

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

<u>George Garcia,</u>)	Human Rights Act Case No. 9808008532
Charging Party,)	
vs.)	<i>Final Agency Decision</i>
<u>Albertson's, Inc.,</u>)	
<u>Respondent.</u>)	

I. Procedure and Preliminary Matters

George Garcia filed a complaint with the department on May 4, 1998. He alleged that his former employer, Albertson's, Inc., retaliated against him because he filed a discrimination complaint by reprimanding him several times between September 30, 1997 and March 11, 1998 and by reducing his hours on or about November 5, 1997.

On January 11, 1999, the department gave notice Garcia's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing convened on March 25 and 26, 1999, in Billings, Montana. Garcia attended with his attorney, Thomas Parady (Oliver Law Firm). Albertson's attended through its designated representative, Sarah Shin, with its attorney, John G. Crist (Crist Law Firm). The hearing examiner excluded witnesses on the motion of Albertson's. Garcia, Ryan Jenkins, Karen Buckingham, Cari Schmidt-Casey, Mickey Miller, Dawnette Percival and Dennis Munger testified under oath. The parties stipulated to the admission of Garcia's exhibits 1 and 2 and 7 through 24, and to the admission of the employer's exhibits A through E. The employer offered exhibit F, and the hearing examiner admitted it without objection.

II. Issues

The legal issue in this case is whether Albertson's unlawfully retaliated against George Garcia by reprimanding him between September 30, 1997 and March 11, 1998 and by reducing his hours on or about November 5, 1997. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Albertson's hired Garcia as a service deli clerk on May 2, 1994, to work in the North 27th Street store in Billings, Montana. Working as a deli clerk, Garcia learned that his main responsibilities consisted of serving customers, cleaning the deli, washing dishes and making sales announcements. Dawnette Percival, assistant deli manager, helped to train Garcia. Percival had worked for Albertson's since May 1991, first as a service deli clerk and then an assistant manager. She helped supervise Garcia until she left the Billings store in August 1994 to transfer to an Albertson's store in Helena. Percival and Garcia had no difficulties working together. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 1; testimony of Garcia and Percival.
2. In February 1996, the deli manager position opened at the North 27th Street store. Garcia applied for the job. He believed his experience and performance as a service deli clerk qualified him for the deli manager job. Albertson's hired Mark Gilmer rather than Garcia. Gilmer became the second deli manager to supervise Garcia. Testimony of Garcia.
3. In July 1996 the deli manager position opened again at the North 27th Street store. Garcia again applied for the job. Albertson's selected Percival, who was returning to Billings. Percival had worked as the Helena Albertson's service deli manager since April 1995. In the first week of August 1996 she became the third deli manager to supervise Garcia. Testimony of Garcia.
4. Percival approached Garcia and asked if he intended to work into management. She needed an assistant manager. Garcia seemed to her to be unhappy with the company. He did not appear sure that he wanted to work into management. Because Garcia did not assure her that he wanted to be assistant manager, she chose the best other current deli employee as assistant manager. Testimony of Percival.
5. In September 1996 Percival began rotating deli employees between shifts. She made the change from the practice of prior managers because she believed both that the morning shifts were not doing enough work, and that the afternoon shifts required more coverage. Garcia objected, because he now was receiving fewer of the desirable opening shifts and Sundays off, while deli employees with less seniority were receiving more of them. Closing shifts were least desirable, because of the clean up, and Garcia could no longer avoid those shifts because of his seniority. In late 1996 and early 1997, Garcia complained to Percival, to Dennis Munger the store manager, and to Chris White the assistant store manager. He filed union grievances. Testimony of Garcia and Percival.

6. From May 2, 1994 through July 1997, Garcia received no written reprimands concerning his work performance as a service deli clerk. He worked for three different deli managers, and worked with five or six assistant deli managers. He had one oral warning during that time, for not calling in far enough in advance about an absence. He received neither unsatisfactory evaluations nor disciplinary actions. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 2; testimony of Garcia; exhibit 8.

7. During fall 1996 through spring 1997, Percival had discussions with Garcia about deficient work performance. Garcia's attitude had changed. He was no longer as pleasant with co-workers and customers. He began to disregard her directions. He began to show his resentment toward Percival, because she had changed his work schedule and now was expressing dissatisfaction with his performance. Their discussions about his work performance became more frequent in 1997. These discussions grew heated, with yelling between Garcia and Percival. Garcia became short and disrespectful toward Percival. Percival sometimes went home crying at the end of the day, after confrontations with Garcia. Testimony of Percival.

8. Albertson's employee discipline procedures provided for documentation of warnings for unsatisfactory performance. Albertson's had a particular form to record an "oral warning" to an employee. See exhibit 8. Store manager Munger discouraged the use of this form. He preferred that his department managers resolve problems without resort to the formal documentation. Percival attempted to resolve the continuing conflict with Garcia without documenting the discussions, in deference to her manager's wishes. Testimony of Munger and Percival.

9. In March 1997, Garcia called the Montana Human Rights Commission staff to inquire about filing a complaint. He believed Percival was being overly critical. He thought his union complaints might have contributed to the deteriorating relationship with Percival. He was getting neither "his" Sundays off regularly nor as many opening shifts per week as he had in the past. Garcia also believed that Albertson's had twice unfairly passed him over for deli manager. He suspected Albertson's might be treating him unfairly because he was Hispanic. He did not proceed with a complaint in March. Testimony of Garcia.

10. In July 1997, Garcia began working a second job at Wal-Mart in Billings. In order to be scheduled at Wal-Mart, Garcia filled out an "availability sheet" indicating the days and times he was available to work. Wal-Mart then posted a schedule for several weeks in advance. Garcia wanted to work regular early day shifts at Albertson's, so he indicated to Wal-Mart

that he was available for afternoon and evening shifts. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 4; testimony of Garcia.

11. On July 28, 1997, Garcia filed a human rights complaint against Albertson's. Case No. 9801008276. He alleged that Albertson's denied him promotions and that his supervisor harassed him because he was Hispanic. Part of the impetus for Garcia's complaint was Percival's continued practice of rotating deli shift assignments. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 3; testimony of Garcia.

12. Between August 2, 1997 and October 17, 1997, Garcia received four written warnings concerning his work performance at Albertson's. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 5.

13. On August 2, 1997, Garcia tossed a spoon into the deli sink. Percival was in the deli. She told him not to throw spoons, that he might hit her. He responded by asking her to stop harassing him. The two began to argue. Percival left the deli and consulted the assistant store manager. She wrote up Garcia for insubordination and attitude. Instead of a written record of an oral warning (the normal first level of discipline), she gave Garcia his first written warning, the normal second level of discipline. Garcia denied throwing a spoon and refused to sign the written warning. Testimony of Percival; exhibit 12.

14. Percival did not know of Garcia's human rights complaint until August 15, 1997. Testimony of Percival.

15. By the end of August, Garcia was working between 16-20 hours a week at Wal-Mart, in the evenings. Garcia knew his Wal-Mart schedule before he obtained his Albertson's schedule for the same week. He also knew that Albertson's attempted to schedule employees to accommodate those who worked second jobs. Garcia made a practice of waiting until Percival asked before he would provide information about his availability. Because he regularly worked evenings at Wal-Mart, he saw no reason to provide very similar availability information to Albertson's for each new schedule. Garcia knew that if Percival reverted to the practice of allowing senior employees to select their shifts, then he could maintain the hours he worked before at Albertson's. Testimony of Garcia.

16. Percival did not revert to the seniority system. The continuing rotation of deli assignments resulted in conflicts between Garcia's work schedules on his two jobs. He began to request that Albertson's change his schedule to accommodate his work schedule at Wal-Mart. These requests were for the early day shifts and Sundays off that Garcia enjoyed before Percival

began the rotation of shifts among employees. Percival tried to accommodate Garcia without ceasing the rotation of shifts. The scheduling conflicts reduced Garcia's hours at Albertson's. Addressing the conflicts without ceasing her practice of rotating shifts among employees, Percival did not give Garcia every hour on every shift he requested. Testimony of Garcia and Percival.

17. On September 30, 1997, Percival gave Garcia a second written warning, for repeated tardiness and insubordination. Garcia had been repeatedly late in arriving for work in the preceding week, and when questioned about his tardiness, he called Percival a "racist." Garcia believed that other employees were late as often as he was without receiving written warnings, although he did not know what warnings other employees might have received. Since he believed that he had done nothing wrong, Garcia sincerely considered Percival a racist. Garcia refused to sign the warning and denied the "racist" comment.¹ Testimony of Percival and Garcia; exhibit 13.

18. On October 17, 1997, Percival gave Garcia two additional written warnings and a one-day suspension. Percival approached Garcia about attendance problems. He again called her a racist and argued that his attendance was as good as that of other employees. Percival also confronted Garcia about her observation that he handled meat he was cutting for a customer with his bare hand, and was rude to the customer. Garcia argued with her, asserting that he had not handled the meat with his bare hand--that Percival either was mistaken or fabricating the accusation. He also argued that he had not been rude to the customer and that the customer had not complained. Garcia refused to sign the written warnings. Testimony of Percival and Garcia; exhibits 14 and 15.

19. During the Human Rights Bureau's investigation of Garcia's retaliation complaint, Albertson's asserted that a customer had complained about Garcia's conduct on October 17, 1997. There was no such complaint. Percival had relied upon her own observations. This incorrect assertion was not a deliberate fabrication by Albertson's. Munger believed in keeping paperwork as simple and short as possible. The documentation he reviewed 11 months after the 1-day suspension did not accurately refresh his recollection, and he believed that a customer had complained. He remembered even less by the time of hearing. Miscommunication and poor recollection caused the incorrect assertion, not deliberate falsification. Testimony of Munger and Percival; exhibits 22 and 24.

20. During September 1997 through January 1998, Albertson's reprimanded other employees, including Percival, for tardiness, writing bad

¹ In his testimony, Garcia acknowledged that he believed during the September 30 confrontation that Percival was a racist. He denied voicing this belief. *Final Agency Decision, Page 5*

checks to Albertson's, leaving work early and failing to report for work as scheduled. The bad check warning, like Garcia's first insubordination warning, was a written warning because of the seriousness of the conduct, although it was the first documented disciplinary action. Testimony of Percival and Munger; exhibits 16, 17 and 18.

21. In November 1997, Percival, by her scheduling, further reduced Garcia's hours. Garcia remained unwilling to ask Wal-Mart to adjust his schedule to work more hours at Albertson's. Garcia continued to seek additional hours at Albertson's consistent with his preferred schedule, although he knew that Percival was not willing to return to that schedule. Percival continued her rotation of shifts, and continued to allocate shifts so that when Albertson's business required fewer deli employees, all deli employees shared in the reduction of hours. Garcia's insistence upon hours that did not conflict with his Wal-Mart schedule left Percival with only two options--to stop rotating shifts among employees or to continue to assign Garcia to fewer hours. Testimony of Garcia and Percival.

22. The Human Rights Bureau found Garcia's complaint of discrimination without merit in January 1998. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 3; testimony of Garcia.

23. By the first week of February 1998, Garcia was working essentially full-time at Wal-Mart and part-time at Albertson's. His working relationship with Percival had degenerated to the point that when she could not find a notebook in which she kept her daily notes about employees and work matters, she believed Garcia had taken it. The conflict between them never abated. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 6; testimony of Garcia and Percival.

24. Garcia worked for Albertson's until October 1, 1998 when Smith's Food and Drug bought the Albertson's store. Albertson's offered the store employees, including Garcia, opportunities to seek transfers to other Albertson's stores in Billings. Garcia preferred to apply with Smith's. Albertson's made employees generally aware that Smith's was recruiting and hiring workers. Albertson's treated Garcia in the same fashion as other employees in notifying them that Smith's was recruiting employees. Garcia is now an employee of Smith's. Final Prehearing Order, "Facts and Other Matters Admitted," Par. No. 1; testimony of Garcia and Munger.

IV. Opinion

Montana law prohibits retaliation against employees for asserting and prosecuting a Human Rights Act claim. §49-2-301 MCA. To prevail on a claim of unlawful retaliation in violation of §49-2-301, MCA, a charging party can establish a prima facie by showing that:

- a. he engaged in activities protected by the Human Rights Act (opposing unlawful discrimination, filing a human rights complaint, participating in a proceeding or hearing under the Act, or other similar activity);
- b. the employer subjected him to an adverse employment decision (such as termination, discipline, or refusal to hire or promote); and,
- c. there was a causal connection between the protected activity and the adverse employment decision.

Laib v. Long Construction Co., HRC Case #ReAE80-1252 (August 1984), **quoting** *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982); **accord**, *Schmasow v. Headstart*, HRC Case #8801003948 (June 26, 1992).

This is the first tier of the *McDonnell Douglas* method of evaluating discrimination claims.² Garcia has the burden of persuading the factfinder that Albertson's would not have disciplined him or reduced his hours but for the filing of his discrimination complaint. *Laib*; **accord**, *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513-14 (9th Cir. 1989); *Ruggles v. Cal. Poly. State University*, 797 F.2d 782, 785 (9th Cir. 1986). Garcia filed a Human Rights complaint. Albertson's cut his hours and disciplined him. Garcia's burden in establishing the third element of a prima facie case, i.e., evidence of a causal link between the protected activity and the adverse action, is a difficult one. He can meet it through a variety of circumstantial evidence.

Garcia's flurry of write-ups began immediately after he filed his complaint. Proximity in time between the protected activity and the adverse action can trigger the presumption of retaliation. *Love v. Re/Max of America*, 738 F.2d 383 (10th Cir. 1984). Logically, however, until Percival knew of the complaint, the hearing examiner cannot presume retaliatory intent in her adverse action. The presumption of retaliatory intent would arise if Garcia proved that Percival had knowledge of his complaint before undertaking the adverse action. *See, e.g., Wall v. A.T.&T. Technologies, Inc.*, 754 F. Supp. 1084 (D.C. N.C. 1990). The reduction in hours and loss of more desirable shifts began occurring before Garcia filed his complaint. The conflict between Percival and Garcia already existed and was growing before Garcia filed his complaint.

² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Identification of Percival, the person responsible for the adverse actions, as a subject of the human rights complaint could also trigger the presumption of retaliation. *See Miller v. Fairchild Industries*, 797 F.2d 727 (9th Cir. 1986). Percival was certainly a subject of the complaint of racial discrimination, although not the only subject. Nevertheless, here also, until she knew of the complaint, she could hardly have retaliated for it.

Proof of a substantial difference between Garcia's treatment and that of other Albertson's employees who behaved in the same way at work would be another method of proving retaliation. *Simmons v. Camden County Bd. of Ed.*, 757 F.2d 1187 (11th Cir.), *cert. denied* 106 S.Ct. 385 (1985). Garcia did not present such proof. He proved that Albertson's first gave documented oral warnings to tardy employees. Tardiness without insubordination was not substantially similar to his behavior.

Garcia could also present other evidence sufficient for the factfinder to conclude that the adverse treatment was due to the protected activity. He was not limited to the above categories of proof. *See, e.g., Cohen v. Fred Meyer Inc.*, 686 F.2d 793 (9th Cir. 1982). In Montana, the discharge or demotion of an employee during the pendency of a human rights complaint filed by that employee establishes the proximity in time between the protected activity and the adverse employment action, and gives rise to a rebuttable presumption that the discharge or demotion was unlawfully in retaliation for the protected activities. Rule 24.9.803(2), A.R.M. Reduction of hours and disciplinary action, taken together, are sufficiently analogous to demotion to trigger the presumption. With the Commission's regulatory presumption to reinforce the federal case law, Garcia proved his prima facie case, although the disciplinary action and reduction of hours commenced before his supervisor knew of his complaint. Because the disciplinary actions and the reductions in hours continued after Percival and Albertson's knew of the Human Rights complaint, Garcia presented grounds to apply the presumption.

Once Garcia established his prima facie case of retaliation, the burden shifted to Albertson's to produce credible evidence of a legitimate, nondiscriminatory reason for its adverse actions. *Laib and Schmasow, op. cit.* This is the second tier of the *McDonnell Douglas* standard of proof.

Albertson's selected Percival rather than Garcia as the deli manager. She had more management experience than he did.³ Albertson's had a legitimate business purpose for its hiring decision, made before Garcia's original human

³ Garcia did not present evidence that his qualifications matched or exceeded those of the deli manager before Percival. Thus, Garcia did not prove any discrimination in that hiring decision.

rights complaint. Percival adopted the rotating shift schedule for legitimate business reasons. She was trying to get better production and to offer all deli employees opportunities to work a variety of shifts.

Resenting Percival for getting the deli manager job and for rotating his shifts, Garcia resisted her directions and her schedules. The demeanor of Garcia and Percival during their testimony showed the personal conflict between them at a level that patently interfered with the normal conduct of business in the deli. Other witnesses who observed one or both of them during the 1996 and 1997 time-frame expressed varied opinions about what caused the conflict and who was angry, but the tension between the two was readily apparent.

Percival took disciplinary actions against Garcia after she knew of his human rights complaint. She took the adverse actions because Garcia was repeatedly tardy and insubordinate.⁴ Garcia's final write-up, for rudeness to a customer⁵, came only because of the on-going conflict with Percival. Without the multiple prior incidents, Percival would have followed Munger's directions and handled the matter without formal documentation. Garcia brought the disciplinary actions on himself. Percival acted, in each instance, for legitimate business reasons.

Percival also made every reasonable effort to schedule Garcia for as many shifts as possible, within the confines of the rotating shift schedule and Garcia's availability. Consciously or unconsciously, Garcia made choices about his work at Wal-Mart and his availability for work at Albertson's that left Percival with a single choice--either scrap the rotating shift schedule or reduce Garcia's hours. Percival's decision, for legitimate business reasons, to stay with the rotating shift schedule inevitably resulted in reduced hours for Garcia. That result stemmed from legitimate non-discriminatory business decisions by Albertson's.

Once Albertson's proved nondiscriminatory reasons for its adverse actions, Garcia had to prove that the asserted reasons were merely a pretext for retaliation. *Laib* and *Schmasow*, *op. cit.* This is the third tier of the *McDonnell Douglas* standard of proof. Neither the testimony from other employees who concluded that Percival was angrier than Garcia, nor the evidence that Percival vented her frustrations to other management employees, as overheard by

⁴ Garcia presented no evidence of racism. Accusing a critical supervisor of racism without any factual basis is insubordinate.

⁵ The context of this argument was also Percival's accusation that Garcia handled meat with his bare hand, but the final write-up (Exhibit 15) only mentioned rudeness to the customer.

another former employee with her own cause for resentment towards Albertson's, established pretext. Garcia's own testimony that he did nothing wrong and was treated unfairly was not credible.

Albertson's did not retaliate against Garcia for his human rights complaint, in the guise of changing the schedule and disciplining a difficult employee. Percival changed the existing schedule for nondiscriminatory business reasons, before Garcia's complaint. After Garcia began his antagonistic behavior, he filed a human rights complaint. After Percival and Albertson's learned of that complaint, Garcia persisted both in his antagonistic behavior and in his practice of limiting his availability for any shifts except the ones he wanted. Garcia made the choices that led to Albertson's adverse actions.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Garcia did not prove that Albertson's illegally retaliated against him in employment.

VI. Order

1. Judgment is found in favor of Respondent Albertson's, Inc., and against George Garcia on his complaint that Albertson's illegally retaliated against him in employment
2. The complaint is dismissed.

Dated: August 2, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry