

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0059011237 AND
0068011872:

JANE BRESE,)	Case Nos. 2219-2005 and 337-2007
)	
Charging Party,)	
)	
vs.)	DECISION
)	
K-MART,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

On September 24, 2004, Jane Brese (Brese) filed a complaint of disability discrimination and retaliation against K-Mart with the Department of Labor and Industry (HRB No. 0059011237). The Human Rights Bureau conducted an informal investigation, found merit and certified the complaint for hearing. The Hearings Bureau held a contested case hearing (Case No. 2219-2005) and ruled that K-Mart did not discriminate against Brese. On appeal, the Human Rights Commission affirmed the decision that there was no disability discrimination, remanding to the Hearings Bureau for a decision on the retaliation claim. This is “Brese 1.”

In the meantime, on February 6, 2006, Brese filed a second retaliation complaint against K-Mart with the department (HRB No. 0068011872). The Human Rights Bureau conducted an informal investigation, found merit and certified the complaint for hearing. This is “Brese 2.” The Hearings Bureau had scheduled a hearing in “Brese 2” (Case No. 337-2007), when the Hearing Officer learned of the Commission’s decision to remand Brese 1. The parties agreed to postpone the hearing in Brese 2, so that the Hearing Officer could decide whether additional evidence was proper in the remand of Brese 1 and consolidate the two cases if he ruled that additional evidence was proper on remand.

On August 22, 2007, after considering the contents of the files, including the authorities and arguments submitted by the parties, and the applicable law and facts, the Hearing Officer ruled that the intent of the HRC remand and the furtherance of justice required allowance of new testimonial evidence in Brese 1, and therefore consolidated Brese 1 on remand with Brese 2 for hearing.

The consolidated contested case hearing proceeded on October 18, 2007. The Hearing Officer, who had heard and decided Brese 1, also included in the record of the consolidated cases the entire evidentiary record (transcript–Exhibit 104–and exhibits–Exhibit 105) from the hearing in Brese 1. Thus, the entire record for the consolidated cases is the evidence presented on March 15-16, 2006 (Brese 1) and the evidence presented on October 18, 2007 (Brese 1 on remand and Brese 2). Jeff Simkovic, Simkovic Law Firm, withdrew after the March 2006 hearing and before the October 2007 hearing. Mary Ann Sutton alone represented Brese, who attended both hearings, in the October 2007 hearing. David McLean and Ryan Willmore, Browning, Kaleczyc, Berry & Hoven, P.C., represented K-Mart throughout both hearings, with K-Mart’s designated representative, Don Metters. In addition to the witnesses and exhibits presented during Brese 1, all identified in the record and in the decision in Brese 1, Don Metters, Connie Brown, Angie Hopkins, Kevin Vincelette and Jane Brese testified on October 18, 2007, and exhibit 106 was admitted into evidence on October 18, 2007.

After the hearing on October 18, 2007, Brese filed a brief, but not a proposed decision. K-Mart filed both. Brese did not timely file a reply brief and the Hearing Officer closed the record on January 14, 2008.

II. Issues

The issues on remand of Brese 1 and the issues in Brese 2 appear in the final prehearing statement applicable to the October 18, 2007 hearing. A discussion of those issues, and how the facts and the law resolve them, appears in the opinion herein.

III. Findings of Fact

1. K-Mart employed Jane Brese, initially as a cashier, beginning in 1980. K-Mart promoted Brese to a position as a full time “pharmacy technician in training” on April 17, 1996.
2. In July 2003, Brese learned, before a scheduled meeting at which store management intended to notify her of the demotion, that her status as an employee was going to change to part-time customer service associate. She left the store and went on medical leave before the meeting occurred.
3. On January 21, 2004, Brese was released to return to work without restrictions. She returned to work at K-Mart on January 22, 2004. K-Mart assigned her to work as a part-time cashier rather than returning her to the pharmacy technician in training position that she had filled prior to her disability leave. This assignment change resulted from K-Mart’s prior decision to change Brese’s position before she went on leave (because of personality conflict issues with management and some attendance issues), and from her failure to keep K-Mart advised of the status of her efforts to comply with state law by passing the National PTCB Certification examination, for which she had first to obtain her GED in order to sit for the examination.

4. To the knowledge of K-Mart, Brese returned to work without restrictions, according to her physician, Dr. Yaney. The decision to assign Brese to a part-time cashier position instead of returning her to the pharmacy could not have resulted from retaliatory animus toward Brese because of an actual, perceived or record disability. K-Mart did not know that Brese had a disability, did not perceive Brese as disabled and had no current record of Brese as disabled.

5. From Brese's return to work on January 22, 2004 to her resignation on August 4, 2004, Brese did not apply for any other positions at K-Mart after the store's management assigned her the part-time front end cashier position. K-Mart management "scouts" for potential "keepers" among current employees and encourages good prospects to seek better positions that become available. K-Mart could have considered Brese for openings in the store without her applications for the openings. A current employee evidencing little or no interest in advancement would not be as good a prospect as a current employee eager to advance and seeking advancement.

6. In February 2004, the part-time pharmacy technician in training resigned and K-Mart did not fill the vacant position. Instead of replacing the part-time pharmacy technician, a part-time cashier was utilized in the pharmacy. Brese was not offered or assigned the position.

7. Even when Brese worked in the pharmacy, it was K-Mart's standard of practice to utilize cashiers for assistance. At the time of the October 2007 hearing, K-Mart still utilized only one pharmacy technician in the pharmacy.

8. K-Mart filled an open position of hard home manager at the end of February 2004.

9. Brese commenced proceedings against K-Mart in the Human Rights Bureau with a complaint she filed in March 2004 (HRB No. 0041010920), then again with her Brese 1 complaint in September 2004 (HRB No. 0059011237) and then with her Brese 2 complaint in February 2006 (HRB No. 0068011872). Section I of this decision, discussing the procedural histories of the latter two complaints, is hereby incorporated by reference. Brese's first complaint, filed in March 2004, alleged disability discrimination by K-Mart in failing and refusing to reinstate her to her position of pharmacy tech in training when she returned from a 26-week disability leave commencing on July 21, 2003. The final investigative report on the complaint she filed in March 2004 found that it was not timely filed. Brese neither filed a civil action nor pursued administrative remedies beyond the Human Rights Commission on the March 2004 complaint.

10. Both the pharmacy cashier position and the hard home manager position were filled before Brese filed her first discrimination complaint in March of 2004.

11. In April 2004, the full-time pharmacy technician position was available. Lowell Brown called Sue Huff, former K-Mart pharmacy tech employee who had quit without appropriate notice, and hired her back, incorrectly believing that Huff already had her full pharmacy technician license.

12. Pharmacist Leon Odegaard believed that Brese had much higher skills than either the pharmacy tech who had just left or Susan Huff, and had told management he wanted Brese returned to Pharmacy. K-Mart decided not to return Brese to the position because it believed she had problems getting along with other employees in the pharmacy. Brese was also not placed back into the pharmacy technician position because before she took her medical leave she had requested to be removed from the pharmacy and reported that she found the pharmacy a depressing place to work, creating stress and anxiety for her. In addition, management believed Brese was not qualified for the pharmacy due to management's understanding that Brese had not obtained her GED and therefore would still not be able to sit for the National PTCB Certification examination. Although it did not prevent K-Mart from considering her for the pharmacy, Brese also had not requested to return to the pharmacy after her placement in the part-time cashier position in January 2004.

13. The substantial and credible evidence of record does not establish that a reason for not returning Brese to the pharmacy was K-Mart's animus toward her because of her Human Rights discrimination complaint.

14. In April of 2004, the Front End Lead/Up-Front Manager position became available at K-Mart. The position was filled by Connie Brown on April 29, 2004. Brown was at least as qualified as Brese for the position and there is no evidence that K-Mart believed Brown had prior problems getting along with other employees.

15. Brese was left in the part-time cashier position for legitimate, nondiscriminatory reasons.

16. The substantial and credible evidence does not establish that Don Metters ever had a conversation with Kevin Vincelette regarding the hard home position or ever told Kevin Vincelette that Brese could not be considered or placed in other positions because she filed a discrimination claim.

17. Don Metters went into loss prevention in March or April 2004 and was no longer the District Manager for the district including the West Billings K-Mart store. Therefore, Metters was not thereafter in position to direct that Brese would not be promoted because of her first discrimination claim.

18. K-Mart used, at the times pertinent to these cases, a program/procedure called "HR Easy," for investigating internal complaints by employees. For external complaints, such as human rights claims, K-Mart followed the process set forth by the state guidelines. The differences between internal and external investigations were in part to avoid the appearance of attempting to exert undue influence on potential witnesses. The substantial and credible evidence does not establish that K-Mart's explanation of these differences was untrue or pretextual.

19. K-Mart offered Brese a part-time position in the one-hour photo lab in 2004, with no indication that the hours would be better than the cashier hours, which she declined.

20. Brese ended her employment with K-Mart on August 4, 2004. Although K-Mart kept her at the same hourly rate of pay, her drastically reduced hours resulted in loss of more than half of the income and most of the fringe benefits she had received prior to her disability leave.

21. Brese did not provide appropriate notice and departed from her employment position abruptly after giving notice of her resignation. She worked one or two more days and then did not show up the next day for a scheduled shift.

22. Brese applied for a position at Kwikway on December 4, 2005. Angie Hopkins, the manager of Kwikway, checked on Jane's references. Connie Brown, who was now personnel manager for K-Mart, received a call from Angie Hopkins for a reference.

23. Connie Brown had been Brese's supervisor when she was a cashier in 2004. Brown told Hopkins that Brese was not eligible for rehire and that she had left under bad circumstances. Brown, in her testimony, justified providing this information to Kwikway because she, as Brese's supervisor in 2004 knew of the attendance and performance problems with Brese in her cashier position. K-Mart's personnel records for Brese do not reflect any such problems.

24. Connie Brown testified that she was not aware of Brese's discrimination complaints when she gave the reference to Kwikway, and that if she had known of Brese's discrimination complaints, she would have given the same reference information to Kwikway.

25. Brown's account of what she knew about Brese's attendance and performance in 2004 as a cashier, and her account of what she did not know about Brese's discrimination complaints, are both incredible. K-Mart's records do not verify the attendance and performance testimony given by Brown, and Brown's position as Personnel Manager suggests that she more likely than not was aware of that in December 2005 Brese had a discrimination complaint (Brese 1) awaiting a contested case hearing before the Department of Labor and Industry.

26. After receiving the reference information from Brown, Hopkins told Brese the position was still available. Hopkins intended to continue the hiring process with Brese. Brese withdrew her application at Kwikway because of the wage, \$6.00 per hour, and concluded the hiring process. Brese was still collecting her unemployment at that time, and wanted to find a job for better than \$6.00 an hour if she could. She later did take a part-time job at \$6.00 per hour with Fiddler's Green in February 2006, because her unemployment was running out.

27. The substantial and credible evidence does not establish that K-Mart's reference from Connie Brown had an adverse effect on Brese's job prospects with Kwikway, because Brese discontinued the application process.

28. Brese was hired by the State Liquor Store in May 2006. She listed K-Mart as a reference with the State Liquor Store.

IV. Opinion¹

Montana law prohibits Montana law prohibits retaliation against an individual who engages in a protected activity. Mont. Code Ann. § 49-2-301; see also, Admin. R. Mont. 24.9.603. Retaliation constitutes unlawful employment discrimination. Admin. R. Mont. 24.9.604(3)(a).

The final prehearing order for this consolidated hearing stated four issues related to the retaliation claims (the other issues are damages issues):

1. Can Brese make a retaliation claim “because of disability” in this case?
2. Did K-Mart make the statements to Kwikway as alleged?
3. If so, were the statements made for legitimate business reasons?
4. If not, were the statements made in retaliation for Brese’s pending discrimination claim?

Final Prehearing Order (signed by both parties 10-18-07), p. 10, Sec. VIII.

The first issue is purely semantic. Disability discrimination in employment involves an employer or its agent refusing employment to a person, barring a person from employment, or discriminating against a person in compensation or in a term, condition, or privilege of employment because of physical or mental disability when the reasonable demands of the position do not require a physical or mental disability distinction. Mont. Code Ann. § 49-2-303(1)(a). Having an actual disability, a perceived disability or a record of a disability are the three means of belonging to the protected class of persons with disabilities, *see*, first element of prima facie case in the first tier of proof in *McDonnell Douglas Corp. v. Green*, (1973) 411 U.S. 792, 802.

Being a person with a disability, a member of a protected class, does not constitute engaging in protected activity, which involves action to oppose illegal discrimination or to participate in a Human Rights Act investigation or proceeding. Mont. Code Ann. § 49-2-301. Brese’s argument that she was a victim of retaliation [adverse action] “because of disability” is not a retaliation claim at all, but instead an attempt to relitigate her disability discrimination

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.

claims, resolved by the agency decision against her in Brese 1 and affirmed by the Human Rights Commission.

Nonetheless, the Hearing Officer will address the claims of “retaliation” prior to the Kwikway reference, as presented in the evidence, before returning to the last 3 liability issues from the final prehearing order. To prove her claim, Brese must prove (1) she engaged in protected activity; (2) K-Mart took a significant adverse action against her; and (3) there was a causal connection between the significant adverse action and Brese’s protected activity. *Rolison v. Bozeman Deac. Health Serv., Inc.*, ¶17, 2005 MT 95, 326 Mont. 491, 111 P.3d 2002; Admin. R. Mont. 24.9.610.

Brese filed her first discrimination complaint on March 5, 2004. She was moved to the part-time cashier position when she came back to work in January 2004. The hard home manager position became available in February 2004. The cashier position in the pharmacy was filled prior to February 18, 2004. The record in these consolidated cases does not establish that Brese engaged in any kind of protected activity known to K-Mart prior to the notice to her employer of the March 2004 complaint. It is impossible as a matter of law for Brese to establish a causal connection between the adverse actions alleged (making her a part-time cashier in January 2004 and not placing her in the two other jobs at the West Billings store in February 2004) and her protected activity, since she engaged in her first protected activity after K-Mart took these employment actions.

The evidence is equivocal about whether Brese ever requested a return to the pharmacy after her reassignment as a part-time cashier in 2004. Even if she did not, and even though she never applied for any other positions at K-Mart after returning from disability leave, and may never have expressed an interest in any other position to the management team, it was still legally possible for her to prove adverse action against her in not offering her or considering her for other positions after K-Mart knew she had a discrimination complaint pending.² Nevertheless, Brese at all times had the ultimate burden of persuading the fact finder that K-Mart took adverse employment action against her because of her pending Human Rights complaint. *Heiat v. E.M.C.* (1996), 275 Mont. 322, 912 P.2d 787, 792-93; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 817-18, *citing Johnson v. Bozeman Sch. Dist.* (1987), 226 Mont. 134, 734 P.2d 209, 213. For the employment actions involved (*i.e.*, replacing the full time pharmacy tech, selecting a new Front End Lead/Up-Front Manager), Brese’s proof did not ultimately persuade the Hearing Officer that any of the actions were taken because of retaliatory animus.

This leaves the final 3 liability issues, regarding the Kwikway job reference. Clearly, K-Mart (Connie Brown) did make the statements to Kwikway as alleged. K-Mart had not

² *Pannoni v. Bd. of Trustees*, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, cited by K-Mart, is not on point factually because it involved a former employee who did not reapply for work with the employer, a school district. K-Mart did sometimes recruit and promote people who did not apply for the jobs, unlike the school district in *Pannoni*.

established any legitimate business reason for Brown to make the statements, and the substantial and credible evidence supports application of the presumption that the pending Human Rights complaint, which Brown more likely than not did know about, prompted the comments. Admin. R. Mont. 24.9.603(3). However, legally the statements were only retaliatory if they had a significant adverse impact upon Brese's job prospects with Kwikway. Admin. R. Mont. 24.9.603(1). For examples of the kinds of significant adverse impacts required to establish retaliation, *see*, Admin. R. Mont. 24.9.603(2)(a) through (e).

In the present case, Brese did not establish a significant adverse impact upon her job prospects with Kwikway. Although she argued that similar comments to other prospective employers could have occurred and that without such comments she would not have had such difficulty finding other jobs, her argument was based solely upon speculation, rather than evidence. Thus, although Connie Brown's comments to Angie Hopkins are troubling and largely inexplicable except for animosity due at least in part to Brese's pending and prior discrimination complaints, Brese failed to prove that the comments constituted a significant adverse act. This necessarily means that Brese failed to prove that the statements were "made in retaliation."

The Hearing Officer is not entirely satisfied with this outcome, because of the lack of any reasonable explanation of the comments to Kwikway. Nonetheless, because Brese failed to prove any adverse impact and failed to establish that any such comments were made to other prospective employers, she failed to carry her ultimate burden of persuasion regarding the Kwikway reference. Lacking proof sufficient to find that illegal retaliation occurred, the Hearing Officer is powerless to address the conduct of K-Mart, through Connie Brown, in making the comments to Angie Hopkins. Charging Party's retaliation allegations, in both Brese 1 on remand and Brese 2 in de novo hearing, lack merit and both complaints (Brese 1 to the extent it is back before the department) should be dismissed.

V. Conclusions of Law

1. The Department has jurisdiction over the retaliation claims in both Brese 1 and Brese 2. Mont. Code Ann. §§ 49-2-509(7) (2003) and 512(1) (2007).

2. K-Mart did not take adverse employment action against Brese at any time after her return to work in January 2004, in retaliation against any protected activity in which she engaged. Mont. Code Ann. § 49-2-301.

3. Because K-Mart did not engage in the retaliation alleged by Brese, both Brese 1, to the extent it is before the department on remand, and Brese 2, in its entirety, must be dismissed. Mont. Code Ann. § 49-2-507.

VI. Order

1. The department grants judgment against charging party, **Jane Brese**, and in favor of respondent, **K-Mart**, on Brese's charges of illegal retaliation as alleged in both her complaints before the department.

2. The department dismisses Complaint No. 0059011237 (Brese 1, to the extent it is before the department on remand) and Complaint No. 0068011872 (Brese 2).

Dated: March 20, 2008.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer