

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0109014354:

CHARLOTTE BOONE,)	Case No. 628-2011
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
GREAT FALLS TRANSIT,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Charlotte Boone filed a complaint with the Department of Labor and Industry on April 14, 2010. She alleged that Great Falls Transit, her employer, retaliated against her because she filed complaints of disability discrimination and retaliation against it when the general manager, Jim Helgeson, singled her out, treated her rudely and on March 15, 2010, disapproved her request to use sick leave to attend the funeral of her stepfather (a leave request already approved by the operations manager). On October 15, 2010, the department gave notice Boone’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on May 19, 2011, in Great Falls, Montana. Boone attended with her counsel, David G. Dennis, Law Offices of David G. Dennis. Great Falls Transit attended, through designated representative Jim Helgeson, with counsel, Kevin C. Meek, Ugrin, Alexander, Zadick & Higgins, PC.

Charlotte Boone, Sylvester Barros (Operations Manager), Max Hallfrisch (Business Agent, IBT Local No. 2) and Jim Helgeson testified under oath.

Exhibits 4, 6, R4 and R16 were admitted into evidence.

The parties elected to submit the case without post hearing filings.

Having considered the evidence and applicable authorities, the Hearing Officer now issues this decision.

II. Issues

The pivotal issue is whether the employer took adverse employment action against the charging party because of her protected activity.

III. Findings of Fact

1. Charging party Charlotte Boone has been an employee of Respondent Great Falls Transit (GFT) since March 29, 2004, working as a transit driver. As of the date of hearing, she had been on Worker's Compensation benefits and absent from work, though still an employee, for a little over a year. Her industrial injury occurred on February 4, 2010, when she fell while assisting a passenger.

2. Boone believed that another employee, Peggy Hess, an "A.D.A. coordinator," inexplicably disliked her and repeatedly accused Boone of improper behavior at work. According to Boone, she "kept going to management and asking them to help me" regarding the conflicts with Hess, but got no assistance.

3. Boone believed that the conflict with Hess turned GFT General Manager Jim Helgeson against her. Eventually, Boone filed two Human Rights complaints, in 2006 and 2007, complaining of disability discrimination and retaliation by GFT, at least in part through Helgeson's actions and inactions. Both complaints were apparently resolved without contested case hearings.

4. Boone also filed a union grievance regarding Helgeson's treatment of her. On February 8, 2010, Boone and Union representative Max Hallfrisch met with Helgeson and Sylvester ("Sly") Barros, Operations Manager, to address the grievance.

5. During that meeting, Helgeson admitted that he did not like Boone, but asserted that he was treating her fairly, and that so long as he did treat her fairly, it didn't matter how he felt about her personally. Helgeson went further and told Boone that he would be happy for her to leave the workplace for employment elsewhere.

6. It is more likely than not that Helgeson came "not to like" Boone because of her emotional responses to stress in the work place, which Helgeson termed "drama." Admitting his negative feelings to Boone, in the context of a grievance meeting or any place else, showed candor, and poor judgment, on Helgeson's part.

7. Helgeson admitted in his hearing testimony that he avoided interactions with Boone, because he was concerned that she would misinterpret any interactions between them, reading retaliatory animus into whatever he might say or do. He also blamed Boone for "starting" the practice by ignoring him when he happened to be at the same place at the same time as she at work. His testimony that she ignored him

first is credible, but his response of ignoring her back shows remarkably poor judgment for an experienced supervisor.

8. It is more likely than not that Helgeson did not intend, in any action or inaction, to retaliate against Boone for her prior discrimination/retaliation complaints. It is more likely than not that Helgeson never took any adverse employment action against Boone because of her prior discrimination/retaliation complaints. "Ignoring her back" in the workplace cannot, under these peculiar circumstances, be considered a significant adverse action against her, although, again, it was a singularly immature response for a supervisor.

9. Helgeson took several actions that Boone interpreted as retaliatory. He had her go out and move her parked car so that it was within one marked parking space in the employee parking area. He affixed a "safe driver" award Boone had earned to the front of her locker, instead of presenting it in person to her, with others present. He also affixed a PSR ("Passenger Service Report," basically a complaint from a customer or observer -- not an employee -- about the conduct of a transit driver) to the front of her locker, for her to sign and return, instead of providing it to her personally, in private.

10. In each instance, GFT presented legitimate, non-discriminatory reasons for Helgeson's actions. He had Boone move her car because it was an extreme instance of sloppy parking, blocking two spaces in an area with limited space for employees. Because Boone's schedule was not "fixed" so that her time in the office area was the same daily, Helgeson delivered the "safe driver" award (after receipt of which Boone would receive a cash payment in her next check) by affixing it to her locker, so that she would receive it sooner than if Helgeson had to make arrangements to meet with her, in the presence of other employees, to deliver the award. He delivered the PSR in the same manner, instead of meeting with Boone in private to obtain her signature acknowledging receipt of it, so she could sign and return it sooner, and he credibly testified that it was folded over so that other employees could not see what it was.

11. Helgeson also denied Boone time off to attend her stepfather's funeral because the policy regarding leave for funerals did not include step relatives. Whether or not Barros had previously approved the leave for Boone, the evidence is clear that denial of the time off was consistent with the actual policy, and thus Helgeson's decision treated Boone just like every other employee. After this leave request was denied, the union began to negotiate with GFT to change this policy, rather than arguing that it meant something different from what Helgeson read it to mean.

12. Boone had also applied for a job which she believed would have allowed her to return to work, since she thought it would be within her limitations. It is not clear that the job actually would have been within her limitations. Helgeson participated in the decision to award the position to another employee. The selection of the other employee for the job was based upon comparative qualifications, not retaliatory animus.

13. A reasonable person in Boone's situation might well have concerns about whether Helgeson was retaliating. However, a reasonable person would have or should have known, after considering the facts in each instance, that Helgeson had legitimate business reasons for each decision. Therefore, the decisions he made and the actions the employer took would not have a chilling effect upon whether a reasonable employee would oppose acts of illegal discrimination or retaliation by the employer.

IV. Opinion¹

Montana law prohibits retaliating by taking adverse action against an individual because that individual has opposed any practices forbidden by the Montana law. This is true under the Montana Human Rights Act and the Governmental Code of Fair Practices. Mont. Code Ann. §§49-2-301 and 49-3-209.

"Illegal retaliation" is defined by the department's administrative rules, in pertinent part, as "a significant adverse act against a person because the person has engaged in protected activity." Admin. R. Mont. 24.9.603(1). Likewise, "protected activity" means "the exercise of rights under the act or code and may include (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code." Id.

To prove her claim, Boone must prove (1) she engaged in protected activity; (2) GFT took a significant adverse action against her; and (3) there was a causal connection between the significant adverse action and Boone's protected activity. E.g., Rolison v. Bozeman Deac. Hlth Serv., Inc., ¶17, 2005 MT 95, 326 Mont. 491, 111 P.3d 2002; Admin. R. Mont. 24.9.610.

A significant adverse act taken against a person during or within six months after that person participated or assisted in an investigation, proceeding or hearing to enforce any provision of either the Human Rights Act or the Governmental Code of Fair Conduct Act, triggers a disputable regulatory presumption of retaliatory motivation for that significant adverse act. Admin. R. Mont. 24.9.603(3). In this

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.

case, many of the actions of which Boone complains came within the time period specified in the rule, and could give rise to the disputable presumption of retaliatory animus if those actions were significant adverse actions.

It might be a good idea for GFT to train its General Manager to be a little less candid about his negative personal feelings toward an employee he supervises, to avoid further complaints which, even if ultimately not well-founded, will still cause GFT to go to the expense of successfully defending against them. However, Helgeson's articulation of his dislike for Boone, on this record, was not itself a significant adverse action, coming as it did with the simultaneous assertion that he was treating her fairly.

On this record, the evidence of legitimate business reasons for the other actions alleged to be retaliatory successfully rebutted the disputable presumption of retaliatory motivation, and negated the evidence from which the fact-finder could otherwise infer retaliatory animus because of the lack of legitimate, non-retaliatory business reasons for the actions.

Although Helgeson did require Boone, in particular, to go out and repark her car, the evidence also established that moving her car was necessary, to remedy a sloppy job of parking in an area with limited space for employees, so that reparking freed up a parking spot in the employee parking area.

For both the positive and negative documents (the "safe driver" award and the PSR), the evidence established legitimate, non-discriminatory reasons for Helgeson to place them on her locker. Once Boone received the "safe driver" award, she would be entitled to receive the cash payment she earned with the award in her next paycheck. Had Helgeson made arrangements to deliver the award in person, in the presence of other employees, it could have delayed her receipt of the cash award. Likewise, delivering the PSR sooner, folded so other employees could not see what it was, instead of meeting with Boone in private to obtain her signature acknowledging receipt of it, allowed her to sign and return it sooner and conclude the transaction, while protecting her privacy.

Helgeson's denial of Boone's time off request to attend her stepfather's funeral was justified because the policy regarding leave for funerals did not include step relatives. Even if Barros had previously approved the leave for Boone, the evidence is clear that denial of the time off was consistent with the actual policy, so that Helgeson's decision treated Boone just like every other employee.

The Railroad Labor Act preempts state law claims that provide other remedies to employees when those state law claims are disputes over the interpretation or application of CBA's, in other words, disagreements about how to

give effect to the bargained-for agreement, defined as “minor disputes” under federal preemption case law. E.g., *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254, 114 S.Ct. 2239, 29 L.Ed.2d 203. When state law claims do not depend upon interpretation of a CBA, involving purely factual questions about an employee’s conduct and the employer’s conduct and motives, such claims do not require interpretation of the CBA’s terms and the state law claims are not preempted. Substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA. *Id.* at 257.

In the present case, the union and GFT both agreed upon what the time off policy meant, so there was no dispute about the terms of the CBA. This is clearly true, because after Boone’s leave request was denied, the union began to negotiate with GFT to change this policy. Thus, the Hearing Officer was free to decide this charge without deciding whether the RLA pre-empted this discrimination complaint (as it may or may not have done). The same evidence that established the lack of disagreement about the meaning of the CBA also established that Helgeson applied it properly in denying Boone’s request. There being no evidence that any other interpretation was ever applied to any other employee’s request, GFT established a legitimate non-retaliatory business reason for taking the adverse action.

Finally, the job for which Boone applied because she thought it would have allowed her to return to work within her limitations (which may or may not have been true) was awarded to another employee, based upon better comparative qualifications. Even if Boone’s evidence had established that the job would have given her a chance to return to work, GFT established a legitimate non-retaliatory business reason for taking what Boone considered to be an adverse action against her.

GFT successfully overcame the disputable presumption of causation with its persuasive evidence of legitimate and non-retaliatory business reasons for its allegedly retaliatory actions against Boone. Boone always had the ultimate burden of persuasion that she was actually subjected to illegal retaliation. *H.A.I. v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993). At the end of the day, she failed to carry that burden.

V. Conclusions of Law

1. The Department has jurisdiction over Boone’s charges of illegal retaliation. Mont. Code Ann. §49-2-512(1).

2. Boone failed to prove that Great Falls Transit illegally retaliated against her because she had filed two prior illegal discrimination or retaliation complaints. Mont. Code Ann. §49-2-301.

VI. Order

1. Judgment issues in favor of Great Falls Transit and against Charlotte Boone on her charge that it illegally retaliated against her.
2. Boone's complaint is dismissed.

Dated: November 25, 2011.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: David G. Dennis, Law Offices of David G. Dennis, attorney for charging party Charlotte Boone, and Kevin C. Meek, Ugrin, Alexander, Zadick & Higgins, PC., attorney for respondent Great Falls Transit:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Kathy Helland
Human Rights Bureau, Department of Labor & Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights

Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Tamara Newby, (406) 444-3870 immediately to arrange for transcription of the record.