

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011911:

LINDA RAIHA,)	Case No. 591-2007
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
BUTTE-SILVER BOW LOCAL)	
GOVERNMENT,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Linda Raiha filed a Human Rights complaint against Butte-Silver Bow County (BSB) alleging age discrimination in employment (refusal to hire) and retaliation. At the joint request and stipulation of the parties, jurisdiction in this matter was extended to permit the administrative proceedings to extend for more than 12 months after complaint filing.

The contested case hearing in this matter was held on February 22, 2007 in Butte, Montana. GERALYN Driscoll, attorney at law, represented Raiha. Tom Welsch, attorney at law, represented BSB. Raiha, City Court Judge Steven Kambich, City Court Clerk Arlene Spear, BSB Personnel Director Tim Clark, BSB Chief Executive Officer Paul Babb, Former City Court Judge Tom Gallagher, Rhonda Johnson, Dina McLeod, and BSB County Weed Control Supervisor John Moodry all testified under oath in this matter. The parties stipulated to the admission of Charging Party's A, B, D, E, F, G, H, I, J, K, P, Q, R, V and Respondents' Exhibits 101-117, 119 and 120. In addition, Charging Party's Exhibits N and M-BSB 5, M-BSB 6, M-BSB 8, M-BSB 10 through 12, M-BSB 29, M-BSB 55, M-BSB 167 through 169, M-BSB 263 through 536, M-BSB 560 through 566, M-BSB 578 through 585 and M-BSB 613 through 621 were also admitted into evidence.

Counsel for each party requested time for post-hearing briefing. These requests were granted and the parties final briefs were timely filed on June 4, 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 examiner 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. Linda Raiha has worked full-time for Butte-Silver Bow County since 1982. During that time, she has been a “floater.” A “floater” is a person who moves around to different departments in the county to assist in doing different tasks.

2. Steven Kambich was elected to the position of city court judge in Butte and took office on January 1, 2005. At the time Kambich took office, he had one full-time employee, Arlene Spear, who served as the city court clerk. At the time Kambich took office, Spear was 63 years old. At the time of the hearing in this matter, she was 65 years old. At all times pertinent to this matter, Spear has served and continues to serve as Kambich’s clerk.

3. Raiha was assigned to assist in the city court on an as needed basis. While working for Kambich, Raiha did not receive any evaluations of any kind. This was because Kambich was not responsible for evaluating Raiha. This fact is corroborated by the testimony of former City Judge Tom Gallagher. During his eight year tenure as city judge, Gallagher never evaluated Raiha even though she was doing some work in the city court.

4. While Raiha never received any negative written comments from Kambich, she did have two problems with her work. First, she had some trouble filing warrants and city traffic tickets properly. This fact was corroborated by Spear. Second, Kambich felt that Raiha’s public contact skills were not what they should be for holding the full-time position with the city court. Spear also observed these problems with Raiha’s city court work.

5. Between January 2005 and June 2005, rumors began to circulate around BSB about the possibility of an early retirement incentive program for BSB employees. Kambich was concerned about losing experienced workers. He talked to both Spear and Raiha about whether they had any plans to retire. Kambich never made any comments about age nor did he ever indicate that he cared one way or the other about any worker’s age. His motive in inquiring into retirement was not borne out of any desire to discriminate against anyone based on age. Raiha herself testified at hearing that she never got the impression that Kambich did not like older workers or that he would rather have younger workers around.

6. Kambich arranged for computer training for the employees on the SWIFT computer program. The training was in-house and was conducted over a two week period by a person working with the Montana Supreme Court. During the first week, Raiha was able to attend the sessions conducted in the morning. She did not, however, attend all of the training offered that week. During the second week, due to the need to ensure that the counter in the City Court

was adequately staffed, Raiha volunteered to work at the counter. Because of this, she was not able to complete her training on the SWIFT system. Kambich was aware that Raiha had not completed her training and he considered this in reviewing her internal application.

7. Because of the work load in the city court, Kambich concluded that a full-time assistant clerk position was necessary. He sought permission to hire an additional full-time clerk to assist in the city court. BSB developed a job description of the position and recruited internally between June 24 and June 30, 2005, to fill the position.

8. The job description indicated that the position required the successful candidate to establish and maintain close cooperative working relationships with the City Court judge, employees in the Justice Court and District Court, other BSB employees, defendants and the general public. The position listed several clerical duties including obtaining information from the jail on defendants scheduled to appear in City Court, maintaining records of continued cases, sending notices of trials to defendants, and various other duties. Among the required skills and knowledge and abilities was the requirement that the employee “have a good knowledge of office filing systems and procedures.” Exhibit B.

9. The new City Court assistant clerk position was covered by a collective bargaining agreement that set forth criteria related to the selection process which BSB personnel were obligated to follow in hiring for that position. That criteria required simply that there be written criteria against which to evaluate the applicants and that the selection procedure be developed in advance of any applicant review. In this case, both criteria were met. The position description provided the written criteria against which all applicants would be assessed and the description was developed in advance of any application process.

10. BSB Policy 125 (Exhibit I) sets out a framework for reviewing hiring/ promotion opportunities. Where a collective bargaining agreement is in place, this policy does not apply unless the collective bargaining agreement does not cover the issue. In the case of hiring for the city clerk position, the collective bargaining unit covered the method to be used in reviewing applications for the position.

11. Raiha, Sally Perrini, and Laurie Rose all applied for the position. At the time of her application, Raiha was 61 years old. The other two applicants were both over the age of 40. Raiha’s application was a very simple one page standard internal application document (Exhibit C) that stated: “I have been working at city court for the past 4-5 years and doing the required work. I recently went through training for the new supreme court computer program through the State of Montana [sic] I have computer skills in various programs, take shorthand and typw [sic] with accuracy.” Though the form did not require the applicant to submit any additional materials to support the application, it did not prohibit the applicant from doing so.

12. Raiha gave a minimal description of her experience for the position on the form. She made no effort to explain any of her training or experience pertinent to the job. Her

application gave Kambich little to go on. It did not set out any particulars of her work history nor did it direct the reviewer to any other sources regarding her work history. Not surprisingly, Kambich relied on his knowledge of Raiha's work experience since Raiha provided Kambich no other means by which to evaluate her application.

13. Nothing in BSB hiring practices and procedures requires an employer to interview an applicant. The internal application form itself indicates that "An interview may be scheduled provided the applicant meets minimum qualifications and the length of service requirements established for the position."

14. Kambich reviewed the three internal applications and rejected all three, without giving any of the three applicants interviews. He relied on his knowledge of having worked with each of the applicants since the time he had taken office. He rejected Perrini because of concerns about her ability to maintain confidentiality. He rejected Rose over concerns about her ability to handle the public (feeling she might be overwhelmed by the public).

15. Kambich rejected Raiha because of concerns about her filing skills and also because of concerns about her office mannerisms. On one occasion, Raiha had told Kambich in the presence of others that he "better get moving," embarrassing Kambich. In addition, at the time of evaluating Raiha's application, Kambich knew that Raiha had not completed the computer training that he had arranged for Spear and Raiha, which was necessary to carry out their jobs in the City Court.

16. Because Kambich did not accept any of the three applicants, he contacted BSB personnel director Tim Clark by letter on July 1, 2005 and requested that the city court clerk position be posted externally. He reiterated his rejection of the three internal applicants in a subsequent letter to Clark on July 26, 2005. That letter indicated that none of the three in-house applicants possessed adequate qualifications or work experience to perform the duties of the job.

17. On July 20, 2005, Raiha's union filed a grievance on her behalf over BSB's failure to promote Raiha or one of the other two in-house applicants for the city court clerk position. That grievance process continued until January 19, 2006, when the union dropped its grievance.

18. After Kambich rejected the three internal applicants, BSB recruited for the position externally. Raiha and several other persons applied for the job by submitting the applications contained in Exhibit M. Kambich reviewed the applications and chose ten persons for an interview. Raiha was not one of the persons he chose.

19. Among the persons chosen for an interview were Rhonda Johnson, Christina Bloom and Sue Atkinson. Johnson's application reveals that she had worked in the Butte City Court (as a Career Futures volunteer) and mentioned Spear as a reference. Kambich was

familiar with Johnson's work while she had worked in the City Court. Johnson performed all functions of the city court clerk job while working as a volunteer there and did them well. As Spear remarked at hearing, and the hearing examiner finds, Johnson was "great" in that position while she volunteered in the city court.

20. Bloom had been a court clerk for the Granite County Justice Court and the Phillipsburg City Court. On paper, Bloom had much stronger qualifications than Raiha for the position. Atkinson had been the city judge for the City of Walkerville, Montana for several years. On paper, she too had much stronger qualifications for the position than Raiha.

21. BSB assembled a panel to interview the 10 applicants chosen. The panel was comprised of Kambich, Spear, and Jeff Amerman,, Budget Director for BSB. After completing the interview process, the panel unanimously chose Johnson for the position.

22. Raiha filed a grievance with BSB on August 9, 2005 to protest the fact that she was not selected for the city court position. On August 17, 2005, CEO Babb denied the grievance on the basis that Kambich was an elected official.

23. Johnson initially performed her duties well. However, her attitude began to change while she was in the position. She became rude and short tempered with the public and was disrespectful to Kambich. In addition, in one instance she improperly accepted cash for a fine payment even though she was not permitted to do so. Because of her attitude and the incident of improperly taking cash for a ticket, Kambich discharged Johnson sometime in January 2006.

24. BSB utilized an internal recruitment process to fill the position left vacant with Johnson's discharge. Seven persons who were all BSB employees were interviewed for the position on February 2, 2006. Raiha did not apply for the position.

25. The interview panel to fill this new vacancy consisted of Kambich, Jon Vendever, BSB's Director of Public Works, and Amerman. This time, the interview panel unanimously chose Marilyn Starcevich. Among other qualifications, Starcevich was thoroughly versed in using the SWIFT computer system. This particular qualification was obviously important for the position since Kambich anticipated that the city court would be implementing the system in city court in order to comply with Montana Supreme Court requirements.

26. In July, 2006, Kambich requested that the new city court clerk position be upgraded from a Grade 2 to a Grade 4 position. The difference between the two pay grades is \$230.00 per month (\$115.00 per each grade).

27. Kambich's reason for requesting the upgrade was for a legitimate business reason: at the time of the request, the SWIFT program was going to be implemented in the city court and the new hire would have to know and utilize this system. This represented an increase in job

duties over the requirements of the former position and Kambich believed this justified the upgrade he requested.

28. On March 6, 2006, Raiha filed a complaint of age discrimination with the Human Rights Bureau of the Montana Department of Labor and Industry.

29. On July 11, 2006, Raiha, who continued to work for the Weed Control Board, asked to be upgraded from Grade 2 to Grade 4 in her position as weed control secretary. The Weed Control Board agreed to authorize John Moodry to seek an upgrade for Raiha from grade 2 to grade 4. There is no evidence that Raiha's duties had increased in fulfilling her position with the Weed Board.

30. Since Paul Babb became the Chief Executive Officer of BSB in January 2005, BSB had been studying the equity of pay and pay increases for employees. There had been disparities in pay and there had been no uniform method of implementing pay increases. To this end, BSB contemplated commissioning a salary study from an independent group to identify how to increase salaries equitably. The actual salary study was not started until December, 2006.

31. Due to concerns about the lack of uniformity in salaries and salary increases, Babb implemented a policy in BSB of denying salary increases until such time as the salary situation could be properly analyzed and a salary study completed. It was during this time that the Weed Control Board approached Babb to obtain his authorization for salary increase for Raiha which the board had authorized at its August 1, 2006 meeting. In addition, the board sought a pay increase for Raiha's supervisor John Moodry. Because of the salary freeze, Babb denied each of the requested salary increases on September 12, 2006. See, Exhibit S, December 6, 2006 letter from Weed Board to Paul Babb, indicating the board was in receipt of Babb's letter denying raises for "both John Moodry and Linda Raiha."

IV. Opinion¹

The Statute of Limitations Did Not Expire

BSB argues that the statute of limitations on Raiha's claim expired before she filed the complaint in this matter. The hearing examiner does not agree.

Where a complainant attempts to resolve a dispute underlying a Human Rights claim by filing a grievance and the grievance procedure does not conclude within 120 days after the alleged act of discrimination, then a Human Rights complaint must be filed within 300 days after the alleged act occurred. Mont. Code Ann. § 49-2-501.

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.

In this case, the union filed a grievance on behalf of Raiha arising out of the alleged discriminatory conduct. The grievance was filed on July 20, 2005. That grievance ended on January 19, 2006 when the union decided it would not pursue the matter any further on Raiha's behalf. Raiha then had until at least early June, 2006 (300 days after Johnson was hired for the city clerk position) to file her complaint. She filed her complaint on March 6, 2006, well before that deadline. Her complaint is, therefore, timely.

BSB Is Not Protected By Governmental Immunity.

BSB argues that it is immune from suit with respect to the age discrimination charge under the auspices of Montana Code Annotated § 2-9-112(1). BSB contends that Judge Kambich alone made the decision not to hire Raiha, Kambich is part of the judiciary, and therefore, the county is immune from his conduct. Raiha contends that BSB's authority for this argument, *Mead v. McKittrick* (1986), 223 Mont. 428, 727 P.2d 517, is inapposite to the case at bar, because wrongful conduct by members of the judiciary in the performance of purely administrative acts are not insulated from liability.

As Raiha correctly notes, the Montana Supreme Court in *Clark v. Dussault* (1994), 265 Mont. 479, 878 P.2d 239, found that the immunity bestowed in Mont. Code Ann. § 2-9-112(2) did not protect a justice of the peace from an employment grievance filed against him by his office manager. In reaching its conclusion, the court reasoned that the office manager was not a "key court employee" under the analysis in *Mead*, whose hiring or firing was a judicial act which was immune from grievance. Rather, the court concluded that because the office manager was a county employee who was hired by the county and whose duties were not the "duties of the confidential and close nature of those generally associated with a personal secretary," no immunity existed. *Clark. at 488, 878 P.2d at 244.*

Mont. Code Ann. § 2-9-112(1) provides in no uncertain terms that the "state and other governmental units are immune from suit for acts or omissions of the judiciary." Mont. Code Ann. § 2-9-112(2) insulates a judge "from suits for damages arising from his lawful discharge of an official duty associated with judicial actions of the court." Mont. Code Ann. § 2-9-112(1) applies "to judicial acts with no stated limitation. It applies to protect the state and governmental agencies whenever the **judicial power of the state is put to use in a judicial action.**" *Knutson v. State* (1984), 211 Mont. 126, 129, 683 P.2d 488, 490 (emphasis added).

The judiciary includes district courts, justice courts, "and such other courts as may be provided by law." Montana Constitution, Article VII, Section 1. One court provided by law is a municipal court such as the one to which Kambich was elected. Mont. Code Ann. § 3-6-201. Thus, if Kambich's conduct is an "act or omission of the judiciary" within the meaning of subsection 2-9-112 (1), BSB will prevail on the age discrimination claim because BSB would be immune from suit.

Kambich's alleged conduct was not a judicial action within the meaning of Montana Code Annotated § 2-9-112 (1). The rationale of *Knutson* and *Dussault*, taken in conjunction with the language of the immunity statute, make this clear. The position sought by Raiha was not one of a key court employee. The position sought by Raiha was a county hired and paid position, like the employee in *Dussault*. Moreover, while the job criteria listed personal secretary as needed as one of several criteria, it certainly was not one of the more important criterion. There were several other and far more important ones, such as filing of warrants and tickets, sending out notices of trials, preparing warrants and dealing with the public. There is nothing in the record to suggest that the position was "of the confidential and close nature of those generally associated with a personal secretary." *Dussault, supra*. Since hiring an assistant city court clerk, with this job description, was not a judicial action, BSB is not entitled to immunity under Mont. Code Ann. § 2-9-112(1).

BSB Did Not Discriminate Against Raiha on the Basis of Age .

Mont. Code Ann. § 49-2-303(1) prohibits discrimination in employment based on age when (as here) the reasonable demands of the position do not require an age distinction. With no direct evidence of discrimination, the multi-tier standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies.² *Heiat v. E.M.C.* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Office*, ¶22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Raiha must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a prima facie case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In Montana, a prima facie case of age discrimination is made out where the charging party shows (1) that she is a member of a protected class; (2) that she was qualified for the position she sought, (3) she suffers detriment in employment and (4) she is replaced by a substantially younger person. *Cf., Clark v. Eagle Sys.*, (1996), 279 Mont. 279, 927 P.2d 995 (a charging party makes a prima facie case in an age discrimination case where that person shows that she is member of a protected class, she performs her job in a satisfactory manner, (3) she is terminated or demoted, and (4) she is replaced by a substantially younger worker.) If Raiha proves a prima facie case of discrimination, the burden shifts to BSB, who

² Charging party asserts that this case is also a "direct evidence" case (Charging Party's opening brief, page 7), but the hearing examiner does not agree. Where the charging party presents evidence of statements made by a decision maker related to the decisional process being challenged which reflect unlawful discrimination, then the case is one of direct evidence of discrimination. *Laudert, supra*, at ¶29. There has been no such showing in this case. Kambich's inquiries regarding whether Raiha or Spear intended to retire are not on their face discriminatory nor do they evidence in and of themselves any discriminatory intent. Rather, they are a part of the circumstantial evidence being presented by the charging party to establish her *prima facie* case. Accordingly, this case is properly analyzed under the *McDonnell-Douglas* indirect evidence framework.

must then offer evidence that is sufficient, if believed, to support a finding that its decision not to hire Raiha for the position was based on a factor other than age. *St. Mary's Honor Center at 506-07; Heiat at 328, 912 P.2d at 791* (quoting *Texas Dept. Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)). Should BSB carry that burden, Raiha must then “prove by a preponderance of the evidence that the legitimate reasons offered by [BSB] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont. 24.9.610(3). Raiha, however, at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *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 at 328, 912 P.2d at 791* (quoting *St. Mary's Honor Center at 515*) (emphasis added). See also *Vortex Fishing Sys, Inc. v. Foss*, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. “The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has ‘use[d] the factor reasonably in light of the employer’s stated purpose as well as its other practices.” *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)).

“[T]o establish pretext [Charging Party] ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [BSB’s] proffered legitimate reasons for its action 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 (Cal. App. 1999)). “An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action.” *Cellini v. Harcourt Brace & Co.*, 51 F.Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing *Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991)). Where a charging party’s evidence of pretense is strictly circumstantial, he or she “must produce ‘specific, substantial evidence of pretext’” in order to prevail. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). See also *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004) (in order to avoid summary judgment in absence of direct evidence of pretext, claimant must produce specific, substantial circumstantial evidence of pretext).

Here, Raiha has met her prima facie case under the rationale of *Clark, supra*. She is 61 years old and has produced evidence to show that she was qualified for the position. She has also shown that she was not hired and the job was ultimately given to Rhonda Johnson, a 38 year old person. Thus, the burden shifts to BSB to show legitimate non-discriminatory reasons for its conduct.

BSB met that burden. Kambich did not interview Raiha in the first round nor did he select her for an interview in the second round because he had legitimate concerns about her filing skills and her personality. Spear, who had been the city court clerk for years, corroborated

Kambich's concerns with respect to Raiha's ability to complete filing. Given the nature of the position as reflected in the position description (most notably the importance of filing and the obvious need for frequent contact with the public), Kambich's articulated reasons demonstrate a legitimate, non-discriminatory basis for deciding not to interview Raiha. Kambich used these two factors reasonably in light of the position's requirements as set out in the position description.

Because BSB has shown legitimate non-discriminatory reasons for its hiring decision, the burden thus shifts back to Raiha to show that Kambich's articulated concerns were nothing but pretext. Raiha has attempted to undo BSB's case by showing (1) that Kambich had discussed with Raiha whether she planned to retire, (2) that Raiha really didn't have any problems with her filing skills or her contact with the public as claimed by Kambich and she never arrived late or left early as Kambich claimed, (3) that Kambich did not follow the selection procedures established by the collective bargaining agreement that covered the hiring for the position and did not provide any written or oral reprimand to Raiha regarding her work, (4) that the person selected for the position after the external posting of the job was not as qualified as Raiha, and (5) that hiring Marilyn Starcevich to replace Johnson further shows the discriminatory animus of BSB. While this is a close case, the hearing examiner remains unconvinced that Kambich discriminated based on age in making his hiring decision.

While it is true that Kambich discussed retirement with both Raiha and Spear, under the circumstances of this case those discussions do not help to prove pretext. At the time of the discussions, rumors had been circulating around the courthouse that BSB would implement an early retirement program. Kambich, not wanting to lose experienced workers, inquired about Raiha's and Spear's plans since they both might be eligible. The legitimacy of Kambich's inquiries is reinforced by Raiha's own testimony that she did not get the impression that Kambich's questions were motivated by any discriminatory animus.

Raiha did have problems with filing as demonstrated by the testimony of Spear. While the charging party asserts that the testimony offered by BSB regarding the problems perceived in Raiha's filing is merely self serving, the hearing examiner does not see it as such. It is difficult to write off Spear's testimony as self serving in this case because she, like Raiha, is an older worker (older, in fact, than Raiha) and she was of all people in the best position to know how Raiha worked in the city court. There is nothing in Spear's testimony that would render it incredible and it is her testimony that the hearing examiner finds most credible with respect to the issue of whether Raiha had a problem with filing.

Raiha also relies heavily on the fact that she never received an unsatisfactory job performance evaluation from Kambich nor did she ever receive any reprimand about her work. Kambich, however, was under no obligation to evaluate Raiha in her position because she was a floater. Moreover, Kambich testified credibly that because she was a floater, he was more inclined to let her errors go.

Raiha's suggestion that Kambich failed to follow the hiring guidelines in making the determinations is incorrect. The criteria contained in the collective bargaining agreement requires that written criteria be utilized as the benchmark for reviewing applications and that the criteria be developed in advance of any applicant review. Here, Kambich testified that he had an idea of the written criteria when he reviewed the applications. And in fact, with respect to Raiha's application, he rejected her based on his concerns about her office mannerisms and her filing skills, both of which are critical to the position as described in the position description. This is consistent with the strictures of the collective bargaining agreement and does not show that Kambich's legitimate reasons for rejecting Raiha were pretextual.

Likewise, the hearing examiner is unpersuaded that hiring Rhonda Johnson shows pretext. Johnson was not devoid of experience in working in the city court clerk's office. She had worked with Kambich for some time prior to the hiring decision and Kambich was aware of her skills. He felt that her personality and her office skills were a good fit for the city court clerk position and apparently they were. His observations of Johnson's good work were corroborated by Spear. Johnson had worked in the office as a Career Futures volunteer and had proven her mettle in the position. In addition, as the respondent correctly notes, the position itself was not so challenging that the extent of a candidate's education was critical. Thus, the hearing examiner finds that even though Johnson may have had less education than Raiha, hiring Johnson under the circumstances in this case does not show pretext as the charging party contends.

Raiha's suggestion that hiring Starcevich to replace Johnson shows pretext is wrong. Starcevich was, according to her resume, well versed in the operation of SWIFT. At the time of the hiring process, the plan was (and from all appearances still is) to implement SWIFT in the City Court. Far from showing discrimination, Starcevich's qualifications, being closely aligned with the requirements of the city court clerk position, actually strengthen BSB's position that its hiring decision was not based on illegal discrimination.

Moreover, as long as a business decision is made for non-discriminatory reasons, employers may make their business decisions as they see fit and not run afoul of anti-discrimination statutes. See *St. Mary's Honor Ctr. v. Hicks*, *supra*. Both the Montana and federal courts acknowledge that a claim of discrimination does not authorize the courts to second-guess an employer's 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*, 130 F.3d 1101, 1109 (3rd Cir. 1997) (*citing Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination].") Stated differently, the law does not require an employer to make the best or even a wise choice in deciding who to hire. The law requires only that an employer not make a hiring decision that is based on illegal discrimination. In this case, after weighing all the evidence, the hearing examiner finds the

preponderance of the evidence shows a legitimate non-discriminatory basis for the hiring decision in this case.

BSB Did Not Retaliate Against Raiha

Raiha's retaliation claim rests on two contentions. First, she argues that BSB's response to her Human Rights claim, which included affidavits criticizing Raiha's work habits, was in itself retaliatory. Second, she contends that CEO Babb's denial of her Weed Board approved request for salary increase in September 2006 was retaliatory. There is no merit in either contention.

Montana law prohibits retaliation in employment practices for protected conduct. 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). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in protected activity, (2) thereafter her employer took an adverse employment action against her and (3) a causal link existed between her protected activities and the employer's actions. *Beaver v. D.N.R.C.*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. See also, Admin. R. Mont. 24.9.610 (2). When significant adverse actions are taken against a charging party during the pendency of a Human Rights proceeding by an employer who has actual or constructive knowledge of the proceeding, a rebuttable presumption arises that the action was in retaliation for engaging in protected conduct. Admin. R. Mont. 24.9.603 (3).

Circumstantial or direct evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence, 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. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9th Cir. 1996).

Raiha's contention that the filing of the affidavits in this case is retaliatory is simply unfounded. The affidavits, with respect to problems with Raiha's filing skills, are true. Moreover, the charging party has cited absolutely no authority for the proposition that an affidavit or assertion, even if found to be untrue, can be retaliatory when introduced in good faith in furtherance of the legal right to defend against a claim of discrimination. The affidavits in this case were obviously filed in defense of the claim, not to retaliate against the charging party, and there is no evidence that any of the allegations in the affidavits were promulgated in bad faith. The affidavits were not retaliatory.

Raiha has presented a prima facie case of retaliation in the denial of the pay increase, but only because the conduct occurred while her Human Rights complaint was pending. This prima facie case, based upon circumstantial evidence, shifts the focus of the inquiry to BSB to

show a legitimate non-discriminatory basis for the conduct. If BSB can do this, Raiha may then prove that Babb's reasons for denying the salary increase were merely pretextual. Raiha, however, bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by retaliatory animus. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632.

BSB has demonstrated a legitimate business reason for its decision not to raise Raiha's salary at the time she requested it. Babb's testimony that the request was denied as part of a general freeze of salaries until such time as a salary study could be completed is credible. Thus, the burden shifts back to Raiha to demonstrate pretext in the proffered legitimate reasons for the denial of her salary increase request.

Raiha has failed to meet her burden of persuasion on this issue. The credible evidence in this matter shows that Babb's decision was motivated by legitimate fiscal reasons, not to retaliate. Babb had frozen salary increases during this time. Furthermore, there is no evidence to suggest that the amount of duties that Raiha faced in her job had increased as would the duties in the city court clerk position with the implementation of the SWIFT system. Indeed, the evidence shows that in fact not only was Raiha's request denied, but also Moodry's salary increase was denied. Mindful of Raiha's ultimate burden of persuasion to show pretext, the hearing examiner does not find that she has met that burden. The evidence does not preponderantly demonstrate that retaliation played any role in denying Raiha the wage increase she requested.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Raiha timely filed her claim of illegal age discrimination pursuant to Montana law. Mont. Code Ann. § 49-2-501(4).
3. BSB does not have immunity from Raiha's claims pursuant to the provisions of Mont. Code Ann. § 2-9-112(1).
4. BSB did not discriminate against Raiha in failing to hire her for the city court clerk position either during the internal review of applications or during the external hiring process. BSB had legitimate non-discriminatory reasons for not promoting Raiha to the position.
5. BSB did not retaliate against Raiha for engaging in protected activity. Raiha did not show that the legitimate business reasons proffered for the actions were false or that retaliation was the real reason for the failure to give her a raise.

VI. Order

Judgment is found in favor of BSB and Raiha's case is dismissed.

Dated: July 13, 2007.

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry

Raiha FAD ghp