

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1572-2019:

ELEANOR ANDERSON MALONEY,

Charging Party,

vs.

YELLOWSTONE COUNTY AND  
BOARD OF COUNTY  
COMMISSIONERS,

Respondents.

HEARING OFFICER DECISION  
AND NOTICE OF ISSUANCE OF  
ADMINISTRATIVE DECISION

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**I. INTRODUCTION**

Charging Party Eleanor Maloney (“Maloney”) alleged Respondents Yellowstone County and Yellowstone County Board of Commissioners (sometimes collectively referred to as the “County”), discriminated against her on the basis of sex. On August 14, 2020, prior to the commencement of the evidentiary hearing, this Hearing Office issued an Order on the parties’ respective motions for summary judgment as to the issue of the Respondents’ liability for employment discrimination arising out of the Yellowstone County Health Benefits Plan (the “Plan”). In the order, the Hearing Officer found that the Respondents engaged in unlawful employment discrimination in violation of the Montana Human Rights Act (“MHRA”) by implementing and administering the Plan that expressly denies coverage for “services or supplies related to sexual reassignment and reversal of such procedures[.]”

This matter was tried before this Hearing Officer on August 18, 2020. Maloney appeared and was represented by attorneys Alex Rate of the ACLU of Montana, Malita Picasso of the ACLU LGBT & HIV Project, and Elizabeth K. Ehret. The County appeared and was represented by Jeana R. Lervick, Chief In-House Deputy County Attorney for Yellowstone County.

Charging Party's Exhibits 1 through 12, 18 through 19, 26 through 32 and 47 through 71 were admitted at the outset of the trial. Respondents' Exhibits A through E, G through M, O, and R through Y were also admitted. The parties also stipulated to 49 Findings of Fact that were admitted for the trial.

The remaining issues to be resolved at the evidentiary hearing were: (1) whether the County's discriminatory policy also violates the Montana Governmental Code of Fair Practices; (2) whether Maloney is entitled to damages; (3) the extent of the damages to which Maloney is entitled, if any; and (4) what affirmative relief is appropriate.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings.

## **II. ISSUES**

1. Did the County discriminate against Maloney on the basis of sex in violation of the Governmental Code of Fair Practices, Title 49, Chapter 3, Mont. Code Ann.?

2. If the County did discriminate against Maloney on the basis of sex in violation of the Governmental Code of Fair Practices Act, what harm, if any, did Charging Party sustain as a result and what reasonable measures should the department order to rectify the harm?

3. If the County did discriminate against Maloney on the basis of sex in violation of the Governmental Code of Fair Practices Act, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

4. Given the County's illegal discrimination on the basis of sex under the Montana Human Rights Act, what harm, if any, did Charging Party sustain as a result and what reasonable measures should the department order to rectify the harm?

5. Given the County's illegal discrimination on the basis of sex under the Human Rights Act, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

### III. FACTS<sup>1</sup>

1. \* Respondents are Yellowstone County and its Board of County Commissioners; they are referred to collectively herein as the “County” unless otherwise stated.

2. \* The County is governed by a three-member elected Board of County Commissioners. At the time of the hearing, the current Board of Commissioners were Chairman Denis Pitman, Commissioner John Ostlund and Commissioner Don Jones. During the relevant time-period of this matter, Commissioner Jones was not yet elected, and Commissioner Robyn Driscoll served in his stead.

3. \* Yellowstone County is comprised of multiple departments and divisions of local government. One such division is the Yellowstone County Attorney’s Office (the “County Attorney’s Office”). The County Attorney’s Office is responsible for prosecution of criminal matters throughout the County, as well as civil complaints made against the County.

4. \* Maloney is presently a resident of Butte, Montana.

5. \* In the present matter, Maloney contends that the County discriminated against her while she was employed as an attorney in the County Attorney’s Office.

6. \* Maloney is a woman who is transgender, which means that she has a female gender identity but had a male sex assigned to her at birth.

7. \* Typically, people who are assigned a male sex at birth based on external anatomy identify as boys or men, which means that their gender identity aligns with the sex they were assigned at birth. For transgender individuals, however, their gender identity differs from the sex they were assigned at birth. Transgender women are women who were assigned the sex of “male” at birth, but have a female gender identity. Experts agree that gender identity has a biological component, meaning that each person’s gender identity is the result of biological factors in addition to social, cultural, and behavioral factors.

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<sup>1</sup> Stipulated facts are denoted with an asterisk (“\*”). The parties’ stipulations have been rearranged from the manner in which they were presented both in order to match the chronological order of events as well as to eliminate some duplication and errors. Some wording has been altered to accommodate duplicative statements as well as to correct grammatical issues, including changes necessary for consistency between the parties’ disparate usage of terms, but the substantive content remains intact.

8. \* Being transgender is not a mental disorder. Transgender people have no impairment in judgment, stability, reliability, or general social or vocational capabilities solely because of their transgender status. Transgender people may, however, require treatment for “gender dysphoria,” the diagnostic term for the clinically significant emotional distress experienced as a result of the incongruence of one’s gender with their assigned sex and the physiological developments associated with that sex. Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (“DSM-V”) and International Classification of Diseases (“ICD-10”). The criteria for diagnosing gender dysphoria are set forth in the DSM-V.

9. \* The World Professional Association for Transgender Health (“WPATH”) has published Standards of Care for treating gender dysphoria. Under the WPATH standards, medically necessary treatment for gender dysphoria may require medical steps to affirm one’s gender identity and transition from living as one gender to another. This treatment, often referred to as gender-affirming care, may include hormone therapy, gender affirming surgery, and other medical services that align individuals’ bodies with their gender identities. The goal of treating gender dysphoria is to enable the patient to live all aspects of life consistent with their gender identity, thereby eliminating the distress associated with the incongruence. Under the WPATH standards, the exact medical treatment varies based on the individualized needs of the person.

10. \* In 2016, the Center for Medicare & Medicaid Services (“CMS”) reaffirmed that gender-affirming surgery “may be a reasonable and necessary service for certain beneficiaries with gender dysphoria” and that “coverage is available for gender reassignment surgery when determined reasonable and necessary . . . on a case-by-case basis.”

11. \* In late-2016, employees of the County Attorney’s Office reached out to Maloney in an effort to convince her to work for the County Attorney’s Office as a prosecutor.

12. \* County Attorney Scott Twito (“Twito”) had to work to convince Maloney to come to work for the County Attorney’s Office, as Maloney had not been looking to leave her employment with the State of Montana Attorney General’s office.

13. \* Twito and Maloney had a number of discussions regarding pay and benefits before Maloney would agree to accept the position.

14. Maloney was generally aware of the benefits offered by the County when she began her employment. The benefits offered were one reason why Maloney chose to work for the County.

15. \* Maloney officially started work with the County Attorney's Office on February 13, 2017.

16. At the time of Maloney's hiring, she had been aware that she had wanted to seek gender confirmation surgery for nearly twenty-five years, but also knew that the process would be extremely "expensive." (Hrg. Tr., 138-139:18-7.)

17. \* From February 13, 2017, to June 18, 2018, Maloney was employed full-time by the Yellowstone County Attorney's Office as a Senior Deputy County Attorney.

18. As a Senior Deputy County Attorney, Maloney prosecuted cases of abuse and neglect of minors in the Thirteenth Judicial District Court of Montana. Prior to joining the Yellowstone County Attorney's Office, Maloney served as an Assistant Attorney General for the State of Montana, where she also specialized in cases of abused and neglected children in the Thirteenth Judicial District and became well acquainted with the staff of the County Attorney's Office.

19. Maloney attended a new employee orientation in the spring of 2017.

20. All new employees are given a copy of the existing insurance plans, including coverage and exclusions, at the new employee orientation. Maloney received a copy at that time, as well, but did not request one prior to then.

21. \* During Maloney's employment, the County Attorney's Office offered its employees two self-funded insurance plans (for purposes of this decision and because both plans contain the same exclusions at issue herein, the two plans are not differentiated) under the Yellowstone County Group Health Benefits Plan. Because the County's insurance plans are self-funded, it means that they are ultimately controlled by the County.

22. \* The Plan contains fifty-four different exclusions from coverage.

23. Maloney, as a Yellowstone County employee, was enrolled in the Plan.

24. \* As beneficiaries of a self-funded insurance plan, County employees pay premiums into the Plan fund, which is managed by the County and Board of Commissioners and used to fund the costs for employee coverage in accordance with the terms of the Plan. The County is responsible for establishing the level of employee contributions into the Plan.

25. The Plan, as adopted and maintained by the County, contains an exclusion from coverage of all “services or supplies related to sexual reassignment and reversal of such procedures” (the “exclusion”).

26. \* On January 1, 2017, the County entered into an Administrative Service Agreement with Employee Benefit Management Services, Inc. (“EBMS”) by which EBMS would begin serving as the Plan’s third-party administrator (“TPA”).

27. \* The 2018 Administrative Services Agreement between the County and EBMS, which defines the relative duties and responsibilities of the parties, states that, “[t]he [County] understands that [EBMS] is not an investment advisory, law firm or actuarial firm, and does not render any legal advice to [the County].”

28. The Plan generally states that the County contracts with EBMS to process claims, provide claims payment and perform other claims management functions under the direction of the County. The County determines the terms of the Plan and directs EBMS to administer the Plan as established and approved by the County. Only the County has the power to amend or to alter the plan.

29. As the TPA, EBMS makes decisions regarding whether treatments are medically necessary, as defined by the terms of the Plan.

30. \* When EBMS began serving as the Plan’s TPA on January 1, 2017, the County requested that the existing coverage and exclusions from its previous health benefit plan, with Blue Cross Blue Shield, be “left in place, which included the exclusion regarding ‘sex reassignment.’” The County confirmed in an email dated October 28, 2016, that the design of the Plan did not change when EBMS became the new TPA.

31. For the most part, the County has historically not asked that the Plan be changed when it changes TPAs, in part, because the County relies on the TPA to notify it if changes need be made, as well as the fact that employee benefits are largely negotiated with the County’s eight unions and significant changes could create labor-related issues.

32. \* In the spring of 2017, Maloney began counseling.

33. At the time Maloney started hormone replacement therapy, she had not spoken to anyone at the County about the Plan but went to Planned Parenthood “specifically because you generally don’t have to have insurance and stuff to see them.” (Hrg. Tr., 44:13-16.)

34. \* In August and September 2017, Maloney was diagnosed with Gender Dysphoria, F64.1, DSM-V and began hormone treatment. This diagnosis was affirmed by Maloney’s medical expert, Dr. Gorton, who evaluated Maloney in 2019 and confirmed that she was appropriately diagnosed.

35. \* In December 2017, Maloney began therapeutic counseling with Kael Fry, MS, MFT, in Bozeman, Montana, on an outpatient basis for treatment of emotional distress caused by her gender dysphoria. In accordance with this course of treatment, Maloney began attending monthly counseling sessions with Kael Fry in December 2017.

36. \* In the fall of 2017, Maloney learned that EBMS believed that payments made in error by EBMS to service providers would need to be recovered.

37. \* This communication from EBMS ultimately led to discussions between Maloney and EBMS regarding the Plan and coverage for the treatment she sought.

38. \* Following these discussions and in a letter dated April 11, 2018, Maloney sought pre-approval from EBMS for consults for facial feminization surgery.

39. \* The April 11, 2018, letter was copied to the County and indicated that Maloney was already undergoing hair removal and had been on hormone replacement therapy for “over six months.”

40. On or about April 11, 2018, Maloney contacted EBMS by telephone to discuss insurance coverage for a consultation with a surgeon to discuss gender-affirming surgery that she was seeking as part of the treatment for her gender dysphoria. Maloney was informed that the Plan excluded coverage for transition-related care.

41. \* On April 12, 2018, Maloney mailed a letter to EBMS and Yellowstone County Human Resources informing them of the April 11th denial

of coverage and seeking pre-approval for a consultation with a surgeon regarding gender-affirming surgical procedures to treat her gender dysphoria.

42. \* On April 12, 2018, Maloney also provided the letter to her direct supervisor, Chief Deputy Attorney Scott Pederson (“Pederson”), asking him to look into the “possibly discriminatory” practice of excluding medical services as part of its Plans. The Charging Party noted in her April 12, 2018, letter that she had asked EBMS to reconsider its position on its denial of payment for services.

43. Maloney’s April 12, 2018, letter was a request to the County to amend its insurance policy.

44. In response to Maloney’s notice to the County of her intent to seek gender reassignment, the County held a meeting with a pastor who specializes in transgender issues for its management staff in the County Attorney’s office. The County explored issues such as gender-neutral restrooms and provided Maloney with time off to address related issues.

45. Pederson, in conjunction with Director of Human Resources Dwight Vigness (“Vigness”), arranged for Maloney to appear before the Board of County Commissioners to discuss the removal of the exclusion from the Plan.

46. \* The County Commissioners hold approximately three discussion meetings a week, most weeks of the year.

47. County Commissioners cannot take action on items on their discussion agendas. Instead, County Commissioners can only take formal action at a Regular Meeting of the Board.

48. \* On April 23, 2018, Maloney met with the Board of County Commissioners, Vigness, and civil in-house attorney Kevin Gillen (“Gillen”).

49. At this meeting, Maloney explained to the County Commissioners the medical necessity of the gender-affirming care for which she sought coverage, and provided them with information, resources and case law showing that the transgender healthcare exclusion was discriminatory. After the meeting, Maloney did not hear from the County Commissioners again.

50. Both prior to and following the meeting, the County’s legal and human resources departments reviewed the issues brought up by Maloney. Included in the County’s review of the issue was a discussion including EBMS’s legal department. At the time, EBMS’s legal team determined the legal issue



was unsettled, but based on his own legal knowledge and research, Gillen had what he believed to be a clear, unequivocal understanding that there were no legal requirements to provide transition-related care funding. In connection with its review of the issues, the County sought information from the Montana Human Rights Bureau and advised Maloney's union to file an action for declaratory relief, so as to determine its obligations under the law.

51. On May 4, 2020, an EMBS employee responded to an e-mail inquiry from Gillen with the following response (Gillen's questions are bolded, with EBMS' responses shown thereafter):

**So if I have this right, EBMS determined that [Maloney] had an appealable issue, that being the exclusion.** [Maloney] does not have an appealable issue. There have been no denials at this time for any submitted claims for [her] to appeal. In light of the information received from [Maloney] a courtesy review of the Plans allowable benefits has been completed. This also isn't a pre-service authorization as the Plan has no requirement for the treatment to be authorized. They [sic] Plan specifically denies the coverage if the Plan wants to allow the benefits then they [(i.e., the County)] would be making an exception to the Plan Document.

**EBMS then pushed the appealable issue to the EBMS medical review Board and that is what you all are waiting for?** We have had this matter reviewed by legal Counsel in reference to the discrimination factor raised by [Maloney]. This has not been sent to date to a review organization which reviews medical necessity not Plan language and discrimination as we have not received a directive from the County.

Our team will be reaching out to [her] today to let [her] now [sic] that a determination has not been reached and that as soon as a decision has been made we will contact [her].

I am waiting for final confirmation from that County that they do not wish to make an exception to the benefit Plan.

Once that is received we will provide a written response to [her] outlining the Plans [sic] benefit.

Pursuant to our conversation the other day, we may then if the County elects have the language reviewed by outside counsel on

behalf of the County to determine if there is any reason to amend the Plan/ benefit.

(Stip. Hrg. Ex. 28.)

52. \* On May 11, 2018, EBMS notified Maloney of an adverse pre-notification determination.

53. \* The May 11, 2018, EBMS reply to Maloney formally notified her that the April 12, 2018, request for coverage was denied. The reply letter stated that the exclusive basis for the denial of coverage was the Plan's "sexual reassignment" exclusion. The letter stated: "It has been determined based upon review of the Plan Document and the submitted [sic] documentation that the services requested are not allowable under the Plan. The Plan notes under the Exclusions and Limitations on page 68 of the Plan Document and Summary Plan Description that '*Services or supplies related to sexual reassignment and reversal of such procedures*' are not covered."

54. The Plan does not provide a clear process or procedure by which a Plan participant can challenge the terms of the Plan, including the scope of its coverage or exclusions. (Stip. Ex. 1.) However, as a general matter, when an employee has a dispute over a claim, they must first attempt to work it out with the TPA.

55. Pursuant to the Plan, initial pre-service claim determinations must be made by EBMS within 15 days after receipt of the claim request, absent an extension. The Plan further provides that any adverse pre-service claim determination may be appealed by a member within 180 days from receipt of the adverse determination. An appeal may be verbal or in writing, and need only list the reasons why the member disagrees with the adverse determination. In cases of pre-service claim determinations, a final internal adverse benefit determination must be made within 30 days of EBMS' receipt of the member's appeal. No additional or external review is available under the Plan for adverse determinations based on contractual or legal interpretations without any use of medical judgment.

56. Once the foregoing process is completed, a member may appeal EBMS's determination to the County. After the processes detailed in the Plan are completed, any unresolved issues may be brought before the Board of Commissioners.

57. For a substantive change to be made to an insurance plan, the Board of County Commissioners must go through a lengthy and involved

process that requires meetings of the County Insurance Committee, notifications to each of the unions, and input from the County's TPA and consultant.

58. Removing an exclusion altogether involves a number of factors, including reinsurance and stop loss, as well as the collective bargaining agreement of each of the County's unions.

59. \* On May 24, 2018, Maloney submitted a letter of resignation to the Yellowstone County Human Resources office notifying the County that her resignation would be effective June 18, 2018. The letter stated, "[t]he only factor that led to the decision to [resign] was the specific exclusion in the County's health care plan as administered by EBMS prohibiting coverage for 'services or supplies related to sexual reassignment.'"

60. Maloney's letter further states:

As I informed you earlier this week, following the most recent rejection of my request for nondiscriminatory health care coverage, I began seeking employment elsewhere. The only factor that led to the decision to seek employment elsewhere was the specific exclusion in the County's health care plan as administered by EBMS prohibiting coverage for "services or supplies related to sexual reassignment." It remains my position that this provision is contrary to the current status of the law, and is facially discriminatory.

I have filed appropriate grievances and appeals with the County and EMBS. The County has remained silent, deferring to EBMS; EBMS has repeatedly denied coverage. As a result I am compelled to resign in order to obtain a position with an employer who will not discriminate against employees on the basis of sex in their employee benefits package. I deeply regret that the County has been unwilling or unable fix this improper policy and practice, or to offer any justification for said policy and practice.

It saddens me that in order to receive the medically necessary, appropriate treatment, I have no alternative but to resign in order to mitigate the harm by gaining employment with an organization that has a non-discriminatory health insurance plan. I truly enjoyed my time here; I loved working in this office. I sincerely regret that I will not be present for the next aggressive team building exercise.

(Ex. O.)

61. Maloney did not receive a response to her letter from the County.

62. By June 1, 2018, Maloney directed EBMS not to provide the County with any correspondence regarding her insurance claims.

63. \* On or about June 9, 2018, Maloney received a notice from EBMS denying payment for therapy services rendered by Kael Fry on April 20, 2018, as barred by the Plan's exclusion.

64. \* On June 14, 2018, EBMS sent Maloney a letter notice of the Plan's "final internal adverse benefit determination" denying coverage for Maloney's gender-affirming medical care because the Plan excludes "[s]ervices or supplies related to sexual reassignment and reversal of such procedures." The notice further stated that the Plan does not provide for any additional appeals of this decision.

65. Pursuant to the terms of the Plan, because the June 14, 2018, adverse determination was based on a contractual or legal interpretation without any use of medical judgment, Maloney had no further appeal rights under the Plan, and had exhausted her available remedies under the Plan for obtaining coverage for gender-affirming care.

66. On June 18, 2018, Maloney officially resigned from her position with the County.

67. The sole basis for Maloney's resignation from her position with Yellowstone County was the County's refusal to provide coverage for her medically necessary gender-affirming care by either removing the exclusion from the Plan or granting an exemption from the exclusion.

68. \* At no point has the County claimed that the gender-affirming care sought by Maloney was not excluded from coverage by the "sexual reassignment" exclusion, and the County concedes that, "the Plans clearly exclude" coverage for gender-affirming care.

69. At the time of her separation from service from the County, Maloney earned a base salary of \$3,041.67 per semi-monthly pay period. Maloney also received semi-monthly fringe benefits amounting to \$912.17, plus an added \$3.04 in State of Montana contributions to her Montana Public

Employees Retirement System Plan (PERS). These fringe benefits amounted to 30.41% of her base salary.

70. According to the Collective Bargaining Agreement between Yellowstone County and Teamsters Local Union #190, which was the union for Yellowstone County's Deputy County Attorneys, Maloney's salary with the County was expected to increase by the greater of \$4,000.00 or 4.00% annually.

71. Maloney enjoyed her job with the County. It provided both financial stability and a deep sense of emotional satisfaction. Maloney freely admitted, "[a]bsent the healthcare coverage, I'd go back in a heartbeat." (Hrg. Tr., 78-79:15-7.)

72. Maloney offered the testimony of Certified Public Accountant John Myers ("Myers"), who was qualified as an expert in computing lost compensation and other economic damages based on his education, certifications, and experience.

73. Following her separation from the County, Maloney moved to Alder, Montana, to a family residence where she lived while searching for employment as an attorney. In order to transport her belongings from Billings to Alder, Maloney had to make a total of approximately seven round trips between the two locations.

74. Maloney applied for only two jobs after she left the County. She took the first job she was offered, and withdrew her name from contention for the second, which was a State job. Maloney did not apply for more jobs, because she could not find jobs having benefit plans without transgender healthcare exclusions.

75. Maloney did not apply for jobs in Billings due to fear that it would be "relatively difficult to find a job as a freshly outed transgender person in Billings, Montana." (Hrg. Tr., 65:2-4.)

76. \* On August 8, 2018, Maloney began her employment with the Montana Legal Services Association (MLSA) as a Domestic Violence Staff Attorney, based in Dillon, Montana. Maloney continued to live in Alder, Montana and made daily commutes to Dillon until she could afford to relocate from Alder.

77. Travel from Dillon to Billings is approximately 230 miles, for a round-trip distance of 460 miles. The distance between Alder to Dillon is

approximately 52 miles, or a round-trip of 104 miles. Maloney undertook two trips for medical appointments to Billings from Dillon, amounting to approximately 460 miles per round-trip.

78. \* On or about December 1, 2018, Maloney moved to Dillon, Montana, where she lived until October 2019 when she transferred to a similar position with MLSA in Billings, Montana. Maloney continued serving in this role with MLSA until March 2020.

79. \* On March 25, 2020, Maloney began her current employment as an Assistant Public Defender at the Montana Public Defender's Office (OPD) in Butte, Montana. Maloney's annual salary at OPD is \$67,293.50.

80. Maloney's decision to take the position with OPD was based on the fact that the Human Resources Department assured her that the State's health insurance plan provided coverage for the gender-affirming medical care that she sought.

81. When Maloney left MLSA to assume her current position with OPD, she relocated from Billings to Butte, where she currently resides. Maloney made two round trips. The mileage from Butte to Billings is approximately 288 miles per round-trip.

82. \* Since her separation from the County, Maloney has continued to obtain her medical care in Billings, Montana, with the same providers that she used since she first began receiving her gender-affirming care.

83. Since her separation from the County, Maloney has continued to obtain her mental health care in Bozeman, Montana. Every two weeks, Maloney visits Kael Fry in Bozeman, Montana, for her therapy appointments.

84. Four times per year, Maloney visits Haleigh James, her endocrinologist, in Billings, Montana, for her hormone treatment.

85. Once per week, Maloney visits her electrolysis provider in Bozeman.

86. Based on the frequency of her regular appointments, Maloney will make approximately 174 round trips between Butte and Bozeman for her medical appointments between March 18, 2020, and June 17, 2022. The mileage from Butte to Bozeman is approximately 170 miles per round-trip. The Mileage from Billings to Bozeman is approximately 288 miles per round-trip. This difference represents a reduction of approximately 118 miles per round-

trip when traveling from Butte to Bozeman compared with traveling from Billings to Bozeman.

87. \* When Maloney began her employment with the MLSA, on August 8, 2018, her salary was \$2,000 per bi-weekly pay period, or \$52,000.00 per year. Her salary increased by 2.00% in August 2019, to \$2,040 per bi-weekly pay period or \$53,040.00 annually. The fringe benefits amount to 23.46% of her base salary. Attorneys who continue to work for MLSA have been told to expect raises of approximately 2% per year.

88. \* On March 25, 2020, Maloney's annual salary increased from \$53,040.00 to \$67,293.50, reflecting her departure from MLSA and her new salary with OPD. According to the U.S. Bureau of Labor Statistics for 2020, her compensation as a Montana state employee will increase annually by 2.7 percent.

89. Maloney's compensation with OPD also consists of fringe benefits paid by the State of Montana beginning 31 days after accepting her new position. These benefits include participation in the state Health and Benefit Plan for which the state contributes \$12,648.00 annually on her behalf. The state also contributes 8.77% of her salary to the Montana Public Employees defined benefit plan. Maloney's fringe benefits amount to 35.63 percent of Maloney's total compensation from OPD.

90. \* The 2020 standard IRS computed mileage rate for business travel is \$.575 per mile.

91. In total, Maloney is claiming \$19,475.77 for unpaid moving and medical expenses incurred since her departure from service with the County through June 17, 2022.

92. In total, Maloney's is claiming \$131,879.96 in lost compensation and unpaid moving and medical vehicle expenses for the four years following her separation from the County, discounted at 2.75% to present value at the date of the separation.

93. Maloney has not requested as damages any reimbursement for medical expenses not covered as a result of the Plan's exclusions and Maloney has not requested damages for emotional distress.

## IV. DISCUSSION<sup>2</sup>

### A. Governmental Code of Fair Practices

Maloney argues that this tribunal's finding that the County health plan's "sexual reassignment" exclusion . . . denies coverage to those of transgender status on the basis of sex" necessitates a finding that it also violates the Montana Governmental Code of Fair Practices (GCFP). Maloney argues that because the Yellowstone County health benefits plan is a "service" within the meaning of Mont. Code Ann. § 49-3-205, and further because Yellowstone County is a party to an "agreement" or "plan" that unlawfully excludes treatment on the basis of sex, the exclusion violates the GCFP. In response, the County argues Maloney was not recruited, appointed, assigned, trained, evaluated or promoted in a discriminatory fashion, and that when she was hired, the Plan was already in place and contained the offending exclusion. It further notes that her position was not altered during her tenure and her pay and benefits remained as negotiated with her union. Because of all these things, the County argues the GCFP is not applicable.

In relevant part, the GFCP provides that, "[s]tate and local government officials . . . shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to...sex[,]" and that, "local governmental agencies shall promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government." Mont. Code Ann. § 49-3-201. The GCFP also mandates that all local governmental services, "must be performed without discrimination based upon . . . sex." Mont. Code Ann. § 49-3-205(1). The GCFP further proscribes local governmental agencies from becoming, "a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices." Mont. Code Ann. § 49-3-205. Under the GCFP, state and local governmental agencies include "a county . . . or other unit of local government and any instrumentality of local government." Mont. Code Ann. § 49-3-101. The GCFP and MHRA anti-discrimination provisions are regularly analyzed together because the affirmative duties imposed on governmental actors by the GCFP include ensuring compliance with the state's anti-discrimination policies. *See, e.g., Taliaferro v. State*, 235 Mont. 23, 764 P.2d 860 (1988); *Thompson v. Bd. of Trs.*, 192 Mont. 266, 627 P.2d 1229 (1981). As Maloney correctly points out, the Montana Supreme Court found the GCFP is a "strongly worded directive [] from the legislature prohibiting employment discrimination. . . ." *Thompson*, 192 Mont. at 270, 627 P.2d at

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



1231 (citing Mont. Code Ann. §§ 49-3-201(1), 49-2-303(1)); *see also* Mont. Code Ann. § 49-3-301 (regarding cooperation of local government under GCFP with Human Rights Commission).

With regard to proscribing local government from being “a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices,” the Hearing Officer finds the language of the GFCP is unambiguous. The plain language of the GFCP applies here. This tribunal has found the Plan to be discriminatory, and because the County is a party to the Plan, the County sanctioned discriminatory practices which directly affected Maloney through its implementation. Mont. Code Ann. § 49-3-205.

Having found a violation of the GFCP, it is unnecessary to conduct analysis of further violations. Pursuant to Mont. Code Ann. § 49-3-315, the procedures set forth with regard to complaints brought under the MHRA also apply to complaints alleging a violation of the GFCP. As such, the relief granted here will not be differentiated between relief under the MHRA versus relief under the GFCP, because the damages relief afforded under each is identical and not cumulative.

## **B. Direct Evidence and Mixed Motive Defense**

As a preliminary matter, the County raises certain arguments in its defense which suggest this is an indirect evidence case subject to the shifting-burden test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This, however, is a direct evidence case, as there is no dispute about the meaning or intent of the discriminatory exclusionary language or that it was the basis for Maloney’s disparate treatment.

“Direct evidence’ is that which proves a fact without an inference or presumption and which in itself, if true, establishes that fact.” Mont. Code Ann. §26-1-102(5). Discrimination claims involving direct evidence abandon the *McDonnell Douglas* burden-shifting analysis, and the issue that remains is whether the adverse employment action was illegal. *See Reinhardt v. Burlington N. Santa Fe R.R.*, 846 F. Supp. 2d 1108, 1112 (2012).

To reiterate as already determined by this tribunal’s summary judgment order, the MHRA prohibits employers from “discriminat[ing] against [an employee] in compensation or in a term, condition or privilege of employment because of [the employee's] sex.” Mont. Code Ann. § 49-2-303. This prohibition against sex-based discrimination applies to the provision of “fringe benefits available through employment, whether or not administered by the

employer.” Admin. R. Mont. § 24.9.604. The MHRA provides that a political subdivision of the state, including a local county, engages in an unlawful discriminatory practice when it withholds from or denies to a person any services, advantages or privileges because of sex. Mont. Code Ann. § 49-2-308(a). Here, Maloney has shown that she is a member of a protected class, that she was qualified for her position, and that she was denied health insurance coverage and therefore treated differently because of her sex. See *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020). As such, Maloney has established discrimination based on disparate treatment as a matter of law.

With regard to mixed motive, the County has argued its implementation of the Plan language was nondiscriminatory, notwithstanding the discriminatory language contained within the Plan. Where nondiscriminatory considerations are involved, an employer has the limited affirmative defense of mixed motive available to it. Admin. R. Mont. 24.9.611(1); see also *Laudert v. Richland Cnty. Sheriff's Dep't*, 2000 MT 218, ¶¶ 26-27, 301 Mont. 114, 7 P.3d 386 (adopting the “mixed motive” analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003). As pointed out by Maloney, however, the mixed motive defense is typically applied in cases where there are truly independent grounds for the discriminatory action. For example, in an employment discrimination case where someone claims termination, someone may have a poor employment history that would independently provide grounds for the actions taken. See, e.g., *Laudert*, ¶ 16 (regarding failure to hire because of employment history).

Maloney’s legal challenge is in essence a facial challenge to the Plan in that she argues the Plan language is discriminatory on its face. The Hearing Officer has already determined the exclusion is discriminatory and violates the MHRA by its terms, as applied to her. Because she challenges the language of the Plan itself, her claim is not that Yellowstone County took a specific adverse action against her, but rather that the language is discriminatory to any employee of Yellowstone County to which it might apply. However, she brings the claim only as it applies to her.

There simply was no alternative basis for denial of procedures aside from the Plan’s exclusions. Insurance coverage was excluded solely on a discriminatory basis. As stated by the County itself: “The action taken by Respondents that led to discrimination concerns actually wasn’t an action at all . . . the County [has not] treated the Charging Party herself differently than any others in her situation.” The County itself suggested the Union bring a

declaratory judgment action. Therefore, there is no specific adverse action taken against her other than the existence of the language.

The Hearing Officer recognizes that insurance would typically involve facts that provide multiple bases for denial of coverage, not all discriminatory, but that is simply not the situation here. The County has at no time argued, for example, that it also independently denied coverage to Maloney based on medical necessity, cost, or some other, nondiscriminatory reason.

Because it is the legality of the language of the Plan that is it as issue, the County cannot defend itself by arguing a mixed motive defense because it cannot argue the same action would have been taken in the absence of discrimination; there can be no absence of discrimination when the language is discriminatory on its face. The County cannot show any facts in which it would have had the same exclusion apply in the absence of discrimination. The intent of the plain language is to discriminate on the basis of sex. Therefore, the County's assertion of a mixed motive defense because it had legitimate business reasons for its treatment of Maloney is not valid.

### **C. Constructive Discharge**

Maloney's damages claim centers entirely around arguing she was constructively discharged, and therefore suffered damages. The County argues in response that it had not yet finalized its determinations of Maloney's requests that the provision be changed before she left the County. The County further asserts removing the exclusions would not necessarily have resulted in payment of any and all treatments sought, as gender confirmation requires many different treatments, all of which would have required pre-approval.

Montana's Wrongful Discharge from Employment Act ("WDEA"), Mont. Code Ann. §§ 39-2-901 *et seq.*, is not controlling under a human rights claim, as other case law specifically regarding constructive discharge in discrimination cases also applies. The WDEA, however, is still helpful as a starting point. Pursuant to the WDEA, a "constructive discharge" means "the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative." Mont. Code Ann. § 39-2-903(1). In Title VII cases, the 9th Circuit has stated that, "[a] constructive discharge occurs when, looking at the totality of the circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'" *Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990) (quoting *Watson v. Nationwide Ins. Co.*, 823 F.2d 360,

361 (9th Cir. 1987)); *see also Bourque v. Powell Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980) (an employee need not show the employer imposed intolerable working conditions with the intent or purpose of forcing the employee to resign). The United States Supreme Court more recently held that, under the constructive discharge doctrine, “[t]he inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (also noting that the constructive discharge concept was originally developed by the National Labor Relations Board to address situations in which employers coerced employees to resign).

The Montana Supreme Court has also addressed constructive discharge in the context of discrimination cases and reached similar conclusions: “This Court has recognized that whether a constructive discharge has occurred is usually a question of fact determined by the totality of the circumstances.” *Bellanger v. Am. Music Co.*, 2004 MT 392, ¶ 14, 325 Mont. 221, 225, 104 P.3d 1075, 1077 (citing *Snell v. Montana-Dakota Utils. Co.*, 198 Mont. 56, 65, 643 P.2d 841, 846 (1982); *Niles v. Big Sky Eyewear*, 236 Mont. 455, 461, 771 P.2d 114, 118 (1989); *Kestell v. Heritage Health Care Corp.*, 259 Mont. 518, 524, 858 P.2d 3, 11 (1993); *Jarvenpaa v. Glacier Elec. Coop.*, 271 Mont. 477, 484, 898 P.2d 690, 694 (1995)). In addition to applying a totality of the circumstances test, a constructive discharge claim must be “supported by more than an employee’s subjective judgment that working conditions are intolerable.” *Doohan v. Bigfork Sch. Dist. No. 38*, 247 Mont. 125, 132, 805 P.2d 1354, 1358 (1991), overruled on other grounds by *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411, 42 (1995) (citing *Snell*, 643 P.2d at 846; other citations omitted); *see also Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) (the imposition of intolerable working conditions need not be with the purpose of forcing the employee to resign). The totality of the circumstances test also provides, “. . . the conclusion of constructive discharge does not automatically arise whenever employment discrimination is followed by the victim’s resignation.” *Snell*, 198 Mont. at 65, 643 P.2d at 846.

The parties stipulated to the fact that, transition-related healthcare may be medically necessary for many transgender individuals experiencing gender dysphoria. The parties also stipulated to the fact that Maloney was diagnosed with gender dysphoria. Finally, Maloney testified that she had come to the point that she absolutely needed medical care. The County does not dispute these matters. What the County primarily argues is that Maloney left her position too early, that the County’s process to respond to her requests was not final and that she had to stay in order to pursue further attempts to remove the exclusion from the Plan. The County argues that when Maloney left, there

was no definitive answer from the County that they would not remove the exclusion for her.

Under the totality of the circumstances, the County is incorrect that Maloney failed to exhaust her remedies before she left. At the time Maloney left her position on June 18, 2018, there were no further steps she could take. Maloney had completed all possible appeal steps available to her under the terms of the Plan. By the Plan's own plain language, an adverse determination based on a legal interpretation without any use of medical judgment had no further appeal rights. Maloney had received a final denial from EBMS. Even though Maloney submitted her resignation letter before she received the final EBMS letter, Maloney was not required to wait for a result she knew was coming. Further, the County could have indicated to her at any time before her last day that they were willing to work with her. Maloney had gone directly to her supervisors and to the Commission to ask them to consider her request. Twito testified he did not recall personally responding to any of her inquiries about removal of the exclusion. Gillen indicated Maloney's expectation that a resolution might be found for her between EBMS and the County regarding the exclusion could not be "further from the truth." No one in authority expressed possible resolution of the situation to Maloney.

Further, because Maloney had exhausted her remedies through EBMS, the County could not expect that Maloney remain in her position in order to bear the burden of going through the public process of convincing all interested parties to amend the Plan. As the County itself has argued, for a substantive change to be made to the Plan, the Board of County Commissioners must go through a lengthy and involved process that requires meetings of the County Insurance Committee, notifications to each of the unions, and input from the County's TPA and consultant. The County's expectation that Maloney remain in her position throughout such a lengthy and potentially futile process defies the point of statutory remedies to prohibit discrimination. Aside from engaging in a lengthy campaign with the County Commissioners to alter the Plan's terms which may or may not have been successful, there was nothing else Maloney could do to remove the discriminatory exclusions. Were Maloney to have stayed in her job, those discriminatory exclusions would have been part of the Plan for the foreseeable future. Because Maloney's treatment was medically necessary, the totality of the circumstances demonstrates that Maloney had no reasonable choice but to leave her position in order to obtain coverage for her health.

The County also argues Maloney was not constructively discharged because she may not have had all her treatment requests covered by the Plan if the exclusion were removed. That also is not a reasonable expectation to place

on Maloney under the totality of the circumstances. Maloney cannot be expected to prove all the medical care she sought would have been covered, when the clear message she was given was that none of it was covered.

The County also argues that under Section 39-2-903, MCA, “constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.” The County asserts the insurance coverage was a term or condition of employment and that therefore, Maloney’s resignation was not a constructive discharge. Besides not being directly applicable to this case, this language of the Wrongful Discharge from Employment Act does not address the situation when those terms or conditions of employment are discriminatory. Further, as stated, the MHRA applies to the benefits provided to an employee under Admin. R. Mont. § 24.9.604. This term of employment discriminated against Maloney solely based on her sex and created an untenable situation in light of her medical diagnosis.

The County also argues Maloney was deliberately indifferent to the fact the County did not cover her condition, such that she should have verified this before her employment. However, Maloney could reasonably assume the coverage at the County would be the same as the State job which she left to come to the County, and that the coverage did not discriminate. The County’s awareness, or lack thereof, that the Plan exclusion was discriminatory does not impact whether the exclusion created an intolerable situation for Maloney. The sex-based exclusion here is no different than if the Plan had excluded care, not on the basis of cost or medical necessity, but rather specifically because of someone’s race, disability, religion, or other protected class. The Hearing Officer does not doubt that Maloney worked with colleagues and in a position both of which she enjoyed, but being in an otherwise-affable workplace while also being forced to sit in the back of the proverbial bus because of one’s protected status is not a balanced or tenable situation. The exclusions from Plan coverage on the basis of sex is not something that Maloney should have had to continue suffer through after making repeated attempts to remedy the situation.

The burden here was on Maloney to show actual evidence that her working conditions were illegal or had become so intolerable that a reasonable person in her position would have felt compelled to resign. Maloney has met the burden that the situation was illegal via the existence of the Plan exclusion. In addition, she has shown resignation was the only reasonable alternative because, with her undisputed diagnosis, her testimony, and the fact that the situation would continue for the foreseeable future with no changes, the situation was also intolerable. Maloney has presented sufficient evidence to

meet this burden. *See Suders*, 542 U.S. at 141. Her claim of constructive discharge therefore succeeds. Because Maloney’s constructive discharge claim succeeds, she is entitled to appropriate relief.

## **V. DAMAGES AND AFFIRMATIVE RELIEF**

### **1. Effect of Reliance on HRB Guidance**

In cases where a respondent seeks guidance from a regulatory body and relies on that guidance in its actions, it may support an argument against the award of back pay. *See* 42 U.S.C. § 2000e-12(b) (regarding reliance on EEOC guidance); 29 C.F.R. § 1601.93 (regarding the effect of certain EEOC no cause findings). This statutory rule has only been applied to Title VII cases involving EEOC guidance, however, and is very narrowly limited to letters approved by the Commission and designated as “opinion letters” that are signed by designated counsel on behalf of the Commission, matters specifically designated as such and published in the Federal Register, and certain no cause findings in affirmative action cases if they include a special statement to the effect that they constitute a written interpretation or opinion of the Commission. *See* 29 C.F.R. § 1601.93; *see also Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1194-95 (6th Cir. 1995) (regarding an opinion letter that met all the requirements of 29 C.F.R. § 1601.93 and therefore qualified as an EEOC opinion under section 713(b)(1) of Title VII (42 U.S.C. § 2000e-12).)

With regard to the County’s reliance on guidance from the HRB, even if this tribunal were somehow able to extend application of a federal statute regarding EEOC guidance to the circumstances of this case, it would not meet the requirements. Although the County should be commended for seeking HRB’s guidance, that guidance was informal and neither intended to be nor capable of being binding on either it or this tribunal. Thus, the guidance sought by the County does not act as a bar to back pay or any other award of damages.

### **2. Compensatory Damages and Lost Pay**

Maloney has requested an award of compensatory damages related to moving expenses and travel to medical providers after leaving her position with the County. The MHRA expressly allows this tribunal to “require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against.” Mont. Code. Ann. § 49-2-506(1)(b), (2). Such pecuniary harm would include

compensatory damages beyond lost pay, such as those sought here by Maloney.

In employment discrimination, once the charging party has established that their 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. Front pay compensates a 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 v. Gibson's Prods. Co.*, 226 Mont. 69, 74, 733 P.2d 1292, 1295 (1987).

Having found Maloney was constructively discharged, this tribunal concludes she is entitled to compensatory damages as a direct and foreseeable result of that discharge. The issue, then, is not whether Maloney is due damages, but rather in what amount and to what extent Maloney mitigated those damages.

With regard to mitigation, a 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).

The County bears the burden proving that Maloney failed to mitigate her damages. *Cromwell v. Victor Sch. Dist. No. 7*, 2006 MT 171, ¶ 25, 333 Mont. 1, 140 P.3d 487. To satisfy this burden, the County 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).

With regard to mitigation of damages, the County argues Maloney failed to mitigate her damages because she did not look for work in the Billings area, applied for only two positions after leaving her job with the County, and ultimately took a position with a significantly lower salary. In response, Maloney asserts nothing dictates a geographical limitation on an employee’s job search, and offers misplaced reliance on Montana case law in support of that assertion. *See Martinell v. Mont. Power Co.*, 268 Mont. 292, 321, 886 P.2d 421, 439 (1994).

In the *Martinell* case, the Montana Supreme Court stated a terminated employee has a duty to exercise ordinary diligence to procure other employment. *Martinell*, 268 Mont. at 321, 886 P.2d at 439. It concluded that ordinary diligence does not require a terminated employee to search for employment in another line of work or to move to a different locality. *Id.* (citing *Dawson v. Billings Gazette*, 223 Mont. 415, 726 P.2d 826, at 828 (1986)). The Court noted, however, that by failing to apply for enough jobs and unreasonably restricting the scope of a search, as occurred in the *Dawson* case, it may lead a factfinder to reasonably conclude a party had failed to mitigate their damages. *Id.* Contrary to Maloney’s assertion, *Martinell* does not stand for the proposition that one need not exhaustively look for jobs in their local market—quite the contrary.

In the *Dawson* case, cited in *Martinell*, the Montana Supreme Court found Dawson had failed to mitigate his damages. *See Dawson*, 223 Mont. at 417-18, 726 P.2d at 828. To quote the Court:

After he was fired Dawson applied to just four newspapers, restricted his job search to papers of equal or greater circulation than that of the Gazette, and only those located in the western United States. He totally rejected the idea of working for a smaller newspaper in fear of the resulting harm to his career. The Sacramento Bee indicated that a position might be available but Dawson rejected the inquiry because of the salary cut he would be taking.

*Id.*, 223 Mont. at 417, 726 P.2d at 828. Although the Court noted that, “an injured party is not required to seek employment in another line of work or to

move to a different locality,” (citing *Selland v. Fargo Public School Dist. No. 1* (N.D.1981), 302 N.W.2d 391, 393), it went on to say that, “he or she must exercise ordinary diligence to procure other employment (citing *Vallejo v. Jamestown College* (N.D.1976), 244 N.W.2d 753, 759). *Ibid.*

Unlike *Martinell*, the issue here is not that Maloney did not expand her search beyond Billings or look for work in a different field. Rather, it is that she did not even look in her local job market of Billings. Maloney has never argued that substantially equivalent jobs were not available in the Billings area. Maloney expressed concern about her employability as “a freshly out trans person in Montana” (Tr. at 66:19-21), but did not demonstrate how it was necessary to so severely limit her job search based on an assumption about how she may potentially be treated. As the County also points out, Maloney contends her travel to Billings for treatment is one of the ways in which she was damaged, yet it was very much her personal decision to leave the area. Maloney’s argument is also undermined by the fact that, when the grant ran out for her subsequent position with Montana Legal Services in Dillon, she accepted a position with the same employer in Billings. In light of the foregoing, the County has met its burden of showing Maloney’s failed to use reasonable diligence in seeking employment in the Billings area.

Maloney was nonetheless able to obtain new employment in her field shortly after leaving the County. As she fairly points out, the County offered no evidence of pay for other jobs which might have been available at the time. Maloney also did reasonably limit her job options to those employers with nondiscriminatory insurance plans. The evidence also shows, however, that Maloney came to the County from a position with the State of Montana in the Billings area which paid significantly more than the position she accepted with Montana Legal Services in Dillon, and actually returned to another position with the State thereafter, also for a significantly higher salary. Indeed, Maloney’s base salary with the County in 2018 was \$76,262.16, while her salary with Montana Legal services was \$46,000. When she returned to work for the State, her salary rose to \$67,293.50. When combined with the facts that Maloney submitted so few applications, so severely limited the geographic area in which she conducted a search, and actually withdrew an application with the State after accepting the job with Montana Legal Services, the totality of the circumstances provide strong evidence that her position with Montana Legal Services did, in fact, amount to underemployment, and that Maloney failed to mitigate her damages in this regard.

Even though she failed to mitigate her lost salary damages as much as she could have, Maloney is entitled to damages that are above and beyond what was caused by her failure to mitigate. She is entitled to both back and

front pay as a result of reduced salary for a total of four years as she requests, just not in the amount she requests. Given that she held a position with the State prior to moving to the County, the Hearing Officer believes a reasonable measure of Maloney’s full-employment salary is provided by her position with OPD. Damages need only be reasonably certain and not absolutely certain. *See Kerr*, 226 Mont. at 74, 733 P.2d at 1295. Using the data provided by Maloney’s expert, the Hearing Officer has reduced Maloney’s OPD salary for years 1 and 2 such that each successive year represents a 2.7% annual increase, the same amount by which Maloney anticipated her salary would grow. Using the exact same methodology, formulas, and table as Maloney’s own expert, including a 2.75% discount rate, the Hearing Officer arrives at the following revised calculation for lost pay:

		1 Yellowstone County		3		4		5		6		7	
Estimated Lost Compensation Computations		Summary of Estimated Compensation for 4 Years		Discounted @ 2.75%	OPD Fringe Benefit %	Summary of Estimated Compensation for 4 Years		Discounted @ 2.75%	Column 3 - Column 6		Lost Compensation Net Present Value		
Year 1	June 18, 2018 - June 17, 2019												
	Estimated Base Salary	\$	76,262.16			\$	63,801.70						
	Fringe Benefits @ 30.41% of Base Salary	\$	23,191.32	\$	99,453.48	\$	22,732.54	\$	86,534.24	\$	84,218.24	\$	15,235.24
Year 2	June 18, 2019 - June 17, 2020												
	Estimated Base Salary	\$	80,262.16			\$	65,524.34						
	Fringe Benefits @ 30.41% of Base Salary	\$	24,407.72	\$	104,669.88	\$	23,346.32	\$	88,870.67	\$	84,177.26	\$	14,964.83
Year 3	June 18, 2020 - June 17, 2021												
	Estimated Base Salary	\$	84,262.16			\$	67,293.50						
	Fringe Benefits @ 30.41% of Base Salary	\$	25,624.12	\$	109,886.28	\$	23,976.67	\$	91,270.17	\$	84,136.29	\$	17,161.03
Year 4	June 18, 2021 - June 17, 2022												
	Estimated Base Salary	\$	88,262.16			\$	69,110.42						
	Fringe Benefits @ 30.41% of Base Salary	\$	26,840.52	\$	115,102.68	\$	24,624.04	\$	93,734.46	\$	84,095.35	\$	19,170.83
			\$	429,112.32	\$	400,497.30		\$	360,409.54	\$	336,627.14	\$	66,531.94

(See Addendum A for a larger format version of the foregoing table.) In total, Maloney is awarded \$66,531.94 in lost pay and fringe benefits. The eventual job she was able to obtain with OPD resulted in this amount of damages to her caused by the County’s discrimination. Because the County is a governmental entity, no interest is awarded. *See Mont. Code Ann. § 2-9-317* (“ . . . [I]f a governmental entity pays a judgment within 2 years after the day on which the judgment is entered, no penalty or interest may be assessed against the governmental entity.”).

With regard to other compensatory damages, as stated, Maloney presented no evidence that substantially equivalent jobs were not available in the Billings area. To award moving and other travel-related expenses to Maloney when she did not even look for jobs in her home market would require this tribunal to not only ignore Maloney’s failure to mitigate in this regard, but to actually reward that failure. Having found Maloney did not use reasonable diligence in seeking employment in the Billings area, her request for compensatory damages, including moving expenses and cost of travel to providers, is denied.

The Hearing Officer also notes that, while working for the County, Maloney regularly traveled from Billings to Bozeman for medical appointments, which is an approximate 288-mile round-trip. Now that Maloney travels from Butte to Bozeman, the round-trip mileage is only approximately 170 miles. This change represents a 118-mile *decrease* for every round trip. Based on Maloney's estimated 174 round-trips for which she is requesting damages, her move to Butte actually resulted in a reduction of approximately 20,532 miles traveled over the relevant time period. Thus, the facts show no loss associated with travel for medical treatment due to moving, and this is an independent basis for denial of a portion of those claimed damages.

## **5. Affirmative Relief**

The determination that the actions of the County were discriminatory mandates affirmative relief under both the MHRA and GCFP to enjoin and prevent future discriminatory acts by the County. Mont. Code Ann. §§ 49-2-506(1)(a), 49-3-315. With regard to affirmative relief, within 20 days of this order, the County shall: (1) discontinue enforcement of the exclusionary provision in the Plan found to be discriminatory herein; (2) identify its current management and supervisory employees with responsibility for oversight and identify appropriate transgender discrimination training that meets the approval of HRB. The County must thereafter provide that training at its expense at the earliest availability, and thereafter annually for current management employees so long as any transgender healthcare exclusions remain in effect, keeping records to verify its continuing compliance with this judgment; (3) must work with an attorney familiar with transgender discrimination issues to create and review for improvement policies and notices regarding transgender discrimination that comply with the MHRA and GCFP; and (4) must thereafter adopt policies and appropriately disseminate policies to all employees. Verification must be provided to HRB within 10 days of completion.

## **IV. CONCLUSIONS OF LAW**

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

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

3. Discrimination based on transgender status falls under the MHRA's prohibition on sex discrimination. Mont. Code Ann. § 49-2-303; *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020).

4. The County violated the MHRA when it discriminated against Maloney on the basis of sex through the Plan exclusions with regard to its exclusions for transgender healthcare coverage. Mont. Code Ann. § 49-2-303; *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020).

5. The County violated the GFCP by becoming “a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices.” Mont. Code Ann. § 49-3-205.

6. The relief available for violation of the GFCP is the same as that for violation of the MHRA. Mont. Code Ann. § 49-3-315.

7. Maloney proved she was constructively discharged because she exhausted all reasonable remedies available to her, and is therefore due appropriate damages. *See Pa. State Police v. Suders*, 542 U.S. 129 (2004).

8. Maloney does not seek damages for either uncovered medical expenses as a result of Plan exclusions or emotional distress, failed to prove the same, and therefore is not due such damages. See Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993).

9. 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).

10. For purposes of Mont. Code Ann. § 49-2-505(8), Maloney is the prevailing party.

## **V. ORDER**

### **IT IS THEREFORE ORDERED THAT:**

1. Judgment is granted in favor of Maloney against Respondents.
2. Within 60 days of the date of this decision, the County shall pay to Maloney the sum of \$66,531.94 in economic losses sustained.
3. Respondents shall effectuate the affirmative relief set forth hereinabove within the specified timelines.

///

DATED: this 24th day of January, 2022.

A handwritten signature in black ink, appearing to read "Chad R. Vanisko". The signature is stylized with a large initial "C" and "V".

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

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party, Respondents, and their respective counsel:

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 is timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), and this 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.**

\*\*\*\*\*

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:

ALEX RATE  
ACLU OF MONTANA  
PO BOX 1968  
MISSOULA MT 59806

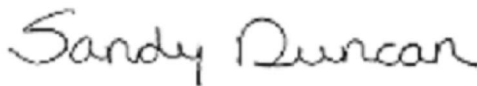
ELIZABETH K EHRET  
ATTORNEY AT LAW  
1010 VINE STREET  
MISSOULA MT 59802

MALITA VENCIENZO PICASSO  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION (ACLU)  
125 BROAD STREET 18<sup>TH</sup> FLOOR  
NEW YORK NY 10004

JOSHUA BLOCK  
ACLU LGBT & HIV PROJECT/ACLU FOUNDATION  
125 BROAD ST 18<sup>TH</sup> FLOOR  
NEW YORK, NY 10004

JEANA R LERVICK  
CHIEF IN-HOUSE DEPUTY COUNTY ATTORNEY  
YELLOWSTONE COUNTY  
PO BOX 35025  
BILLINGS MT 59107-5025

DATED this 24th day of January, 2022.



Maloney.HOD.cvp



ADDENDUM A

		1	2	3	4	5	6	7
		<u>Yellowstone County</u>			<u>MT Public Defender</u>			
Estimated Lost Compensation Computations		Summary of Estimated Compensation for 4 Years		Column 2 Discounted @ 2.75%	OPD Fringe Benefit %	Summary of Estimated Compensation for 4 Years	Column 5 Discounted @ 2.75%	Column 3 - Column 6 Lost Compensation Net Present Value
Year 1	June 18, 2018 - June 17, 2019							
	Estimated Base Salary	\$	76,262.16			\$ 63,801.70		
	Fringe Benefits @ 30.41% of Base Salary	\$	23,191.32	\$ 99,453.48	96,791.71	35.63% of Base	\$ 22,732.54	\$ 86,534.24
							\$ 84,218.24	\$ 15,235.24
Year 2	June 18, 2019 - June 17, 2020							
	Estimated Base Salary	\$	80,262.16			\$ 65,524.34		
	Fringe Benefits @ 30.41% of Base Salary	\$	24,407.72	\$ 104,669.88	\$ 99,142.09	35.63% of Base	\$ 23,346.32	\$ 88,870.67
							\$ 84,177.26	\$ 14,964.83
Year 3	June 18, 2020 - June 17, 2021							
	Estimated Base Salary	\$	84,262.16			\$ 67,293.50		
	Fringe Benefits @ 30.41% of Base Salary	\$	25,624.12	\$ 109,886.28	\$ 101,297.33	35.63% of Base	\$ 23,976.67	\$ 91,270.17
							\$ 84,136.29	\$ 17,161.03
Year 4	June 18, 2021 - June 17, 2022							
	Estimated Base Salary	\$	88,262.16			\$ 69,110.42		
	Fringe Benefits @ 30.41% of Base Salary	\$	26,840.52	\$ 115,102.68	\$ 103,266.18	35.63% of Base	\$ 24,624.04	\$ 93,734.46
							\$ 84,095.35	\$ 19,170.83
				\$ 429,112.32	\$ 400,497.30		\$ 360,409.54	\$ 336,627.14
							\$	\$ 66,531.94