking. Polar's cost factor at the airport had already exceeded what Polar had budgeted for that amount. As a result, Wolfe expected and needed to receive 100% productivity from his employees. Accordingly, Wolfe told Lamping to separate Brustkern and Stearns so that each would continue working.

18. Stearns' conduct on the airport job had drawn warranted criticism from her job site supervisor Terry Lamping. Stearns was "very argumentative" (testimony of Lamping) with people on the crew and with the other trades working on the airport project. In addition, Stearns was not happy with her assignments. Lamping, observed that she seemed to have a chip on her shoulder. On one occasion at the airport, Stearns went into a rage when she had been locked out of a panel by a co-worker and had come yelling to Lamping that a co-worker was trying to kill her.

19. In order to keep the peace between the workers, Lamping decided to separate Stearns and have her work by herself. Lamping was aware that Polar was facing layoffs of the Polar airport personnel as that job wound down. On the day of Stearns' layoff, Lamping called Wolfe to recommend that he lay off Stearns because of her attitude.

20. Lamping's observation that Stearns had a chip on her shoulder and had a poor attitude on the job is amply corroborated by Stearns' journal which she kept from 2002 to 2005. Among other entries, Stearns noted in her June 17, 2002 entry that she was "sick of life again today" and "I hate my job and do not like most of the people I work around. I think they're a bunch of phony, backstabbing liars . . . We have nothing to say to each other or I to them." On June 25, 2002, she stated that she was "fed up" with being asked why no one wanted to work with her. On September 27, 2002, she wrote that her co-workers had confronted her about how they did not like how the local chapter of the union was handling things and they were mad at her because she was "making bad choices" and "fucking things up" in her capacity as their union representative.

21. Wolfe decided to lay off four workers, Stearns, Ron Van Diest, Ben Roberts and Mike Peterson. Stearns was laid off on May 25, while the other three were not laid off until later in the week. The reason the other three were not laid off on the day Stearns was is because those three were not working on that day. The other three were, however, laid off on the next day each reported to work.

22. Prior to the time of the lay-offs, Polar bid on new jobs but had not been successful in obtaining any of those jobs. The only two jobs that Polar had going on were the hospital job and the airport job. With no new jobs on the horizon, Wolfe had no choice but to reduce the work force.

23. Wolfe noted on Stearns' termination slip that she was eligible for rehire. None of the four discharged workers was rehired nor were their positions filled. Wolfe was unable to reassign Stearns to the hospital job because she had been perceived by other Polar workers to have caused problems at that job site. Polar's hospital site foreman, Joe Mannix, refused to work with Stearns because of her attitude.

24. At the time of Stearns' layoff, the airport project was down to the "punch list" phase. That is, the project had been completed and only repairs to improperly installed electrical equipment needed to be fixed. As Lamping testified, (and the hearing examiner finds), there were no other big jobs out there that Polar had coming up. Lamping was trying to keep people busy at the airport site as Wolfe had instructed. In the meantime, Mannix, the Polar foreman at the hospital job, was trying to keep the workers on that site busy. As there were no new jobs on the horizon, the need for layoffs became apparent.

25. Wolfe kept Bill Casey, Ken Glueckert, Dan Kokoruda, Joe Mannix, the hospital job foreman, and Tony Selva on even after he decided to lay off the other four workers. Wolfe thought Casey was an apprentice and that he did not need to be laid off because he was an apprentice. Glueckert, Mannix and Kokoruda came on board at Polar at a later time than Stearns. However, these three employees were not new to Polar by any stretch of the imagination, the least senior of the three (Mannix) having been employed by Polar for over five years. Polar employee list, Charging Party's Exhibit 2. And none of the five male employees were causing the employee strife that Stearns was causing. In addition, Selva was better at wiring houses than Stearns. Stearns was not that good at wiring houses and wiring houses is more difficult than wiring commercial buildings.

26. All of Polar's workers were covered by a collective bargaining agreement as they were all union employees. Under the collective bargaining agreement, there was no seniority policy and Polar itself had no seniority policy for any of its workers.

27. Stearns was aware at least as early as 2002 that Wolfe's conduct was illegal and that she could file a human rights complaint against him for his conduct.

28. Throughout her tenure at Polar, Stearns was a difficult employee to work with. She often felt that she was talked down to by other Polar employees who felt that she was not up to the task of the work because she was a woman. The male employees often felt that Stearns was hard to get along with, that she did not take direction well, and that she had a "chip on her shoulder."

29. Stearns decided that she was going to do something about the situation she had encountered with Wolfe. Initially, she called the Montana Department of Labor and Industry's Human Rights Bureau sometime in April, 2005. Before she would speak to a representative of the Bureau, she would hang up.

30. Finally, during the second week of May, 2005, Stearns got up the courage to talk to someone at the Bureau about her concerns. She called in and spoke to Kathy Kountz of the

Human Rights Bureau. Because Stearns did not want to speak with a Human Rights Bureau investigator who was from Helena, the Bureau provided her with a telephone appointment to speak to Alice Whiteman, a Human Rights investigator from Missoula. The telephone appointment was scheduled for May 23, 2005. Stearns left work that day and went home to complete an interview with Whiteman.

31. Because the interview distressed Stearns, she called the Human Rights Bureau later on the 23rd and asked to speak once again to Kountz. Kountz called Stearns back on May 24th while Stearns was at the airport job site. Stearns informed Kountz that she could not talk at the time because other persons, while not in the same room with her, were nearby. There is no evidence that any of the other workers heard Stearns' conversation with Kountz or that anyone was aware that Stearns was talking to a representative of the Human Rights Bureau.

32. The Human Rights Bureau prepared a complaint for Stearns based on her information and sent it to her for her review and signature. Stearns kept the complaint until October 3, 2005 when she returned it to the HRB and filed it.

33. Wolfe did not know that Stearns had been talking to the Human Rights Bureau or had been contemplating taking any action against Polar until he received notification of Stearns' human rights complaint on October 4, 2005.

IV. OPINION¹

In this case, Stearns alleges that she was the victim of a continuous course of sexual harassment by the owner of the respondent from 1999 up through May, 2005 when she was discharged from her position as an electrical journeyman. She further asserts that she was discharged in retaliation for instituting an investigation and complaint through the Human Rights Bureau of the Montana Department of Labor and Industry. Polar denies that Stearns was ever subjected to sexual harassment while in the company's employ. In addition, Polar argues that Stearns' complaint is untimely under the Montana Human Rights Act as it was not filed within 180 days of the date of the last incident of sexual harassment alleged in the complaint (February 5, 2005).

This case involves both direct and indirect evidence of discrimination. Wolfe's alleged conduct occurring on February 5, 2005 and prior to that time, if found to be true, shows direct evidence of sex discrimination through a hostile working environment. The May, 2005 incidences (isolating Stearns from a co-worker at the airport job site and discharging her from employment), if proven, are instances of indirect evidence of sex discrimination.

¹ 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.

While the facts found by the hearing examiner regarding Wolfe's conduct between 1999 and February 5, 2005 would support a finding that Stearns was subjected to a sexually hostile environment during that time period, that conduct by itself would not be actionable because Stearns' complaint was not filed within 180 days of that conduct.² Stearns must also prove that the May, 2005 incidents contributed to the hostile working environment in order to make the February, 2005 and earlier incidents actionable in this case. If the May incidents are found to have contributed to Stearns' hostile working environment claim, then "the entire time period of the hostile environment [including the incidents back to 1999] may be considered . . . for the purposes of determining liability." *Benjamin, supra*, 2005 MT 123, ¶43, 327 Mont. 173, ¶43 112 P.3d 1039, ¶43, citing *National Railroad Passenger Corp v. Morgan*, 536 U.S. 101(2002). If, on the other hand, the May incidents are not shown to be part of a hostile working environment (or to themselves be independent acts of discrimination), then her complaint fails as there would be no act that occurred within 180 days of the filing of the complaint and the Human Rights Commission would lack jurisdiction over the complaint. *See, e.g., Stiles v. Blue Cross, Blue Shield of Montana*, 1999 MT 301, ¶20, 297 Mont. 156, ¶20, 991 P.2d 955, ¶20 (Human Rights Commission properly concluded that it did not have jurisdiction to adjudicate the charging party's complaint where the complaint was not filed within 180 days of that last act of discrimination as prescribed by Montana Code Annotated §49-2-501(4) even though the complaint was filed within 225 days of the last act of discrimination).

A. *The May, 2005 Incidents Were Not Part of A Hostile Working Environment.*

Because the May, 2005 incidents are the crux of the charging party's case, it is necessary to first analyze those incidents to determine if they contributed to Stearns' hostile working environment claim or are otherwise independent acts of discrimination. Where there is no direct evidence of discrimination, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) standard applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Lauder v. Richard County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, ¶ 22, 7 P.3d 386, ¶ 22. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. *E.g., Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principles articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Stearns must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a *prima facie* case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). She must show that she is a member of a protected class and that she was segregated from her co-employee or discharged under circumstances "which give rise to a reasonable inference that [she] was treated differently because of [her] membership in the

²As discussed below, the hearing examiner has rejected the charging party's arguments regarding the application of "constructive filing" and equitable estoppel as a means of saving Stearns' claim from the effect of the statute of limitations.

protected class.” *Id.*; Admin. R. Mont. 24.9.610(2)(a). If Stearns proves a *prima facie* case of discrimination, the burden shifts to Polar which must then offer evidence that is sufficient, if believed, to support a finding that Stearns’ segregation from her co-worker and her discharge was based on a factor other than sex. *St. Mary’s Honor Center*, 509 U.S. at 506-07; *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *Tx. Dpt. Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)). Should Polar carry that burden, Stearns must then “prove by a preponderance of the evidence that the legitimate reasons offered by [the respondent] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont. 24.9.610(3). Stearns at all times retains the ultimate burden of persuading the trier of fact by a preponderance of the evidence that she has been the victim of discrimination. *Heat*, 275 Mont. 329, 912 P.2d at 792.

“[A] reason cannot be proved to be a ‘pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason.” *Heat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *St. Mary’s Honor Center*, 509 U.S. at 515) (emphasis added). See also *Vortex Fishing Systems, Inc. v. Loss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15. “The appropriate inquiry to determine if the factor put forward is a pretext is whether the employer has ‘used] the factor reasonably in light of the employer’s stated purpose as well as its other practices.’” *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). “[T]o establish pretext [Charging Party] ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the employer’s] proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence.’” *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642, (9th Cir. 2000) (quoting *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (Cal. App. 1999)).

“An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action.” *Cellini v. Harcourt Brace & Co.*, 51 F.Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing *Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991)). Where a charging party’s evidence of pretense is strictly circumstantial, he or she “must produce ‘specific, substantial evidence of pretext’” in order to prevail. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). See also *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004) (in order to avoid summary judgment in absence of direct evidence of pretext, claimant must produce specific, substantial circumstantial evidence of pretext).

Moreover, as long as a business decision is made for non-discriminatory reasons, employers may make their business decisions as they see fit and not run afoul of anti-discrimination statutes. See *St. Mary’s Honor Ctr. v. Hicks*, *supra*. Both the Montana and federal courts acknowledge that a claim of discrimination does not authorize courts to second-guess an employer’s personnel decisions. “It is not the function of the courts to become the arbiter of all relationship decisions between employers and employees.” *Finstad v. Montana Power Co.* (1990), 241 Mont. 10, 29, 785 P.2d 1372, 1383. See also, *Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1109 (3rd Cir. 1997) (citing *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157,

159 (7th Cir. 1996) (“The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination].”)

Applying the above precepts to this case, Stearns made out her prima facie case. Stearns’ testimony that she did not understand why she and her co-worker were separated and that she was discharged close in time to when she first contacted the Human Rights Bureau (within one day) is enough to establish her prima facie case. The burden thus shifts to Polar to show legitimate business reasons for Polar’s actions.

Polar articulated legitimate business reasons for its decisions to separate Stearns from her co-worker. Polar was already over its cost forecast for the airport job and productivity was essential in order to keep the profit margin up. When Wolfe observed Stearns and a fellow co-worker talking, he ordered Lamping to separate them so that they would focus on doing their work. Wolfe’s conduct was reasonable.

Wolfe’s articulated basis for laying off Stearns is sufficient to show a legitimate business reason for laying off Stearns. Wolfe’s and Lamping’s testimony show that Polar did not at the time of the layoffs have sufficient work to keep all of its employees. The airport job was winding down and Stearns could not be sent over to the hospital job because of the problems she had in working for Joe Mannix, the foreman on the hospital job. Other than the airport job and the hospital job, Polar had no big jobs on the horizon. Polar had no seniority retention requirement for its union employees. Keeping Casey, Glueckert, Kokoruda, Mannix, and Tony Selva was not unreasonable under the evidence adduced at the hearing. Wolfe thought Casey was an apprentice who did not need to be laid off. Glueckert, Kokoruda and Mannix, though not having been at work for Polar as long as Stearns, still had substantial experience. The least senior of these three employees, as shown in Charging Party’s Exhibit 2, (Mannix) had been working at Polar for over five years. Selva was good at wiring homes while Stearns was not. None of the employees retained created the friction on the job site that Stearns had created because of the chip on her shoulder. And none had a foreman recommend his layoff due to poor work demeanor as had Stearns when Lamping called Wolfe and asked that Stearns be laid off.

As Polar has demonstrated legitimate business reasons for its actions, the burden shifts back to Stearns to show that those reasons were mere pretext. Stearns has asserted that Wolfe’s conduct in separating her from her co-worker was motivated by illegal conduct to segregate her from male employees because Wolfe wanted her. The evidence does not bear this out. Unlike the facts of *Benjamin*, *supra*, which showed an ongoing hostile working environment, there is no connection between the discriminatory acts of February, 2005 and before and the non-discriminatory legitimate business decisions that occurred in May, 2005.

Wolfe separated Stearns from her co-worker because she was not getting her work done as he felt she should be. Polar had already exceeded its labor factor in its bid for the airport job and 100% productivity was necessary from all employees. When Wolfe observed Stearns and a

co-worker leaning on ladders “BSing” (Wolfe’s testimony, understood in context to stand for the vernacular “bull shitting”), he ordered that they be separated.

Likewise, the preponderant evidence does not support a finding that Wolfe laid off Stearns as part of an ongoing hostile work environment. Stearns unquestionably had personality conflicts with her co-workers, a fact that was not lost on Lamping in his position as foreman at the airport site. Stearns’s co-workers’ concerns about her demeanor were motivated by legitimate considerations. Stearns and her co-workers had personality conflicts which created strife on the job between them. Stearns went into a rage when she had been locked out of a panel by a co-worker and had come yelling to Lamping that the co-worker was trying to kill her. Lamping concluded that her conduct was “over the top.” Stearns had a chip on her shoulder and was not taking direction. This attitude is underscored by the tone of her journal. Knowing that layoffs were on the horizon, Lamping recommended to Wolfe that he lay off Stearns.

Stearns has attempted to demonstrate pretext by asserting that less senior employees were retained and that layoffs were unnecessary as demonstrated by the man-hours of work for which workers were paid (Stearns’ Exhibit 5). Keeping the less senior workers is not preponderantly demonstrative of a discriminatory motive under the facts of this case. As previously stated, Wolfe thought Casey was an apprentice who did not need to be laid off. Glueckert, Kokoruda and Mannix, though not having been at work for Polar as long as Stearns, still had substantial experience. Selva was good at wiring homes while Stearns was not. Moreover, there was no seniority policy at Polar that would have required less senior employees to be laid off first. And none of the workers had created the turmoil that Stearns had on the job with her attitude.

The hearings examiner has reviewed the actual hours worked (Exhibit 5) and does not agree with Stearns’ position that the number of hours worked by employees refutes the wisdom of layoffs. During the time that the layoffs occurred, the hours were declining (falling from approximately 500 man hours per week during the first week of May, 2005 to approximately 360 man hours per week in July, 2005). See Exhibit 5. These numbers support Polar’s contention that man hours were declining and is consistent with Wolfe’s concerns that layoffs were required because jobs were not on the horizon. Polar had only two major jobs going at the time, the airport project and the hospital job, with no new major jobs on the horizon. The airport project was winding down and the work there was drying up. Wolfe reasonably perceived that Stearns could not be sent to the hospital project because of her personality conflicts.

It is also telling that Stearns was but one of four employees laid off as a result of declining work. It is not rationale to assume that a small employer would go to the length of eliminating a substantial part of his workforce in order to cover up an illegal discharge of a female employee.

Finally, Stearns argues that the layoff came as a result of Wolfe finally tiring of Stearns’ rejection of Wolfe’s advances. Under the facts of this case, however, that conclusion cannot be

drawn. The inference here is equally strong that Wolfe, having made advances over a period of years and not having discharged Stearns, would not suddenly change his mind and do so in May, 2005. All of the above factors, compounded by Lamping's suggestion to Wolfe that Stearns be laid off because of the personality conflicts she had with co-workers, shows that Wolfe laid off Stearns for legitimate business reasons and not to discriminate against her or to subject her to a sexually hostile working environment.

B. *Stearns' Discharge Was Not Retaliatory.*

Stearns has also alleged that her discharge was retaliatory. Montana law prohibits retaliation in employment practices for protected conduct. Retaliation under Montana law can be found where a person is subjected to discharge after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in a protected practice, (2) that thereafter her employer took an adverse employment action against her, and (3) a causal link existed between protected activities and the employer's actions. *Beaver v. Montana Department of Natural Resources*, *op. cit.*, 2003 MT ¶7, 318 Mont. 35, ¶7, 78 P.3d 857, ¶7. *See also*, Admin. R. Mont. 24.9.610 (2).

Circumstantial or direct evidence can provide the basis for making out a prima facie case. Where the prima facie claim is made out by circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, then the charging party may demonstrate that the reason offered was mere pretext. The charging party can do this by showing that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9th Cir. 1996).

In this case, Stearns relies primarily upon her assertion that Wolfe somehow became aware of her contacting the Human Rights Bureau (approximately two days after the contact). There is, however, no credible evidence in this matter that Wolfe knew or could reasonably have known of the complaint until October, 2005, more than four months after he discharged Stearns. To suggest that a Polar employee overheard Stearns' conversation in the basement of the airport project site and then reported to Wolfe is sheer speculation. Indeed, the conversation that Stearns recounted at hearing could not reasonably be understood by one overhearing the conversation to have been related to filing a human rights complaint. Stearns said that she simply told her caller that she could not talk right then because she was at work.

Stearns appears to rely on mere temporal proximity to show that the layoff was retaliatory. Under Montana law, proof that there is close temporal proximity between protected activity of the charging party and adverse action by the respondent can establish a reasonable inference that the charging party was treated differently because of engaging in protected activity. Admin. R. Mont. 24.9.610(2)(b)(iii). In this case, however, temporal proximity cuts far more in favor of finding that Wolfe had no knowledge of Stearns' protected activity. Under the circumstances relayed through the evidence at hearing, there is no probability that an

employee would have equated Stearns' brief conversation to be an inquiry to the Human Rights Bureau or that Wolfe would have had time to find out about it in the less than 24 hours that elapsed between the call and Stearns' discharge. Thus, Stearns' prima facie case, if one has been presented, is marginal.

Even if Stearns has made out a prima facie case, she has failed to meet her ultimate burden of persuasion on the issue. Stearns bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by unlawful discrimination, in this instance, by retaliatory animus. *Hearing Aid Institute v. Rasmussen*, (1993), 258 Mont. 367. 852 6P.2d 28. The credible evidence in this matter shows that Wolfe did not know about Stearns engaging in protected conduct until he received Stearns' complaint in this matter in October, 2005. Stearns asserts that she told co-workers that she was being sexually harassed and that she was thinking of filing a sexual harassment complaint with the Human Rights Bureau. While this may be true, the substantial evidence in this matter shows that none of Stearns' co-workers ever shared this information with Wolfe. And it is simply not credible to believe that co-workers could have overheard and then understood Stearns' cryptic conversation with the Human Rights Bureau and then relayed the imminent filing of a complaint to Wolfe so that he would have acted in retaliation to discharge her less than 24 hours later after the call. In this case, retaliation played no role in Stearns' discharge. The discharge was simply a legitimate business decision.

C. *Constructive Filing and Equitable Tolling Theories Cannot Save Stearns' Untimely Complaint.*

As the May incidents are not part of the claimed hostile working environment (either as acts of discrimination or retaliation), Stearns is necessarily relegated to showing that the February, 2005 incidents and those occurring prior to that time are actionable even though the complaint in this matter was filed more than 180 days after the February, 2005 incident. To do this, Stearns argues that her complaint is nonetheless timely under the doctrines of constructive filing and equitable tolling. The hearing examiner does not agree.

Stearns argues that she "constructively filed" a complaint by simply telephoning the Human Rights Bureau. As the respondent correctly points out in its closing brief, the cases cited by Stearns for her proposition do not support her point because in those cases the charging party actually filed a written document. Stearns did no such thing. Instead, she only called the Human Rights Bureau.

More importantly, her "constructive filing" theory has no force in light of the plain language of the Montana Human Rights statute of limitations. Under the Montana Human Rights Act, a charging party must file a "complaint" within 180 days after the alleged unlawful discriminatory act occurred in order for the complaint to be timely filed. Mont. Code Annotated §49-2-501(4)(a). The complaint "must be in the form of a **written, verified** complaint stating the name and address of the party. . . alleged to have engaged in the discriminatory practice and the particulars of the alleged discriminatory practice (emphasis added)." Mont. Code Annotated §49-2-501(3). Simply making a telephone call to the Human

Rights Bureau does not create a written, verified complaint that will toll the statute of limitations and Stearns' claim cannot be saved through application of a "constructive filing" theory.

Likewise, the Montana case law relating to equitable tolling does not permit its application to the instant case. The Montana Supreme Court has adopted equitable tolling, but has permitted it only in those circumstances where a party in good faith pursues one of several legal remedies and that party meets three criteria: (1) timely notice of the claim to the defendant within the applicable statute of limitations, (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct in filing the second claim. *Chance v. Harrison*, (1990), 244 Mont. 215, 228, 797 P.2d 200, 208. Where the claimant has only one forum in which to file a claim (as in the case at bar), the Montana Supreme Court has not permitted the invocation of equitable tolling to permit the otherwise untimely filing of a claim. *Erickson v. Croft* (1988), 233 Mont. 146, 760 P.2d 706, *Hash v. U. S. Communications*, (1994), 268 Mont.326, 886 P.2d 442, *Arthur v. Pierre Limited*, 2004 MT 3003, 323 Mont. 453, 100 P.3d 987. Moreover, the requirement of timely notice to the respondent within the time frame of the statute of limitations has not been met in Stearns' case. Neither Wolfe nor Polar had any notice of this complaint within the time limits imposed by the statute of limitations. In light of existing Montana case law, the hearings examiner does not see that he has any power to invoke equitable tolling to save Stearns' untimely filing.

Citing to a 9th Circuit Court of Appeals decision, *Veronda v. Cal. Dept. Of Forestry and Fire Protection*, 11 Fed. Appx. 731(9th Cir. 2001) (an unpublished decision under the 9th Circuit Federal Rules of Civil Appellate Procedure), the charging party has advanced an alternative theory of equitable tolling. The argument rests on an interpretation of equitable tolling which is much broader than the doctrine presently recognized under Montana case law. This interpretation permits invocation of the doctrine where a plaintiff because of disability, irremediable lack of information, or other circumstances beyond his control does not file a timely complaint. *See, eg., Josephs v. Pacific Bell*, 432 F.3d 1006, 1014 (9th Cir. 2005)(equitable tolling applies to time limits for filing Title VII complaint of discrimination under 42 USC 2000 e(5) where plaintiff diligently pursued his claim, was misinformed or misled by the administrative agency responsible for processing his charge, relied in fact on the information or misrepresentations of the agency causing him to fail to exhaust his administrative remedies, and was acting pro se at the time). *See also, Rodriguez v. Airbourne Express*, 265 F. 3d 890 (9th Cir. 2001).

Equitable tolling as it exists in Montana at this time suggests that the doctrine is primarily concerned with the untoward effect of a late filing upon the defendant (as shown by the requirement that the respondent have **timely** notice of the claim) and Stearns has presented no Montana authority that would permit the expansion sought. Moreover, Stearns did not produce adequate evidence at hearing to show that she meets all of the criteria described in *Josephs, supra*. Without that showing, even if Montana courts had adopted this broader

interpretation of equitable tolling, the hearings examiner could not find that the statute of limitations should be tolled in Stearns' case.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. The May, 2005 incidences of separating Stearns from a co-worker and discharging her as part of a reduction in work force were not part of and did not contribute to any sexually hostile work environment that Stearns may have been subjected to between 1999 and February, 2005.
3. Wolfe did not lay off Stearns in May, 2005 to retaliate against her for engaging in protected conduct.
4. Because Stearns did not file her complaint within 180 days of the last act of discrimination, her claim is not timely. Mont. Code Ann. §49-2-501(4)(a).
5. The theories of "constructive filing" and equitable tolling cannot be applied to this complaint.
6. Because Stearns' complaint is untimely, this tribunal lacks jurisdiction to consider the complaint and it must be dismissed.

VI. ORDER

Based upon the foregoing, judgment is entered in favor of Respondent Polar Electric and Stearns' complaint is dismissed.

DATED: February 14, 2007

/s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT, Hearing Examiner
Hearings Bureau, Montana Department of Labor and Industry

Stearns FAD ghp