

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 105-2017:

HEATHER SCHNEITER,)	
)	
Charging Party,)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
ARLEE SCHOOL DISTRICT,)	
)	
Respondent.)	

* * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Heather Schneider brought this complaint alleging that her employer, Arlee School District (School District), discriminated against her in employment on the basis of race (Native American) by failing to appoint her as an elementary tutor for the 2016-2017 academic year and appointing a less qualified candidate who was not Native American.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on November 21, 2016 in Arlee, Montana. Attorney Torrance Coburn represented Schneider. Attorney Elizabeth O’Halloran represented the School District. School District Superintendent David Whitesell appeared as a designated representative for the School District.

At hearing, Schneider, Ronda Howlett, Wendy Swab, Shawn Orr, Sibley Malee-Ligas, Anne Tanner, Tricia Desjarlais, SueAnn McCay, Karen Smith, Pamela Schneider, Don Holst, Deanne Smith, Chris Kuschel, and Whitesell testified under oath.

Charging Party’s Exhibits (C.P. Ex.) 1 through 4; 6 through 8; the last page of Exhibit 9; 11; and 12 were admitted into evidence. Charging Party’s Exhibit 5 was withdrawn. Charging Party’s Exhibit 10 was not offered. Respondent’s Exhibits (R. Ex.) 102; 108 through 110; 112; 113; 115; and 117 were admitted. Respondent’s Exhibits 101, 103 through 107; 111 and 114 were withdrawn. Respondent’s Exhibit

116 was not offered. Those exhibits that were withdrawn or not offered are not part of the record. Due to the confidential information contained in some of those documents, the exhibits will either be available for pickup by the parties or destroyed at the parties' request. The parties are directed to email Sandra Page, Legal Secretary, at spage@mt.gov no later than ten days from the date of this decision to state their preference.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Office of Administrative Hearings on February 8, 2016. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did Arlee School District discriminate against Heather Schneider on the basis of race in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Arlee School District did illegally discriminate against Heather Schneider 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 Arlee School District did illegally discriminate against Heather Schneider 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. Respondent Arlee School District (School District) is a political subdivision of the State of Montana and operates Arlee Public Schools in Arlee, Montana.

2. Charging Party Heather Schneider taught fifth grade in the School District for approximately 17 years. Schneider began teaching second grade for the School District during the 2016-2017 academic year.

3. Schneider is Native American. Schneider is a first generation descendant of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

4. Schneider's ethnicity was generally known by School District staff.

5. The School District is located on the Flathead Reservation.

6. Schneider has a Bachelor of Arts degree in Education with a concentration on Elementary Education. Schneider has a Master's Degree in Education with a concentration on Leadership/Administration, which she earned through the Montana State University Indian Leadership (ILEAD) Program.

7. The ILEAD program provides grant opportunities for Native American teachers to earn their Masters' Degree in Education. Grant recipients must demonstrate leadership and teaching skills within their school district. The School District was required to document Schneider's leadership and teaching activities as part of her application for grant funding under the ILEAD Program. In July 2013, Schneider prepared a letter to be submitted to the ILEAD Program, which Arlee Elementary School Principal Don Holst reviewed and submitted.

8. Schneider at all times pertinent to this matter has been a licensed educator in Montana. Schneider holds endorsements in K-12 Reading, K-12 Principal, Reading Recovery and Literacy Learning.

9. Schneider has received positive performance appraisals throughout her employment with the School District. Schneider was named the Flathead Indian Teacher of the year in 2012. Schneider has also been awarded Tribal Teacher of the Year for the School District.

10. The School District receives grant funds under Title III (the 21st Century Grant) that it applies to the Arlee Partners in Learning Program to provide after school tutoring to its students.

11. The primary goal during the first and second years of the tutoring program was to improve the academic achievement of the students participating in the program. The program was meant to align with the academic standards required of the School District, including Common Core and the Indian Education for All mandate, and to enhance the students' classroom experience.

12. The 21st Century Grant program requires demonstrated improvement in the academic achievement of students participating in the program.

13. On August 18, 2015, the School District announced it had four grant funded elementary after school tutor positions and two grant funded junior high/high school after school tutor positions open for the 2015-2016 academic year. Ex. 1.

14. The announcement noted the after school tutor positions were slated to begin September 14, 2015 and that tutors would be paid an hourly rate of \$25.00. The announcement also noted that after school elementary tutors would be required to work from approximately 4:10 p.m. to 5:30 p.m., Monday through Thursday and junior high/high school after school tutors would be required to work Monday through Thursday, 4:10 p.m. to 5:30 p.m. or 4:10 p.m. to 6:30 p.m., with only one tutor staying from 5:30 p.m. to 6:30 p.m. The announcement also noted, "Preference will be given to current certified staff members. If you were employed in on [sic] of these positions last year, you must reapply this year." C.P. Ex. 1.

15. On August 26, 2015, Schneiter timely submitted her letter of interest for the elementary after school tutoring position to the District Office. C.P. Ex. 2.

16. Schneiter had worked as an elementary after school tutor for the five years prior to the 2015-2016 academic year.

17. Six individuals applied for the after school tutor positions. All six individuals applied for the elementary positions, and two of the six applied for both the high school and elementary positions. Given there were more applicants than available positions, it was necessary for the School District to conduct interviews and engage in a more formal interview process.

18. The School District utilized a hiring policy that required an initial review of applicants by a hiring committee, a submission of recommended candidates for the position to the Superintendent for approval and final authorization by the Board of Trustees upon the Superintendent's presentation of recommended candidates. C.P. Ex. 8.

19. The School District's hiring policy contains an antidiscrimination statement indicating that district representatives do not discriminate on the basis of race or other protected classes. C.P. Ex. 8, p. 1.

20. The School District did not inquire about the race of any of the applicants and does not track the race of any of its current employees.

21. The School District's hiring policy required the Principal/Supervisor to oversee the review of applications and that a committee, including a School Board member, other appropriate administration, an Indian Education Committee (IEC) member, and one other staff member assist in the review of applications and selection of interview candidates. C.P. Ex. 8, ¶4.3.2.

22. The hiring policy in effect at the time did not direct School Board member and IEC member participation in the interview process as the interview function was reserved to the Principal/Supervisor, unless otherwise specified by the Superintendent. C.P. Ex. 8, ¶4.3.3.

23. IEC members and School Board members occasionally participated in interviews. However, it was not unusual for interviews to be conducted without the participation of the IEC or School Board.

24. Holst participated in the selection of the candidates for the elementary tutor positions, as did Christine Kuschel, who then served as Arlee Public Schools Grants Manager.

25. Kuschel was responsible for grant administration for the School District, including the 21st Century Grant. Kuschel wished to enhance the regular school day and increase academic achievement while delivering those services in a cultural context.

26. Kuschel invited IEC members to participate in the interviews via email to IEC member Wendy Schwab, who she asked to forward the invitation to other IEC members. No IEC member or School Board member participated in the interviews.

27. Interviews were primarily conducted by Kuschel, with Holst participating in some but not all interviews. The selection of finalists for the positions was based upon the candidates' letters of interest and interviews. No other documents were considered or reviewed.

28. Six candidates were interviewed for the elementary after school tutor positions. Those candidates included, Schneiter, Sibley Malee-Ligas, Sue Ann McCay, Karen Smith, Ann Tanner, and Shawn Orr.

29. Third grade teacher Sibley Malee-Ligas has taught for the School District for ten years having previously taught second grade and kindergarten. Malee Ligas taught first grade for the St. Ignatius School District for four years prior to working for the School District. Malee-Ligas holds a Master's Degree in science. Malee-Ligas had previously worked as a tutor for the School District for six years. Malee-Ligas also has significant experience in early elementary education and is considered to be skilled in presenting information clearly for students who are in need of extra help.

30. Sue Ann McCay has taught second, third and fourth grade for the School District, as well as the talented and gift program and junior high. McCay has taught for the School District for approximately 29 years and previously taught for three years in Lewistown, Montana. McCay holds a Masters Degree. McCay has worked as an after school tutor for the School District for approximately two years and has taught summer school for the School District for approximately seven years.

31. Karen Smith has taught first grade for the School District approximately three years. Smith previously taught at a reservation school in Lame Deer for five years; one year in Lolo; a half-year in Minneapolis, and one year in Alaska. Smith has tutored for the School District as a substitute for one year and part-time for one year, as well as done summer school for the school district for two years. Smith has also tutored at Sylvan Learning Center in Missoula where she taught several Arlee students. Smith also tutored in Lame Deer where she had specific experience administering the 21st Century Grant tutoring program.

32. According to Smith, she “sort of” applied for the elementary after school tutor position. Smith submitted her letter of interest noting she was not available to work all four days and requested to be considered for a part-time or substitute position. Smith also noted during the interview that she was not available to work all four days.

33. First grade teacher Anne Tanner has worked for the School District for approximately 11 years. Tanner spent six years working in the Title I reading and math intervention program. Tanner also taught sixth grade and kindergarten in Shepherd, Montana and worked for Easter Seals in Missoula for three years. Tanner has worked as a tutor for the school district for seven years and has taught summer school for the school district for five years.

34. Shawn Orr has taught elementary Indian studies and physical education for the School District for approximately 15 years. Orr has a B.A. degree, has worked as a tutor for five years, and has taught summer school for the School District for two years. Orr is Native American.

35. All candidates were asked the same questions from a template. C.P. Ex. 4. Kuschel used her notes from the interviews to create a spread sheet noting the candidates’ responses. R. Ex. 102.

36. On September 3, 2015, Kuschel notified Superintendent David Whitesell via email the candidates chosen for the elementary after school tutor positions. R.

Ex. 106. The candidates chosen were Sibley-Ligas, McCay, Smith and Tanner. Schneiter and Orr were not chosen¹. Kuschel noted in the email that Smith was unable to commit to four nights per week and a substitute would be needed for “some nights.” Kuschel suggested Schneiter be asked to substitute.

37. Kuschel did not consider Smith’s limited availability to be an issue because there had been job sharing between tutors in the past and substitutes had not been difficult to find for the tutoring program.

38. Kuschel considered all candidates to be “exceptionally highly qualified” and “fabulous.” Kuschel ranked Smith higher than Schneiter, despite Smith admittedly being unavailable to work the four nights per week required of the position, due to her past experience administering the 21st Century Grant in Lame Deer, as well as her enthusiasm for the position. Kuschel identified a “spark” in Smith that led her to recommend Smith for the after school elementary tutor position.

39. Kuschel also chose Smith, in part, because she thought the focus of the after school tutoring program should be more on academic achievement rather than just completing homework based upon Smith providing more detailed answers regarding activities she would have students do as part of the tutoring program.

40. Kuschel also chose Smith after considering student assessment results and pondering what changes could be made to the after school tutoring program to improve the academic achievement of students who needed additional help. Kuschel thought it may be beneficial to bring in a new person as a tutor, particularly one with the tutoring experience of Smith, to see if the students’ performance improved.

41. Schneiter learned from another School District employee that the recommended slate of candidates would be presented at the September 8, 2015 School Board meeting and she was not included. The Board of Trustees and the School Board approved the hiring of Malee-Ligas, McCay, Smith and Tanner for the elementary after school tutor positions, as well as Shawna O’Neil and Sarah Stubbs for the Junior High/High School after school tutor positions.

¹Schneiter argued that Kuschel also failed to recommend her to teach the 2015 Discovery Summer Camp. This claim was not included in Schneiter’s original Charge of Discrimination; nor was it addressed in the cross examination of Kuschel by Schneiter’s counsel. There is insufficient evidence in the record for the hearing officer to consider the impact of Kuschel’s decision regarding this position.

42. O'Neil was chosen due to her having strong experience in math despite being a few credits short of having achieved her degree in math. O'Neil is considered to be a community math tutor who is willing to help students with math homework. Kuschel's goal was to have one candidate with a strong math background and one tutor with a strong English background work as the Junior High/High School after school tutors.

43. Smith declined the position when it was offered to her. Smith informed Holst that she would not accept the position because she was not able to work all of the hours required. Smith thought it odd she was offered the position given she was explicit in her not being available to work four days per week. Smith does not hold a reading certification.

44. On September 14, 2015, Smith followed up with a letter indicating she was only available to work as a part-time tutor or as a substitute tutor. R. Ex. 111.

45. The School District did not re-post or re-open the after school elementary tutor position.

46. On September 24, 2015, Holst asked Schneiter to consider taking the position, but Schneiter declined. Whitesell also offered the position to Schneiter on September 29, 2015, which she again declined.

47. Both Holst and Whitesell had the authority to make a job offer to Schneiter pending approval of the School Board. Based upon past practice, the School Board would have most likely have approved Schneiter's hire at the next meeting had she accepted the job offer. There were no conditions attached to the job offer made to Schneiter.

48. Holst, Kuschel, and Whitesell, who is also Native American, never expressed a discriminatory animus toward Native Americans to Schneiter.

49. Schneiter applied for and was qualified for the elementary after school tutor position for the 2015-2016 academic year. Despite her qualifications, the School District did not select her or any other Native American candidate for one of the four positions, which were ultimately offered to non-Native American candidates.

50. The School District's decision not to offer one of the four positions to Schneiter was not due to any discriminatory animus based upon her race.

51. Schneider rejected the School District's subsequent offers for the elementary after school tutor position when one of the non-Native American candidates declined the position.

52. Schneider did not apply for the elementary after school tutor positions for the 2016-2017 academic year. Holst invited Schneider to apply, and she declined.

IV. DISCUSSION

The Montana Human Rights Act prohibits discrimination in employment based upon race, Mont. Code Ann. §49-2-303(1)(a). Schneider alleges the School District discriminated against her on the basis of race when it did not hire her to work as an elementary after school tutor and offered the position to a less qualified candidate who was of a different race.

Schneider did not offer substantial and credible direct evidence of racial discrimination by the School District. In fact, Schneider admitted at hearing that she has never been subjected to any acts or remarks that were racially discriminatory while employed by the School District.

When there is no direct evidence of discrimination, Montana courts apply the three-tiered burden shifting analysis of *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212-13; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1032; *Martinez v. Yellowstone County Welfare Department* (1981), 192 Mont. 42, 626 P.2d 242, 246. 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*, supra at ¶20.

The McDonnell Douglas standard first requires Schneider to establish a prima facie case of discrimination. If Schneider makes such a showing, the burden shifts to the School District to produce a legitimate, nondiscriminatory reason for its actions. If the School District meets this burden, Schneider must show, by a preponderance of the evidence, that the legitimate reasons offered are only a pretext for discrimination. *Vortex Fishing Systems, Inc. v. Foss*, ¶15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. Schneider 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* (1993), 509 U.S. 502, 507, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407, 416.; *Heiat v.*

Eastern Montana College (1996), 275 Mont. 322, 328, 912 P.2d 787, 792. “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.” *Batoon v. City of Conrad*, 1998 MT 313N, ¶71 (citing *St. Mary's Honor Ctr.*, 509 U.S. at 515, 113 S. Ct. at 2752, 125 L. Ed. 2d at 422; *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. *Martinez*, 192 Mont. at 50, 626 P.2d at 246.

A. Schneiter has shown a prima facie case of discrimination².

The elements of a prima facie case vary depending upon the facts of the case. *Vortex Fishing Systems* at ¶16. In this case, Schneiter must show "... (i) that she belongs to a racial minority; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, supra, 411 U.S. at 802, quoted in *Martinez*, 192 Mont. 42, 48, 626 P.2d 242, 246. However, “courts have held that the fourth element in *McDonnell Douglas* was satisfied by a showing that the job vacancies were filled with white employees. *Id.* (citation omitted). “Once a prima facie case is established, an inference arises which is sufficient to sustain the complaining party's burden of proof.” *Id.*

Schneiter is Native American. Schneiter applied for and was qualified for the elementary after school tutor position for which the School District was seeking applicants for the 2015-2016 academic year. Therefore, Schneiter has satisfied the first two elements of the prima facie case.

Respondent contends Schneiter cannot prove the final two elements of the prima facie case. The School District argues Schneiter was offered the elementary after school tutor position - the same position that was offered to Sibley-Ligas, McCay, Smith and Tanner - after Smith declined the offer. The School District

²Schneiter argues that she should be awarded damages based upon the School District not offering her a tutoring position for the 2016-2017 academic year. Respondent's argument that Schneiter's claim for the 2016-2017 academic year fails based upon her failure to actually apply for the position is well taken. Schneiter cannot recover for a position she did not apply for regardless if others were invited to apply.

argues Schneider cannot show she was refused employment based on her race or that she suffered discrimination in compensation or in a term, condition or privilege of employment which is required under Mont. Code Ann. § 49-2-303 (it is an unlawful discriminatory practice to “refuse employment to a person, to bar a person from employment because of race).

Respondent cites several cases in which various courts held that a prima facie case of discrimination cannot be established when a job offer is made. Those cases are distinguishable from this case. In *Lula v. Network Appliance*, 255 F. App’x 610 (3d Cir. 2007), the U.S. Court of Appeals for the Third Circuit declined to expand the definition of adverse action to include the offering of a job that the applicant believes has discriminatory terms of employment. The court also held that an employer’s decision to “deactivate” a job posting and not fill a position does not constitute a valid action as the position needs to remain open after the applicant’s rejection for such a cause of action to lie.

Respondent cites *Ferguson v. Wal-Mart Stores, Inc.*, 114 F.Supp. 2d 1057 (E.D. Wash. 2000) in support of its contention that a job refusal cannot give rise to a cognizable claim under the MHRA. In *Ferguson*, the plaintiff was terminated at the end of her medical leave of absence because her previous position had been filled during her absence according to Wal-Mart’s policies and a position offering comparable pay and hours was not available when plaintiff was cleared to return to work without work restrictions. Wal-Mart subsequently offered plaintiff employment in her previous position but she was cautioned by her supervisor that the district manager was not pleased with the decision and she would be subject to extra scrutiny as a result. The plaintiff was also warned that she would be treated as a new employee and would not retain her previous wage or status. The job was also offered to another applicant, who was younger than the plaintiff. The plaintiff rejected the offer because she believed the job offered to her was different than the job offer made to the younger applicant. The U.S. District Court for Eastern Washington held the plaintiff had failed to demonstrate a prima facie case of discrimination based upon her refusal of a job that was essentially the same position as offered to a younger applicant.

The other cases cited by the School District also include holdings by courts outside of Montana that the plaintiffs had failed to establish a prima facie case by having either failed to counter evidence that the plaintiff had refused offers made by the union or the plaintiff had not applied for the job at all. See *Johnson v. Pipefitters Local 636*, No. 97-1361, 1997 U.S. App. LEXIS 35848, at ¶ 5 (6th Cir. Dec. 16,

1997); *Farzan v. Wells Fargo Bank N.A.*, 2013 U.S. Dist. LEXIS 169743 at ¶71 (S.D.N.Y. Dec. 2, 2013).

In this case, Schneiter applied for a position for which she was qualified not only based upon her education and training but also her experience of having served as an elementary after school tutor during the previous five academic years. Respondent's argument that Schneiter was not refused employment because she was offered the tutor position after Smith, who conceded she did not meet the listed criterion for the position that she be available to work four evenings per week, refused the offer is not persuasive. There is no dispute Respondent initially rejected Schneiter for the elementary after school tutoring position and offered the position to another applicant. Schneiter is correct in her argument that the subsequent offer made to her is only relevant as to the tolling of the accrual of damages and not to the ultimate decision as to whether an adverse employment action took place. See *Martinell v. Montana Power Co.*, 268 Mont. 292, 322-323, 886 P.2d 421, 440 (1994); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 2141 (1982). Therefore, Schneiter has shown that the School District rejected her for the position of after school elementary tutor despite her qualifications. Schneiter has further shown that the School District filled all four available positions with individuals who were not Native American. Therefore, Schneiter has established all four elements of the prima facie case and an inference of discrimination at law has been raised.

B. The School District has produced evidence of legitimate, nondiscriminatory reasons for its action.

Since Schneiter established a prima facie case of discrimination based on race, the burden now shifts to the School District to produce evidence of legitimate, nondiscriminatory reasons for its actions. Admin. R. Mont. 24.9.610(3). Under this prong of the McDonnell Douglas test, the School District's "burden is one of production - not persuasion." Ray, 2007 MT at ¶33. "That is, [the School District] does not have to persuade the court that it was motivated by the particular reasons, but, rather, it is sufficient if [the School District's] evidence raises a genuine issue of fact as to whether it discriminated against the [charging party]." Id. "The [School District] can raise this issue of fact by clearly and specifically articulating a legitimate reason for rejecting [Schneiter]." Id.

Kuschel testified that all of the applicants for the after school tutor positions were "exceptionally highly qualified" and the differences between the candidates were "grains of sand." Kuschel found Smith to be a more desirable candidate due to her tutoring experience at Sylvan Learning Center and Lame Deer, where she was

responsible for administering the 21st Century Grant. Kuschel also identified a “spark” in Smith during the interview that led her to her decision to include Smith as one of the four names forwarded to Whitesell. Specifically, Kuschel noted Smith’s requests for materials and other resources for the tutoring program in her interview notes.

The courts have found that subjective criteria can be "ready mechanisms for discrimination." *Atonio v. Wards Cove Packing Co., Inc.*, 827 F.2d 439, 445 (9th Cir. 1987). However, an employer's use of subjective employment criteria is certainly not prohibited by Title VII nor does it "alone shift to the defendant the burden of proving absence of intentional bias." *Casillas v. United States Navy*, 735 F.2d 338, 345 (9th Cir. 1984) (citation omitted). Instead, an employer's use of subjective criteria must be considered with the other facts and circumstances of the case and assessed "in light of the nature of the job and other important factors." *Id.*

The evidence shows Kuschel asked each applicant the same set of questions. Kuschel relied upon notes taken during the interviews to create a spreadsheet showing the information provided by the applicants. See R. Ex. 102. The ultimate selection of names forwarded to Whitesell was based solely upon the submitted letters of interest and the applicants’ interview performance. There is no evidence showing that either Holst or Kuschel inquired about the applicant’s race or cultural background and there is no evidence showing that such information was even considered by Kuschel or Holst. While Kuschel’s preference for Smith over Schneiter may have been based on criteria other than a straight assessment of the candidate’s paper credentials, the evidence does not show her decision not to include Schneiter in the list of names forwarded to Whitesell was based upon a discriminatory animus. Therefore, Respondent has articulated a legitimate, non-discriminatory reason for its decision not to hire Schneiter for the 2015-2016 elementary after school tutor position.

C. Schneiter has not shown Respondent’s proffered reasons were pretext for discrimination.

Since the School District has produced a legitimate, non-discriminatory reason for the rejection, Schneiter now has the opportunity to prove that the reasons offered were only a pretext for discrimination. *Ray*, 2007 MT 21, ¶31. At this point, Schneiter’s burden merges with the ultimate burden of persuading the court that the plaintiff has been a victim of intentional discrimination. *Heiat*, 275 Mont. at 328, 912 P.2d at 792 (quoting *St. Mary's Honor Ctr.*, 113 S. Ct. at 2752; *Burdine*, 450 U.S. at 256).

Pretext may be proved 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. *Hearing Aid Inst.*, 258 Mont. at 372, 852 P.2d at 632 (quoting *Texas Dep't of Community Affairs v. Burdine* (1980), 450 U.S. 248, 256, 101 S.Ct. 1089, 1095).

"[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Heiat* at 328, 912 P.2d at 791 (quoting *St. Mary's Honor Center* at 515) (emphasis added). See also *Vortex Fishing Sys, Inc. v. Foss*, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). "An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action." *Cellini v. Harcourt Brace & Co.*, 51 F. Supp.2d 1028, 1040 (S.D. Cal. 1999) (citing *Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991)). See also, *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987) (noting that a reason honestly described but poorly founded is not pretext that shows discrimination and that no matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and 1981 do not interfere unless the employment decision emanates from discrimination).

Where a charging party's evidence of pretense is strictly circumstantial, he or she "must produce 'specific, substantial evidence of pretext'" in order to prevail. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). See also *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004). The plaintiff always bears the ultimate burden of proving that the employer intentionally discriminated against her." *Burdine*, 450 U.S. at 253.

Schneiter essentially offers two arguments as to why Respondent's proffered reasons for not choosing her as an elementary after school tutor are pretext for racial discrimination. First, Schneiter argues Respondent departed from its own hiring policies and procedures in the interview process and in making its selection for the elementary after school tutor positions by not having members of the School Board or IEC participate in the interviews. Schneiter also points to Holst not having participated in all of the interviews held by Kuschel.

Schneider's argument is not persuasive. Wendy Swab, Chairman of the IEC, testified that she recalled receiving an email regarding interviews being held for the tutor positions for the 2015-2016 academic year. Swab testified that she and other IEC members did not participate in the interviews but could not recall a reason why. Swab's testimony also suggested that it was not a regular practice for IEC members to participate in interviews. It does not appear Respondent foreclosed the participation of either IEC members or School Board members in the interviews or in any way prevented any member of the IEC or School Board from participating.

Also undercutting Schneider's argument is the hearing officer's own observations from the day of hearing. Arlee Elementary school staff are obviously committed to their students and their academic achievement, but it is a busy school with several buildings and several things happening all at once. Trying to get Holst's testimony in before the end of the day and in between his commitments was a challenge at hearing. However, it was achievable through the cooperation of Arlee school staff, counsel, and Holst's own flexibility. Arlee Elementary appears to make do with what it has and is able to succeed in part due to the staff's commitment to its students and to one another. Holst not participating in all of the interviews does not appear to have been a deliberate slight to those applicants he did not interview; nor does it appear to have been an effort to sway or otherwise affect the outcome of those interviews. Therefore, Schneider's argument that Respondent's departure from its own hiring policies and procedures is evidence that Respondent's proffered reasons for not choosing her as an elementary after school tutor were pretext for racial discrimination is not persuasive.

Schneider next argues that she was one of, if not the most, qualified candidate for the elementary after school tutor position. It is undisputed Schneider had more teaching experience than three of the selected applicants and had more years of tutoring experience than two of the selected applicants. Further, Schneider was one of only two applicants who held a Reading Endorsement, which was important given that reading was a focus of the elementary after school tutoring program. Finally, Schneider, unlike Smith, was available to work the required schedule.

Schneider also argues she interviewed at least as well if not better than other candidates based upon the spreadsheet prepared by Kuschel despite Kuschel's testimony that Smith performed better at the interview than Schneider. Kuschel's notes do reflect that Schneider offered more information than other candidates during the interview. However, what distinguishes Schneider from Smith in Kuschel's notes is that Smith made specific requests for materials and other resources for the tutoring program, which Kuschel testified struck her as being a positive sign.

There is no doubt that Schneider is a dedicated and passionate teacher who loves her job and working with her students. There is also no doubt that Schneider is highly qualified and has a demonstrated commitment to the School District. However, the inquiry here is whether there was a discriminatory intent on the part of the Respondent in making its decision not to hire her for the elementary after school tutor position. As noted by the court in *Odima v. Westin Tucson Hotel Co.*,

“ . . . the focus of Title VII is to ensure neutral employment and personnel decisions. Thus, the employer has the discretion to choose among equally qualified candidates, provided that the decision is not based upon unlawful criteria. Moreover, the fact that a court may think that an employer misjudged the qualifications of the applicant does not in itself expose [the employer] to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.”

Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 602 (9th Cir. Ariz. 1993)(internal quotations and citations omitted).

Further, “[c]ourts only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (internal quotation marks omitted); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000) (“That Quaker made unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age.”); *Green v. Maricopa County Cmty. Coll. Sch. Dist.*, 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003) (“The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered. We do not sit as a superpersonnel department that reexamines an entity's business decision and reviews the propriety of the decision.”) (internal quotation marks omitted).

The hearing officer is not in the position to second guess the wisdom of the School District’s decision not to hire Schneider for one of the four elementary after school tutor positions for the 2015-2016 academic year. The hearing officer’s inquiry is limited to only whether an unlawful consideration figured into that decision. This is where Schneider’s claim falters. After observing the witnesses at hearing and listening to their testimony, as well as reviewing the evidence in this matter, the hearing officer is unable to find the School District’s decision was due to any discriminatory animus based upon Schneider’s race. Certainly, the decision not to hire Schneider appears to have been ill advised, but the hearing officer is not

persuaded that the reasons offered by Kuschel and Holster are not true and honestly held by them. Therefore, Schneiter has failed to prove by a preponderance of the evidence that the Respondents' decision not to hire her for the 2015-2016 academic year was as a result of a discriminatory animus. Therefore, Schneiter's claim fails.

V. CONCLUSIONS OF LAW

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

2. Heather Schneiter failed to prove Arlee School District discriminated against her illegally because of race. Mont. Code Ann. §49-2-303(1)(a). For purposes of Mont. Code Ann. § 49-2-505(8), Arlee School District is the prevailing party.

VI. ORDER

1. Judgment is granted in favor of Arlee School District and against Heather Schneiter. Schneiter's complaint is dismissed with prejudice as lacking merit.

DATED: this 27th day of March, 2017.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Heather Schneider, and her attorney, Torrance Coburn, Tipp, Coburn Schandelson, PC; and Respondent Arlee School District, and it's attorneys, Elizabeth O'Halloran and Elizabeth Kaleva, Kaleva Law Office:

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, Mont. Code Ann. § 49-2-505 (4), WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
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 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 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 appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard, (406) 444-4356 immediately to arrange for transcription of the record.