

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

ADRIANNE COTTON,
Charging Party/Appellant,

HRB CASE NO. 0190142

-v-

REMAND ORDER

MONTANA DEPARTMENT OF
CORRECTIONS,
Respondent/Appellee.

Charging Party, Adrienne Cotton, filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of retaliation. Ms. Cotton was employed as the Government Relations Director for the Montana Department of Corrections (DOC). During the course of her employment, she participated in a protected activity. Shortly thereafter, Cotton's position as the Government Relations Director was eliminated. She alleges DOC eliminated her position as a result of her participation in a protected activity. Following an informal investigation, the Department determined that no reasonable cause supported Cotton's allegations. Cotton objected to the Department's determination before Montana's Human Rights Commission (Commission).

The Commission first considered the matter on September 20, 2019 and sustained the objection. The case was then remanded to the Office of Administrative Hearings of the Department of Labor & Industry, which held a contested case hearing, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a decision on November 4, 2021. The hearing officer entered judgment in favor of the DOC and determined that discrimination did not occur.

Charging Party subsequently appealed the decision to the Commission. The Commission considered the matter on March 18, 2022. Isaac M. Kantor, attorney, appeared and presented

oral argument on behalf of Ms. Cotton. Sarah Mazanec, attorney, appeared and presented oral argument on behalf of the DOC.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3). The commission reviews conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. The commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305.

DISCUSSION

Before the Commission, Cotton argued the hearing officer erred in allowing DOC to present evidence that Cotton's position was eliminated for budgetary reasons. Cotton further argued the hearing officer committed a cumulative error by failing to consider all of the evidence as a whole. Specifically, Cotton argued the hearing officer erred in failing to find that temporal proximity existed between Cotton's protected activity and the decision to eliminate her position. Decision, at 45-50.

Before the Commission, DOC argued the hearing officer engaged in a thorough analysis, correctly weighed the evidence presented (both in context and as a whole), and determined that

Cotton failed to show a causal link between her participation in a protected activity and the elimination of her position. DOC further argued the hearing officer's decision should be affirmed.

After careful consideration of the complete record and the argument presented by the parties, the Commission modifies Findings of Fact 69 and 115 to read as follows:

69. ~~Although Lopach requested assistance from DOA upon learning of the allegations, he did nothing to hinder or influence the investigation conducted by DOA or to compel a certain result. Hrg. Tr. 273:2-5; 289:11-21.~~ Neither Pavao nor Mitchell spoke with Lopach during the course of their investigation. Hrg. Tr. 193:3-6; 220:1-6.

115. MacEwen also recommended the elimination of the Government Relations Director position. MacEwen relied upon information provided to her by Wolken, who had been Cotton's direct supervisor, about Cotton's day to day duties. Hrg. Tr. 307:17-20; 307:24-308:6. MacEwen also relied upon information gathered during DOC leadership team interviews, including an interview of Cotton, and a review of orally described job descriptions for each position on the Leadership Team and did not review written job descriptions. Hrg. Tr. 378:6-22; 422:4-7.

The Commission modifies these facts after determining the hearing officer's findings were not based on competent, substantial evidence and were incomplete. In modifying Finding of Fact 69, the Commission determined the hearing officer incorrectly concluded Lopach did nothing to hinder or influence the sexual harassment investigation. The Commission determined Finding of Fact 115 was an incomplete description of the materials relied upon by Peggy MacEwen in making her recommendation.

The Commission further determined the hearing officer erred in determining Charging Party failed to prove Respondent retaliated against her for engaging in a protected activity. In order to prove retaliation, Cotton is first required to establish a prima facie case. Admin. R. Mont. 24.9.610. A prima facie case of retaliation requires Cotton to prove that she engaged in a protected activity, that she was qualified for employment, and that she was subjected to an adverse employment action in circumstances raising a reasonable inference that she was treated

differently due to her participation in a protected activity. *Id.* Once she has articulated a prima facie case, the burden shifts to DOC who must articulate a legitimate, non-discriminatory reason for the adverse employment action. If DOC is able to do so, the burden shifts back to Cotton to prove the DOC's alleged non-discriminatory reason was mere pretext with evidence that DOC's actions were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief. *Id.*

Cotton has established a prima facie case that DOC retaliated against her. The parties do not dispute that Cotton engaged in protected activity when she participated in the sexual harassment investigation, and the parties do not dispute she was employed by DOC at the time of her participation. The Commission finds that the proximity in time between Cotton's participation in the protected activity and DOC's decision to eliminate her position is sufficient to establish a reasonable inference that her position was eliminated due to her participation in the protected activity. Once the burden shifted to DOC, the DOC articulated several reasons for eliminating Cotton's position, including budgetary concerns and organizational review that recommended elimination of the position.

Under the final part of the retaliation analysis, the burden then shifts back to Cotton to prove that the DOC's proffered reasons for the elimination of her position were merely pretextual. Cotton argues that DOC's stated reasons are pretextual and offers that the temporal proximity between her participation in the sexual harassment investigation and the elimination of her position is sufficient to establish that DOC's reasons are pretextual. The Commission agrees.

Temporal proximity can be circumstantial evidence supporting a retaliation claim, and in some instances can establish causation by itself. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Here, the Commission believes the time between Cotton's participation in a sexual

harassment investigation and DOC's decision to eliminate her position is sufficient to establish the temporal proximity of her retaliation claim, and the hearing officer erred in determining it did not. The Commission further finds that the temporal proximity between Cotton's participation in the protected activity and the elimination of her job is sufficient to overcome DOC's articulated reasons for eliminating the job. Therefore, the Commission finds that the hearing officer misapplied the law prohibiting retaliation to the facts of this case.

ORDER

IT IS HEREBY ORDERED that the hearing officer's conclusions of law 2 and 4 are rejected as incorrect. Therefore, the matter is remanded to OAH for a determination of damages to be awarded to Ms. Cotton.

DATED this 10th day of June 2022.



Peter M. Damrow, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 10th day of June 2022.

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