

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1346-2017:

KIONDRA BULLOCK,)
)
 Charging Party,)
) **HEARING OFFICER DECISION**
 vs.) **AND NOTICE OF ISSUANCE OF**
) **ADMINISTRATIVE DECISION**
 TELETECH CORPORATION,)
)
 Respondent.)

* * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

On July 29, 2016, Kiondra Bullock (Bullock) filed a complaint with the Montana Human Rights Bureau (HRB) alleging TeleTech Services Corporation (TeleTech) discriminated against her on the basis of her race and retaliated against her by placing her on a final written warning after she complained about the conduct of her co-workers. On December 28, 2016, Bullock, through her attorney, Nate McConnell, prepared an Amended Report of Discrimination, which amended her complaint to include hostile work environment. On January 23, 2017, the HRB issued a Final Investigative Report which did not address the hostile work environment claim because there was insufficient time to fully investigate the allegation. Because the hostile work environment issue was not certified for hearing before this tribunal, on July 24, 2017, Hearing Officer Caroline Holien granted a motion filed by Teletech and issued an order narrowing the scope of the hearing to exclude the hostile work environment issue.

Hearing Officer Chad R. Vanisko convened a contested case hearing in this matter on April 19, 2018 at the Flathead Job Service. Josh Van de Wetering, Attorney at Law, represented Bullock. Joshua Kirkpatrick and Michelle Gomez, Attorneys at Law, represented TeleTech.

At hearing, Bullock, Alex Goodnight (Goodnight), and Vanessa Oden (Oden) testified under oath. Charging Party's Exhibits 1 through 3 and 5 through 12 were admitted. Charging Party's Exhibit 13 was retroactively offered and admitted.

At the close of the hearing, the parties agreed to simultaneously file and serve their first brief and proposed findings of fact and conclusions of law no later than 60 days after receiving the hearing transcript, which was sent to the parties on or about May 2, 2018. Counsel for TeleTech submitted its opening brief on July 2, 2018. Counsel for Bullock did not submit a brief.

On July 26, 2018, the Hearing Officer conducted a conference call with the parties regarding Bullock's failure to submit a brief. Counsel for Bullock informed the Hearing Officer he had not received the transcript and had not yet reviewed opposing counsel's brief. Based upon those representations, the Hearing Officer ordered the submission of briefs optional at that point, and stated that he would issue a decision based on what was already submitted, but may, within his sole discretion, consider an untimely brief from Bullock's counsel should he submit one before a final decision was issued. The last communication from Bullock's counsel promised submission of a brief on August 30, 2018. However, no brief was ever submitted. The matter was thus deemed submitted for determination as of September 4, 2018.

Based on the evidence adduced at hearing and the arguments of the parties, the following hearing officer decision is rendered. In summary, Bullock's claims that several incidents occurring over the course of her roughly 17-month employment with TeleTech, all of which were appropriately investigated and responded to by the company to the extent they were reported, amounted to discrimination and/or resulted in retaliation are unfounded.

II. ISSUES

1. Did TeleTech Corporation discriminate against Kiondra Bullock on the basis of race and/or retaliate against her in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If TeleTech Corporation did illegally discriminate and/or retaliate against Kiondra Bullock as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If TeleTech Corporation did illegally discriminate and/or retaliate against Kiondra Bullock as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

1. TeleTech is a third-party outsource business processing center providing customer service management and overall support for a variety of businesses. TeleTech operates a call center in Kalispell, Montana. Operations in Kalispell include customer service management support services for financial clients in the areas of checking, savings and credit card services.

2. TeleTech typically has anywhere from 80 to 100 people taking phone calls on each floor on an average day at its Kalispell location.

3. TeleTech's monthly attrition rate is approximately six to eight percent. Attrition is a significant concern for TeleTech. Attracting and retaining qualified workers is difficult in an area such as Kalispell. As such, supervisors and managers are tasked with keeping attrition rates as low as possible for their employee groups.

4. Bullock was, at all times pertinent to this case, a resident of Kalispell.

5. Bullock is an African American female.

6. On January 13, 2015, Bullock began working for TeleTech as a Team Lead, Service Delivery Small Business. Bullock was hired for the position because she interviewed well and represented that she had relevant college and graduate education, a strong background in customer service, leadership experience in call centers, and she left her prior jobs in good standing.

7. Bullock reviewed TeleTech's Workplace and Behavior Policy at the time of her hire. The Workplace and Behavior Policy is reviewed with all new employees.

8. TeleTech requires employees to take an annual web-based training on harassment and TeleTech's code of ethics. The training takes anywhere from 15 to 45 minutes. A corporate representative with TeleTech also comes to the Kalispell facility to conduct discrimination and sensitivity training with managers and supervisors.

9. Tomi Peterson (Peterson) was initially Bullock's direct supervisor. In September, 2015, Vanessa Oden became Bullock's supervisor. Bullock and Oden had a generally positive working relationship, and Bullock had good regard for Oden as a supervisor. Oden was one of the reasons why Bullock remained at TeleTech as long as she did.

10. Bullock's job duties included managing employees on a daily basis, which included her "looking at their outcomes, looking at their statistics, measuring their quality, coaching them to actually improve in their job, handling any issues of people's absences, tardies, team morale. . . ." Bullock Tr. 12:22-25; 13:1-2. At any time, Bullock supervised between five and 20 employees.

11. Bullock's work space was a large open room in which customer service representatives, or "associates," work in cubicles.

12. Associates primarily work by taking phone calls. There are production coaches who walk the floor and address concerns as they arise. There are also Team Leads who manage a number of associates to ensure they are performing at appropriate levels.

13. At the beginning of her employment, Bullock heard a coach and an associate telling jokes about African Americans. Bullock walked away when she first heard the jokes, but later sent an email to the coach's Team Leader about the interaction. Bullock received a response from Oden letting her know it had been handled.

14. Bullock felt Oden and Peterson had promptly and appropriately addressed her complaint.

15. In April, 2015, Bullock was being coached by Peterson, when Tory Graham, the Site Director at the time, came into the meeting and asked Bullock if, ". . . it [was] true black women do not like to swim because they don't want to get their hair wet. . . .". Bullock Tr. 26:16-23. Bullock felt the question was offensive and she was being asked to "represent everything black." *Id.* at 28:2-13. Bullock did not complain about Graham's question to the employer because Graham was the highest level of management at the facility.

16. Also in April, 2015, Bullock had left herself logged into a shared document. When she returned to work, she discovered another associate, Sandi Cowden (Cowden), had shut down her computer, causing her to lose all of her work.

Cowden told Bullock she shut down her computer so she could access the document. The situation escalated to the point of Cowden yelling at Bullock.

17. Cowden did not use any racially insensitive language during her verbal altercation with Bullock. Bullock believed the situation was racially motivated, however, because other employees were not treated the same way and, if they were yelled at by another employee, the offending employee was reprimanded.

18. Bullock complained to Graham about Cowden's behavior. Graham told Bullock that Cowden did not mean anything by it, and Bullock should go back to work.

19. Cowden did apologize to Bullock, but made a comment about Bullock's husband being a good-looking white man and she "would do him." Bullock Tr. 33:13-16. Bullock assumed that either Graham or Peterson had directed Cowden to apologize.

20. Bullock considered Cowden's conduct to most employees as being inappropriate regardless of the race of the employees involved.

21. In May, 2015, Jo Bowman (Bowman), who had recently been hired as the Site Director, showed Bullock a picture of her son, who is bi-racial, and asked Bullock what it was like being African American in Kalispell. Bullock had not previously met Bowman and did not know she was the new Site Director. When Bullock challenged the propriety of Bowman's question, Bowman told Bullock that she was considering having her son move to Kalispell.

22. Bullock did not complain to the employer about her interaction with Bowman because, as the Site Director, Bowman was the highest level of management at the facility.

23. Also in May, 2015, Bullock sent an e-mail to Andre Mehan (Mehan), who was in charge of Human Capital (*i.e.*, human resources) at the time, after another employee, Harlan Fredenberg (Frendenberg), "yelled and screamed" at her on the floor. Bullock Tr. 36:10. Bullock listed all the other events where she believed she had been treated differently due to her race in her e-mail.

24. Mehan met with Bullock a few days after she sent the e-mail. Mehan apologized, let her know that it would not happen again, and indicated he would be talking to Graham and Peterson.

25. Around the time Bullock met with Mehan, a news story broke about Rachel Dolezal, who was a white female leader of the Spokane office of the NAACP who was found to have been pretending to be an African American. Graham asked Bullock about how she felt, as an African American woman, about the Dolezal matter. Bullock told Graham she did not want to discuss it because Dolezal was a friend of hers.

26. On or about July 30, 2015, Bullock wrote a letter to Susan Frye (Frye), who was the Vice President at the time, about the many incidents she had experienced. Bowman spoke to Bullock a few days later, apparently in response to Bullock's letter to Frye. Bullock sent her a copy of the letter in early August, 2015, so Bowman could investigate her concerns.

27. On September 11, 2015, Bullock was placed on the first Performance Improvement Action Plan (PIP). The PIP addressed concerns regarding the manner of Bullock's communication with other employees and displaying a lack of team work. The PIP included the following performance expectations:

Maintain a professional demeanor at all times while at work. This includes keeping criticism about leaders and peers to your Manager in your Manager's office.

Customer Focus including supporting the floor during your shift for agent support, assisting peers as needed and supporting Leaders and their decisions.

Teamwork and Collaboration including following the scent sensitive policy. Maintaining confidentiality of communications from leadership. Responding in a professional matter [sic] to others, IE, if someone greets you with a "Hi" or "Good Morning[.]"

Ex. 9.

28. Bullock had previously had good performance reviews at her six-month and annual reviews.

29. In February, 2016, three of Bullock's team members—Tim Silotti, Don Clark, and Preston Enyeart—complained they were not getting the support they needed from Bullock and were being bullied by her. Another employee, Ryan Lamb, later complained that Bullock treated him differently due to his lifestyle choices.

Clark and Lamb later left their employment with TeleTech. A third employee, Jealousy Powell, also complained that Bullock had engaged in unprofessional behavior while at work.

30. Oden determined the associates were consistent in their complaints that they had been bullied by Bullock.

31. On April 4, 2016, Bullock received a second PIP. The second PIP addressed issues regarding Bullock's employee management. Specifically, the second PIP included the following performance expectations:

Recognize employees every week for improvements on call behaviors, metrics, attitude or team work.

Identify why Job Abandonment as a termination reason is increasing in your team assignment.

Have no more than 1 termination maximum per month and ensure you meet goal of 6% or less month over month.

Ex. 8.

32. On April 11, 2016, Bullock was talking to another employee, Crystal Smyth (Smyth), at the beginning of her shift. Smyth was telling Bullock about her new rental property that had a lot of acreage. Bullock mentioned that Smyth could babysit for her and let her grandkids run free out there because Bullock lived in an apartment. Alex Goodnight, who worked as a production coach, walked up and commented that kids make good slave labor.

33. As a production coach, Goodnight was required to actively roam the production floor and field questions from the agents on the phone. He was a subordinate of Bullock in the workplace hierarchy.

34. Bullock did not immediately respond to Goodnight's comment, but was angry and offended at the comment and the response of her co-workers, which was laughter.

35. Bullock interpreted Goodnight's comment to be related to her race and to harken back to the days of plantation owners and slavery.

36. Goodnight intended his comment to mean kids like playing in the dirt and could be useful in a garden. Goodnight did not intend his comments to be offensive or racist.

37. There were approximately seven to eight people present at the time of Goodnight's comment. Bullock told Goodnight that his comment was inappropriate and, in a "long soliloquy," to him why she found the comment offensive. Bullock Tr. 48:3-16; 108:9-11. Bullock told Goodnight, in an elevated voice, that what he said to her was racist propaganda. Bullock Tr. 108:17-109:13. Bullock told Goodnight to "walk away and don't come back unless you're invited." Bullock Tr. 108:13-15. Bullock spoke with an elevated voice but did not believe she was yelling at Goodnight.

38. Bullock had never before had a run-in with Goodnight, and he never before exhibited racist behavior toward her.

39. Goodnight returned to his desk and sent an email to his supervisor, Kalee Haxby (Haxby), informing her of his interaction with Bullock.

40. Goodnight was called into Bowman's office, where he explained what had happened between himself and Bullock.

41. Because their personal work computers were directly tied into client systems, security concerns dictated that TeleTech employees were generally unable to use their work computers to interface with non-client systems, such as TeleTech Human Capital. An employee who is at a leadership level has a TeleTech and a client-provided computer so they can access client reporting. The agents handle financial accounts, so the computers are set up so they cannot e-mail outside of the client's ethernet.

42. Goodnight wrote a statement regarding the incident on Bowman's computer, which could be used to contact human resources and other, internal TeleTech systems. Bowman was not present in her office while Goodnight wrote his statement.

43. Bowman told Goodnight that he needed to be more mindful of the things he said so he could avoid hurting other people's feelings.

44. Oden had all of the employees who were identified as having observed or overheard the exchange between Bullock and Goodnight come to Bowman's office and type up their statements without anyone else present.

45. Bullock went to Oden's office later that morning following the incident between Goodnight and Bullock. Oden asked Bullock as she entered her office why she was receiving emails that Bullock was yelling on the call center floor. Oden told her that Cowden and another employee had sent her emails saying Bullock had yelled at Goodnight. Bullock explained what had happened, and Oden told her it was not an "HR issue." Bullock Tr. 54:19-20. Oden directed Bullock to leave her office and return to her desk.

46. Later that day, Bowman sent Bullock an instant message telling her she could write a comment to Mehan about the situation.

47. Bullock was frustrated with what she believed to be TeleTech's failure to properly respond to her complaint. Bullock ultimately sent an e-mail to TeleTech's "We Hear You" program, which allows employees to submit complaints or concerns to the corporate office. Bullock took this approach due to her previous dealings with Mehan, whom she did not believe had adequately addressed her concerns.

48. After sending Bullock back to her desk, Oden contacted Bowman and Mehan. Bowman directed Oden to send her all of the e-mails she had received complaining about Bullock's conduct that day. Bowman had Oden review the e-mails and compared them to the list of individuals who had complained to her about Bullock's behavior. Oden was then sent to retrieve those individuals so Bowman could interview them about what had occurred earlier that morning.

49. Bullock was asked to provide a written statement, and she refused.

50. At the end of TeleTech's investigation of the incident with Goodnight, human resources advised Bowman and Oden that it was deemed that Bullock had incorrectly handled the situation, based on her role as a leader, and a final written warning was warranted. A decision was made to issue Bullock a final written warning because she was expected to adhere to a higher standard as a leader in the building and to act with professionalism, which she had not done in situations with her subordinates.

51. On May 20, 2016, Bowman and Oden gave Bullock the final written warning. The warning addressed Bullock's behavior toward Goodnight and telling

him to get away from her desk in a raised voice. The warning also cited multiple separations resulting from Bullock's behavior, her lack of professionalism, and to employee complaints about her conduct at work. Bullock refused to sign the warning.

52. Bullock prepared a written response outlining her concerns regarding the manner in which her complaint had been dealt with by Human Capital.

53. At the time she received the final written warning, Bullock was applying for a service delivery supervisor position at a different location.

54. On June 6, 2016, Bullock informed Oden that she was quitting her employment with TeleTech. Oden asked what she could do to retain Bullock because she both enjoyed working with Bullock and thought she had been a great leader up to that point.

55. It was Bullock's decision to quit her employment with TeleTech and begin working elsewhere. There was never an implied or express suggestion that TeleTech had any intent of discharging Bullock so long as she successfully addressed the legitimate issues raised in the final written warning.

56. Bullock submitted her written resignation later that same day.

57. TeleTech provided sensitivity training to its managers and supervisors after Bullock separated from her employment.

58. During the pendency of this case, TeleTech learned that Bullock had falsified her resume, both as to education and work experience.

59. TeleTech did not discriminate against Bullock because of her race.

60. TeleTech did not retaliate against Bullock because of her race.

IV. DISCUSSION

The Montana Human Rights Act (MHRA) prohibits discrimination in employment based upon race, Mont. Code Ann. § 49-2-303(1)(a). Bullock alleges TeleTech discriminated and/or retaliated against her on the basis of race in violation of the MHRA. When there is no direct evidence of discrimination, Montana courts apply the three-tiered burden shifting analysis of *McDonnell Douglas Corp. v. Green*,

411 U.S. 792 (1973). *See Hearing Aid Inst. v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *see also Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988). The *McDonnell Douglas* “burden-shifting approach” applies in this case because it involves circumstantial rather than direct evidence of unlawful discrimination (also known as a “pretext” case). *See Laudert v. Richland Cnty. Sheriff's Dep't*, 2000 MT 218, ¶ 20, 301 Mont. 114, 7 P.3d 386.

The *McDonnell Douglas* standard first requires Bullock to establish a prima facie case of discrimination. If Bullock makes such a showing, the burden shifts to TeleTech to produce a legitimate, nondiscriminatory reason for its actions. If TeleTech meets this burden, Bullock must show, by a preponderance of the evidence, that the legitimate reasons offered are only a pretext for discrimination. *See Vortex Fishing Systems, Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, 38 P.3d 836. Bullock at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Heiat v. Eastern Montana College*, 275 Mont. 322, 328, 912 P.2d 787, 792 (1996). It is not enough to support a conclusion of discrimination for a court to simply disbelieve the reason offered by the defendant for its decision; rather, the court must also be persuaded that discrimination was the real reason for the employer's action. *See St. Mary's Honor Ctr.*, 509 U.S. at 515; *Heiat*, 275 Mont. at 328, 912 P.2d at 791). The *McDonnell Douglas* elements, constituting a prima facie case, do not require a showing of scienter on the part of the employer. *See Martinez v. Yellowstone Cnty. Welfare Dep't*, 192 Mont. 42, 50, 626 P.2d 242, 246-47 (1981).

A. Discrimination

1. Bullock Has Not Shown a Prima Facie Case of Discrimination

The elements of a prima facie case vary depending upon the facts of the case. *See Vortex Fishing Systems*, ¶16. To establish a prima facie case of race discrimination in employment, a plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the job that he or she was performing; and (3) the plaintiff suffered an adverse employment action, or was discharged. *See McDonnell Douglas*, 411 U.S. at 802; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-523 (1981).

Bullock is an African American woman who lives and works in a city that, either proportionately or in absolute numbers, does not have a large African American community. Although it later became apparent Bullock had presented a false employment and educational history to TeleTech when she was hired, by all

accounts, Bullock was a fairly successful TeleTech employee who was valued by the employer until the final few months of her employment. Bullock has therefore satisfied the first two elements of her prima facie case.

The next issue is whether Bullock suffered an adverse employment action. Bullock must demonstrate that TeleTech took one or more adverse employment actions against her because of her race. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93, 99-100 (2003). An adverse employment action is one that "materially affect[s] the compensation, terms, conditions, or privileges of . . . employment." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008). Although adverse action is defined broadly, not every employment decision amounts to an adverse employment action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). "Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." See *Bishop v. Bell Atl. Corp.*, 299 F.3d 53, 59 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)). To determine whether a particular action is materially adverse, the court must employ an objective standard and consider the context and circumstances of the particular case. See *Burlington N.*, 548 U.S. at 68-69, 71.

Bullock did have issues with her employment. She was placed on two PIPs because of her objective job performance and received a final written warning as a result of her conduct toward her co-workers and subordinates. There is no evidence, either direct or circumstantial, however, showing the discipline she received was based upon her race. Further, there is absolutely no evidence showing the discipline she received materially affected the compensation, terms, conditions or privileges of her employment.

Although Bullock testified she was subjected to various comments by her co-workers (*e.g.*, a co-worker asking how she liked living in the area as a black woman; a co-worker asking about whether she could swim as a black woman; and a co-worker commenting that Bullock's children would make good slave labor at another co-worker's large property, etc.), under the *McDonnell Douglas* analysis, stray remarks, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process are insufficient to establish a prima facie case. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-78 (1989); see also *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991) (discriminatory comments that are "vague and remote in time and administrative hierarchy . . . are not more than 'stray remarks,' which are insufficient to establish discrimination."). While the comments made by Bullock's co-workers were questionable in terms of propriety and were certainly insensitive, the

evidence indicates that they were infrequent and sporadic events. Moreover, the offensive comments and questions came from individuals who were not "decisionmakers" in the issuance of the PIP and final written warning to Bullock.

Bullock had been on notice as early as September, 2015, that the employer considered her behavior unacceptable and she needed to improve her conduct toward her co-workers. These concerns were again shared with Bullock in the April 4, 2016, PIP that dealt specifically with the concern that she was losing employees due to her conduct. The final incident that led to the final written warning involved Bullock yelling at Goodnight for a comment that she found unacceptable. While Bullock may have been highly offended by the connotations of Goodnight's comment, the fact remains that Bullock's reaction itself was inappropriate and resulted in several employees complaining about her raised voice and disruptive behavior in the middle of an open floor-plan call center.

Based on the foregoing, Bullock has failed to meet the third element of her prima facie case. Therefore, Bullock's claim of discrimination in employment based upon race must fail.

2. TeleTech Has Shown it Had Legitimate, Non-Discriminatory Reasons for Its Actions and There Was No Pretext

Even if Bullock had established a prima facie case of discrimination, TeleTech has shown it had legitimate, non-discriminatory reasons for its actions. *See Admin. R. Mont.* 24.9.610(3). Under this prong of the *McDonnell Douglas* test, TeleTech's "burden is one of production – not persuasion." *Ray v. Mont. Tech of the Univ. of Mont.*, 2007 MT 21, ¶ 33, 335 Mont. 367, 152 P.3d 122.

TeleTech produced substantial, credible evidence showing there had long been concerns about Bullock's workplace behavior. Oden testified that, while Bullock had been an excellent employee early in her career, she and other members of management had increasing concerns that Bullock's behavior toward her co-workers and her subordinates was negative and disruptive. In particular, there was a concern that Bullock's behavior was causing an increase in the attrition rate in her group, which was problematic for a company that experiences a high rate of employee turnover as a matter of course. TeleTech has therefore met its burden of offering legitimate, non-discriminatory reasons for its issuance of discipline to Bullock regarding her conduct at work.

Furthermore, Bullock cannot show that the reasons offered by TeleTech were only a pretext for discrimination. *See Ray*, 2007 MT 21, ¶31. Pretext may be proven 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. *See Hearing Aid Inst.*, 258 Mont. at 372, 852 P.2d at 632 (quoting *Burdine*, 450 U.S. at 256). In order to prove something is a pretext for discrimination, it must be shown both that the reason was false and that discrimination was the real reason. *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 515). Bullock's burden now merges with the ultimate burden of persuading the court that the plaintiff has been a victim of intentional discrimination. *See Heiat*, 275 Mont. at 328, 912 P.2d at 792 (citing *St. Mary's Honor Ctr.*, 113 S. Ct. at 2752; *Burdine*, 450 U.S. at 256).

The issues that gave rise to the final PIP and final written warning were issues addressed by the employer in a PIP issued in September, 2015. Despite this PIP, Oden testified she learned that several employees who had reported to Bullock quit due to difficulties they experienced with Bullock. Oden further testified the increase in the attrition rate for Bullock's group, as well as the concerns voiced by the employees who had quit, led to the final PIP. Oden's testimony, which was particularly persuasive, established that Bullock had been a valued employee until the final few months of her employment when Oden and other members of management began having concerns about Bullock's disruptive behavior. Bullock offered little evidence to rebut TeleTech's evidence regarding concerns about her behavior at work other than conclusory statements that she was an excellent employee. There were issues completely unrelated to race that affected Bullock's ability to successfully perform her job duties—namely, Bullock's combative and disruptive behavior in the workplace. Bullock has failed to show that legitimate, non-discriminatory reasons offered by TeleTech were pretext for discrimination. Therefore, Bullock's claim again must fail.

B. Retaliation

1. Bullock Has Shown a Prima Facie Case of Retaliation

Montana law 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. *See Admin. R. Mont. 24.9.603 (2)*. The elements of a prima facie retaliation case under Title VII are: (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 exists between the protected activity and the employer's action. See *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶17, 326 Mont. 491, 111 P.3d 202; see also *Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; 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. See generally *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). A retaliation claim is a separate action from the original discrimination suit. See *Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989)

Circumstantial evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent’s acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610(3), (4); see also *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 868 (9th Cir. 1996).

The first element is whether Bullock engaged in protected activity. “Protected activity” means the exercise of rights under the act or code and may include: (a) aiding or encouraging others in the exercise of rights under the act or code; (b) opposing any act or practice made unlawful by the act or code; and (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. Admin. R. Mont. 24.9.603(1). Bullock engaged in protected activity when she complained about conduct in the workplace that she believed to be discriminatory. In each instance, Bullock was protesting conduct prohibited under MHRA, namely discrimination against a protected class. Therefore, Bullock has satisfied the first element of her prima facie retaliation claim.

The second element of the retaliation claim concerns whether TeleTech took an adverse employment action against Bullock. As stated above, Bullock was placed on two PIPs because of her objective job performance and received a final written warning as a result of her conduct toward her co-workers and subordinates. On their face, these were adverse employment actions taken after Bullock engaged in protected activity. Thus, Bullock has satisfied the second element of her prima facie retaliation claim.

In order to establish the causal link between the protected conduct and the illegal employment action as required by the prima facie case, the evidence must show the employer's adverse employment action was based in part on knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003); *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(Causation "may be inferred from . . . the proximity in time between the protected action and the allegedly retaliatory employment decision").

The actions taken by TeleTech have a degree of temporal proximity to Bullock's protected activity. In May, 2015, Bullock sent an e-mail to Mehan complaining about her treatment by Fredenberg on the floor and listing other events where she believed she had been treated differently due to her race. On July 30, 2015, Bullock wrote a letter to Frye about the incidents she had experienced which she tied to her race. Thereafter, on September 11, 2015, Bullock was placed on the first PIP, but there was no evidence of any temporal or other causal linkage to any protected activity. In February, 2016, three of Bullock's subordinates complained about her, leading to her second PIP on April 4, 2016. In this case, there again was no evidence of any temporal relationship or other causal connection between the PIP and protected activity. Finally, after Bullock complained about the incident with Goodnight on April 11, 2016, she was given a final written warning on May 20, 2016, in part for her actions directly relating to the April incident. Circumstantial evidence based on the temporal proximity of the final written warning to the Goodnight incident—combined with the fact that the final written warning partially concerned Bullock's behavior in relation to the Goodnight incident—satisfies the third and final element of Bullock's prima facie retaliation claim.

2. TeleTech has Rebutted Bullock's Prima Facie Case of Retaliation

If the plaintiff makes out a prima facie case, the employer can rebut it by producing evidence of a legitimate, nondiscriminatory explanation for its actions. *See St. Mary's Honor Ctr.*, 509 U.S. at 506-07 (1993) (once a prima facie case is established, the burden of production shifts to employer to articulate a nondiscriminatory reason for adverse employment action, causing the presumption created by the prima facie case to fall away.) A plaintiff who establishes a prima facie case of retaliation bears the "ultimate burden of persuading the court that [she] has been the victim of intentional [retaliation]." *Burdine*, 450 U.S. at 256. In order to

carry this burden, a plaintiff must establish “both that the [employer’s] reason was false and that [retaliation] was the real reason for the challenged conduct.” *St. Mary's Honor Ctr.*, 509 U.S. at 515.

To reiterate what was set forth above, TeleTech produced substantial, credible evidence showing there had long been concerns about Bullock’s workplace behavior. The issues that gave rise to the final PIP and final written warning were issues addressed by the employer in the PIP issued in September, 2015. Bullock's behavior had become combative and disruptive and was causing an increase in the attrition rate in her group, which in turn was problematic for TeleTech’s business. TeleTech has again shown legitimate, non-discriminatory reasons for its issuance of discipline to Bullock regarding her conduct at work.

Bullock offered no evidence that the issues raised by TeleTech were not genuine, nor did she offer any evidence relating to any action taken by TeleTech to protect activity other than the circumstantial connection discussed above. Indeed, with respect to the final written warning, TeleTech waited to issue the warning until completing its own internal investigation of the incident. Its rationale for issuing the final written warning was not proven false or even challenged by Bullock. To reiterate from the analysis already set forth above, there was no evidence offered showing that the reasons offered by TeleTech for taking adverse employment actions against Bullock were untrue or of unworthy credence. Therefore, Bullock's claim of retaliation must fail.

V. CONCLUSIONS OF LAW

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

2. The MHRA prohibits discrimination in employment based upon race. Mont. Code Ann. § 49-2-303(1)(a).

3. Bullock failed to prove that TeleTech Corporation either discriminated against her illegally because of race or retaliated against her for engaging in protected activity. Mont. Code Ann. §§ 49-2-301, -303(1).

4. For purposes of Mont. Code Ann. § 49-2-505(8), TeleTech Corporation is the prevailing party.

VI. ORDER

Judgment is granted in favor of TeleTech Corporation and against Kiondra Bullock, whose complaint is dismissed with prejudice as meritless.

DATED: this 29th day of November, 2018.

/s/ CHAD R. VANISKO
Chad R. Vanisko, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Kiondra Bullock, Charging Party, and her attorney, Joshua Van de Wetering; and TeleTech Corporation, Respondent, and its attorneys, Joshua B. Kirkpatrick and Michelle L. Gomez:

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) and (4).

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).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.

Bullock.HOD.cvp