BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0048011052

HEDWIG CRUM,	)	Case No. 1227-2005
	)	
Charging Party,	)	
	)	
vs.	)	*Final Agency Decision*
LEWIS AND CLARK COUNTY,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Hedwig Crum filed a complaint with the Department of Labor and Industry on May 11, 2004. She alleged that Lewis and Clark County retaliated against her for filing a previous Human Rights complaint by giving her unwarranted counseling and warning notices. On December 16, 2004, the department gave formal notice that Crum's complaint would proceed to a contested case hearing, appointing Terry Spear as hearing examiner.

The contested case hearing proceeded on May 10 and 11, 2005, in Helena, Lewis and Clark County, Montana. Crum attended in person with her counsel, Jennifer S. Hendricks, Meloy Trieweiler. The county attended through its designated representative, Sheila Cozzie, Human Resources Director, with its counsel, Richard L. Parish, Chronister Parish Larson & Thompson. Normand d'Esterre, Barbara Delsigne, Hedwig Crum, Patty Marble, Traci Lamar, Marlene Lauretta, Jayne Elwess, Wanda Jean Whitley, Vicki Holmes and Sheila Cozzie testified. Either upon stipulation or without objection, the hearing examiner admitted exhibits 1-14, 15 (for notice purposes), 16-19, 21, 101-103, 105, 114 and 118. The hearing examiner admitted exhibit 20 over the county's relevance objection and exhibit 22 over the county's untimely disclosure objection. The hearing examiner reserved ruling on the county's hearsay objection to exhibit 23, which is now admitted over that objection. The parties filed post hearing arguments and proposed decisions and submitted the matter for decision. A copy of the Hearings Bureau docket of this contested case proceeding accompanies this decision.

II. ISSUES

The issue is whether the county retaliated against Crum because of her previous complaint, and if so, what reasonable measures the department should order to rectify any resulting harm and to correct and prevent similar discriminatory practices. A full statement of the issues appears in the hearing examiner's "Final Prehearing Order," May 2, 2005.

III. FINDINGS OF FACT

1. Lewis and Clark County operates Cooney Convalescent Home, a Nursing Home located in Lewis and Clark County, Montana. The County hired Crum on February 9, 2000, as a dietary aide. She is still employed in that capacity.

2. As a dietary aide, Crum's immediate supervisor is the dietary director, also known as the dietary manager, one of seven supervisory positions at Cooney under the immediate supervision of the Cooney Administrator. In the absence of the dietary manager, the on-duty cook supervised the dietary aides. The on-duty cook always had the authority and responsibility to direct the work of the dietary aides, to assure timely and proper completion of necessary work.

3. At all pertinent times, Marlene Lauretta has been the Cooney Administrator.

4. In her first annual evaluation, in January 2001, Crum received 2 "Marginal" performance ratings, for quantity of work (working too slowly) and for versatility (not learning new tasks).[1] She received 5 "Acceptable" ratings, 1 "Commendable" rating and her supervision rating was "not applicable." Her assigned goals for the coming year included faster completion of tasks and completing cleaning tasks in a timely manner.

5. Normand d'Esterre had become Crum's immediate supervisor, as dietary director, before her second annual evaluation, in February 2002. She received all "Acceptable," "Commendable" and "Outstanding" ratings. Her supervision rating was "Acceptable," with a comment that she preferred not to take on cooks' responsibilities. Her only assigned goal for the coming year was completion of a Health Department food safety class.

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[1] The county's evaluation form remained essentially unchanged throughout Crum's employment. It had 9 categories for rating, with 5 ratings available for each category – "Unsatisfactory," "Marginal," Acceptable," "Commendable" and "Outstanding," in ascending order. By 2003, "Marginal" was changed on the form to "Needs Improvement."

6. In October 2002, Lauretta suspended Crum for 3 days with pay, as a result of Crum disobeying a direction to leave to Social Services assisting a resident to find a relative. Instead, without notifying the administration or Social Services, Crum undertook an internet search for the relative, then told the resident it had cost $40, which she asked the relative to pay. Lauretta noted, in the suspension notice, that Crum "does not understand that this falls under 'exploitation' of an elder person." Crum refused to sign the "Counseling Form" that documented the discipline.

7. On January 15, 2003, d'Esterre gave Crum a "Counseling Form" regarding taking too long a break on that day. Crum disagreed. Crum received the original form from d'Esterre, to sign and return. She refused to sign it or to return it.

8. On January 21, 2003, d'Esterre gave Crum a second "Counseling Form," citing her for insubordination and improper conduct, because Crum refused to sign the previous "write up" (***see*** finding 7).[2] Crum refused to sign this write up as well.

9. On January 31, 2003, d'Esterre gave Crum a third "Counseling Form," for writing "inaccurate dietary orders for new residents," resulting in "serving potentially hazardous food to the resident [singular] which could have caused choking." Crum refused to sign the write up.

10. On or about February 11, 2003, Crum filed a complaint of discrimination with the Montana Human Rights Bureau, alleging she had been discriminated against in employment on the basis of age. She also filed an internal grievance regarding the disciplinary actions taken against her.

11. In her third annual evaluation, signed by d'Esterre and Lauretta on March 11, 2003, Crum received an "Unsatisfactory" rating for her attitude (with a notation that "Something occured [sic] in the last 6 mos. that has made you difficult to work with"), and 5 "Needs Improvement" ratings for quality of work (regarding correct performance of tasks "particularly with regard to resident therapies"), time management (noting "very slow accomplishing tasks" [original emphasis] for the "past 6 months"), quantity of work ("pick up the pace!!"), initiative ("You must learn to do work that you see needs to be done") and supervision (refusal "to accept cook's responsibilities" is "'letting down' co-workers" and with "more training than less senior employees" Crum "should be willing to accept responsibility."). There was a "general comment" noting Crum's "marked loss of effectiveness" in her work. There

[2] The document (Exhibit 2) bears the erroneous date of "1/21/02," a mistake in the write up which the parties agreed should have read "1/21/03."

were no assigned goals for the coming year. Crum refused to sign the evaluation, writing on it the comment that "most of these statements are not true."

12. Sheila Cozzie, Human Resources Director, investigated Crum's grievance and wrote a report addressing it on March 28, 2003. The persons she interviewed, according to the names cited in her report, consisted of Lauretta, the cook, the relief cook, the Director of Social Services and Crum. Cozzie apparently also interviewed unnamed "alleged witnesses" to the insubordination write up (***see*** finding 8).

13. Cozzie reported that her investigation revealed that "approximately three months ago coworkers began complaining" about Crum's behavior and performance. Cozzie added that after the complaints, "Crum allegedly began to ignore other employees and was rude to fellow workers." Crum's grievance alleged that she had been disciplined unfairly regarding her attitude and work performance. Cozzie, relying upon the reports of the management personnel she interviewed, concluded that Crum was too slow, apparently because she was visiting with residents while at work and engaging in activity outside her normal work duties. Cozzie concluded that Crum needed more specifics regarding the deficiencies in her work performance, and wrote that the investigative report addressing the grievance "will serve as the written warning in replace [sic] of the warning" that Crum was too slow in her work. None of the 2003 written warnings in evidence[3] contain references to Crum being too slow in her work. The March 2003 performance evaluation, issued 17 days before Cozzie's report, contained multiple references to Crum being too slow.

14. Cozzie's specifications of Crum's slow work follow a reference in her investigative report to Lauretta "most recently" instructing Crum "that she could no longer serve drinks and nutritional supplements because of her inability to complete the task timely." Cozzie concluded this "is not a solution that is workable," noting that Crum "must be able to perform all tasks as outlined in her job description," attaching a copy of the description to the investigative report.

15. Cozzie concluded that the January 15, 2003, write up for taking a long break could not be substantiated, since the Director of Social Services (who d'Esterre cited as the other witness to Crum's long break) instead told Cozzie that she had seen Crum taking a break in a patient restricted area. Cozzie directed that the write up be removed from Crum's personnel file for lack of corroboration (it apparently was removed). Cozzie then added "I believe it is important to note that it is not appropriate to take breaks in resident restricted areas. This is their home. We are

[3] The January 15 written warning was ultimately removed from Crum's personnel file and is not in evidence.

here to serve them and should not violate their privacy or invade their space." Effectively, Cozzie's comments replaced the original write up with something quite comparable to a write up, based upon a different account of the break Crum took from the account contained in the original write up.

16. Cozzie upheld the insubordination write up, noting that Crum admitted refusing both to sign and to return the document. Cozzie noted that Crum accused d'Esterre of being rude and talking to her "like she was a criminal," but concluded that Crum, as an employee, should have obeyed the directive, stating "obey now and grieve later." The insubordination write up had not specified any disciplinary action that would result from further problems or rules violations. Cozzie's Investigative Report states "if an employee refuses to follow orders of a supervisor, it is considered insubordination and a terminable offense."

17. Cozzie's grievance report gave Crum a documented written warning specifying that she was working too slowly and reversed an accommodation (removal from a specific task) that had placed an undue burden on other employees. The grievance report agreed with Crum's very poor 2003 performance evaluation. It also both approved the insubordination write up and added to that write up a specific warning that termination could be the possible action for further similar conduct.

18. On or about August 13, 2003, Crum, the county and the Human Rights Bureau entered into a Settlement Agreement to resolve her complaint of age discrimination. In the settlement agreement, the county agreed to remove from Crum's personnel file the January 21, 2003, write up for insubordination, to provide EEO training to certain Cooney supervisors and not to retaliate against Crum for filing the discrimination complaint.

19. In February 2004, Crum received her fourth annual evaluation, signed by Lauretta on February 17, 2004, and by d'Esterre on February 19, 2004. Originally, d'Esterre had prepared a more positive evaluation but Lauretta ordered him to change it. Crum received no "Unsatisfactory" ratings, 5 "Needs Improvement" ratings for quality of work (commenting, "Shift supervisors are not satisfied with 'slow' work. You often ask others to help you finish tasks assigned to you."), attitude, quantity of work and versatility (all without written comments) and communications ("Some residents misunderstand when you ask them about menu and alternate. Try to be more clear in your conversations with them."). She received 3 "Acceptable ratings. Supervision was rated "not applicable."

20. The evaluation included a "general comment" noting that Crum "has done a good job overcoming health issues. She still has a tendency to rely very much on

co-workers and this causes resentment within the work force and department." Her assigned goals for the coming year read "Try to rely on getting jobs done by yourself. Example – stocking juice machine."

21. Crum again did not sign the evaluation. She wrote employee comments on it, asking d'Esterre to give her "a few examples in writing of what do I can [sic] improve." She added that she liked to do her best, because she liked her job. She added questions: "Improvement needed? Careless Mistakes like what for careless mistakes? Not meeting standards? Examples of this?" At the bottom of the last page of the evaluation, she added additional written questions:

> 2 Attitude: Examples of this? Examples of being stubborn?
> 3 Quantity of Work – Overtime / leaving without work completed?
> 4 Versatility – what new tasks have been slowly learned? What switching of assignments were a problem?
> 5 Communication with residents. Is German accent a problem? That cannot be changed. Would putting choices in writing help?
> Suggestions for improvement / comments on progress / recognition: For example?
> 6 Improvement Needed?

22. After the poor evaluation, Crum asked d'Esterre to provide a written plan of improvement based on the evaluation. Despite this request and written follow-up requests to Cozzie, d'Esterre did not provide the requested plan.

23. On April 1, 2004, Crum was summoned to Lauretta's office, where she was accused of yelling at another employee. Crum became defensive and angry, told Lauretta she was getting sick and left the office. At the behest of other employees, who observed that Crum did appear ill, Crum went to the emergency room. She was diagnosed with anxiety, for which she was later prescribed medication.

24. Crum complained that she was unable to meet the physical requirements of her position. As a result, a meeting was held involving Crum and her union representative. An agreement was reached that a physician of her choosing would review her job description and evaluate her physical abilities in relation to her job. The county fully cooperated with Crum and submitted relevant information to Crum's physician. The physician confirmed that Crum was able to meet the physical requirements of the position. The county participated in this process to identify any physical disability Crum may have had so that reasonable accommodation could be arranged. No disability was identified.

25. On or about April 12, 2004, an attorney representing Crum inquired regarding the county's compliance with the August 2003 Settlement Agreement. In addition to objecting to alleged ongoing retaliation, he inquired about the county's failure to conduct the EEO training required by the Settlement Agreement.

26. On April 15, 2004, the county held a meeting to satisfy the EEO training requirement of the Settlement Agreement. After this "training," the participants in the meeting discussed their ongoing problems and concerns with Crum.

27. Also on April 15, 2004, the county arranged a meeting among the county, Crum, her Dietary Supervisor and the Cooney Administrator, at which Crum was provided with a memorandum outlining specifically the expectations of her work performance. Crum refused to sign the memorandum as required. On the same day, April 15, 2004, d'Esterre, under the direction and supervision of Lauretta, wrote Crum a memo further criticizing her performance and threatening her with "immediate dismissal" for any "[r]efusal to cooperate."

28. By this time, d'Esterre himself was in conflict with the county's management team and would ultimately file his own discrimination claims against the county. Lauretta was directing his actions regarding Crum.

29. By mid-April 2004, Crum's passive aggressive behavior at work (which contributed to the escalation of her conflicts with management in 2003 and 2004) reached the level at which she refused (as she still does) to take direction from supervisors or even to speak directly with Lauretta. On April 23, 2004, she received a written warning, given after a verbal warning for failure to accomplish assigned tasks that not been done, notwithstanding that Crum had signed off the tasks as having been completed. Crum refused to sign the write up. Another employee received a similar warning for this incident.

30. During the term of Crum's employment by the county, she has not been terminated, suspended, or demoted. She remains in the same position for which she was originally hired.

31. The county did not comply with the terms of the Settlement Agreement. The county failed to supply the required EEO training to its employees for over 6 months. The January 21, 2003, insubordination write up remained (still at the time of hearing) in Crum's personnel file.

32. The majority of Crum's complaints alleging retaliatory conduct involved problems with Crum's relationships with co-workers and supervisors (i.e., the cook

and relief shift cook) who were not even aware of Crum's prior age discrimination complaint.

33. The actions taken by the county were not in retaliation for Crum's prior complaint of discrimination. Such actions, although inept and carried out at best inefficiently, were reasonable efforts to correct deficiencies in Crum's work performance and to alleviate difficulties between Crum and other employees. The conflict between d'Esterre and county management hindered the efforts to improve Crum's performance.

34. The county has not deliberately created a hostile work environment for Crum. The county's efforts have been directed toward improving Crum's work performance. The actions taken by the county regarding Crum were undertaken for reasonable business reasons directed toward the improvement of Crum's work performance.

35. Taken individually, the events which are the subject of Crum's complaint were not adverse employment actions. The cumulative impact of those actions has been adverse, pushing Crum further into resistance, denial and withdrawal from interaction with co-workers and supervisors.

36. Crum has not filed a grievance or attempted to take any action under the applicable collective bargaining agreement with respect to the alleged adverse actions taken after she filed her original human rights complaint. Given the outcome of her previous grievance, it is reasonable that she would see pursuit of a grievance as futile.

IV. OPINION[4]

The Montana Human Rights Act law bans retaliation against a person who files a discrimination complaint under the Act. Mont. Code Ann. § 49-2-301; *Mahan v. Farmers Union Central Exch., Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 857-58.

To establish her prima facie case of unlawful retaliation in violation of the Act, Crum must prove that: (1) She filed a complaint alleging illegal discrimination; (2) the county subjected her to significant adverse acts and (3) that there was a causal connection between the significant adverse acts and her complaint filing. *Foster v. Albertson's, Inc.* (1992), 254 Mont. 117, 835 P.2d 720, 727;

[4] 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.

Schmasow v. Headstart (June 26, 1992), HRC Case #8801003948; ***accord***, *Laib v. Long Cons. Co.* (August 1984), HRC Case #ReAE80-1252, ***quoting*** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793; ***see*** *Payne v. Norwest Corp.* (9th Cir.1997), 113 F.3d 1079; *Moyo v. Gomez* (9th Cir. 1994), 40 F.3d 982, 984 ***and*** *Alexander v. Gerhardt Enter., Inc.* (7th Cir. 1994), 40 F.3d 187, 195; ***see also*** Admin. R. Mont. 24.9.603(1).[5]

If Crum proves a prima facie case of retaliation, the county must either controvert that evidence or present proof establishing affirmative defenses (such as legitimate business reasons for the significant adverse acts). Crum may then present evidence of pretext or other rebuttal. Ultimately, she has the burden of persuading the fact finder that she suffered illegal retaliation for which the department should impose affirmative relief, and require that the respondent rectify any harm she suffered. ***E.g.***, *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209 (1987).

Crum filed a Human Rights Act complaint in February 2003, which was pending until Human Rights Bureau approval of settlement in August 2003. Filing and prosecuting her complaint before the Human Rights Bureau was protected activity. This satisfies the first element of her prima facie case.

Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). Crum was subjected to disciplinary actions while her complaint was pending and within 6 months thereafter, but none of those actions resulted in any change in her job, pay or conditions of employment. However, the collective effect of those actions clearly was adverse to Crum. When she filed her complaint in this case, she was estranged from a job she liked, distrustful of her employer and her co-workers and (more likely than not) distrusted by her employer and her co-workers. A co-worker observing the county's treatment of Crum might reasonably be deterred from filing a discrimination complaint, if that co-worker was aware of Crum's prior complaint. This satisfies the second element of her prima facie case.

Admin. R. Mont. 24.9.603(3) dictates a disputable presumption of retaliatory motive for significant adverse acts against a Human Rights Act complainant while the complaint is pending or within six months after its resolution.[6] Most of the conduct

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[5] Sub-chapter 6 of the Commission's rules applies to this contested case, including subsection 603. Admin. R. Mont. 24.9.107(1)(b).

[6] The alleged retaliator must have knowledge of the complaint, which was admittedly true for the county–d'Esterre, Lauretta and Cozzie, primarily.

at issue in this case occurred while Crum's prior complaint against the county was pending or within six months after its resolution. Thus, she is entitled to the disputable presumption of retaliatory motive.

The presumption of retaliatory motive establishes a causal connection between Crum's protected activity and the county's subsequent adverse employment actions. *Laib v. Long Construction Co.* (Aug. 1984), HRC Case No. AE80-1252, ***quoting*** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793; *Schmasow v. Headstart* (June 1992), HRC Case No. 8801003948; ***see*** *Foster v. Albertson's* (1992), 254 Mont. 117, 127, 835 P.2d 720, ***citing*** *Holien v. Sears Roebuck Co.* (Or. 1984), 689 P.2d 1292; ***see also*** *Moyo v. Gomez* (9th Cir. 1994), 40 F.3d 982, 984; *Alexander v. Gerhardt Ent., Inc.*, 40 F.3d 187, 195(7th Cir. 1994). Montana follows federal discrimination case holdings when the same rationale applies under the Montana Human Rights Act. *Crockett*, ***op. cit.***, 761 P.2d at 818; *Johnson*, ***op. cit.***, 734 P.2d at 213. Resort to the federal case law is proper, even though it is not mandatory. *Longan v. Milwaukee St. Rest.* (November 1983), HRC No. AE82-1796. The presumption satisfies the third element of her prima facie case.

The county proffered legitimate business reasons for undertaking the disciplinary actions against Crum. Each adverse action of which Crum complained was precipitated by performance problems or insubordination on her part. The discipline meted out to her was not necessarily disproportionate to the conduct which triggered the discipline. The disciplinary actions were mild, having no reasonably tangible impact upon the terms and conditions of her employment. Unfortunately, Crum perceived the discipline as unfair persecution. As a result of her perceptions and reactions, effective communication with management and her co-workers worsened.

As long as employers make their business decisions for non-discriminatory reasons, they may make those decisions as they see fit without violating discrimination laws. *St. Mary's Honor Center v. Hicks*, (1993) 509 U.S. 502, 506. Montana and federal courts acknowledge that a claim of discrimination does not authorize the adjudicators to second-guess employers' personnel decisions. "It is not the function of the courts to become the arbiter of all relationship decisions between employers and employees." *Finstad v. Montana Power Co.* (1990), 241 Mont. 10, 29, 785 P.2d 1372, 1383. ***See also***, *Keller v. Orix Credit Alliance* (3rd Cir. 1997), 130 F.3d 1101, 1109 (*citing Carson v. Bethlehem Steel Corp.* (7th Cir. 1996), 82 F.3d 157, 159 ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination]."

The hearing examiner found that the disciplinary actions taken were for legitimate business reasons. The problems with Crum's performance and attitude were real. The impact of the disciplinary actions was the opposite of what the county intended, worsening the situation instead of ameliorating the problems. But that did not establish that the county's reasons were pretextual, only that the county did not do a good job of solving the problems. Lauretta's insistence that d'Esterre push Crum harder to improve her behavior and performance may likewise have been a poor choice of tactics, but Crum did not establish that the litany of behavior and performance problems merely provided a pretext for retaliation for the filing of the prior discrimination complaint. Nor did the county's tardy provision of the required training demonstrate pretext. Finally, the county's inexplicable failure to remove the January 21, 2003, write up for insubordination, while demonstrating a surprising lack of competent file management, did not suffice to show pretext.

Crum at all times had the ultimate burden of proving her discrimination claims. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett*, ***op. cit.***, 761 P.2d ***at*** 816; *Johnson*, ***op. cit.***, 734 P.2d ***at*** 213*; Martinez v. Yellowstone County Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246. Although it is a close case in many respects, Crum failed to carry that ultimate burden. She was not subjected to retaliation for protected activity.

V. CONCLUSIONS OF LAW

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

2. Lewis and Clark County did not retaliate against Hedwig Crum for filing a previous Human Rights complaint by giving her unwarranted counseling and warning notices. Mont. Code Ann. § 49-2-301.

3. The complaint must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

Judgment is entered in favor of respondent Lewis and Clark County and charging party Hedwig Crum's complaint is dismissed.

Dated: November 18, 2005.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner

Hedwig Crum FAD tsp