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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 271-2019:

KARALEE MULKEY,	)	
	)	
Charging Party,	)	
	)	**ORDER GRANTING**
vs.	)	**RESPONDENT'S MOTION FOR**
	)	**SUMMARY JUDGMENT AND**
BROADUS PUBLIC SCHOOLS,	)	**DISMISSING**
	)	
Respondent.	)	

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I. INTRODUCTION

On December 31, 2018, the Respondent, Broadus Public Schools (BPS), by and through its attorney, filed its Motion for Summary Judgment and Verified Brief in Support. In its motion, BPS argues summary judgment is appropriate in this matter because the uncontroverted facts show that it did not retaliate against the Charging Party, Karalee Mulkey, by not scheduling her to work as a substitute custodian or by comments made by the School District Superintendent in an article regarding a voluntary resolution agreement reached in a previous Charge of Discrimination filed by Mulkey against BPS.

In its motion, BPS also takes issue with findings made by the Human Rights Commission (HRC) regarding the allegation that BPS had violated a settlement agreement it had previously entered into with Mulkey by not offering her work as a substitute custodian. BPS argues it was not given the opportunity to respond to comments made during the HRC meeting. BPS contends HRC went beyond the scope of Mulkey's claim and the Final Investigative Report in its remand of the matter to the Office of Administrative Hearings.

The final argument offered by BPS in support of its motion for summary judgment alleges summary judgment is proper due to Mulkey's failure to adequately respond to its discovery requests and Mulkey's refusal to attend her deposition.

Mulkey's response to BPS's motion was due January 15, 2019. To date, no response has been received. The administrative file shows Mulkey has had no contact with the Office of Administrative Hearings since filing her Preliminary Prehearing Statement on September 13, 2018.

II. UNCONTROVERTED FACTS BASED UPON THE PLEADINGS

1. BPS is a public school system organized and operated pursuant to Montana law. BPS serves approximately 230 students kindergarten through 12th grade and employs approximately 45 employees, including 26 teachers.

2. BPS is governed by an eight-member elected Board of Trustees (the Board). The Board hires a superintendent to act as the District's chief executive officer who, at times relevant to this matter, is Jim Hansen.

3. Mulkey has, to-date, filed three other claims of discrimination against BPS.

4. In June 2016, Mulkey filed a Charge of Discrimination with the Montana Human Rights Bureau (HRB) alleging discriminatory employment practices, and the parties resolved the case in December of that year.

5. In June 2017, Mulkey filed a second Charge of Discrimination against BPS alleging employment discrimination and the parties resolved that complaint in August 2017.

6. On August 14, 2017, BPS entered into a Voluntary Resolution Agreement (Agreement) with Mulkey pertaining to the second complaint which was agreed to by the Board in a session closed to the public, on August 14, 2017 ("Agreement").

7. BPS has complied with the terms of this and previous Voluntary Resolution Agreements.

8. On August 24, 2017, the Powder River Examiner newspaper ran a story regarding the August 14, 2017 Board Meeting. The article was titled "Budget, remodeling among issues at Broadus schools." At the conclusion of the article, the newspaper stated that "another important item" had been brought up, and quoted a statement made by the Superintendent. The statement specified in its entirety:

> I would like to briefly explain the August agenda item to consider a voluntary resolution agreement. Last year the district received a

> summer employment application and did not hire the applicant. The applicant filed a complaint with the Equal Employment Opportunity Commission that was transferred to the Montana Human Rights Bureau claiming sex, age, and disability discrimination. The district's insurance carrier paid the claim and attorney fees, less the deductible. This spring the individual submitted another application for summer custodial employment and was not offered a position. The applicant filed another complaint with the Equal Employment Opportunity Commission which was transferred to the Montana Human Rights Bureau claiming disability and retaliation discrimination. As stated on the agenda, the district's attorney recommends the board approve the voluntary agreement as a way to avoid costly litigation.

9. The article put out by the newspaper further specified that the Board approved the Agreement.

10. The Superintendent's statement was made in response to questions made of BPS and as a result of the public's right to know matters of import regarding its public schools.

11. BPS was mindful of any privacy interests Mulkey may have had and, in fact, Mulkey was informed by the Superintendent on July 24, 2017 that her Settlement Agreement would be on the Board agenda (as required by law) and that if she had any privacy concerns she was to let the Superintendent know.

12. The Charging Party stated to the Superintendent that she did not want her name used in the paper and the Superintendent informed her that he could not control what was printed by the press. However, in the interest of her concerns, the matter was discussed in closed session and the Charging Party's name was not at any time stated by BPS.

13. BPS ultimately employed Mulkey as a substitute custodian.

14. Substitute custodians are not regular employees of BPS. There is no expectation of work, nor any set schedule guaranteeing hours.

15. BPS gives regular employees preference over non-employees when additional help is required.

16. BPS scheduled substitute custodians with more seniority to work in September 2017 and October 2017. The individual who did the scheduling had no role in Mulkey's previous complaints

17. The Agreement entered into by the parties in August 2017 states that BPS agreed to "employ Charging Party as a Summer Custodian to begin July 10, 2017." The Agreement further states "[t]here is no guaranteed end date; Charging Party will remain employed until the summer work is finished…."

18. The Agreement further states that BPS "agrees 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."

19. On October 10, 2017, Mulkey filed the present complaint alleging (1) BPS did not schedule her to work as a substitute custodian in retaliation for her previous complaints and (2) that details of her previous settlement with BPS were released to the press in retaliation for her previous complaints.

20. Mulkey filed another claim after the present matter, which is pending before HRB.

III. DISCUSSION

Any party may move, with or without supporting affidavits, for summary judgment on all or part of the claim. Rule 56(a) M.R.Civ.P. The judgment sought is mandatory if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3) M.R.Civ.P.; *Peterson v. Eichhorn*, ¶12, 2008 MT 250, 344 Mont. 540, 189 P.3d 615. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mont.R.Civ.P. 56(c).

A principal purpose of summary judgment is to "isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Moreover, summary judgment is mandated "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." *Celotex Corp.*, 477 U.S. at 322. "In such a situation, there can be 'no

genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. This causes the moving party to be entitled to judgment as a matter of law because the nonmoving party failed to sufficiently show facts supportive of an essential element of the case for which she bears the burden of proof. *Id.* at 323.

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

A. Mulkey has not shown retaliation was the "but for" cause of BPS not scheduling her to work as a substitute custodian and releasing information regarding settlement of her Charge of Discrimination.

When a Respondent moves for summary judgment on a Human Rights Act case, it must first be determined if the Charging Party has pled all the elements of a prima facie case. If Mulkey is found to have established her prima facie case of retaliation, then BPS's motion must be supported with evidence of a legitimate, nondiscriminatory reason for its action or evidence that it took no illegal action. If BPS does so, Mulkey is left with the burden of offering evidence sufficient to raise material fact questions about BPS's legitimate business reason or to raise an inference of pretext or otherwise contest and bring into doubt BPS's evidence supporting its motion. ***E.g.,*** *Heiat v. Eastern Mont. College* (1996), 275 Mont. 322, 912 P.2d 787, 792-93; ***see also*** *Reeves v. Dairy Queen, Inc.* (1998), 287 Mont. 196, 201, 953 P.2d 703, 706; *Stuart v. First Security Bank* (2000), 302 Mont. 431, 437, 15 P.3d 1198, 1202.

Pleading a prima facie retaliation claim against an employer under Montana anti-discrimination law requires three elements be established:

(1) The charging party/employee engaged in protected activity;
(2) Thereafter, the respondent/employer took adverse employment action against the charging party; and

(3) A causal link existed between the protected activity and the employer's action.

Rolison v. Bozeman Deaconess Health Serv., Inc., ¶17, 2005 MT 95, 326 Mont. 491, 111 P.3d 2002, ***citing and discussing*** Admin. R. Mont. 24.9.603 ***and*** Mont. Code Ann. §49-2-301.

There is no dispute Mulkey engaged in protected activity by filing a Charge of Discrimination with the Human Rights Bureau in June 2016 and June 2017. Mulkey must now show she suffered an adverse employment action and a causal link existed between the protected activity and the employer's action.

A significant adverse act against a person because the person has engaged in protected activity or is associated with or related to a person who has engaged in protected activity is illegal retaliation. Admin. R. Mont. 24.9.603(1). Illegal retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2).

A retaliatory action is materially adverse if it would likely dissuade a reasonable person from engaging in protected conduct. *Burlington Northern & Santa Fe Ry.,Co., v. White*, 548 U.S. 53 (2006); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174-75 (2011) (reversing, without dissent, a Sixth Circuit decision that Title VII does not permit third party retaliation claims, and reiterating that "the significance of any given act of retaliation will often depend upon the particular circumstances," as stated in *Burlington*, and is not amenable to any categorical rules). The *Burlington* court made clear that an adverse employment action in a disparate treatment claim is different than an adverse employment action in a retaliation claim. "Whereas an adverse employment action for purposes of a disparate treatment claim must materially affect the terms and conditions of a person's employment, an adverse action in the context of a retaliation claim need not materially affect the terms and conditions of employment so long as a reasonable employee would have found the action materially adverse, which means it might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'." *Id.* at 68; see also *Thompson v. North American Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863 (2011) (applying *Burlington* standard).

The totality of the circumstances determines whether one or more employment actions would dissuade a reasonable person from engaging in protected activity. *Id.* at 69 ("Context matters. 'The real social impact of workplace behavior often depends

on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed'.") That standard imposes an obligation not only to look at each action as a separate and distinct instance of material adversity, but to review the events as a whole to determine whether the cumulative weight of the actions constitute retaliation.

Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases. But timing alone will not show causation in all cases; rather, in order to support an inference of retaliatory motive, the adverse employment action must have occurred fairly soon after the employee's protected expression. *Kelley v. Billings Clinic*, 2014 U.S. Dist. LEXIS 8495, 2014 WL 223377 (D. Mont. Jan. 21, 2014)(citations and quotation marks omitted).

The Ninth Circuit generally has held that a period of less than three months between a plaintiff's protected activity and an adverse employment action is sufficient to raise an inference of causation. *Id.* See, e.g., *Hernandez v. Spacelabs Med., Inc*., 343 F.3d 1107, 1111, 1113 (9th Cir. 2003) (interval of less than a month between protected activity and adverse action sufficient for causal link); Bell, 341 F.3d at 865-66 (9th Cir. 2003) (holding that temporal proximity supported causal link where plaintiff was placed on administrative leave about three weeks after complaining, was returned to duty and placed back on leave almost three months after complaining and was ultimately terminated seven months after complaining); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (sufficient causation evidence found when adverse action taken less than three months after a complaint was filed, two weeks after the charge was first investigated, and less than two months after the investigation ended). *Id.*

In addition, a disputable presumption that the adverse action taken was in retaliation for protected activity when the complained of action takes place while proceedings are pending or within six months following the final resolution of the proceedings is created under Admin. R. Mont. 24.9.603(3).

The parties entered into an Agreement in August 2017 that provided BPS would hire Mulkey on an as-needed basis. There was no specific guarantee under the Agreement that Mulkey would receive any hours of work from week to week.

Substitute custodians are not regular employees of BPS and do not have a set work schedule. Substitute custodians work on an as-needed basis. BPS gives regular employees preference when additional work is available.

BPS employed the services of two substitute custodians who were senior to Mulkey in terms of seniority. Scheduling was done by an individual who had no involvement in Mulkey's previous charges of discrimination. Mulkey had no reasonable expectation that BPS would utilize her services as a substitute custodian if there was no actual need for her services. While BPS may not have employed her services within six months of the settlement of her claim or during the pendency of her most recent claim, the totality of the circumstances does not show that its failure to schedule her to work as a substitute custodian during the 2017/2018 academic year constituted an adverse action, as defined above.

Mulkey has also failed to show that the disclosure of information pertaining to the Agreement between her and BPS that was included in the August 24, 2017 newspaper article was an adverse employment action. The article contains information the Superintendent would reasonably be required to disclose pursuant to the public's right to know about the business being conducted by a public agency. Therefore, the evidence does not show the disclosure of the information included in the August 24, 2017 article constituted an adverse action.

Even if one was to find that BPS's failure to schedule Mulkey to work constituted an adverse action, no evidence has been offered to establish the requisite causal link between Mulkey's protected activity and the alleged adverse action. While the timing of Mulkey's complaints - June 2016 and June 2017 - and their subsequent settlements may give rise to an inference of retaliation, the span of time between the complaints, the Agreement and BPS not scheduling Mulkey to work the span of time is too great to establish a causal link. It should also be noted that the individual who did the scheduling of substitute custodians had no involvement in Mulkey's charges of discrimination. Further, the article complained of in Mulkey's Charge of Discrimination contains no personally identifiable information about Mulkey. Mulkey has failed to offer any evidence establishing a causal link between her protected activity in June 2016 and June 2017 and BPS's failure to schedule her to work as a substitute custodian during the 2017/2018 academic year.

Assuming for the sake of argument that Mulkey had succeeded in establishing her prima facie case, BPS has offered a legitimate, non-discriminatory reason for its failure to schedule her to work as a substitute custodian and its release of information regarding its Agreement with Mulkey. BPS has established it employed the services of substitute custodians who had more seniority than Mulkey. BPS also established that scheduling was done by an individual who had no role in Mulkey's previous complaints of discrimination. BPS has also established that the release of information pertaining to its Agreement with Mulkey was motivated by the public's right to know rather than any retaliatory animus as alleged by Mulkey. There is no substantial credible evidence of record showing that the reasons offered by BPS for the actions complained of by Mulkey were not worthy of credence. Mulkey has failed to show that BPS's legitimate, non-discriminatory reasons offer were pretext for retaliation.

Mulkey has failed to establish the necessary elements of her prima facie case of retaliation. Further, Mulkey has failed to show that the legitimate, non-discriminatory reasons for its complained of actions was pretext for retaliation. Therefore, BPS is entitled to judgment as a matter of law because Mulkey has failed to sufficiently show facts supportive of an essential element of the case for which she bears the burden of proof. *See Celotex Corp*., 477 U.S. at 322. Therefore, BPS's motion for summary judgment is GRANTED.

B. Mulkey has not shown that BPS violated the terms of the Agreement by not scheduling her to work as a substitute custodian during the 2017/2018 academic year or that its failure to do so was retaliation.

Mulkey has failed to produce any evidence showing BPS violated the terms of the Agreement by not scheduling her to work as a substitute custodian. BPS employs substitute custodians on an as-needed basis. BPS did not require her services during the 2017/2018 academic year. Mulkey has not produced any evidence showing causal link between her protected activity and BPS's failure to schedule her to work. Even if Mulkey had produced sufficient evidence to establish a prima facie case of retaliation based upon her not having been scheduled to work during the 2017/2018 academic year, she has produced no evidence showing the legitimate, non-discriminatory reasons offered for BPS for its actions was pretext for discrimination. Therefore, BPS's motion for summary judgment regarding the allegation it failed to abide by the terms of its Agreement with Mulkey is hereby GRANTED.

C. Mulkey's failure to respond to BPS's motion for summary judgment warrants judgment as a matter of law in BPS's favor.

Rule 56(e)(2), M.R.Civ.P., provides:

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

In its reply, BPS's counsel noted that Mulkey had been in contact with their office after her response was due under the scheduling order dated October 10, 2018 chastising her for filing the motion. There is no evidence of record showing that any mailing sent by OAH has not been received by Mulkey. Mulkey knew or should have known of her duty to respond by virtue of the scheduling orders in this matter, which provides in pertinent part:

> 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, default of Respondent or other appropriate action, as a prerequisite of continuing to prosecute or resist the complaint.

See Order Resetting Contested Case Hearing Date and Prehearing Schedule (October 10, 2018).

As noted above, summary judgment is appropriate in this case as Mulkey cannot prove the prima facie elements of a retaliation case. Further, even if Mulkey could prove those elements, she cannot show that the legitimate, non-discriminatory reasons offered by BPS for its complained of actions were a pretext for discrimination. Additionally, the sanction of dismissal of her claim is appropriate given Mulkey's failure to respond to BPS's motion or to make any effort to request additional time to respond to the motion. Therefore, pursuant to Rule 56(e)(2), M.R.Civ.P., it is therefore appropriate to enter summary judgment against Mulkey.

IV. ORDER

IT IS THEREFORE ORDERED that Broadus Public Schools' motion for summary judgment as to Karalee Mulkey's retaliation claim is hereby GRANTED. Broadus Public Schools did not retaliate against Karalee Mulkey for her protected activity. JUDGMENT IN FAVOR OF RESPONDENT IS HEREBY GRANTED AND CHARGING PARTY'S COMPLAINT HEREIN IS NOW DISMISSED, AND BECOMES A FINAL DECISION UNLESS APPEALED TO THE MONTANA HUMAN RIGHTS COMMISSION WITHIN FOURTEEN (14) DAYS OF ITS ISSUANCE, AS STATED IN THE NOTICE SET FORTH ON PAGE 12 OF THIS DECISION.

DATED: this 17th day of January, 2019.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Karalee Mulkey, Charging Party; and Broadus Public Schools, Respondent, and its attorneys, Jeffrey A. Weldon and Jeana R. Lervick, Felt, Martin, Frazier & Weldon, P.C.:

The Hearing Officer Decision above granting summary judgment and dismissing the complaint in its entirety, 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).

THERE IS NO TRANSCRIPT OF HEARING, BECAUSE SUMMARY JUDGMENT WAS GRANTED BEFORE HEARING. Direct any questions about the appeal process to Annah Howard, (406) 444-4356, Human Rights Bureau, Department of Labor and Industry.

Mulkey.SJO.chp