

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0069011992:

LORNA BERGER,)	Case No. 884-2007
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
GALLATIN COUNTY,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Lorna Berger filed a Human Rights complaint against Gallatin County alleging the county discriminated against her on the basis of sex and retaliated against her. Prior to the hearing, Gallatin County moved to dismiss both charges. Berger did not oppose the dismissal of the sex discrimination charge and that charge was dismissed. Gallatin County argued that the retaliation claim must also be dismissed because the Human Rights Bureau's reasonable cause finding relied on facts that were not alleged in the complaint. Ruling on that motion was held in abeyance until the issuance of this decision. For the reasons stated below, that motion is denied.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on May 3 and May 4, 2007 in Bozeman, Montana. Gary Beiswanger, attorney at law, represented Berger. Alan Baris, attorney at law, represented Gallatin County. Berger, Gene McLoney, Ed Kawa, Jeannie Brown, Erma Kurk, Sue Browning, Anne Adair, Ross Hofer, Kathy Younkitis, Jennifer Blossom, Erin Howard, Mitch Urdahl, Cynde Hertzog, and Lee Provance all testified under oath in this matter. Charging Party's exhibits 1, 2 (pp. 2&3 only), 4 through 8, 10, 11, 12, 13, and 14 and Respondent's exhibits 101, 103 through 111, and 112a were admitted into evidence.

The parties requested time for post-hearing briefing. These requests were granted and the parties' final briefs were timely received on July 30, 2007, at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

A complete statement of issues appears in the final pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. FINDINGS OF FACT

1. In 2001, Erin Howard, the office administrator of the Gallatin County Road and Bridge department, hired Berger to work as filing clerk. Berger was trained in completing payroll, filing, coding invoices and assisting in the process of paying claims. She also processed encroachment and utility permits. She was initially hired as a part-time employee.

2. Erin Howard was Berger's direct supervisor. Lee Provance was at all times material to this case, the superintendent of the road and bridge department. At the time of Berger's hire, the bridge crew foreman was Dan Kuchinsky.

3. Berger received her first performance review in 2002. Her last performance review was provided in 2005. Berger received good performance reviews. On one occasion during her employment, Provance gave Berger a performance review. All other performance reviews were conducted by Erin Howard.

4. During 2005, Berger's other job as a part owner of a trucking company ended, enabling her to work full-time for the county. Because of Berger's good work, Provance lobbied the county to make her a full-time employee in March, 2005. In addition, Provance sought and successfully obtained a pay raise for Berger in December 2004 to bring her up to target market for her position.

5. Beginning in 2003, Berger was authorized to pay claims for the Road and Bridge Department. Howard authorized Berger to pay such claims because Howard, who was embarking on having a family, knew that she would be absent for extended periods of time. After the birth of her second child in late 2005, Howard knew that she would not likely in the future have extended leaves of absence. In order to centralize and standardize the claims paying process, Howard decided it was no longer necessary to have Berger able to pay claims. Thus, for 2006, Howard had no need to and did not put Berger on the county claims authorization list.

6. Berger entered into a romantic relationship with Dan Kuchinsky, the Road and Bridge Department foreman. Provance discussed this relationship with both Berger and Kuchinsky to make sure that they did not let their relationship interfere with their respective job duties.

7. Berger, Howard and Provance maintained good working relationships until January 2006. This is demonstrated by the fact that during 2002 and 2003 (as demonstrated by Berger's

comments on her evaluation) and 2004 and 2005 (as shown by Berger's testimony at hearing) felt that Provance and Howard were good supervisors.

8. On January 16, 2006, Provance suspended Kuchinsky for insubordination. Kuchinsky had been telling his bridge crew that Provance was out to fire them all. Kuchinsky treated his crew very poorly. Conditions had gotten so bad that the lead man on the crew, Bill Brownell, called Provance and told him what had been going on and demanded that something be done. Provance investigated Brownell's complaints by interviewing the other crew members. These members confirmed Brownell's complaints. Shortly after the suspension, Provance discharged Kuchinsky for his conduct.

9. On January 17 at about 8:00 a.m., Provance informed both Brownell and Berger that he had suspended Kuchinsky. He also made Brownell interim bridge foreman. Upon hearing the news, Berger began crying and told Provance "It's all my fault." For the better part of that morning, Berger cried, at times uncontrollably, on and off. Her distress was obvious and finally Provance told Berger that she could take the rest of the day off. Through the rest of the week, Berger was in and out of the office.

10. At 8:00 a.m. on the day after learning of Kuchinsky's suspension, Berger went to Gallatin County Human Resources manager Cynde Hertzog and filed a verbal complaint against Provance alleging sexual harassment and a hostile working environment. Berger did not hide from Hertzog the fact that she was upset with Provance for suspending Kuchinsky. Indeed, she told Hertzog that she felt the suspension of Kuchinsky was "gross injustice."

11. Hertzog encouraged Berger to file her complaint in writing and told Berger that if her complaints were accurate, discipline would be merited. On January 23, 2006, Berger supplemented her verbal complaint with a written letter to Hertzog about Provance's alleged conduct.

12. After Kuchinsky's discharge, Berger's attitude toward her coworkers changed dramatically. She became distant from Howard. She stopped speaking to Provance and Brownell. She also turned a "cold shoulder" to Mitch Urdahl (testimony of Urdahl), the Gallatin County road foreman.

13. Provance continued to say a "good morning" and "good evening" when he entered and left the Road and Bridge office. His greetings were directed to all persons within earshot, including Berger. He no longer had direct contact with Berger for obvious reasons: he was aware of her allegations of sexual misconduct and he did not wish to give her any opportunity for making any further allegations.

14. Provance maintained Road and Bridge personnel files in a file cabinet in his office. Soon after Kuchinsky's discharge, someone accessed his personnel file without required permission from Provance. There was information in that file that had not been revealed to

Kuchinsky. In discussions with Provance, Kuchinsky stated that he was aware of that information even though Provance had not provided it to him.

15. At the time Kuchinsky's personnel file was improperly accessed, Berger was trying to help Kuchinsky mount his grievance against Provance and the county. Because Kuchinsky had obtained information from his personnel file of which he should not have been aware, Provance became convinced that Berger was the person who had surreptitiously accessed Kuchinsky's personnel file.

16. On January 24, 2006, Provance issued a set of directives to Berger regarding her work hours and her leaving during normal working hours (which she had been doing with some regularity). Provance required her to (1) only work normal hours at the road and bridge office (7:30 a.m. to 4:00 p.m.), (2) prohibited Berger from entering Provance's office unless invited by him in the presence of another staff member, (3) required Berger to only open work files (be they "hard" files or computer files) that were necessary to the performance of her job, (4) prohibited Berger from taking leave unless she filled out the proper paper work to do so, and (5) prohibited Berger from entering the Road and Bridge Department grounds after normal work hours or during weekends or holidays.

17. Provance's rationale for imposing these restrictions was not to retaliate against Berger for alleging sexual harassment. Rather, Berger's allegations legitimately compelled Provance to take measures to ensure that Berger and he would not be alone in the office. He made Berger fill out county required leave slips because Berger had twice recently left without informing either him or Howard that she was leaving. And he imposed the requirement that she not come onto Road and Bridge property after hours or weekends because he legitimately and reasonably believed that Berger had accessed Kuchinsky's personnel file without his knowledge and disseminated information in that file to Kuchinsky. These directives were not unreasonable under the circumstances.

18. Hertzog investigated Berger's complaints against Provance by interviewing all the witnesses that Berger wanted to have interviewed. To complete the investigation, she talked to shop personnel, to Howard, Provance and Berger. After completing the interviews, Hertzog concluded that Berger's allegations were baseless. Hertzog reasonably discounted Berger's allegations about Provance allegedly asking her to go to Hawaii with him because Berger never brought it to anyone's attention until a year after it allegedly occurred. Hertzog quite reasonably concluded that Berger's allegations were not based on any concern about sexual harassment but were in fact motivated by Berger's anger toward Provance over Kuchinsky's discharge.

19. To ensure that no illegal or inappropriate actions were taken against Berger due to her complaint, Hertzog required Provance to clear any further disciplinary action taken against Berger with Hertzog and the Gallatin County Attorney. Hertzog also told Provance that retaliation against Berger would not be permitted. As described below, additional disciplinary

actions were taken against Berger. Each one of those actions was reviewed and approved by Hertzog and the county attorney before being implemented.

20. Berger continued her crusade to bring to light how she felt Kuchinsky's firing was wrong. Berger complained to Hertzog and each county commissioner about Kuchinsky's firing.

21. Berger continued to display emotional outbursts and continued to treat office personnel (Howard, Brownell and Urdahl) poorly. Because of this, on February 6, 2006, Provance issued Berger a written warning regarding her behavior (Exhibit 105). The warning required Berger to be pleasant with employees, to stop her "silent treatment" of other employees, to ask permission to leave the road office, and to fill out appropriate leave slips when leaving for extended periods of time. *Id.*

22. Provance's rationale for imposing the restrictions on Berger was not motivated by any desire to retaliate. Rather, they were prompted by Berger's attitude toward her co-workers and her frequent absences from the office since the time that Kuchinsky had been suspended.

23. On February 27, 2006, Berger was in the office and received a call regarding flooding on Amsterdam Road in the Gallatin Valley. The call came in from a veterinary clinic located on property that was threatened by the flooding. Berger took the call. Because she was not speaking to Brownell, Berger, instead of immediately notifying Brownell, took a message from the caller and then clipped the message to Brownell's door. Brownell was in his office at the time.

24. The Road and Bridge Department's policy regarding flooding was to immediately dispatch a foreman to assess the flooding. Only after the foreman has a chance to review the situation on scene does the department then decide whether to take immediate action.

25. The flooding at the property became so bad that the veterinary clinic called back a few hours later in somewhat of a state of panic. This time, Berger called Brownell on the radio to advise him of the problem. Brownell responded with personnel and discovered the flooding was severe. The problem required renting a pump and additional piping in order to pump the water away from the threatened property. Because there was no response at the time the first call was placed to the Road and Bridge Department, personnel were required to stay at the scene much longer (overnight) than they would have had to had the call be handled promptly. This resulted in the Road and Bridge Department having to pay substantial overtime to employees.

26. Provance investigated the cause of the department's failure to immediately respond to the flooding after the first call was received. He spoke to all department personnel involved and reasonably determined that Berger's failure to communicate the flooding problem to Brownell immediately after the first call resulted in the flooding becoming worse. Because of Berger's attitude toward Brownell, Provance reasonably concluded that the only reason she did

not hand the note to Brownell after the first call was Berger's refusal to interact with Brownell after the suspension and firing of Kuchinsky.

27. Berger also made mistakes in completing her payroll duties. These mistakes were yet another manifestation of her deteriorating work brought on by her anger with Provance and the other employees in the Road and Bridge department over Kuchinsky's discharge. Among the mistakes were errors made on the timecards of Provance and employees Clay Stinson and Steve Allen.

28. On March 7, 2006, Provance issued Berger a second letter of warning, advising her that her failure to notify Brownell in a timely fashion of the flooding and her continued attitude toward her co-workers at work merited a reprimand. Exhibit 106. With respect to the flooding incident, Provance articulated wholly legitimate reasons for faulting Berger for the problem. Berger did not make direct contact with Brownell that day because of an ongoing grudge against him for his involvement in Kuchinsky's suspension and discharge. Provance's letter also articulated legitimate business reasons for reprimanding her for mistakes in payroll, "failure to communicate with others in the office, and maintaining a "sullen demeanor" in the office. Exhibit 106, page 2.

29. As a result of the March 7, 2007 written reprimand, Berger was given a plan for corrective action that included the following:

- (1) That she would communicate effectively with all staff members;
- (2) That she would notify the appropriate foreman of any emergency;
- (3) That she would double check her work for errors;
- (4) That she would be pleasant with staff and the public while at work.

Exhibit 106.

30. On March 17, 2006, Berger overcharged a road and bridge employee, Kwinci Tatarski, six hours of vacation time. Instead of charging Tatarski's account eight hours per day while she was out of the office, Berger charged ten hours per day against the account. She made this mistake despite previous admonitions to be more careful in her work. Her work on payroll continued to be sloppy and demonstrated a lack of concern for completing her payroll duties accurately.

31. Because Berger's payroll work continued to be sloppy, and because of Berger's attitude problems, Howard asked Provance to prepare another written warning to Berger. This resulted in Provance issuing Berger a third letter of warning on March 21, 2006. Exhibit 108.

This letter advised Berger that she had overcharged Tatarski's vacation hours. The letter further advised her that she must be more attentive to her work.

32. While Berger perceived the payroll errors to be trivial, Howard did not. Payroll errors concerned Howard because it would take two weeks to fix the problem if it was not caught. Furthermore, Berger's payroll errors did not begin until *after* the time Kuchinsky was suspended. Berger's payroll errors reasonably appeared to go hand in hand with the poor work attitude she developed when Kuchinsky was suspended and then fired.

33. After preparing the March 21, 2006 written reprimand, Provance and Howard called Berger into a meeting with them so that Provance could give Berger the reprimand. At first, Berger refused to come into the meeting room unless a county commissioner was present with her (something that would not have been possible at the time because no commissioner was available). Howard and Provance offered to have a third party sit in but Berger insisted on having a commissioner come in.

34. Berger threw a temper tantrum during her meeting with Provance and Howard. She was argumentative with and yelling at Howard and Provance. Berger also insisted on placing her rebuttal in writing on the letter of reprimand even though Provance wanted her to write out her rebuttal on a separate sheet of paper. Provance warned Berger not to write her rebuttal on the letter of reprimand, but Berger kept on doing so. She also verbally attacked Howard.

35. Berger's temper tantrum and insubordination toward Provance resulted in Provance suspending her from work for three days. Exhibit 109. Berger refused to acknowledge receipt of the letter suspending her.

36. After returning from her suspension, Berger's work improved. She did not receive any further letters of reprimand.

37. At no time after Berger's complaint of sexual harassment was she excluded from Road and Bridge meetings. She was free to attend as she always had and Provance took no steps to exclude her from those meetings. On occasion, the door to the office where the meetings were held would be closed. This was not to exclude Berger from the meetings, however. The purpose was to ensure that the meetings would not interfere with the customer service desk which was a few feet from the office where the meetings were held.

38. In April 2006, Howard enrolled Berger in training that was scheduled for June 2006. Berger never attended that training because she left her employment prior to the training. Berger was never relieved of any of her duties within her job description even after she filed her complaint.

39. On one occasion, Provance refused to drink the coffee in the Road and Bridge Department because he was concerned that it might be poisoned. There is no evidence that this comment was directed at Berger.

40. On April 30, 2006, Berger sent Provance a letter of resignation wherein she left her employment with Gallatin County effective May 1, 2006. In her letter of resignation, Berger stated “No matter how much you hate me for exposing your illegal activities and for not lying and aiding in yet another wrongful discharge of another employee, I am not about to be a follower of you or anyone else. If history is any indicator, your little Jonestown will too come crashing down and your flock will scatter.”

IV. OPINION¹

Berger contends that the imposition of discipline on her in January, February and March, 2006 was retaliatory. She argues that the discipline amounted to adverse employment action and she relies on the timing of the imposition of the discipline and her perception that the discipline was unmerited to support her case. Gallatin County responds that no adverse employment action occurred and that in any event the discipline imposed was imposed for legitimate reasons. In addition, Gallatin County argues that Berger’s case should have been dismissed before hearing because the Human Rights Bureau exceeded its jurisdiction in finding that retaliation existed based on facts other than those alleged by Berger in her complaint.

Whether or not the action taken against Berger in this case was adverse, it is clear that there is no causal link between the employment action and Berger’s engaging in protected activity. The discipline was not implemented in order to retaliate. Rather, it was legitimately imposed to deal with Berger’s deteriorating work habits which were almost certainly borne out of resentment for Provance’s suspension and discharge of Kuchinsky.

A. *The Hearings Bureau Cannot Dismiss The Complaint Before Hearing.*

Gallatin County argues that this matter should have been dismissed by the Human Rights Bureau at the investigation stage because, instead of relying on the facts alleged by Berger as retaliation in her complaint, the Human Rights Bureau relied on other facts not pleaded in the complaint to reach its determination that reasonable cause existed for the retaliation claim. In support of its argument, Gallatin County bootstraps from the rationale of *Centech v. Sprow*, 2006 MT 27, 331 Mont. 98, 128 P.3d 1036 (which held that a hearing officer could not amend a complaint which had alleged only sex discrimination in wages paid for part-time work to encompass discrimination in wages based on sex in full-time work). The hearing officer does not agree with the respondent’s argument for two reasons.

¹ 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.

First, *Centech* is inapposite to the facts of the instant case. In *Centech*, the Montana Supreme Court affirmed a district court determination that the respondent had been denied due process at the hearing stage because the hearing officer *sua sponte* amended the complaint to conform to the evidence presented at hearing when that evidence had not been pled in the complaint. Recognizing that the Montana Human Rights Act did not permit the commission to consider claims filed more than 180 days after the occurrence or discovery of conduct violating the Act, the supreme court concluded that the hearing officer erred in amending the complaint to include a factual basis for recovery which had not been pled in the complaint. 2006 MT ¶24, ¶25.

No such denial of due process has occurred in this case. The facts alleged in the complaint are the same ones that were litigated at the hearing. There is no problem in this case with the 180-day time limit for filing a complaint and the respondent has been on notice of the issues and facts alleged by the charging party since the filing of the complaint in this matter. There has been no denial of due process at all.

Second, the respondent has failed to cite any authority for the proposition that the hearing officer has the power to review a reasonable cause finding made by the Human Rights Bureau. The statutes and rules provide that the Human Rights Bureau will first make an informal investigation of the merits of the claim and if reasonable cause is found to exist, the matter then goes to conciliation. If the conciliation efforts fail, then the matter proceeds to contested case hearing before the Hearings Bureau. Mont. Code Ann. §§49-2-504, 49-2-505; Admin. R. Mont. 24.9.225, 24.9.226.

There is no procedure for this administrative tribunal to review in an appellate capacity the propriety of a reasonable cause finding of the Human Rights Bureau (except incidentally through the course of the contested case proceeding). It is a basic rule of law that an administrative agency has only those powers specifically conferred upon it by statute or rule. *Auto Parts of Bozeman v. Uninsured Employers' Fund*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 citing *City of Polson v. Public Service Com'n* (1970), 155 Mont. 464, 473 P.2d 508, 511, *Gwynn v. Town of Eureka* (1978), 178 Mont. 191, 582 P.2d 1262, 1263. In the absence of any power to review a reasonable cause finding, there is no basis to dismiss the instant complaint before a hearing.

B. *Gallatin County Did Not Retaliate Against Berger.*

The Montana Human Rights Act prohibits retaliation against an individual who has “opposed any practices forbidden under this chapter . . .” Mont. Code Ann. §49-2-301. Where the only evidence of retaliation is circumstantial, the burden shifting protocol of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. Berger relies exclusively on circumstantial evidence of retaliation, arguing that the timing of the discipline, coupled with her perception that the discipline was unmerited, and the county’s alleged failure to respond to her complaint of sexual harassment,

demonstrate the retaliation. Hence, the indirect evidence analysis must be used to evaluate this case.

A charging party presents a prima facie case of retaliation when she shows that (1) she engaged in statutorily protected activity, (2) she was subjected to adverse employment action, and (3) that a causal link exists between the protected activity and the adverse employment action. *Beaver v. Dpt. of Natural Resources and Cons.*, 2003 MT 287, ¶ 71, 318 Mont. 35, ¶ 71, 78 P.3d 857, ¶ 71; *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). Protected activity includes opposing any act or practice made unlawful by the Montana Human Rights Act. Admin. R. Mont. 24.9.603 (1)(b).

To make out a prima facie case, a charging party must present evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a *prima facie* case exist. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005). If the employee succeeds in making a *prima facie* case, the burden of production shifts to the employer to show a legitimate, non-retaliatory reason for the employment action. *Id.* at 754-55. If the employer meets its burden, the presumption of discrimination created by the *prima facie* case disappears, and the employee is left with the ultimate burden of proving that the protected activity was the but-for cause of the adverse employment action. *Id.* Berger at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of retaliation. *St. Mary's Honor Center at 507; Heiat*, 912 P.2d at 792.

“[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.” *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (*quoting St. Mary's Honor Center*, 509 U.S. at 515) (emphasis added). *See also Vortex Fishing Sys, Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15. “[T]o establish pretext [Berger] ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the County’s] proffered legitimate reasons for its actions that a reasonable [fact-finder] could rationally find them unworthy of credence.’” *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642 (9th Cir. 2000) (*quoting Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (1999)).

In order to prove the first element of the prima facie case, a charging party does not need to prove that unlawful discrimination occurred. Rather, she need only show that she had a reasonable belief that the employment practice she opposed was prohibited by the Act. *Trent v. Valley Electric Assn.*, 41 F. 3d 524, 526 (9th Cir. 1994), *citing Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978). In *Sias*, the court explained the rationale for the “reasonable belief” standard, noting:

The elimination of discrimination in employment is the purpose behind Title VII and the statute is entitled to a liberal interpretation. When an employee reasonably believes that discrimination exists, opposition thereto is opposition to

an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.

Id. at 695.

Berger has made a prima facie showing on the first two elements of her case. On its face, the first element is met because Berger had a reasonable (albeit barely) belief that Provance's alleged conduct was illegal under the Human rights Act. Likewise, the issuance of the reprimands were "adverse" in that they were written reprimands which became a part of her personnel file.

Berger's case fails, however, in the third element of her claim. For the reasons stated by the respondent, the hearing officer tends to agree that Berger has not made out a prima facie case for the third element. Even assuming that she had, however, she has utterly failed to carry her ultimate burden of persuading the fact finder that there is a causal link between the protected activity and the alleged adverse employment actions. Gallatin County has demonstrated that it had legitimate, non-retaliatory reasons for its actions. Gallatin County disciplined Berger only after her behavior in the workplace deteriorated and the discipline imposed was proportional to the problems in Berger's work.

Berger's authority to process claims was changed because her supervisor Howard had returned to work on a permanent basis and wanted to handle the claims exclusively to insure consistency in the accounting. Berger's hours were slightly modified, and she was told not to enter Provance's office to curtail any further allegations of sexual harassment and to protect both Berger and Provance. She was prohibited from being on the grounds on weekends and holidays to assure the integrity of the Kuchinsky grievance and avoid owing her overtime or compensatory time.

Berger was not ostracized by other employees. She was mad at the personnel in the Road and Bridge department because of Kuchinsky's suspension and discharge and she distanced herself from her co-workers. In addition, as the respondent correctly points out, even if the employees did stop interacting with Berger, such actions were their private reactions to her behavior and are not considered adverse employment actions. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000).

Berger is simply wrong in her position that Gallatin County did nothing to investigate her complaint. To the contrary, Hertzog fully investigated the issue, interviewing witnesses identified by Berger, and quite correctly determined that Berger's charges of harassment and discrimination had no merit. Hertzog's incorrectly telling Berger that she had a right to appeal Hertzog's determination does not indicate that Gallatin County was stonewalling Berger in her complaint. Moreover, as the respondent points out, even if the hearing officer were to assume there was any failure on Gallatin County's part to properly investigate Berger's complaint of retaliation, the failure was, at most, a mistake with no ill intent to discriminate. *See Cellini v.*

Harcourt Brace & Co., 51 F.Supp.2d 1028 (S.D. Cal. 1999) (citing *Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991) (honest mistake not pretextual). The human resources department and Hertzog clearly made substantial and good faith efforts to prevent any alleged retaliation against Berger.

The flooding incident clearly was worsened by Berger's desire to avoid contact with Brownell. Despite office policy, she did not want to have contact with Brownell because she harbored anger toward him for his role in the suspension and firing of Kuchinsky. And the discipline imposed as a result of her conduct -simply requiring her to have direct contact with the foreman in any such circumstance- is not adverse and certainly is proportional to the problem.

The competent evidence regarding the Provance's comment about the coffee -Provance's testimony-shows that the comment had nothing to do with retaliating against Berger. Indeed, as determined by the hearing testimony, it is not possible to consider it to be an adverse employment action.

Gallatin County has met its burden to state a legitimate, non-retaliatory reason for its employment actions. The burden now shifts back to Berger to show that Gallatin County's arguments are mere pretext.

The hearing officer agrees with the respondent that Berger provided no credible evidence of pretext and she therefore failed to prove her retaliation claim. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003) (claimant must produce specific, substantial circumstantial evidence of pretext). This is true for several reasons, not the least of which is Berger's utter lack of credibility in this case. Among other things, a charging party's timing and motives for bringing a complaint of discrimination may call into question that person's credibility. *Selby v. Amtrak*, 1999 U.S. App. Lexis 22495, ¶19 (unpublished opinion)(an employee's timing and motives for complaining may call into question his or her credibility).

It is almost certain, based on the timing of her complaint against Provance, that her claims of discrimination and harassment were fabricated. Had Berger actually believed that Provance had engaged in discriminatory and harassing conduct, under the facts of this case she would undoubtedly have reported it sooner. Instead, she waited until the very day after Kuchinsky was suspended to bring out her allegations against Provance. Her conduct was designed to either shift the focus away from Kuchinsky or was vindictive against Provance because she was mad that Kuchinsky had been discharged. Her assertions of discrimination are not credible and, because her motives in complaining are questionable, the hearing officer finds that her entire testimony in this matter is infected by a lack of credibility.

The hearing officer is convinced that Berger's motivation for complaining in this case, and the motivation behind all of her testimony at hearing, stems from her dissatisfaction with

Kuchinsky's suspension and discharge. Her dissatisfaction with Kuchinsky's discharge was made known to anyone who would listen in Gallatin County. It permeated several of her communications with Hertzog and other Gallatin County personnel and it was obviously the motivating force behind her resignation as demonstrated by her letter of resignation.

Moreover, the timing of the imposition of discipline does nothing to rebut Gallatin County's case. The discipline properly coincides with the deterioration of Berger's work attitude. The timing of the discipline, under the facts of this case, simply shores up Gallatin County's position that the discipline was legitimate.

Berger has failed to carry her ultimate burden of persuasion to prove her case. To the contrary, the evidence indicates that Berger's deteriorating attitude, fueled by her disdain for Provance and his handling of Kuchinsky, merited the wholly legitimate discipline imposed upon her. The discipline was not imposed in order to retaliate against Berger and her case must fail.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. The complaint in this case cannot be dismissed without a hearing because the Hearings Bureau has no power to engage in an appellate review of a reasonable cause finding of the Human Rights Bureau and the charging party has not raised any claims that were not pleaded in the original complaint.
3. Gallatin County did not retaliate against Berger by imposing discipline against her.
4. Because Gallatin County did not retaliate against Berger, the issues of whether Berger constructively quit and whether she is entitled to damages are moot.

VI. ORDER

Judgment is found in favor of Gallatin County and Berger's case is dismissed.

DATED: September 7, 2007

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry

Berger FAD ghp