

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0078012298 &
0089012654:

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|----------------------------|-------------------------------------|
| CHAD BORSTEIN, |) Case Nos. 1979-2007 & 1907-2008 |
| |) |
| Charging Party, |) |
| |) HEARING OFFICER'S DECISION |
| vs. |) |
| |) |
| SEARS HOLDING CORPORATION, |) |
| |) |
| Respondent. |) |

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

On February 8, 2007, Chad Borstein filed a complaint (No. 0078012298) with the Department of Labor and Industry, alleging that Sears Holding Corporation (Kmart), his former employer, discriminated against him in employment when it did not promote him in retaliation for filing a prior complaint of discrimination. On July 16, 2007, the department gave notice Borstein's complaint would proceed to a contested case hearing, and appointed David Scrimm as hearing officer.

Borstein filed a subsequent complaint (No. 0089012654) with the department on September 28, 2007 alleging that Kmart discriminated against him in employment when it gave him an unsatisfactory performance review in retaliation for filing previous complaints of discrimination with the department. Proceedings in both cases were stayed on April 4, 2008, pending the outcome of conciliation. On May 17, 2008 the Human Rights Bureau closed conciliation of complaint No. 0089012654. On May 22, 2008, the hearing officer scheduled both cases for hearing beginning on October 14, 2008.

The contested case hearing proceeded on October 14 and 15, 2008, in Helena, Montana. Borstein attended with Mary Ann Sutton, his attorney. Kmart attended through its designated representative, Don Metters, with its counsel, Mark Higgins, Ugrin, Alexander, Zadick & Higgins, P.C. Borstein, Travis Petrik, Mike Smith, Denver Floyd, Marv Martinez and Don Metters testified. The parties agreed to seal the testimony of Denver Floyd to protect attorney-client privilege. Exhibits R-1 to R-149, I-601 and I-602 were admitted.

The Hearings Bureau received the last timely post-hearing filing, Kmart's "Respondent's Proposed Findings of Fact, Conclusions of Law and Decision" on January 12, 2009.¹ The deadline for reply briefs was January 23, 2009, at which time the Hearing Officer deemed the case submitted for decision. The Hearings Bureau file docket accompanies this decision.

II. RESPONDENT'S MOTION IN LIMINE.

On August 28, 2008, the Respondent filed a motion in limine attempting to preclude any testimony at hearing regarding Borstein's religious discrimination claim that was one of two separate claims identified in case No. 0089012654. Kmart argued that since the Human Rights Bureau (HRB) has issued a "no cause" finding with respect to the religious discrimination claim the hearings bureau was without jurisdiction. The hearing officer denied the motion for the following reasons.

The statutes provide the department's authority for dealing with complaints of discrimination in violation of Montana's Human Rights laws. The mechanisms of the Act are the exclusive remedy for such claims. Mont. Code Ann. § 49-2-509(7).

The HRB performs the department's task of informally investigating the matters set out in a discrimination complaint. Mont. Code Ann. § 49-2-504(1)(a). After investigation, the HRB makes a finding regarding the merit or nonmerit of the complaint. Mont. Code Ann. § 49-2-504(4).

If the HRB investigator concludes that the preponderance of the evidence adduced by the HRB during informal investigation does not support the complaint (no merit finding), then the HRB dismisses the complaint and the charging party has 14 days to file objections to the dismissal, for hearing by the Montana Human Rights Commission. Mont. Code Ann. § 49-2-509(3)(c) and (4).

If the HRB investigator concludes the complaint has merit, then the HRB makes informal efforts, by conference, conciliation and persuasion, to resolve the complaint. Mont. Code Ann. § 49-2-504(1)(a). If the informal efforts fail, the HRB refers the complaint to the Hearings Bureau, which performs the department's task of holding a hearing on the complaint. Mont. Code Ann. § 49-2-505(1).

The statutory references throughout these authorizing statutes are to "the complaint." There are no references to distinct claims of discrimination which may be within the four corners of the complaint. There are no references to different claims asserted in the complaint.

The applicable rules regarding investigation appear in the Administrative Rules of Montana, Title 24, Chapter 8.² The rules follow the statutes. Whenever the HRB finds merit in the complaint, it issues a cause finding and commences conciliation efforts; if conciliation fails

¹ Charging Party's Post hearing Reply Brief and Proposed Findings of Fact, Conclusion of Law and Order were stricken as they were filed after the January 23, 2009 deadline for submission.

² Other rules regarding investigations appear in Title 24, Chapter 9, subpart 2, but those rules only apply to complaints filed before July 1, 1997. Admin. R. Mont. 24.9.107(1)(a) and (b).

the HRB requests that the Hearings Bureau commence contested case proceedings on the complaint. Admin. R. Mont. 24.8.220(1)(a). Whenever the HRB finds a lack of merit in the complaint (or otherwise decides no further proceedings are proper), it issues a no cause finding, accompanied by a notice of dismissal and right to sue. Admin. R. Mont. 24.8.220(1)(b).

Here Borstein filed one charge of Discrimination on September 28, 2007 which contained two distinct claims – religious discrimination and retaliation. The HRB investigated both claims independently and found reasonable cause to believe retaliation had occurred, but found that Borstein had not made a prima facie case for religious discrimination.

The unitary treatment of the complaint against Kmart was consistent with the department’s rules. The rules, following the statutes, contemplate either dismissal of the entire complaint or forwarding of the entire complaint to the Hearings Bureau for contested case proceedings unless conciliation succeeds.

The hearing officer is not free to disregard the applicable rules, which are controlling. *Christenot v. State Department of Commerce* (1995), 272 Mont. 396, 901 P.2d 545, 548. At the district court level, the question of whether the rules are consistent with the statutes can arise. *Safeway, Inc. v. Petroleum Release Comp. Board* (1997), 281 Mont. 189, 194, 931 P.2d 1327, 1330. At the agency level, the rules are controlling. *Laudert v. Richland County Sheriff’s Office*, 218 MT 2000, ¶¶ 40-41, 301 Mont. 114, 125, 7 P.3d 386.

This outcome keeps the entire case in one forum. The outcome respondent urged would send some of the claims in the complaint to a Commission hearing on objections, then perhaps to a district court proceeding, while at the same time the other claims would be before the Hearings Bureau in contested case proceedings. The “unitary” approach of the rules (and the statutes) keeps the entire complaint on a single track, unless Kmart had timely sought and obtained a partial summary judgment certified as final under Rule 56, M.R.Civ.P. The severance of claims respondent urged is possible, but it simply was not triggered automatically by the final investigative report. The issues in this contested case involve all the allegations of the charging party’s complaints against Kmart.

III. ISSUES

The issues in this matter are whether Borstein was discriminated against based on his religious affiliation, whether Kmart retaliated against Borstein in response to his filing of several discrimination complaints by not offering him a transfer to a position in Orange County, California and by giving him an unsatisfactory performance evaluation and put him on a performance improvement plan. A full statement of the issues appears in the final prehearing order.

IV. FINDINGS OF FACT

1. Chad Borstein was hired by Kmart in July of 1999, and was promoted to the position of District Loss Prevention Manager for the Montana/North Dakota District in August 2005. Borstein hoped to return to California, specifically the San Francisco Bay area, after proving himself in the Montana/Dakota region. Kmart was supportive of bringing Borstein back to California, but made no guarantees.

2. The Montana/North Dakota market was considered a “starter” or easier market, per Kmart’s complexity rankings, where Borstein would be expected to do well. Borstein received relatively high ranking scores in this market.

3. On April 15, 2006 Borstein received his 2005 annual performance review although his score was acceptable, certain areas were of concern to his supervisor, Don Metters. Specifically, Metters was concerned about the district’s shrink³ and staffing. Borstein noted that “staffing will be a definite area of focus.” Despite these shortcomings, Metters noted that “in a year or two he’ll be ready for a tougher market.”

4. Throughout the rest of 2006, Metters frequently sent messages to Borstein expressing his ongoing concerns about the lack of loss prevention staff in some of the district’s stores and the continuing problem with shrinkage.

5. On or about August 31, 2006, Borstein filed a complaint (No. 0071012111) with the Human Rights Bureau alleging that Kmart discriminated against him on the basis of his religious beliefs. The HRB issued a no cause finding and dismissed the matter. Borstein filed an objection to the dismissal with the Montana Human Rights Commission which issued an order on May 24, 2007 affirming the dismissal. Borstein was issued a right to sue letter, but never filed suit. On October 17, 2006 Kmart headquarters acknowledged receipt of the complaint

6. On or about September 5, 2006, Kmart offered Borstein a district manager position in Sacramento, California. Don Metters offered the position to Borstein as it was in his region. Borstein turned down the offer because the amount of the raise was too small, no cost of living allowance was offered and because he thought that he would not be able to earn bonuses because the district was not performing well.

7. On or about September 23, 2006, Borstein received his mid-year performance appraisal wherein Borstein stated: “ as a new LPDC with just over a year experience at the district level, I feel I have done quite well. I realize that I am still learning . . .” Borstein believed he had not mastered the Montana/Dakota district and that he needed further seasoning in what was a starter market. The appraisal noted that the worker’s compensation history in the stores Borstein supervised was the second worst in the region; the staffing levels of his stores were poor; and his turnover rate was very high as well, all factors which Borstein agreed that Kmart could legitimately consider, and all factors which reflected unfavorably on his job performance up to that point.

8. On or about September 30, 2006, Kmart asked Borstein if he would be interested in the district manager position in Bakersfield, California. Metters told Borstein to call Marv Martinez, his regional manager, about the position. Martinez told Borstein to talk with Jason Link the manager who oversaw the southern California region where the Bakersfield store was assigned. Martinez also counseled Borstein that if he turned down Bakersfield he might not get another offer. Borstein declined to apply for the Bakersfield position.

³ Shrink or shrink loss is generally defined as the loss of merchandise through error or theft.

During conversations with Link, Borstein learned of an opening in Orange County, California which was also in Link's region. Borstein was very interested in the Orange County position even though he had just one year in the Montana position, despite the fact that the Orange County position held a significantly more complex ranking than the Montana market, and required considerable expertise and experience. Link informed Martinez of Borstein's interest in the Orange County position.

9. Although Borstein was very interested in the Orange County position, he was never offered the position. On or about October 5, 2006, Martinez and Borstein discussed the Orange County position, but Martinez did not tell Borstein the Orange County position was his, nor did Martinez have the authority to offer the position. Any such decision would have to be approved by Gary Zamberletti, vice-president for Loss Prevention, who did not do so. Although Borstein testified that he took steps showing that he had been offered and accepted the Orange County position including: looking for a residence; telling his girlfriend; telling renters that he was moving; and mentioning the position in conversations with friends and co-workers, he provided no evidence corroborating those statements. This testimony was not credible.

10. On October 8, 2006, Metters issued a Personnel Interview Record to Borstein in regards to the Shrink Management Plans and binders located in each of his stores. Metters tour of Borstein's district showed that store management was not as involved in shrink management as Kmart expected and that Borstein needed to improve in this area.

11. In October 2006, an internal company investigation was commenced with respect to three concerns touching directly on Borstein's job performance, and his judgment: Borstein's overstatement of the amount on an internal theft issue occurring in one of the stores he supervised; Borstein's carrying of a loaded revolver while on company premises and on company business; and Borstein's inappropriate comments to and in the presence of individuals he supervised which involved sexual and religious references. In the course of the investigations, Travis Petrik concluded that Borstein was not being honest with him, and that he generally exercised poor judgment. These concerns were made known to Marv Martinez, Don Metters, and Jason Link, all individuals involved, in one form or another, with Borstein's potential transfer to the Orange County position. Borstein ultimately received a formal written reprimand for the third incident.

12. On October 30, 2006, Borstein sent an email to Metters in which he referenced his potential move to Orange County, stating, "... if that happens." On January 17, 2007, Borstein sent an email to Martinez asking him "...what is the status of me being moved to a district back in CA," and "I am still interested in the Orange County Market, as previously discussed."

13. In January 2007, Kmart hired Aaron Literal for the district manager position in Orange County. Kmart had legitimate business reasons for deciding to hire Aaron Literal, instead of Borstein. Literal had significant experience as a District Coach and District Manager for other companies – competitors – and most important, he was living, working, and highly respected in the Orange County market. This gave him a distinct advantage in understanding the market, and in his ability to recruit talent for Kmart in that geographic area. Literal was also interviewed by, and recommended for the Orange County position after the interviews, by

Vice-President Gary Zamberletti, Vice-President Bill Titus, and Human Resource Manager Shelly Arnold. As Borstein conceded, at hearing, if Kmart evaluated Literal higher than it evaluated him, it was not only legitimate for Kmart to choose Literal over Borstein, it actually had an obligation to the company to do so.

14. Kmart's hiring of Literal for the Orange County position was also based on legitimate business concerns regarding Borstein's performance and judgment. Borstein was not performing all that well in the Montana/Dakota District which was significantly less complex than the Orange County Market and had displayed some lapses in judgment that were of legitimate concern to Kmart.

15. On February 8, 2007, Borstein filed another complaint with the Human Rights Bureau alleging Kmart retaliated against him when it denied him the Orange County position (Complaint No. 0078012298).

16. Martinez did not learn of Borstein's discrimination complaint until March 2007, well after the decision was made to hire Literal instead of Borstein.

17. In February or March 2007, Kmart again offered the Bakersfield position to Borstein.

18. On or about April 10, 2007, Metters conducted Borstein's annual review. Metters identified several significant performance issues: Borstein's district missed its shrink plan by one-quarter million dollars; Borstein's staffing numbers were unacceptably low; and his turnover rate was high. This review was scored at 2.4. Kmart policy required that Borstein be placed into a performance improvement plan (PIP). Kmart also denied him a raise and cut his bonus. Kmart took these actions based upon legitimate business reasons. Any manager receiving a score of less than 2.5 was required to be placed on a PIP. While Borstein scored well in the LP Ranking Tools system, that scoring system accounted for only 4-5% of how Borstein was performing. Borstein was not performing particularly well in the easier, Montana market.

19. The PIP process was not the "kiss of death," but a legitimate plan to improve employee performance. In 2008, less than 2% of the individuals placed in the PIP process were terminated from, or chose to leave, the company. Kmart's specific written policies mandated Borstein's placement in the PIP process, based upon the low scores he received on his 2006 employee evaluation, a process to which there were no exceptions. Before a manager is placed in the PIP process the performance evaluation that resulted in the PIP process being initiated is reviewed by both the human resources department and senior management.

20. The PIP process normally provides a 90-day window for employees to improve their performance in specific areas and provides for follow-up with the supervisor at 30 and 60 days. Borstein received his first follow-up on May 3, 2007, 23 days after the PIP went into effect and indicated some overall progress. His second follow-up took place on June 27, 2007, 77 days after the PIP went into effect and indicated that he was not progressing satisfactorily. The follow-up meetings identified that Borstein was making improvements in the areas of Focus on the Customer, Staffing, Know How to Make Money, Coaching for execution and Positive

Energy. The meetings also identified areas where Borstein was not making improvement in Accountability and Teamwork.

21. On July 23, 2007 Borstein gave notice that he was resigning his position with Kmart. Borstein's last day of work for Kmart was August 3, 2007.

22. On September 28, 2007 Borstein filed another complaint (No. 0089012654) with the Human Rights Bureau against Kmart alleging that he had been discriminated against on the basis of religion for being placed under a performance improvement plan and retaliated against him in response to his previous discrimination complaints (Nos. 0071012111 & 0078012298).

23. With respect to Borstein's allegations of religious discrimination, there was little if any timely, relevant evidence to even minimally support such a claim. The religious discrimination claim at issue was filed in late September, 2007, meaning that for Borstein to support that claim, he had to demonstrate specific instances of religious discrimination occurring within the 180 days preceding that filing. Borstein presented no evidence to demonstrate that he was subjected to religious discrimination in any form during the period of April, 2007 through the September, 2007 filing.

24. Borstein admitted at hearing that "religion really had no impact on the PIP," and that "I think what she [investigator] was trying to ask me is, is this particular claim [Complaint No. 0089012654], specifically, related to religious discrimination? My answer was no."

25. Marv Martinez and Don Metters received repeated and extensive training in the area of workplace harassment, discrimination and retaliation.

26. Borstein is not entitled to damages. Even if liability was established, Borstein has failed to produce adequate evidence to support his damage claims.

27. Borstein started his new job with Lowe's on August 13, 2007, just 10 days after leaving Kmart with a base salary \$4,000 higher than the base salary he had at Kmart. The position at Lowe's offered less in potential bonuses than did the Kmart position. Borstein had 10 years with Kmart and was vested in its retirement plan. At Lowe's, Borstein was a new employee and could participate in the 401(k) plan.

28. Borstein failed to prove that he suffered compensable emotional distress as a result of Kmart's actions. Borstein first sought treatment for sleep apnea on August 16, 2006, and the records of that visit indicate "a long history of loud snoring and daytime sleepiness, which is worsening." The date of that treatment is well before any discriminatory conduct complained of during the time period which he alleges discrimination and retaliation. Accordingly, Borstein failed to establish a causal link between his alleged sleep apnea and anything done by Kmart.

29. Apart from the unrelated treatment for sleep apnea at the Billings Clinic, Borstein never sought medical care or attention of any kind for conditions he claims are related to the actions of Kmart, nor did he produce any medical bills.

V. DISCUSSION⁴

Borstein filed three charges of discrimination with the Human Rights Bureau. The first was filed on August 31, 2006 (No. 0071012111) and later dismissed by the Human Rights Commission which issued a right to sue letter. Borstein did not file suit. In Borstein's second charge of discrimination (No. 0078012298) he alleged that Kmart retaliated against him for filing the first charge of discrimination by denying him the Orange County position. In Borstein's third charge of discrimination (No. 0089012654) he alleged that Kmart both retaliated against him and discriminated against him when it gave him an unsatisfactory performance review and placed him in a PIP. Kmart denies discriminating or retaliating against Borstein and asserts that it had legitimate business reasons for the actions it took regarding Borstein's employment. It is only the two latter charges that are before the hearing officer.

A. Borstein's retaliation claims

1. Denial of the Orange County Position (Complaint No. 0078012298).

When there is no direct evidence of retaliation, Montana applies the three-tier burden shifting analysis found in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 328, 912 P.2d 787, 792. There is no credible direct evidence that Kmart retaliated against Borstein because he complained about religious discrimination. Therefore, the *McDonnell Douglas* analysis applies.

To establish his *prima facie* case of unlawful retaliation in conformity with tier one of *McDonnell Douglas*, Borstein had to prove three elements: (1) that he engaged in activities protected by the Human Rights Act; (2) that Kmart subjected him to significant adverse acts and (3) that there was a causal connection between the adverse acts and his protected activities. Admin R. Mont. 24.9.603(1).

"Protected activities" include opposition to discriminatory practices the Act forbids. Mont. Code Ann. § 49-2-301; Admin. R. Mont. 24.9.603(1)(b). The Act prohibits retaliation against a person who opposes discrimination or files a complaint. Mont. Code Ann. § 49-2-301(1); Admin. R. Mont. 24.9.603(1)(c). *see, Shields v. Helena S.D. No. 1* (1997), 284 Mont. 138, 943 P2d 999, **following** *Harrison v. Chance* (1990), 244 Mont. 215, 797 P2d 200. Therefore, filing a complaint (No. 0071012111) alleging religious discrimination with the Human Rights Bureau is clearly opposing a practice forbidden by the Act. Borstein established the first element of his *prima facie* case.

Denial of a promotion and denial of benefits is categorically a significant adverse act. Admin. R. Mont. 24.9.603(2)(b). Borstein established the second element of his *prima facie* case.

⁴ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Montana has an administrative presumption that there is a causal connection between participation in a Human Rights Act proceeding and any significant adverse action taken during or within six months after conclusion of that proceeding. Admin. R. Mont. 24.9.603(3).

When a respondent or agent of a respondent has actual or constructive knowledge that proceedings are or have been pending with the department, with the commission or in court to enforce a provision of the act or code, significant adverse action taken by respondent or the agent of respondent against a charging party or complainant while the proceedings were pending or within six months following the final resolution of the proceedings will create a disputable presumption that the adverse action was in retaliation for protected activity.

Borstein established the third element of his *prima facie* case through evidence of Kmart's acknowledgment of the complaint and the proximity in time between his protected activity (the August 31, 2006 complaint) and the significant adverse action (the January 16, 2007 denial of the Orange County promotion), entitling him to the presumption of a causal connection between the two.

In response to Borstein's *prima facie* case, Kmart had the burden, with regard to this indirect evidence, to show a legitimate business purpose for its denial of the Orange County position. Once the first tier of *McDonnell Douglas* had been provided by Borstein, Kmart then had to respond by meeting the requirements of the second tier, for two reasons:

[It] meet[s] the plaintiff's *prima facie* case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56, *see also Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212. Kmart met its burden to show a legitimate nondiscriminatory reason to deny Borstein the Orange County position.

Kmart showed that it had legitimate concerns about Borstein's performance and his judgment. Borstein was not meeting shrink and staffing requirements and had taken a loaded gun on company property and during the performance of his duties off premises. He had also engaged in questionable conduct regarding discussions of religion and sexual orientation with his employees. Borstein's struggles in what was shown to be a starter market made it reasonable for Kmart not to promote him into a more complex market in Orange County. Kmart further showed that Aaron Literal's direct experience in and knowledge of the Orange County market made him a better candidate for the position. Borstein testified that if Literal scored better than he, then Kmart had a duty to hire Literal over him.

Once Kmart produced a legitimate business reason for the discharge, Borstein had the burden of proving that the business reason was a pretext. *McDonnell Douglas* at 802; *see also Martinez v. Yellowstone Co. Welf. Dept.* (1981), 192 Mont. 42, 49, 626 P.2d 242, 247. To meet

this third tier burden, Borstein could present either direct or indirect proof of the pretextual nature of Kmart' proffered reasons:

[]he may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine at 256.

Borstein always bore the ultimate burden of persuading the fact-finder that Kmart illegally retaliated against him. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813; 818; *Johnson, op. cit.*, 734 P.2d **at** 213. Although he offered some rebuttal testimony, he did not carry his ultimate burden of proof. He failed to credibly rebut the evidence of his performance problems. Borstein may sincerely believe that the evidence of his performance problems was exaggerated and unfair. His testimony that he was offered and accepted the Orange County position and that it was later denied him for complaining of religious discrimination may be entirely true regarding what he believes. His belief did not overcome the probative and substantial evidence that he was, in fact, not offered the job and although he was considered for it and expressed a strong interest in it, Literal was simply a better candidate for the position. Moreover, Borstein's comments about the Orange County position to Metters: ". .if that happens" And to Martinez: "...what is the status of me being moved to a district back in CA," and "I am still interested in the Orange County Market, as previously discussed," completely undermine any reasonable belief that Borstein had been offered and accepted the position.

Borstein also failed to rebut the testimony regarding his overall job performance and the lapses in judgment that gave Kmart a legitimate business reason for choosing Literal over him. Borstein failed to rebut Kmart's evidence regarding his problems with shrink and staffing. To the contrary, Borstein testified that those were legitimate problems and that Kmart had legitimate reasons for considering them. Borstein also failed to rebut the legitimate nature of the investigation into the incidents involving the theft, his carrying of a loaded gun or his religious and sexual comments to his employees.

It is not the role of this tribunal to simply substitute its judgment for the business judgments or decisions made by an employer. In order to prevail in this matter, accordingly, Kmart need not demonstrate that its decision to hire Aaron Literal in Orange County rather than promoting Borstein were the only options available at the time. Restated, Kmart need not prove that its business decisions led it to choose the absolutely best possible option, or even the option that this tribunal would have exercised; rather, Kmart simply needs to satisfactorily establish that its reasons were legitimate and true. *Donaldson v. Merrill Lynch & Co.*, 794 F.Supp. 494, 505 (S.D.N.Y. 1992).

The Hearing Officer was not persuaded, based upon the substantial and credible evidence of record, that Kmart's legitimate business reasons for denying him the Orange County position were a pretextual. Thus Borstein failed to prove that Kmart retaliated against him when it denied him the Orange County position.

2. *Placement in the PIP (Complaint No. 0089012654).*

There is no credible direct evidence that Kmart gave Borstein an unsatisfactory performance review, denied him a raise, cut his bonus and placed him in a PIP because he complained about religious discrimination. Therefore, the *McDonnell Douglas* analysis applies.

Here again, Borstein had to prove three elements: (1) that he engaged in activities protected by the Human Rights Act; (2) that Kmart subjected him to significant adverse acts and (3) that there was a causal connection between the adverse acts and his protected activities. Admin R. Mont. 24.9.603(1).

By filing Complaint No. 0089012654 Borstein established the first element of his *prima facie* case. The denial of Borstein's raise, the reduction of his bonus and his unsatisfactory performance review were categorically significant adverse acts. Admin. R. Mont. 24.9.603(2)(b). Borstein established the second element of his *prima facie* case.

The administrative presumption of causal connection applies in this complaint as well. Borstein established the third element of his *prima facie* case through evidence of Martinez' knowledge of the complaint and the proximity in time between his protected activity (the February 8, 2007 complaint) and the significant adverse action (the April 10, 2007 denial of a raise, reduction in his bonus, the unsatisfactory performance review and placement in the PIP), entitling him to the presumption of a causal connection between the two.

In response to Borstein's *prima facie* case, Kmart once again had the burden to show a legitimate business purpose for its alleged retaliatory conduct. Kmart met its burden to show legitimate nondiscriminatory reasons to give Borstein an unsatisfactory performance review, to deny him a raise, to reduce his bonus, and to place him in a PIP with its evidence of the performance problems that Borstein had in the district loss prevention manager position.

Borstein's 2005 evaluation, his 2006 mid-year evaluation and numerous communications from his manager stressed the need to reduce shrink, to increase staff and to increase his communication with store staff in order to reach the shrink and staffing levels.

Once Kmart produced a legitimate business reason for the discharge, Borstein, once again, had the burden of proving that the business reason was a pretext. To meet this third tier burden, Borstein could present either direct or indirect proof of the pretextual nature of Kmart's proffered reasons.

Borstein always bore the ultimate burden of persuading the fact-finder that Kmart illegally retaliated against him. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813; 818; *Johnson, op. cit.*, 734 P.2d at 213. Although he offered some rebuttal testimony, he did not carry his ultimate burden of proof. He failed credibly to rebut the evidence of his performance problems. Borstein may sincerely believe that the evidence of his performance problems was exaggerated and unfair. However. It would strain credulity and require a grand and efficient conspiracy to believe that Kmart, beset with retaliatory animus over Borstein's filing of two human rights complaints, would instead of terminating him or transferring him to some forsaken outpost, decided to offer not one, but three opportunities to transfer back to

California where Borstein had expressed a strong interest in returning. It further defied logic that Kmart, still full of retaliatory animus, would place Borstein on a performance improvement plan and rather than follow the rigid 90-day time frame for improvement then terminate him, actually gave him more time to make the necessary performance improvements. For Borstein to carry his burden the hearing officer would have to believe in this grand conspiracy. He does not.

The Hearing Officer was not persuaded, based upon the substantial and credible evidence of record, that Kmart's legitimate business reason for either denying him the Orange County position or giving Borstein an unsatisfactory performance review, denying him a raise, cutting his bonus and placing him in a PIP terminating his employment was a pretext. Accordingly, Borstein failed to prove by a preponderance of the evidence that Kmart retaliated against him for filing his complaints.

B. *Kmart did not discriminate against Borstein when it gave him a negative performance review, did not give him a raise and placed him under a performance improvement plan.* (Complaint No. 0089012654).

In order for Borstein to prove he was illegally discriminated against he 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). He must show (1) that he is a member of a protected class; (2) that he was entitled to a positive performance evaluation, a full raise and the bonus he was denied; and (3) that he was given an unsatisfactory performance evaluation, denied a full raise and bonus and placed in a PIP in circumstances "which give rise to a reasonable inference that he was treated differently because of his membership in the protected class." *Id.*; Admin. R. Mont. 24.9.610(2)(a). If Borstein proves a *prima facie* case of discrimination by a preponderance of the evidence, the burden shifts to Kmart, which must then offer evidence that is sufficient, if believed, to support a finding that its actions were based on a factor other than religion. *St. Mary's Honor Center*, 509 U.S. at 506-07; *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *Tx. Dpt. Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)).

Borstein met the first element by providing his evidence of being a member of the Jewish faith. Borstein failed to show that he was entitled to a positive performance evaluation, a full raise and full bonus. While he did produce evidence that he scored well in one set of metrics that Kmart used to rate its loss prevention managers, he failed to show that his overall performance merited his desired outcome. Thus, Borstein failed to meet the second element of his *prima facie* case.

Borstein provided no evidence that Kmart discriminated against him in any way within the 180 days preceding the filing of this complaint. Borstein conceded at hearing that he told the person conducting the administrative investigation of his complaint that discrimination had no impact on the PIP. He also testified that in response to a question from the investigator about whether this complaint was related to religious discrimination, his answer was "no." Accordingly, Borstein also failed to meet the third element of his *prima facie* case.

He therefore failed to prove by the preponderance of the evidence that Kmart discriminated on the basis of his religious affiliation.

VI. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case, pursuant to Mont. Code Ann. § 49-2-509(7).

2. Kmart's decision to give Borstein a negative performance review, to not give him a raise and place him under a performance improvement plan was not based on religious discrimination.

3. Kmart's decision to give Borstein a negative performance review, to not give him a raise and place him under a performance improvement plan and to not offer him the Orange County District Manager position were not done in retaliation for Borstein having filed human rights complaints against Kmart.

4. Borstein is not entitled to an award of damages, lost wages or medical expenses in this matter.

5. Because Borstein has failed to prevail in any of his claims, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VII. ORDER

Based upon the foregoing, judgment is entered in favor of Respondent Sears Holding Company, Inc.(Kmart) and Chad Borstein's complaints are dismissed.

DATED: May 22, 2009

/s/ DAVID A. SCRIMM

David A. Scrimm, Hearing Officer

Hearings Bureau, Montana Department of Labor and Industry

Borstein.HOD.dsp