

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1137-2020:

NUGGETT CARMALT,	)	
	)	
Charging Party,	)	
	)	<b>HEARING OFFICER DECISION</b>
vs.	)	<b>AND NOTICE OF ISSUANCE OF</b>
	)	<b>ADMINISTRATIVE DECISION</b>
FLATHEAD COUNTY,	)	
	)	
Respondent.	)	

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**I. PROCEDURAL AND PRELIMINARY MATTERS**

On October 4, 2019, Charging Party Nuggett Carmalt filed a Charge of Discrimination with the Montana Department of Labor and Industry’s Human Rights Bureau (HRB) alleging Flathead County retaliated against her for protected activity, which included her filing a Charge of Discrimination with HRB in November 2015, by denying her application to operate a food booth at the 2019 Flathead County Fair.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on February 17, 2021, in Kalispell, Montana. Attorney Quentin Rhoades represented Carmalt. Attorneys Maureen Lennon and DeAnn Cooney represented Flathead County.

Carmalt, Mark Campbell, J.R. Isles, and Tim Harmon testified under oath. Charging Party’s Exhibits 2, 3, and 4 were admitted, as were Respondent’s Exhibits 101, 102, 103, 105, and 106.

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. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

## II. ISSUES

1. Did Flathead County and Flathead County Fair retaliate against Nuggett Carmalt for protected activity in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA.

2. If Flathead County and Flathead County Fair retaliated against Nuggett Carmalt for protected activity in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA, as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Flathead County and Flathead County Fair retaliated against Nuggett Carmalt for protected activity in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA, as alleged, what should the department require to correct and prevent similar discriminatory practices?

## III. FINDINGS OF FACT

1. Flathead County (County) is a political subdivision of the State of Montana and is governed by a three-member board of County Commissioners.

2. At all times relevant to this matter, Nugget Carmalt (Carmalt) was a resident of Flathead County.

3. Carmalt began working on a seasonal basis for the Northwest Montana Fair and Rodeo (Fair) in Kalispell, Montana, when she was in high school. Carmalt began working for the County Fair on a part-time, permanent basis in 1996. From 2010 through 2015, Carmalt worked full-time as an administrative assistant. Hrg. Tr. 14:16-15:25.

4. Carmalt filed a Charge of Discrimination against the County with HRB in 2014. HRB issued a cause finding. The parties settled the matter in April 2015, after which Carmalt resigned her employment. Hrg. Tr. 18:21-20:24.

5. In November 2015, Carmalt filed a Charge of Discrimination with the Montana Human Rights Bureau (HRB). HRB issued a no cause finding that was later affirmed by the Montana Human Rights Commission (HRC). HRC subsequently issued a Final Agency Decision dismissing the complaint. Carmalt then filed suit in the Eleventh Judicial District Court, where the case is currently pending.

6. Mark Campbell, Flathead County Fairgrounds Manager, was Carmalt's supervisor from 2010 to 2015. Campbell was a subject in Carmalt's 2015 HRB complaint that settled in 2015 and in her action pending in the district court.

7. Campbell reports to the Fair Board, which is made up of volunteer community members appointed by the Flathead County Commission. By resolution of the County Commission, the Fair Board has the administrative ability to operate the fairgrounds. Hrg. Tr. 171:22-25.

8. Campbell previously served as the assistant general manager at the National Orange Show in San Bernadino, California for approximately two years and as the manager of the Shasta District Fairgrounds in Anderson, California, for ten years. Campbell also served as the manager of the King County Fairgrounds in Enumclaw, Washington for approximately five years, before serving as the general manager at the Evergreen State Fairgrounds in Monroe, Washington for approximately eight years. Hrg. Tr. 124:8-18.

9. On May 29, 2019, Carmalt submitted a 2019 Fair Concession Application (application) seeking to operate a food stand at the County Fair under the name, Redneck Chic. Carmalt intended to sell Hillbilly Breath, coffee and mini donuts. Ex. 5-25.

10. Carmalt described Hillbilly Breath as, "Dragons Breath, Food grade liquid nitro with cotton candy balls served in a cup with dipping sauce...kid's adult's breath will look like they are smoking." Ex. 5-26.

11. On July 10, 2019, Carmalt amended the description of her offerings to include: "I am going to serve either the dragons breath [sic] or mini donuts but not both at the fair. I can also serve homemade ice cream from Hedstrom's Dairy with the cryo machine variety of toppings." Ex. 5-25.

12. On July 11, 2019, Carmalt amended the application to change the concession name to 40Sips and noted she would be donating to Hope Pregnancy. Carmalt also amended the application to include: "Menu: I can make liquid nitrogen ice cream from Hedstrom Dairy & Dragons Breath, smoothies, coffee or I can make mini-donuts." Ex. 5-23.

13. Carmalt noted on the amended application that it was "originally in on May 29, 2019 and updated July 11, 2019. *Id.*

14. Carmalt purchased a food cart and trailer shortly after she submitted her first application in May 2019. Carmalt also arranged to donate a portion of her

profits to Hope Pregnancy, a nonprofit organization serving the Flathead Valley. Hrg. Tr. 27:5-22.

15. Prior to 2019, the majority of the booths at the fair were nonprofits. Most recently, nonprofits have stopped operating fair booths due to issues such as volunteer issues and the ability to raise more fund in other ventures. At the time of this matter, all applicants were treated equally without preference being given to a nonprofit applicant. Hrg. Tr. 147:3-148:4

16. Campbell drafted an Administrative Procedures and Considerations guide that he references if there are issues in picking vendors for the Fair, which does not happen frequently due to the low turnover of fair vendors. Hrg. Tr. 166:7-167:15. The guide generally provides that if two applicants are being considered, the non-profit applicant gets the preference. Hrg. Tr. 148:11-149:12. Campbell developed the guide at the suggestion of Carmalt, who during her employment thought a policy should be developed on how to handle vendor choice. Hrg. Tr. 166:2-13.

17. The Fair Board has never adopted Campbell's guide as a policy or mandated adherence to that or a similar approach. Hrg. Tr. 149:25-150:4.

18. Vendors are selected based upon several considerations, including the menu mix; types of food already being offered at the Fair; and types of foods that would best meet the needs of fairgoers. The fair has encouraged vendors for the last several years to improve the quality of the foods offered and focus more on fresh, handmade-type items rather than fried foods. Hrg. Tr. 150:11-24.

19. Other considerations include available locations and what is needed to support the vendor, including utilities and water. Previous experience of the vendor is also considered to ensure the vendor can handle the crowd. Hrg. Tr. 150:25-152:5.

20. Vendors who had worked previous fairs are required to report what changes have been made to their booth and to provide a proposed menu before any contracts are signed for the upcoming fair. If there are no changes to the menu, vendors typically are only required to sign the agreement in order to qualify as a vendor for the upcoming fair. Hrg. Tr. 183:2-22.

21. The Food Vendor Selection Committee (2019 Committee) for the 2019 fair included Campbell, Fair Board Director Doug Wise and county resident J.R. Isles. The Fair does not assemble a food vendor committee every year due to the low turnover in vendors. Hrg. Tr. 184:4-6.

22. Campbell was considered a member of the Committee, but his role was limited to facilitating the decision making process and acting as a tie breaker. Hrg. Tr. 126:21-127:14.

23. Wise joined the Fair Board in 2017. Wise previously worked in casino development. Hrg. Tr. 128:11-129:2. Campbell asked Wise to serve on the 2019 Committee due to his background in picking and developing restaurants for casinos that succeeded in different markets. Hrg. Tr. 130:10-23.

24. Campbell asked Isles to serve on the 2019 committee due to his background with food and food concessions, as well as his general knowledge of the fairgrounds. Hrg. Tr. 126:21-25. 31. Isles has served as the Nutrition Program Manager for the Agency on Aging for Flathead County for approximately 30 years. Hrg. Tr. 205:6-9.

25. The fair had one vendor vacancy that was located in the Trade Center due to the departure of MacKenzie River Pizza Company (MacKenzie River). Hrg. Tr. 124:24-125:6.

26. The Fair received eight applications for the single vacancy. Ex. 101. Each member of the 2019 Committee reviewed the applications independently and met separately with Campbell. Hrg. Tr. 131:7-16.

27. Campbell assembled the applications with a list of the applicants for Wise and Isles to use for scoring and to initial when they had made a decision. Hrg. Tr. 131:7-16; Ex. 101-1. The application of When in Rome was included in the packet, with a menu that was added to the packet after the application was submitted. It is unclear how Campbell came to have the menu and include it in the package of applications. Hrg. Tr. 139:14-25.

28. On June 27, 2019, Wise went to Campbell's office to review the applications. Campbell mentioned to Wise that the vacancy resulted from the departure of MacKenzie River before Wise began reviewing the applications in Campbell's office. Campbell worked on other things in his office while Wise conducted his review. Hrg. 132:1-25.

29. There was no discussion between Campbell and Wise while Wise reviewed the applications. After Wise announced his first choice was When in Rome, Campbell provided Wise with information he had retrieved from an internet search regarding Dragon's Breath. Hrg. Tr. 134:1-135:24; Ex. 5-28 – 5-32.

30. Wise noted When in Rome was his first choice on the matrix, with Daytona Wieners listed as his second choice. Ex. 101-1. Wise chose When in Rome because he thought it would be a good idea to replace MacKenzie River with another vendor that could offer pizza. Wise thought When in Rome would provide a good food option for the 4-H and FFA families that spent a of time at the Trade Center during the fair. Wise Depo. Tr. 9:14-23.

31. Campbell did not direct Wise to choose When in Rome or otherwise advise Wise to reject Carmalt's application. Hrg. Tr. 10:2-11.

32. On June 28, 2019, Isles went to Campbell's office and reviewed the vendor applications. Campbell advised Isles that MacKenzie River would not be a vendor at the fair. Campbell also described the location of the vacancy caused by MacKenzie River's departure before leaving the office. Hrg. Tr. 137:15-25.

33. Isles had made his decision by the time Campbell returned to his office. Isles noted When in Rome as his first choice on the matrix with the note, "Add pizza + salad (apple, walnuts)+(Greek salad) to gyro for good menu mix." Ex. 101-2.

34. Isles picked When in Rome as his first choice based, in part, on his experience operating a Greek gyros stand at the fair for two years and knowing it was a successful operation. Isles also knew, based upon his own experience, that When in Rome had a good reputation in the area for its gyros, pizza, and salads and had won several national awards for its food. Hrg. Tr. 206:12-207:7.

35. The nonprofit status of an applicant did not matter to Isles when he came to his decision. Hrg. Tr. 16-21. Isles paid little attention to applicants' names when reviewing the applications. Isles focused on the menus. Hrg. Tr. 219:21-220:1-4.

36. Isles had never before heard of Dragon's Breath and looked it up using his personal cell phone before coming to his decision. Isles saw videos of people being burned by the product and saw information suggesting people with asthma could have trouble with it. Hrg. Tr. 220:7-223:18. Isles found the issues concerning the product troubling and decided against it. Hrg. Tr. 223:19-24.

37. Campbell believed pizza was a good choice for the vacant spot due to its location in the Trade Center, which is typically a family oriented area. Hrg. Tr. 153:20-154:7. *See* Ex. 102.

38. Other vendors in that area included Porteus Barbecue, which offered a meal format. Other vendors in the area offered more snack options, including mini donuts and coffee. Hrg. Tr. 155:12-21.

39. Campbell never told Wise or Isles that Carmalt had filed a human rights complaint or lawsuit against the fair before they made their respective choice for the 2019 fair. Wise Dep. Tr. 10:12-17; 25:14-23; Hrg. Tr. 207:11-25.

40. Carmalt's claims against Flathead County had no effect on either Wise's choice or Isles' choice of When in Rome as his first choice for the single vacancy for the 2019 Fair. Wise Dep. Tr. 10:18-25; Hrg. Tr. 208:12-18.

41. After receiving the choices of Wise and Isles, Campbell contacted the owners of When in Rome and asked if they could add pizza and salads to their application. Campbell understood that both Wise and Isles wanted When in Rome as the vendor if it was able to offer pizza. Hrg. Tr. 141:6-16.

42. When in Rome indicated they could add pizza to their menu. Hrg. Tr. 141:8-24. The decision and logistics had been worked out with When in Rome by July 10, 2019. Hrg. Tr. 143:1-7; 179:4-18.

43. Despite the decision having been made and the parties having executed the concessionaire contract, no one with the Fair Board office notified Carmalt when she came in to amend her application that the decision had already been made. Hrg. Tr. 19-25.

44. Campbell was aware at least by July 11, 2019, that Carmalt had updated and revised her application based upon his handwriting on the document noting when it was received. *See* Ex. 5-23.

45. Campbell failed to notify Carmalt and the other applicants that their applications had been rejected due to an oversight on his part. Hrg. Tr. 141:25-142:17.

46. The County did not retaliate against Carmalt for her 2015 claim by rejecting her 2019 application and choosing When in Rome for the lone vacancy.

47. The County had legitimate, non-pretextual reasons for its decision to offer the lone opening to When in Rome, which had an apparent ability to offer pizza and salad as a local Italian restaurant.

## IV. DISCUSSION<sup>1</sup>

Carmalt alleges the County retaliated against her for protected activity when the fair rejected her concessionaire application for the 2019 fair and awarded the spot to When in Rome, a for-profit restaurant. County denies the fair's decision was retaliatory and argues it had legitimate, nondiscriminatory business reasons for its rejection of Carmalt's application.

### A. Carmalt's Retaliation Claim

At the outset, it is important to note Carmalt's retaliation claim did not arise in an employment context. Rather, Carmalt's retaliation claim is based upon the County's denial of her concessionaire application for the 2019 fair.

Montana's Governmental Code of Fair Practices (GCFP) bans retaliation by any governmental entity or agency against an individual who has opposed practices forbidden under the Montana Human Rights Act (MHRA) or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under the MHRA. Mont. Code. Ann. § 49-3-209.

A Charging Party alleging retaliation must generally prove the following elements: (1) the plaintiff engaged in a protected activity; (2) thereafter, the respondent took an adverse action against the charging party; and (3) a causal link exists between the charging party's protected activity and the respondent's actions. Admin. R. Mont. 24.9.610(2)(a). See *Mont. State University – Northern v. Bachmeier*, 2021 MT 26, ¶¶ 52, 53, 403 Mont. 136, 480 P.3d 233, *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶¶ 17, 326 Mont. 491, 111 P.3d 202; see also *Beaver v. D.N.R.C.*, 2003 MT 287, ¶¶ 71, 318 Mont. 35, 78 P.3d 857.

Circumstantial evidence can provide the basis for proving the elements set forth above. If the Charging Party relies upon circumstantial evidence in proving the required elements, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R.

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<sup>1</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Mont. 24.9.610(3), (4); *see also Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 868 (9th Cir. 1996). “[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.’” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502,515-16, 113 S. Ct. 2742, 2752 (1993).

## 1. The Protected Activity

Protected activity is defined under Admin. R. Mont. 24.9.603(1) as including:

- (a) aiding or encouraging others in the exercise of rights under the act or code;
- (b) opposing any act or practice made unlawful by the act or code; and
- (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code.

The evidence shows Carmalt engaged in protected activity when she filed her HRB complaint alleging retaliation in 2015 and when she subsequently filed a similar complaint in the district court that was still pending at the time the decision was made regarding Carmalt’s 2019 concessionaire application. Therefore, Carmalt has satisfied the first element of a claim of retaliation.

## 2. The Adverse Action

A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is unlawful retaliation. Admin. R. Mont. 24.9.603(2). A denial of governmental services, benefits or opportunities constitutes a significant adverse action. Admin. R. Mont. 24.9.604(2)(e). A retaliatory action is materially adverse if it would likely dissuade a reasonable person from engaging in protected conduct. *Burlington Northern & Santa Fe Ry., Co., v. White*, 548 U.S. 53 (2006).

The adverse action at issue in this case is the denial of government services, benefits or opportunities. A person in Carmalt’s position, having previously complained of alleged discriminatory conduct on the part of the respondent – a governmental unit - would reasonably be dissuaded from pursuing similar claims after being denied an opportunity to work as a fair vendor and thereby losing a potentially significant source of income. Therefore, Carmalt has satisfied the second element of her claim of retaliation.

### 3. The Causal Link

The final element that must be satisfied is showing a causal connection between the protected activity and the adverse action. Proof of a causal connection between a protected activity and a material adverse action can be established with evidence of a close proximity in time between the protected activity and the adverse action; different and more favorable treatment of persons who did not engage in protected activity; departures from established rules or procedures; proof that the respondent intended to take adverse action because of the protected activity; or other proof that the adverse action was motivated in whole or in part by the protected activity. Admin. R. Mont. 24.9.610(2)(b).

Carmalt concedes the adverse action occurred more than 18 months after she filed her district court action. Carmalt argues, however, that the adverse action occurred at the first opportunity – when the County Fair began accepting applications for the 2019 fair. Carmalt contends Campbell was the active decision maker in the application process, which she argues he manipulated to ensure she would not be awarded a food booth.

Carmalt's argument is based on nothing more than supposition. Campbell denied telling either Wise or Isles to reject Carmalt's application. Neither Wise nor Isles admitted that Campbell pressured them to decide a certain way or otherwise influenced their decision making. The evidence shows Campbell provided each Committee member the applications and asked them to note their first choice on a matrix he had prepared listing the applicants. There is no evidence showing Campbell suggested to either Wise or Isles what their first choice should be or made any disparaging comments about Carmalt's application.

While Carmalt asserts Campbell had a motive to retaliate against her, the evidence does not demonstrate that he had or acted on such a motive. The evidence also does not show that either Wise or Isles had such a motive. Both were voluntary community members. Neither showed any animus toward Carmalt in their testimony or showed they even had any knowledge that she had filed a lawsuit against the County. See Wise Dep. Tr. 10:12-25; Isles Hrg. Tr. 207:11-208-18.

Perhaps the most credible witness on this issue is Isles whose testimony was direct and straightforward. Isles demonstrated little to no interest in the outcome of the present litigation or even any consideration that his testimony may have an effect on the outcome. For example, Isles' testimony regarding how he knew Carmalt and how he came to understand what Dragon's Breath was after seeing it on Carmalt's application demonstrates his complete lack of guile.

Q. Let me ask you this. Have you ever met Nuggett Carmalt before?

A. Yeah. She helped me set up. I had to do the setup with her and everything, and she did good. And then my brother helped the next year. She helped my brother get everything organized.

Q. So back in 2013 when you started your booth, Nuggett helped you.

A. Yes.

Q. So you knew who she was when you were making your selections in 2019; right?

A. Yes.

Q. Did you know that she was affiliated with any of the applicants in 2019?

A. The ones that did it there? I didn't until I looked at it, and then -- because Nuggett is kind of an unusual name. I know two Nuggets, her and one that worked for Express Services. I thought it was the same person, but -- so I knew it was her.

Q. So you remember when you were in the room looking at the applications seeing Nuggett's name?

A. Not after -- when I got done -- I went through everything and I really didn't pay attention. I was kind of looking at the menus and stuff. And what drove me is, I saw -- I think it was called a Dragon's Breath, or whatever it was, and I had never heard of it so I had to look it up and see what it was and stuff.

Q. Did you follow through with that?

A. Yes.

Q. And was that before or after you made your selection?

A. Before.

Q. Did you have access to a computer? Is that how you looked it up?

A. My phone.

Q. Used a smart phone?

A. Yeah.

Q. All right. Did that play any part in your selection?

A. Yes.

Q. How did it play in?

A. Well, I looked it up because I didn't know what it was, you know. And -- and it's kind of a unique idea and stuff, and kind of caught on. But I saw there's videos of some people getting burned by it, and people with asthma could have trouble with it so that kind of worried me. Just that, yeah.

Q. Did you tell anybody about that at the time?

A. I don't think so.

Hrg. Tr. 219:2-221:1.

When asked if his choice would be different if Dragon's Breath was taken off Carmalt's proposed menu, Isles confirmed he would not have chosen Carmalt's application because he did not think a donut/ice cream/coffee place would be as successful as a gyro booth. Hrg. Tr. 224:5-9. There is absolutely no indication his decision was influenced by Campbell or that he was otherwise a tool in an elaborate scheme by Campbell to retaliate against Carmalt.

Similarly, Wise's testimony is devoid of any indication his decision was a product of Campbell's alleged desire to retaliate against Carmalt. Wise testified When in Rome was given the opportunity to add pizza to their proposed menu when Carmalt was not, because he understood the restaurant to have an Italian menu that included pizza. Given the departure of MacKenzie River, Wise testified he thought it best to replace MacKenzie river with a pizza vendor. Hrg. Tr. 15:12-18. Wise testified Carmalt was not given a similar opportunity to add pizza to her proposed menu, because he did not associate the items listed on her proposed menu with pizza. Hrg. Tr. 20:2-17.

While Carmalt's allegations of a causal link were sufficient to proceed to hearing, Carmalt failed to show at hearing any proof that a causal link existed between her protected activity and the selection of When in Rome by Wise and Isle as their first choice for the open vendor slot for the 2019 fair. Carmalt failed to show a meaningful proximity in time, favorable treatment of other persons that indicates retaliation, significant departures from established rules or procedures, proof of intent, or other proof. As such, Carmalt has failed to meet her burden on the initial elements of retaliation. Even assuming *arguendo* that Carmalt had succeeded in meeting this burden, her claim fails because she has not shown the reasons offered by the County for its decision to reject her application were pretext for retaliation, as discussed further below.

#### B. The County's Legitimate, Nondiscriminatory Explanation

Assuming Carmalt had satisfied each element of her claim of retaliation, the County may rebut it by producing evidence of a legitimate, nondiscriminatory explanation for the challenged action. *St. Mary's Honor Ctr.*, 509 U.S. 502, 506-07 (1993). To satisfy this burden, it "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

The County concedes it had actual knowledge of Carmalt's 2015 retaliation claim that was ongoing in 2019. However, the County argues that neither of the decisionmakers – Wise and Isles – had either actual or constructive knowledge. The County argues Wise and Isles chose When in Rome as their first pick because it could offer pizza and salad, which they thought would be more successful than what was offered by Carmalt and the other concessionaire applicants.

The County has offered a legitimate, nondiscriminatory business reason for its decision to offer the lone 2019 concessionaire slot to When in Rome rather than to Carmalt or the other applicants. This reason is supported by the testimony of both Wise and Isles credibly denying that any consideration of Carmalt's claim against the County factored into their choice of When in Rome as the first choice for vendor opening for the 2019 fair. Assuming Carmalt had satisfied her burden, the County produced sufficient evidence to rebut the presumption of retaliation. Carmalt is ultimately left with the burden of showing those reasons were pretext for retaliation.

#### C. Pretext

Carmalt must now show that a retaliatory reason motivated the County in rejecting her concessionaire application for the 2019 fair or its proffered reasons are

completely "unworthy of credence" in order to establish pretext. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). Essentially, Carmalt must show by a preponderance of the evidence that but for the protected activity she would not have suffered the adverse action. *Bachmeier*, ¶ 61, citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

Pretext may be established in two ways: (1) indirectly, by showing that the County's proffered explanation is "unworthy of credence" because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the County. *Chuang v. University of Cal. Davis*, 225 F.3d 1115, 1127 (9th Cir. 2000). These two approaches are not exclusive; a combination of the two kinds of evidence may in some cases serve to establish pretext. *Id.* Stated another way, it is the "cumulative evidence to which a court ultimately looks." *Id.* "[V]ery little direct evidence of [a] discriminatory motive is sufficient." *Winarto v. Toshiba America Elecs. Components, Inc.*, 274 F.3d 1276, 1284 (9th Cir. 2001). But where circumstantial evidence is used, "a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer's motives." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (citations omitted).

Carmalt bears the "ultimate burden of persuading the court that [she] has been the victim of intentional [retaliation]." *Burdine*, 450 U.S. at 256. In order to carry this burden, Carmalt must establish "both that the reason was false and that [retaliation] was the real reason for the challenged conduct." *St. Mary's Honor Ctr*, 509 U.S. at 515.

Carmalt has not shown pretext through direct evidence. Instead, Carmalt points to three areas in which she argues are circumstantial evidence of pretext. Carmalt first argues that it is not credible that Wise had no knowledge of her 2015 claim given his involvement with the Fair Board and the Selection Committee. While it seems unlikely that Wise was not at all aware of Carmalt's claim against the County, there has been no showing that this purported knowledge factored in Wise's decision to choose When in Rome as a vendor for the 2019 fair.

Carmalt then points to the application process itself. Carmalt argues Campbell failed to provide Wise and Isles with a copy of the Administrative Procedures and Considerations guide, which Campbell testified he used when facing issues with picking a vendor. Carmalt argues Campbell manipulated the application process to do away with the preference afforded to non-profits in an effort to retaliate against her. Carmalt's argument is not persuasive. Campbell testified he drafted the policy as a guide, which the County Board has never adopted as policy. There is no evidence showing there was any mandated procedure that Campbell failed to follow.

Further, there is no evidence showing Campbell was required to show vendors serving non-profits preference in the application process. Carmalt has not produced sufficient credible evidence showing Wise's purported knowledge of her protected activity renders the reasons for the County's decision pretext for retaliation.

Carmalt further argues Campbell manipulated the application process by privately asking When in Rome to offer pizza, which Carmalt contends had been unsuccessful when offered by MacKenzie River. *See* Exs. 6-3, 6-4. Carmalt proposed Hillbilly Breath, a/k/a Dragon's Breath, mini-donuts, and coffee. She later proposed to offer homemade ice cream. None of her offerings are savory; nor is there any indication in her application that she was prepared to offer savory foods. It is nonsensical that a County Fair would be required to ask all of the applicants if they could offer pizza when one of the applicants was a local restaurant known to offer pizza on its regular menu.

Wise, Isles, and Campbell testified that they believed a booth offering similar items as MacKenzie River had previously offered would be successful given the booth was in the Trade Center where families regularly congregated. Carmalt clearly disagrees with that assessment and points to MacKenzie River's sales, which were less than other vendors offering coffee and sweets. *See* Ex. 103. However, there is no evidence showing the County's position was based on an intent to retaliate against her. Further, Carmalt's argument presumes she would have been the preferred choice over Baskin Robbins, Sweet and Salty, Annie's Shaved Ice, and Dippin' Dot Ice Cream, all of which were rejected vendors for the 2019 fair offering primarily sweet food items. While Carmalt may have disagreed with the 2019 Committee's decision to opt for a vendor that could easily offer pizza rather than coffee, mini-donuts, homemade ice cream and Dragon's Breath, there is no evidence showing that decision was made to retaliate against Carmalt.

Carmalt also argues Campbell's provision of information regarding Dragon's Breath to Wise during the deliberation process makes the business reasons offered pretextual for retaliation. Campbell testified he provided information he had found through Google to Wise after he announced his first choice. *Hrg. Tr.* 154-21. Carmalt did not offer evidence contradicting Campbell's testimony. Given the novelty of the Dragon's Breath offering, it stands to reason that Wise and Isles, who did his own search, would have questions about the product. Carmalt has not shown that Campbell providing such information to Wise after he made his decision makes the reasons offered by the County pretext for retaliation.

Carmalt has not shown by specific and substantial evidence that the County's proffered reasons are full of such weaknesses, implausibilities, inconsistencies, incoherencies, and contradictions that any fact finder could rationally conclude the

County's actions were motivated by retaliatory animus towards Carmalt. *Mageno v. Fenske Truck Leasing, Inc.*, 213 F.3d 642 (9th Cir. 2000) (quoting *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (1999)). Therefore, assuming Carmalt had succeeded in meeting her initial burden on the case of retaliation, her claim fails because she has not shown by a preponderance of the evidence that any pretext existed for the County's actions.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this matter. Mont. Code Ann. § 49- 2-509(7).

2. Nuggett Carmalt has failed to prove Flathead County retaliated against her for engaging in protected activity. Mont. Code Ann. § 49-2-30I; Admin. R. Mont. 24.9.603(2).

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

## VI. ORDER

Judgment is granted in favor of Flathead County and against Nuggett Carmalt. Carmalt's complaint is dismissed with prejudice as lacking merit.

DATED this 25th day of October, 2021.

/s/ CAROLINE A. HOLIEN  
Caroline A. Holien, Hearing Officer  
Office of Administrative Hearings  
Department of Labor and Industry

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Carmalt Nuggett, Charging Party, and her attorney, Quentin Rhoades; and Flathead County, Respondent, and its attorney, Maureen Lennon:

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 & Industry  
P.O. Box 1728 Helena, Montana 59624-1728**

You must serve **ALSO** your notice of appeal, and all subsequent filings, on all other parties of record.

**ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.**

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.