

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1175-2018:

PAUL BOHAN,)	
)	
Charging Party,)	
)	ORDER GRANTING
vs.)	RESPONDENT’S MOTION FOR
)	SUMMARY JUDGMENT
CITY OF MISSOULA,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On August 1, 2017, Paul Bohan filed a Charge of Discrimination stating:

I believe I have been discriminated against and retaliated against in the area of employment because of my disability, in violation of the Montana Human Rights Act and Government Code of Fair Practices for the following reasons:

- A. For the past several years, I have opposed the manner in which Respondent acts as a governmental entity. Respondent is aware of my disability.
- B. On February 27, 2017, I e-mailed Jon Wilkins, a member of the city council, about an item of city business. He responded five minutes later and wrote I should “be on medication” and not to send him further e-mails.”
- C. I believe Respondent discriminated against me based on my disability by communicating with me in a discriminatory manner.

The following handwritten note appears in the Particulars of the Charge of the complaint: “Please note: A,B,C were written by the Human Rights Bureau and they asked me to sign it. It does not characterize the entirety of my complaint. The attached letter is a summarization of my complaint. P.B.” Included with the

complaint are three additional pages of material outlining eight other allegations against the City of Missoula and other individuals and entities not identified in the Charge of Discrimination.

On May 31, 2018, the City of Missoula filed its Motion to Dismiss Charge of Discrimination Pursuant to Rule 37(d), Mont. R. Civ. P. arguing Bohan's Charge of Discrimination should be dismissed due to his failure to timely respond to the City of Missoula's discovery requests. On June 18, 2018, Bohan submitted his answers to the City of Missoula's discovery requests, as well as argument regarding how the HRB and the City of Missoula have dealt with his Charge of Discrimination. Bohan also sent a flash drive of more than 530 files to both the City of Missoula and OAH. Many of the files on the flash drive could not be opened by either OAH or the City of Missoula. On June 25, 2018, the City of Missoula filed its reply.

On June 20, 2018, Bohan filed a written statement arguing that neither the City of Missoula or HRB had fairly dealt with his Charge of Discrimination. Bohan's written statement also included a description of the difficulties he has encountered during the hearing process. On June 25, 2018, Bohan filed an additional written statement outlining concerns he had regarding the way the City of Missoula and HRB have dealt with his Charge of Discrimination.

On June 4, 2018, the City of Missoula filed its Motion for Summary Judgment arguing there are no disputed issues of material fact and it is entitled to judgment as a matter of law. On June 25, 2018, the City of Missoula filed a reply.

On July 2, 2018, the Hearing Officer held oral arguments on the two motions at the Missoula Job Service Office. Both Bohan and Jack Jenks, attorney for the City of Missoula, appeared. After the conclusion of the oral argument, the Hearing Officer attempted to explain what the next steps would be if the motions were either granted or denied, and what the parties could expect at hearing.

II. FACTS ESTABLISHED BY THE PLEADINGS¹

1. Paul Bohan is not currently, nor has he ever been, an employee of the City of Missoula.

¹Facts listed are taken in a light most favorable to the non-moving party.

2. Bohan lives in Missoula, Montana. Bohan is a frequent critic of the City of Missoula and its elected officials.

3. No elected official or employee of the City of Missoula has prevented Bohan from attending, speaking at, or participating in any City public meeting.

4. On February 26, 2017, at approximately 11:21 p.m., Bohan forward a 2016 email chain to Councilor Jon Wilkins, Mayor John Engen, Councilor Marilyn Marler and Council Jordan Hess. The email chain included an email sent to the City Council, Senators Steve Daines and Jon Tester, Missoula County Attorney Kirsten Pabst and others only a few minutes earlier at 10:45 p.m. The email chain included criticisms regarding the City of Missoula's acquisition of a local private water company. The email chain also included criticisms about the manner in which the City of Missoula conducts business, the 2007 purchase of a baseball stadium and complaints about a local non-profit housing group and local newspaper. *City of Missoula Motion for Summary Judgment*, Ex. B.

5. On February 27, 2017, at approximately 9:23 a.m., Councilor Wilkins responded to Bohan's email. Councilor Wilkins informed Bohan that he had stopped reading his emails because Bohan seemed upset about everything. *City of Missoula Motion for Summary Judgment*, Ex. C.

6. Bohan responded to Councilor Wilkin's email approximately 30 minutes later with criticisms directed at Councilor Wilkins, as well as a fence permit Bohan was required to obtain in 2011. *Id.* Council Wilkins responded a few minutes later explaining that he had put in a referral to address the cost of the fence permits. *Id.*

7. Bohan forwarded his email communications with Council Wilkins to Jon King at Town Square Media at approximately 10:11 a.m. *City of Missoula Motion for Summary Judgment*, Ex. E.

8. Bohan forwarded his email to King to Councilor Wilkins. *Id.* Councilor Wilkins responded, "Paul you need to be on medication don't send me any more emails." *Id.*

III. DISCUSSION

Any party may move, with or without supporting affidavits, for summary judgment on all or part of the claim. Rule 56(a) M.R.Civ.P. The judgment sought is mandatory if the pleadings, the discovery and disclosure materials on file, and any

affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3) M.R.Civ.P.; *Peterson v. Eichhorn*, ¶12, 2008 MT 250, 344 Mont. 540, 189 P.3d 615. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Mont.R.Civ.P. 56(c).

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266. Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Peila*, supra.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. “A fact is material if it ‘might affect the outcome of the suit under the governing law,’ and a dispute about a material fact is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Steele v. Schafer*, 535 F.3d 689, 692, 383 U.S. App. D.C. 74 (D.C. Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

When a respondent moves for summary judgment on a Human Rights Act case, the adjudicative body must first determine if the charging party has pled all the elements of a prima facie case. If Bohan did plead a prima facie case, then the City of Missoula’s motion must be supported with evidence of a legitimate, nondiscriminatory reason for its action or evidence that it took no illegal action. If the City of Missoula does present such evidence, Bohan must show evidence sufficient to raise material fact questions about the City of Missoula’s legitimate business reason or to raise an inference of pretext or otherwise contest and bring into doubt the City of Missoula’s evidence supporting its motion. *E.g., Heiat v. Eastern Mont. College* (1996), 275 Mont. 322, 912 P.2d 787, 792-93; *see also Reeves v. Dairy Queen, Inc.* (1998), 287 Mont. 196, 201, 953 P.2d 703, 706; *Stuart v. First Security Bank* (2000), 302 Mont. 431, 437, 15 P.3d 1198, 1202. Generally, questions of motive and intent are inappropriate for summary judgment. *Heit*, 912 P.2d at 792.

- A. Bohan's claim fails as he cannot show a prima facie case of either discrimination or retaliation in employment based upon his disability.

The Montana Human Rights Act (MHRA) is modeled after the Americans with Disabilities Act (ADA) and prohibits discrimination based on a disability by employers against employees. *Pannoni v. Bd. of Trustees*, 2004 MT 130 ¶ 26, 321 Mont. 311, ¶ 26, 90 P.3d 438 ¶ 26 citing § 49-2-303(1)(a) MCA.: see 42 U.S.C. § 12112(a). It is unlawful for an employer to discriminate against a person in a term, condition, or privilege of employment because of a physical or mental disability unless the reasonable demands of the position require a distinction based on physical or mental disability. Mont. Code Ann. §49-2-303(1)(a); *McDonald v. Dept. of Environmental Quality*, 2009 MT 209, ¶39, 351 Mont. 243, 214 P.3d 749.

In order to establish a prima facie case of discrimination in employment based upon disability, Bohan must show that (a) he is a qualified individual with a disability or impairment; (b) the employer was aware of his disability or impairment; and © the employer failed to reasonably accommodate the disability or impairment. See generally, *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005)(citing *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001)).

The MHRA also bans retaliation in employment because of protected activity. 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).

The elements of a prima facie retaliation case are generally: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶17, 326 Mont. 491, 111 P.3d 202; *Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; *see also*, Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. *Univ. of Tex. South Western Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). A retaliation claim is a separate action from the original discrimination suit. *Mahan v. Farmers Union Cent. Exch., Inc.*, 235 Mont. 410, 422, 768 P.2d 850, 858.

There is absolutely no evidence of record showing Bohan is currently, or has ever been, an employee of the City of Missoula. Bohan argued the MHRA and other federal civil rights statutes apply to him as they would to vendors or contractors of

the City of Missoula. While novel, the argument is not persuasive. Bohan's complaint specially states he was "discriminated and retaliated against in the area of employment because of [his] disability . . .". However, Bohan is not nor has he ever been an employee of the City of Missoula. Therefore, Bohan's claim that the City of Missoula discriminated against and retaliated against him in the area of employment based upon his disability fails as a matter of law.

- B. Bohan's eight additional claims fail as they are beyond the applicable 180-day statute of limitations.

A person claiming to be aggrieved by such a discriminatory practice can file a written, verified complaint with the MHRC setting forth the particulars of the alleged discrimination. Mont. Code Ann. § 49-2-501(1). Generally, complaints must be filed within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. Mont. Code Ann. § 49-2-501(4). "If the department determines that the complaint is untimely, it shall dismiss the complaint on a finding of no reasonable cause." Mont. Code Ann. § 49-2-501(5). *See also Skites v. Blue Cross Blue Shield*, 1999 MT 301, ¶9, 297 Mont. 156, 991 P.2d 955 (1999)(Dismissal was proper when there was no genuine issue of material fact that the plaintiff did not file a complaint with MHRC within 180 days of the most recent or continuing act of discrimination).

Bohan argued that the eight additional allegations included with his Charge of Discrimination are "pattern and process components" of his complaint. However, Bohan can only file a Charge of Discrimination to cover "discrete acts that 'occurred' within the appropriate time period." *AMTRAK v. Morgan*, 536 U.S. 101, 114 (2002). The acts referenced in Bohan's addendum to the Charge of Discrimination are not sufficiently related to the most recent act, e.g. Council Wilkins' February 27, 2017 email, so as to constitute continuing violations. *Id.* "[D]iscrete acts that fall within the statutory time period do not make timely acts that fall outside the time period." *Id.* at 112. "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. The eight additional claims made by Bohan in the addendum to his Charge of Discrimination are time barred and are not actionable in this proceeding.

- C. Bohan's claim fails as the City of Missoula did not deny him services as provided for under Governmental Code of Fair Practices.

Many of Bohan's filings list concerns he had with the manner in which the City of Missoula and various City employees and contractors of the City dealt with

him when he voiced complaints or concerns about government activity. While not specifically argued by either party, it is important to note that Bohan's claim would fail under the Governmental Code of Fair Practices (GCFP).

Montana Code Ann. § 49-3-205(1) provides, "All services of every state or local governmental agency must be performed without discrimination based upon . . . physical or mental disability . . .". The GCFP does not define services; nor does the ADA. The Rehabilitation Act defines a "program or activity" as "all of the operations of . . . a local government." *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. App). The court in *Frame* noted the Supreme Court has broadly understood a "service" to mean "the performance of work commanded or paid for by another," or "an act done for the benefit or at the command of another." *Id.* at 225. The *Frame* court looked to Webster's Dictionary for guidance and noted, "service" is defined as "the provision, organization, or apparatus for . . . meeting a general demand." Going on to look to Black's Law Dictionary, the *Frame* court noted a "public service" includes work "provided or facilitated for the general public's convenience and benefit." *Id.* at 226. The court went on to note that a "service" may be defined as "[t]he duties, work, or business performed or discharged by a public official." *Id.*

There is no evidence in this case that the City of Missoula has denied Bohan any service or that he has been harmed by any service offered by the City of Missoula. Bohan has participated regularly in government meetings; voiced his opinion without hinderance; and has generally been an active citizen in his community. While Bohan may have concerns about the manner in which the City of Missoula conducts business on behalf of its citizens, the evidence does not show that the City of Missoula has engaged in any activity that would be barred under the GCFP. Therefore, Bohan's claim under the GCFP fails as a matter of law.

D. Remaining Issues

The City of Missoula also argued that ADHD does not qualify as a disability under the MHRA. It is unnecessary to address that issue given the findings stated above. Similarly, it is unnecessary to address the City of Missoula's Motion to Dismiss Pursuant to Rule 37(d), Mont.R.Civ.P. given the outcome on its motion for summary judgment.

IV. ORDER

IT IS THEREFORE ORDERED that the City of Missoula's Motion for Summary Judgment pursuant to Rule 56(b), Mont.R.Civ.P. is GRANTED. Paul

Bohan's Charge of Discrimination is therefore DISMISSED. The hearing scheduled for August 2, 2018 is hereby VACATED.

DATED this 9th day of July, 2018.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Paul Bohan; and Respondent City of Missoula and its attorney, Jack Jenks, Capp Jenks & Simpson PC:

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)©

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

Human Rights Commission
c/o Annah Howard
Human Rights Bureau
Department of Labor and 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 ONE DIGITAL COPY 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 Office of Administrative Hearings, 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).