

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

KARALEE MULKEY,
Charging Party/Appellant,

-v-

BROADUS PUBLIC SCHOOLS,
Respondent/Appellee.

HRB CASE NO.0180013

FINAL AGENCY DECISION

On October 10, 2017, Charging Party Karalee Mulkey filed a complaint with the Department of Labor & Industry, which alleged unlawful discrimination in employment on the basis of retaliation. Following an informal investigation, the Department determined that Mulkey's allegations that Respondent Broadus Public Schools (BPS) discriminated against her were not supported by a preponderance of the evidence. The Department issued a Notice of Dismissal. Mulkey filed an objection with the Montana Human Rights Commission. The Commission considered the matter on July 20, 2018. The Commission concluded that the Department's dismissal was an abuse of discretion and remanded the matter to the Department's Office of Administrative Hearings (OAH).

On December 31, 2018, BPS filed a motion for summary judgment and brief in support with OAH. The Hearing Officer issued a Decision on January 17, 2019, granting BPS's motion for summary judgment against Mulkey, effectively dismissing her complaint. Mulkey filed an appeal of the Hearing Officer's Decision with the Commission. The Commission considered the matter on May 24, 2019. Karalee Mulkey appeared and presented oral argument on behalf of herself. Jeana R. Lervick, attorney, appeared and presented oral argument on behalf BPS.

STANDARD OF REVIEW

The Commission reviews conclusions of law for correctness and to determine whether a hearing officer misapplied the law to the facts of the case. Admin. R. Mont. 24.9.123(4)(a). A hearing officer's grant or denial of summary judgment is a question of law that is reviewed for correctness. *See Stuart v. First Sec. Bank*, 2000 MT 309, ¶ 16, 302 Mont. 431, 15 P.3d 1198 (citation omitted).

BACKGROUND

In June 2016, Mulkey filed a complaint of discrimination against BPS alleging discrimination in employment. Mulkey had applied to work as a custodian for BPS, and she was not hired. The parties resolved the first complaint in December 2016. In June 2017, Mulkey filed a second complaint of discrimination against BPS, again alleging that she was not hired to work as a custodian. The parties resolved the second complaint by a voluntary resolution agreement in August 2017 (Agreement). In the Agreement, BPS agreed to pay Mulkey a lump sum, hire Mulkey as a temporary summer custodian, and hire Mulkey as a substitute custodian to work on an "as needed" basis during the school year. According to employee timesheets, Mulkey worked as a temporary summer custodian for BPS in July and August of 2017.¹

In October 2017, Mulkey filed a third complaint of discrimination against BPS, the complaint at issue here, alleging retaliation by BPS. Mulkey alleges that BPS retaliated against her for filing her prior complaints by rejecting her application to work as a custodian and denying her hours as a substitute custodian during the school year. Mulkey further alleged at

¹ Both the Agreement and the employee timesheets were submitted by BPS to OAH in support of their motion for summary judgment.

BPS retaliated against her by disclosing information about her complaints and the Agreement at a school board meeting and to the local newspaper. On April 5, 2018, the HRB Investigator issued the Final Investigative Report on Mulkey's third complaint determining that no cause existed to believe discrimination occurred. Mulkey objected to the dismissal, and in July 2018 the Commission sustained the objection. The matter was remanded to OAH for a hearing.

On December 31, 2018, BPS moved for summary judgment on Mulkey's complaint before OAH. BPS argued that BPS did not retaliate against Mulkey, and the Commission improperly relied on contentions not raised by Mulkey in her complaint when the Commission considered the matter in July 2018. BPS further argued that summary judgment was appropriate because Mulkey refused to engage in discovery. Mulkey's response to BPS's motion for summary judgment was due on January 15, 2019. As of January 17, 2019, the date of the OAH Decision, Mulkey had not responded to BPS's motion for summary judgment. According to OAH records, Mulkey had not had any contact with OAH since September 2018.

The Hearing Officer issued a Decision on January 17, 2019, granting BPS's motion for summary judgment. The Hearing Officer held that Mulkey failed to prove a prima facie case of retaliation. The Hearing Officer determined that Mulkey engaged in protected activity by filing complaints of discrimination; however, she did not prove that she suffered an adverse employment action. Mulkey also failed to prove a causal link between her filing of complaints and not being scheduled for work. Hearing Officer Decision, p. 8. The Hearing Officer further held that BPS was entitled to summary judgment under Mont. R. Civ. P. 56(e)(2) because Mulkey failed to respond to BPS's motion for summary judgment. Hearing Officer Decision, p. 10.

DISCUSSION

Did the Hearing Officer correctly grant summary judgment to Respondent, Broadus Public Schools, as a matter of law?

Under Rule 56 of the Montana Rules of Civil Procedure, “[a] party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.” “[A]n agency should render a judgment ‘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 the movant is entitled to judgment as a matter of law.’” Mont. R. Civ. P. 56(c)(3); *Missoula Elec. Coop. v. Jon Cruson, Inc.*, 2016 MT 267, ¶ 15, 385 Mont. 200, 383 P.3d 210. The Montana Supreme Court detailed the burden shifting of summary judgment as follows:

A party seeking summary judgment has the burden of establishing a complete absence of any genuine factual issues. In light of the pleadings and the evidence before the district court, there must be no material issue of fact remaining which would entitle a non-moving party to recover. Once the moving party has met its burden, the party opposing the summary judgment motion must present material and substantial evidence, rather than conclusory or speculative statements, to raise a genuine issue of material fact.

Heiat v. E. Mont. Coll., 275 Mont. 322, 331, 912 P.2d 787, 794 (1996) (citations removed). The United States Supreme Court, discussing the analogous federal rule, further clarified that “where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quotation marks and citation removed). “[T]he burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325.

In the summary judgment context where discrimination has been alleged, the plaintiff bears the ultimate burden of both establishing a prima facie case of discrimination, and, if the respondent provides a legitimate, non-discriminatory reason for its actions, the plaintiff must provide evidence which supports at least an inference that the employer's offered reasons are a pretext for discrimination. *Stuart*, ¶ 19 (citing *Heiat*, 275 Mont. at 331, 912 P.2d at 794). To establish a prima facie case of retaliation, a plaintiff must prove that "(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. A party opposing summary judgment has an obligation to respond, and "[i]f the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Mont. R. Civ. P. 56(e)(2).

Mulkey maintains that she was not hired as a custodian by BPS because she previously filed complaints of discrimination against BPS with the Department. Mulkey argues that there was work available for her to do as a custodian; however, Mulkey asserts the head custodian scheduled herself for overtime work rather than call substitute custodians. Mulkey further asserts that, contrary to the finding of the Hearing Officer, BPS does not schedule substitute custodians based on seniority. Mulkey also claims that in retaliation for her complaints, information about her Agreement with BPS was disclosed at a public meeting of the school board and in the local newspaper.

Mulkey further contends that she did not fail to engage in discovery before OAH. She asserts that she did not receive interrogatories and discovery requests from BPS until after they were due. Mulkey further asserts that her computer printer does not work, and she had to travel

to Miles City from the Broadus area to use the word processors. Furthermore, Mulkey asserts that she did not attend her December 2018 deposition with BPS because her husband was seriously injured two days before the deposition was scheduled. Mulkey further argues that counsel for BPS did not respond to Mulkey's numerous phone calls.

BPS counters that the Hearing Officer properly granted summary judgment to BPS. BPS asserts that Mulkey was hired as a substitute custodian on an "as needed" basis; however, she was not scheduled to work because her services were not needed. BPS asserts that it gives preference to regular employees and more-senior substitute custodians. BPS argues that Mulkey's complaints about any disclosures in a public school-board meeting and the local newspaper are not adverse employment actions and are irrelevant to Mulkey's claim of retaliation. BPS further argues that Mulkey cannot support her underlying claim of retaliation. BPS asserts that they made numerous attempts to contact Mulkey regarding BPS's discovery requests and Mulkey's scheduled deposition. BPS further argues that they were entitled to summary judgment because Mulkey did not engage in discovery before OAH.

The Hearing Officer correctly concluded that no genuine issues of material fact existed, and BPS was entitled to summary judgment as a matter of law. Mulkey failed to meet her burden of establishing a prima facie case of retaliation. While it is undisputed that Mulkey engaged in protected activity by filing numerous complaints of discrimination against BPS with the Department, Mulkey has failed to provide "material and substantial evidence, rather than conclusory or speculative statements," to support her assertion that she suffered an adverse employment action. By the terms of the August 2017 Agreement, BPS "agree[d] to place Charging Party on the Substitute Custodian list to work as a Substitute Custodian on an as needed basis for the 2017/2018 school year." Hearing Officer Decision, at p.18. Mulkey fails to

provide evidence that she had any reasonable expectation of regular work or guaranteed hours as a substitute custodian. Therefore, she has not shown that she suffered an adverse employment action when she was not scheduled to work in September and early October of 2017. Nor has she provided “material and substantial evidence” of a causal link between her protected activity and BPS’s actions during that time period.

Likewise, the Hearing Officer correctly concluded that Mulkey failed to show that the discussion of Mulkey’s complaints and the Agreement at a school board meeting, and the later release of information to the local newspaper, constituted an adverse employment action. Because the disclosures complained of were reasonably required pursuant to the Montana Constitution’s public right to know provision,² Mulkey has not shown that these disclosures constituted an adverse employment action. The relevant newspaper article, quoted at length in the Hearing Officer’s decision, does not raise any inference of an adverse employment action.

Mulkey failed to establish a genuine issue of material fact as to the essential elements of her retaliation claim based on the “the pleadings . . . answers to interrogatories, and admissions” before the Commission. The record here includes the Agreement, employee timesheets, and other communications between the parties. Montana law makes clear that a respondent’s motion for summary judgment may be made “with or without supporting affidavits,” Mont. R. Civ. P. 56(b), and, as the United States Supreme Court confirms, “regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court [or hearing officer] demonstrates that the

² “No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.” Mont. Const., Art. II § 9, Right to know.

standard for the entry of summary judgment . . . is satisfied.” *Celotex*, 477 U.S. at 323. That standard is met “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. Such is the case here.

In addition, the Hearing Officer’s dismissal of Mulkey’s complaint via summary judgment was an appropriate under Rule 56(e)(2) given Mulkey’s failure to respond to BPS’s motion for summary judgment.³ After careful consideration of the record and the argument presented by the parties, the Commission concludes that the Hearing Officer properly granted summary judgment in favor of BPS.

ORDER

IT IS HEREBY ORDERED, that the hearing officer decision is AFFIRMED IN ITS ENTIRETY.

Either party may petition the district court for judicial review of this Final Agency Decision in the district where the alleged violations occurred. Mont. Code Ann. §§ 2-4-702 and 49-2-505. This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. Mont. Code Ann. § 2-4-702(2).

³ Mulkey was also put on notice of potential sanctions for her failure to comply with the OAH process. The Hearing Officer informed her that: “Failure to comply with an order of the Hearing Officer or to participate in a prehearing conference may result in sanctions. Sanctions include dismissal of the charge . . .” See Order Resetting Contested Case Hearing Date and Prehearing Schedule (October 10, 2018).

DATED this 29th day of July 2019.

A handwritten signature in black ink, reading "Timothy A. Tatarka". The signature is written in a cursive style with a large, sweeping initial "T" and "A".

Timothy A. Tatarka, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 29th day of July 2019.

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