

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

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 227-2020:

JAVIER BAUTISTA,	)	
	)	
Charging Party,	)	
	)	<b>HEARING OFFICER DECISION</b>
vs.	)	<b>AND NOTICE OF ISSUANCE OF</b>
	)	<b>ADMINISTRATIVE DECISION</b>
SELF HELP FAMILY LAW CENTER,	)	
	)	
Respondent.	)	

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**I. PROCEDURAL BACKGROUND**

Javier Bautista brought this complaint alleging the Self Help Family Law Center (SHFLC) discriminated against him in the provision of governmental services because of his disability and retaliated against him for his participation in protected activity in violation of the Montana Human Rights Act and the Governmental Code of Fair Practices.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on July 30, and July 31, 2020, and August 5, and August 6, 2020, at the Office of the Court Administrator. Javier Bautista appeared *pro se* and participated via Zoom.<sup>1</sup> Jeanine Blaner, Attorney at Law, represented SHFLC. Derrek Shepherd, Court Services Director, appeared as SHFLC’s designated representative.

Elizabeth Scholz was sworn in and served as an interpreter for Bautista, when he requested her to do so.

Molly Reynolds, Deputy Missoula County Clerk of Court; Ruth Winzel, File and Collections Clerk; Latishia Atkins, Deputy Missoula County Clerk of Court; Vincent Benlloch, former AmeriCorps Service Member; Chris Clasby, Care Advocate Coordinator for Summit Independent Living Center; Bonnie Kelley, Care Advocate for Summit Independent Living Center; William ‘Skip’ Willard, Facilitator for the Missoula Self Help Family Law Center; Nolan Harris, Court Help Program

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<sup>1</sup> Bautista, Reynolds, Winzel, Atkins, Clasby, Kelley, and Gabriel either appeared via Zoom or by telephone due to COVID-19 related travel restrictions. All other witnesses personally appeared at hearing.

Administrator; Christa Gabriel, Attorney at Law, Disability Rights Montana; Derrek Shepherd, Court Services Director; and Javier Bautista testified under oath.

The parties stipulated to admission of Bautista's exhibits 39, 40, 44, 46, and 48, and SHFLC's exhibits 103, 104, and 105. During the hearing, the Hearing Officer admitted SHFLC's exhibits 101, 102, 106, 109, and 112 through 116. SHFLC's Exhibit 117, an e-mail message from Human Rights Investigator Tam Newby, for the limited purpose of demonstrating that Bautista had contact with the investigator on May 24, 2019, was admitted, as was Bautista's exhibits 21, 22, and 50. Bautista's exhibit 31 was admitted over SHFLC's hearsay objection.

Bautista's exhibits 1 through 20; 23 through 24; 26 through 29; and 32 through 35 for the limited purpose of demonstrating what documents Bautista intended to offer as evidence during a November 20, 2018 hearing in the Missoula County District Court. Bautista's exhibits 25 and 38 were also admitted as demonstrative exhibits, as was Bautista's exhibit 37, which was admitted to show Bautista's state of mind during the period in question over SHFLC's objection. Bautista's exhibit 42 was admitted as a demonstrative exhibit "to show Mr. Bautista's education level" over SHFLC's relevancy objection, and Bautista's exhibit 43 was also admitted to show Bautista had previously received treatment or counseling over SHFLC's hearsay, foundation, and expert testimony objections. Bautista's Charge of Discrimination filed with the Human Rights Bureau (HRB) on January 31, 2019, was admitted as exhibit A.

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 the Self Help Family Law Center discriminate against Javier Bautista in the provision of governmental services because of his disability and/or retaliate against him in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA, and the Governmental Code of Fair Practices?

2. If the Self Help Family Law Center did discriminate against Javier Bautista in the provision of governmental services because of his disability and/or retaliate against him in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA, and the Governmental Code of Fair Practices, as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If the Self Help Family Law Center did discriminate against Javier Bautista in the provision of governmental services because of his disability and/or retaliate against him in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA, and the Governmental Code of Fair Practices, what should the department require to correct and prevent similar discriminatory practices?

### III. EVIDENTIARY ISSUES TAKEN UNDER ADVISEMENT

#### A. *Exhibits 47, 49, 50, 52, and 53 are Inadmissible*

Bautista offered Exhibits 47, 49, 50, 52, and 53 to show what information he provided to the HRB investigator prior to the issuance of the Final Investigative Report. SHFLC argues the exhibits constitute inadmissible hearsay. However, SHFLC argues exhibits 47 and 49 should be admitted as rebuttal evidence subject to the restrictions of M. R. Evid. 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”).

“All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.” M. R. Evid. 402. “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.” M. R. Evid. 401. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” M. R. Evid. 403.

The Hearing Officer is not persuaded that the probative value of exhibits 47, 49, 50, 52, and 53 warrant their admission into the record. The exhibits generally pertain to what information Bautista provided to HRB during its investigation. Bautista testified at hearing and provided sworn testimony as to the events that led him to file a Charge of Discrimination with HRB. SHFLC’s argument that the exhibits constitute inadmissible hearsay is well taken. None of the exceptions to the prohibition against the admission of hearsay testimony has been shown. *See* M. R. Evid. 803.

It is therefore determined that the probative value of exhibits 47, 49, 50, 52, and 53 are outweighed by the value of Bautista’s sworn testimony. Further, to admit

exhibits 47, 49, 50, 52, and 53 would result in the unnecessary presentation of cumulative evidence prohibited under M. R. Evid. 403. Therefore, exhibits 47, 49, 50, 52, and 53 are hereby excluded from the record. Further, exhibit B, offered by SHFLC to add to the “completeness” of exhibit 52, is also excluded.

***B. Exhibits 47, 49, and 118 are Admissible as Impeachment Evidence***

SHFLC argues exhibits 47, 49, and 118 are admissible for the limited purpose of impeachment/rebuttal pursuant to M. R. Evid. 801(d)(1)(A). Bautista denies the exhibits effectively impeach or rebut his testimony regarding the alleged events of November 6, and November 20, 2018. Bautista generally argues for their admission without the limitation provided for in M. R. Evid. 105.

As noted above, the Hearing Officer is not persuaded that the documents provide any relevant evidence in support of Bautista’s case-in-chief. However, exhibits 47, 49, and 118 are admissible for the purpose of rebuttal/impeachment as provided for under M. R. Evid. 801(d)(1)(A), to the extent the information provided by Bautista in those exhibits is inconsistent with the testimony provided at hearing.

***C. The Affidavits of Winzel, Reynolds, and Atkins are Admissible***

Bautista argues the affidavits are admissible for several reasons. First, the statements included in those affidavits were made closer in time than the testimony the witnesses offered at hearing. Second, the affidavits show the Clerk of Court’s office did not want the clerks to testify. Third, Atkins’ affidavit provides important context for her sworn testimony. Finally, the information pertaining to what services are offered at the Clerk of Court’s office impeaches Benloch’s testimony that he thought the services sought by Bautista would be available through the Clerk of Court’s office.

SHFLC argues the three affidavits are inadmissible hearsay and are, therefore, inadmissible. *See* M. R. Evid. 801. As noted above, hearsay evidence may be admitted if there are “comparable circumstantial guarantees of trustworthiness,” regardless of the availability of the declarant. M. R. Evid. 804(b)(5). The affidavits are sworn statements executed by the witnesses before a sworn notary and were offered by an officer of the court, in this case an attorney with the Missoula County Attorney’s office. There was no showing those affidavits were untrustworthy or otherwise fabricated. Therefore, the affidavits of Winzel, Reynolds, and Atkins, all of which provide necessary context for the individuals’ interactions with Bautista and SHFLC during the period in question, will be marked collectively as exhibit 54 and admitted into the record.

#### IV. FINDINGS OF FACT

1. The Charging Party, Javier Bautista, is an individual with a disability. Bautista has a significant visual impairment, and he requires the assistance of another person or adaptive technology to read printed materials.

2. Self Help Family Law Center (SHFLC) is one of six regional self-help centers that are part of the Court Help Program. The Court Help Program is an initiative of the Montana Supreme Court and administered under the Office of the Court Administrator (OCA), which is located in Helena, Montana.

3. The primary purpose of the self-help centers is to assist self-represented litigants with civil legal issues, including family law and landlord/tenant issues. The self-help centers provide legal forms and general legal information. The forms offered by SHFLC at its self-help centers are also available online at [courts.mt.gov](http://courts.mt.gov) and [www.montanalawhelp.org](http://www.montanalawhelp.org). Ex. 102.

4. SHFLC is advertised on the internet, including its own webpages located on the Judicial Branch website. Informational pamphlets are also available with the district courts throughout the state, the State Law Library, and Montana Legal Services Association (MLSA).

5. SHFLC is not a source for legal advice or legal representation. SHFLC staff are generally not licensed attorneys and are not authorized to provide legal advice to individuals involved in the court system. Ex. 102-43; *See also* Mont. Code Ann. §§ 7-61-201, 37-61-210. SHFLC takes extra care to refer to the people it serves as customers so as not to suggest they are providing legal advice or that an attorney-client relationship exists. *See* Ex. 102-14.

6. SHFLC is located on the second floor of the Missoula County Courthouse, next to the Missoula County Clerk of Court's office. It is typically open four days per week, 8:30 a.m. to 4:00 p.m., with a one-hour break at noon. It is not open to customers on Fridays. Its hours are posted at the courthouse, as well as online.

7. The SHFLC serves approximately 17 people each day and 3,500 people annually. SHFLC staff typically spend approximately ten to 20 minutes with each customer. Customers generally visit SHFLC twice. The first visit generally consists of SHFLC staff ascertaining the nature of the customer's legal issue and providing the customer with the appropriate forms and other informational material. The second visit generally consists of SHFLC staff reviewing the forms for completeness.

8. If the customer is seeking information that is beyond that which SHFLC can provide, its staff will attempt to refer customers to other governmental agencies or groups that may be able to assist the customer.

9. At all times relevant to this matter, there were two workers at SHFLC: William “Skip” Willard, SHFLC Facilitator, and Vincent Benloch, AmeriCorps Service Member. Willard served as Benloch’s supervisor.

10. OCA’s Program Administrator Nolan Harris supervised Willard. Derrek Shepherd, OCA’s Court Services Director/Human Resources Director, supervised Harris. Both Shepherd and Harris are located in Helena.

11. Willard is an attorney licensed to practice law in Montana. However, he does not act in a legal capacity at SHFLC. Willard oversees SHFLC’s daily operations, staffing, and works with customers. Willard also trains SHFLC staff and volunteers and ensures SHFLC operates in compliance with the Court Help Program’s policies. Willard has served as the SHFLC Facilitator for approximately three years, having previously served as a volunteer for approximately two years. Ex. 102-35-36.

12. Benloch was a recent graduate of Grinnell College, a small, private liberal arts college, at the time he worked at SHFLC. Benloch had no previous job experience like the work he performed at SHFLC.

13. AmeriCorps Service Members are typically recent college graduates, who serve in a position for one or two years. AmeriCorps Service Members’ duties include assisting customers in finding legal information, forms, and referrals. AmeriCorps Service Members serving SHFLC are employees of the Montana Legal Services Association (MLSA) who are placed at SHFLC as a part of the partnership between MLSA and the Court Help Program. Ex. 102-37.

14. SHFLC management and staff are mindful of the centers’ relationships with local district courts and local attorneys. Willard took those relationships seriously and consciously worked to develop those relationships with the Missoula County Clerk of Court’s office, district court judges, and local attorneys.

15. AmeriCorps Service Members are required to complete a week-long orientation. The training topics covered during the first day or two include: Locating Legal Information, Montana Courts 101, Legal Information v. Legal Advice; Family Law Overview; Anatomy of a Lawsuit; and Working with Low Income People. Ex. 102-7-11.

16. The third day of training involves training on the Court Help Program Policy and Procedures Manual; Judicial Branch Policies Sections 301, 200, 206, 210, 760, 770, 1510, and 1530, materials pertinent to Self-Represented Litigants; Self Help Workshop Instructions and forms, including a Family Law Information packet, instructions for interactive forms, and a dissolution response; and information specific to the six SHFLC centers. AmeriCorps Service Members also receive the training materials for Legal Information v. Legal Advice and Legal Resources Overview. Ex. 102-8-10.

17. Additional training topics include state policies and procedures; a civil procedure overview; and assisting customers in completing court forms. Training is provided on a regular basis throughout the AmeriCorps Service Members' term of service. Ex. 102-10.

18. Benloch completed all orientation training at the beginning of his service. However, a good deal of his training was done on-the-job. Benloch received a copy of the Court Help Program Policy and Procedures AmeriCorps Manual (Manual), which included relevant Judicial Branch Policies, reporting and communication requirements, information about collaborating with other agencies, and a description of program services. Ex. 102.

19. Benloch was generally the first point of contact for SHFLC customers. Willard considered Benloch's job performance as "top notch," and he considered Benloch to be dutiful in the provision of customer service. Benloch attempted to serve customers to the best of his abilities and sought assistance from Willard when necessary. Both Benloch and Willard met with Harris on a weekly basis to ensure a high level of service and to quickly address any issues that may arise.

20. During the relevant period, SHFLC staff were required to complete a Literacy Agreement for customers who had literacy issues or other impairment. A sample Literacy Agreement was included in the Manual's appendix. *See* Ex. 103.

21. The Literacy Agreement generally provided that the staff member would transcribe information provided by the customer when assisting the customer completing forms. SHFLC staff were required to have the Literacy Agreement completed only once per customer. The Literacy Agreement was only between the customer and SHFLC staff and did not control in any other interaction the customer may have had related to the legal issue that brought them to seek the services of SHFLC. *See* Ex. 103.

22. Executed Literacy Agreements were generally uncommon, with no more than ten being completed each year.

23. The purpose of the Literacy Agreement, in part, was to document that the assistance provided was limited to only transcribing what the customer indicated he or she wanted included on the form. SHFLC was mindful that going beyond the scope of what the customer wanted transcribed could constitute providing legal advice, which was directly contrary to its stated purpose and mission.

24. Customers were expected to request assistance in reading or filling out forms, but SHFLC could offer that assistance if they believed the customer had literacy issues or impairment that made reading and writing difficult. If that assistance was requested or offered, the customer would first be asked to sign a Literacy Agreement. Customers were never asked to provide documentation supporting their need for that assistance.

25. SHFLC first determines if a customer has filed something in court or if they have been served with legal documents during their first meeting with the customer. After determining what type of issue the customer is facing, SHFLC determines if SHFLC can provide the requested assistance. If SHFLC staff feel they are unable to provide the requested assistance, they will refer the customer to another agency or organization.

26. SHFLC does not track what customers are assisted or what customers they refer to other resources. SHFLC does not require customers to sign-in when they meet with SHFLC staff.

27. Benloch's standard practice was to supply the customer with pre-printed hard copies of the appropriate forms and paperwork and review them with the customer. Recognizing that many customers do not read the form's instructions, Benloch would go through each element of the form and identify important portions of the instructions. Benloch would provide the customer with an overview of the legal process and stress for them the importance of responding to the legal documents received during the course of the proceeding. Benloch would also refer customers to "hotdocs," which are interactive forms available on [montanalawhelp.org](http://montanalawhelp.org).

28. Benloch spent approximately ten minutes working with a customer during their first meeting. Benloch was ready and willing to spend additional time with a customer when necessary and appropriate.

29. Benloch would typically provide customers with both a hard copy of the form, as well as an electronic version. The Missoula County Clerk of Court's office was not accepting electronic documents at that time, so Benloch generally ensured a customer had a hard copy that could easily be filed.



30. On October 31, 2018, Bautista's estranged wife filed a petition for a temporary order of protection against Bautista in the Fourth Judicial District Court, Missoula County, before the Honorable Karen S. Townsend. Judge Townsend granted a temporary order of protection and set the matter for hearing on November 20, 2018. Ex. 104-19-22. Bautista was served with those documents on November 2, 2018. Ex. 104-23.

31. Bautista and his estranged wife had been married for approximately six years before separating in February 2016. Bautista and his estranged wife had lived both together and apart in Missoula and the surrounding area for several years prior to their separation.

32. In September or October 2018, Bautista travelled from his home in New York City to retrieve his personal belongings after being requested to do so by his estranged wife. Bautista's estranged wife contacted law enforcement while he was at her residence, who then directed Bautista to leave the premises. Bautista remained in the area, living with friends.

33. On or about November 5, 2018, Bautista went to the Missoula County Courthouse to inquire about requesting an earlier hearing date regarding the temporary order of protection.

34. Bautista first went to the Clerk of Court's office. Deputy Clerk of Court Letisha Atkins advised Bautista he needed to file a motion and escorted him to SHFLC to retrieve the form. Atkins then returned to her office. Bautista returned to the Clerk of Court's office a short time later, and Atkins assisted him in filling out the form. Ex. 104-25.

35. The Clerk of Court's office is independent of SHFLC. The Clerk of Court's office frequently referred individuals to SHFLC to obtain legal forms. Atkins had never referred anyone to SHFLC for assistance in filling out legal forms; nor had Ruth Winzel, File and Collection Clerk, or Molly Ann Reynolds, Deputy Clerk/File Clerk. The Clerk of Court's office frequently helped individuals in filling out their forms and accepted appointments if individuals required additional time.

36. Bautista ultimately took his paperwork with him so he could finish them using his laptop. Ex. 104-25-35.

37. SHFLC staff was not aware Bautista required assistance beyond that which Atkins appeared to be providing to him. SHFLC was further unaware Bautista had

intended to or had, in fact, requested an accommodation for his disability when he obtained the form necessary to request an earlier hearing date.

38. On November 9, 2018, Bautista filed a Notice to Court, which included a form with handwritten information that had been completed by Atkins, a certificate of service, and several typed pages. The typed pages include a description of his medical issues, as well as information pertaining to his relationship with his estranged wife. Ex. 104-25-35.

39. Judge Townsend did not grant Bautista's request for an earlier hearing date, and the hearing proceeded as scheduled on November 20, 2018. *See* Ex. 104-39.

40. Prior to hearing, which was scheduled to start at 4:00 p.m., Bautista attempted to file more than 250 pages of documents, which included personal letters, email messages, photographs and other documents covering the nine years he had spent with his estranged wife. Bautista was advised by the Clerk of Court's office that he could not file documents without a Notice of Filing. Bautista learned he could not file the documents without a Notice of Filing. Bautista did not seek assistance from SHFLC. *See* Bautista Response to SHC Prop. FOFCOL, p. 17.

41. The hearing started at approximately 4:45 p.m. *See* Ex. 104-42 (*email from Court Clerk Susan Wall to Criminal Justice Clerk – Warrants Amanda Schrantz*). It is more likely than not that, if Bautista had attempted to access SHFLC on November 20, 2018, he did so after SHFLC had closed for the day.

42. Bautista informed Judge Townsend at hearing that he had additional documents showing the nature of his relationship to his estranged wife. Bautista did not offer the documents at the hearing after the following exchange with Judge Townsend.

**MR. BAUTISTA:** I don't know if I might say, I was -- I had tried to file some evidence. But I was not able to fill out this notice to The Court. The self help center was closed, even before 4:00 p.m. So I don't know, I guess I was hoping to still be able to provide this evidence to The Court.

**THE COURT:** So you may or may not be able to provide it to me. It depends on what it is. All right. You're going to have to be able to tell me what it is and how it is evidence in this kind of a case. Okay.

**MR. BAUTISTA:** Uh-huh.

Ex. 44 (*Floren v. Bautista*, Cause No. DR-18-786 Hrg Tr. 5:25-6:9).

43. Judge Townsend advised Bautista at or near the end of hearing that his estranged wife had initiated divorce proceedings. Judge Townsend advised Bautista that he would have to respond to the dissolution matter in order to be heard by the court in that matter.

**Mr. Bautista:** Yeah. And what kind of forms can I file a response?"

**The Court:** So you can go to the self help center which is located one floor down, right underneath this . . . The self help center is open from 9:00 until 4:00 tomorrow. And you could pick up and work with people there. I'm sure they would help you fill out the appropriate paperwork.

Ex. 44 (*Floren v. Bautista*, Cause No. DR-18-786 Hrg Tr. 50:1-9).

44. At no point during the hearing did Bautista report to Judge Townsend that SHFLC had refused to assist him in filling out paperwork or that he was otherwise unable to meet the procedural requirements she announced in court.

45. The Missoula County Sheriff's Office personally served Bautista with the Verified Petition for Dissolution of Marriage and Summons and Temporary Economic Restraining Order on November 20, 2018 at 6:00 p.m. at the Missoula County Courthouse. Ex. 105-1-29.

46. On November 26, 2018, Judge Townsend issued an Order of Protection forbidding Bautista from having any contact with his estranged wife. Ex. 104-43-48.

47. Within days of the November 20, 2018 hearing, Bautista sought assistance in writing answers on legal forms and housing assistance from Chris Clasby, Peer Advocacy Coordinator at Summit Independent Living Center (SILC). Clasby takes notes when talking with clients as a part of his regular course of business. Clasby also enters information regarding client visits in SILC's database. Clasby referred Bautista to Disability Rights Montana (DRM).

48. Bautista did not report concerns to Clasby that SHFLC had denied him requested services.

49. On December 5, 2018, Bautista spoke with Christa Gabriel, DRM Advocacy Specialist. Gabriel takes notes regarding client or potential client visits and noted she spoke with Bautista on December 5, 2018. Bautista requested assistance from

Gabriel in completing legal forms and obtaining an audio recording of the November 20 hearing.

50. On December 6, 2018, Gabriel contacted the Clerk of Court's office for information on how Bautista may obtain assistance. Gabriel was advised that the Clerk of Court's office generally referred people to SHFLC. If he needed help only with filling in answers on the forms, he could make an appointment with the Clerk of Court's office and one of their staff would assist him. Gabriel communicated this information to Bautista on December 6, or December 7, 2018.

51. At no point did Bautista report to Gabriel that SHFLC had denied him requested services. In fact, Gabriel understood, based upon her conversations with Bautista, that he had not yet spoken with anyone at SHFLC.

52. Bautista also contacted MLSA, who advised him to contact the Pro Bono Program at the University of Montana School of Law. Bautista subsequently spoke with Karlene Kuhn, Pro Bono Coordinator, who scheduled an appointment for him to work with a law student to complete his forms.

53. On December 10, 2018, Bautista spent several hours working on his forms with both a law student and with Kuhn. Kuhn told Bautista that she would try to arrange for him to meet with an attorney the next day. Kuhn also advised Bautista that she had contacted SHFLC and arranged for Benlloch to work with him.

54. At 2:24 p.m., Kuhn emailed Benlloch and advised him that she was sending Bautista to SHFLC and to expect that it may take him 30 minutes or more to get to the courthouse. Kuhn wrote:

This client is visually impaired and sat with a law student this morning for assistance with his paperwork. I think it was fairly frustrating for the client because she could (of course) only offer legal information. In the end they didn't get very far in the many hours he was here, and I thought y'all might be better able to help.

Kuhn advised Benlloch that Bautista had a printed copy of the paper work, but she could provide Benlloch with a digital copy of the paperwork started on by Bautista and the law student. Ex. 101.

55. Bautista arrived at SHFLC well after 3:00 p.m., following his meeting at the Pro Bono clinic. Benlloch had not yet read Kuhn's email and was not aware Kuhn had referred Bautista to SHFLC.

56. Benlloch was the only staff member at SHFLC when Bautista arrived that afternoon. Bautista informed Benlloch of the dissolution proceeding and impending deadline. Benlloch described the process Bautista would have to follow during the dissolution proceedings.

57. Aware Bautista's deadline for filing was the next day, Benlloch took Bautista to the Clerk of Court's office to see what Bautista could file to avoid the entry of default against him. There were other customers at SHFLC at the time, and Benlloch had hoped the Clerk of Court staff could assist Bautista, so he could return to SHFLC and assist the waiting customers.

58. Reynolds ultimately assisted Bautista by reading him the information on the fee waiver form and transcribing his answers. *See Ex. 105-31-36.* Reynolds and other Clerk of Court staff had provided similar assistance to other individuals as part of their regular duties.

59. Bautista was not prepared to complete all of his paperwork that day, because he was hoping to meet with an attorney arranged for by Kuhn. Bautista advised Reynolds that he would return the next day.

60. After speaking with Reynolds, Bautista went to SHFLC, where he informed Benlloch that he would return the next morning. Benlloch agreed to allow Bautista to bring his laptop to SHFLC, so she could work on his paperwork there the next day.

61. Benlloch did not deny Bautista services on December 10, 2018. Benlloch, busy with other SHFLC and being the only staff member in the office, reasonably sought assistance for Bautista at the Clerk of Court's office to determine what he needed to do in order to avoid an entry of default. Reynolds provided Bautista with what assistance she could before he decided to end for the day out of concern that his answers may change after he spoke with an attorney.

62. On December 11, 2018, Bautista returned to SHFLC in the morning. Benlloch took Bautista to a desk inside the offices of SHFLC where Bautista was allowed to work throughout the day. SHFLC does not typically provide customers with work space. Benlloch agreed to do so out of concern that Bautista would be unable to file his dissolution paperwork in time. Benlloch also believed he would be better able to quickly answer Bautista's questions if he was to work in the office.

63. Benlloch realized Bautista required more assistance than he had initially thought after interacting with him during the morning of December 11, 2018. Benlloch suggested Bautista complete a Literacy Agreement so Benlloch could write down his answers on the dissolution paperwork. Benlloch left the decision of whether

a Literacy Agreement should be completed to Bautista out of respect and consideration that Bautista may not wish to receive that type of assistance.

64. The Literacy Agreement provided:

Due to literacy or other impairments I, \_\_\_\_\_, am requesting the assistance of Self Help Law staff to complete legal forms on my behalf. By signing this agreement, I certify that the Self Help Law Center staff did not provide me legal advice, completed the form only as directed by me, and that I am solely responsible for form content.

Ex. 103.

65. Bautista initially refused to sign the Literacy Agreement, because he hoped to meet with an attorney that day and did not want to fill out the paperwork until then. Bautista left SHFLC later that morning for a telephone consultation with an attorney and returned to find SHFLC had closed for lunch.

66. Bautista returned to SHFLC at approximately 2:00 p.m. Shortly thereafter, Bautista agreed to the Literacy Agreement and executed it on December 11, 2018.  
Ex. 103.

67. Benloch worked with Bautista at various times throughout the day on December 11, 2018. Benloch read portions of the paperwork to Bautista and transcribed his answers when he was not helping other customers. Bautista required additional time to consider the information he wanted to include on the forms. Benloch read the answers he wrote to Bautista so he could confirm the accuracy of the information.

68. Benloch worked with Bautista at least three different times that day. Benloch spent more than 30 minutes with Bautista each time. The process was slow due to Bautista taking time to consider his answers and formulating his answers to fit the limited space allowed on the forms.

69. On December 11, 2018, Bautista filed his Response to Petition for Dissolution (without children) at the Clerk of Court's office. *See* Ex. 105-39-45. It was ultimately considered filed with the court on December 21, 2018, when Bautista filed a Certificate of Service showing it had been served upon his estranged wife's attorney. 105-42.

70. Benlloch assisted Bautista several times in December 2018 in filing additional paperwork for the dissolution proceeding. On December 19, 2018, Benlloch emailed a motion for an extension of time and other paperwork to Bautista, after having spent some time trying to find file formats that would work with Bautista's adaptive technology. Ex. 48. Benlloch also assisted Bautista in using "Ask Karla," an online legal assistance service created by MLSA.

71. Benlloch and Bautista had agreed that Benlloch would help to "cut and paste" information Bautista typed on his laptop onto the dissolution forms. Bautista did not seek any further assistance from Benlloch after December 19, 2019.

72. While Benlloch was the only SHFLC staff member who assisted Bautista, Willard observed Bautista speaking with Benlloch on several occasions in December 2018. Willard exchanged pleasantries with Bautista and had inquired as to whether he was comfortable working at the desk inside the offices of SHFLC. At no point did Bautista complain to Willard that he had not received requested assistance.

73. Bautista did not request assistance from SHFLC in late December 2018 and early January 2019.

74. On December 20, 2018, Bautista spoke with an investigator with the Montana Human Rights Bureau (HRB). Bautista informed the investigator that SHFLC had denied him services at various times from November 6, through December 10, 2018.

75. During the last week of December 2018 and early January 2019, Bautista received assistance in completing his dissolution paperwork from Bonnie Kelley, SILC Care Advocate. Kelly also assisted Bautista with housing forms during this period. Kelley assisted Bautista with his request for an extension of time.

76. On or about January 14, 2019, Bautista arrived at SHFLC after it had closed for the day. Benlloch allowed Bautista to enter the office. Bautista complained about the unfairness of the order of protection and sought information about organizations that may assist him. Bautista told Benlloch that he had filed a complaint, or some variation of that term, due to his frustrations with the court system. Benlloch understood Bautista's complaint generally involved Judge Townsend, her court reporter, the Clerk of Court's office, and SHFLC. Benlloch did not understand or was aware that Bautista had filed a Charge of Discrimination with HRB.

77. After talking with Bautista for more than 30 minutes, Benlloch called Willard and advised him that Bautista had filed a complaint against Judge Townsend, her court reporter, the Clerk of Court's office, and SHFLC. Benlloch did not know with what entity Bautista had filed his complaint. Neither Benlloch or Willard knew at that time that Bautista had filed a Charge of Discrimination with HRB.

78. Willard made the decision to "curtail" the services provided to Bautista based upon the information he had received from Benlloch. Willard's intention was not to retaliate against Bautista, but, rather, take the time to ascertain the precise nature of his complaint and to correct whatever issues Bautista may have experienced when working with SHFLC staff.

79. On January 15, 2019, Benlloch and Willard met in the morning to discuss Benlloch's conversation with Bautista. Willard was concerned that Benlloch had made a mistake when completing one of Bautista's forms and wanted to determine what precisely had occurred. Willard was fearful SHFLC may be liable for any error made by its staff, which could lead to issues with OCA, the District Court, and the Clerk of Court's office.

80. Benlloch understood, based upon his conversations with Willard, that he was to limit interactions with Bautista until the complaint had been resolved. Benlloch understood he could continue to provide Bautista with the level of service he typically provided to SHFLC customers. Benlloch was unsure what it meant to "limit interactions," but understood it to mean that he could continue to provide the type of service he provided to other customers.

81. Bautista arrived at SHFLC after Willard and Benlloch had met on January 15, 2019. Benlloch saw Bautista first, and he alerted Willard. Willard informed Bautista that SHFLC staff would be limiting interactions with Bautista until his complaint was resolved, including not allowing Bautista to work at a desk within the office of SHFLC.

82. Bautista returned to SHFLC later that same day to obtain paper copies of forms Benlloch had sent to him via email. Benlloch had anticipated Bautista would return based upon an earlier agreement that he would obtain paper copies of the forms being completed by Bautista. Benlloch provided Bautista with the requested forms and explained the forms, as he would for any other customer. Benlloch had no other interactions with Bautista after January 15, 2019.



83. On January 17, 2019, Harris met with Willard and Benloch for their regular scheduled meeting. Harris learned Bautista was a person with a visual impairment, who Benloch had been assisting with filling out legal forms pursuant to a Literacy Agreement. Harris learned Bautista had indicated he was dissatisfied with how SHFLC had assisted him in filling out forms. Harris assumed Bautista's complaint had been filed with the Clerk of Court's office. Harris was not aware Bautista had filed a Charge of Discrimination with HRB. Harris agreed with Willard that SHFLC could limit filling out forms for a customer who had expressed dissatisfaction with how SHFLC had assisted him in filling out forms, but he reminded Willard that SHFLC needed to provide Bautista with any necessary forms and provide him with all regular SHFLC services.

84. On January 29, 2019, Bautista filed a motion to extend deadlines due to his requiring "urgent medical care in Europe." The motion had been completed with the assistance of both Kelley and Benloch in the weeks prior to its filing. Ex. 105-43-90.

85. On February 25, 2019, Willard received an email from an HRB investigatory that included the Charge of Discrimination signed by Bautista and dated January 28, 2019. The Charge of Discrimination made six allegations:

- (1) Bautista is a person with a disability that limits his ability to see and read printed words off of paper;
- (2) on November 20, 2018, Bautista requested SHFLC to assist him in filling out forms for a court hearing that day;
- (3) SHFLC refused to assist Bautista that day;
- (4) on January 15, 2019, Bautista informed SHFLC that he had spoken with HRB and that he intended to file a charge of discrimination;
- (5) SHFLC refused to provide Bautista with further services because of his complaint with HRB; and
- (6) SHFLC had discriminated against Bautista by failing to provide reasonable accommodations and had retaliated against him by refusing to provide services after he complained about discrimination.

The Charge of Discrimination did not contain any allegations about early November, more than one visit to SHFLC on November 20, or any failure to accommodate on December 10, 2018.

86. This was the first Willard learned that Bautista had filed a complaint with HRB and the first he learned of any specifics regarding Bautista's allegations. Willard

responded to the email before advising Shepherd. Willard realized his error and notified Shepherd, who then became SHFLC's designated representative in responding to the HRB complaint.

87. Shepherd conducted his own investigation as part of his effort to respond to HRB's inquiry.

88. On March 5, 2019, Shepherd sent a letter to Bautista advising him that he was welcome to utilize the services offered at SHFLC. Ex. 106. Bautista did not receive the letter, because he was no longer living at the address Shepherd had found for him. Shepherd also tried calling Bautista without success.

89. After responding to HRB's inquiry and discussing the matter with Benloch and Willard, Shepherd began developing training for SHFLC staff so there would be a clearer understanding as to the obligation to accommodate individuals with disabilities, and topics such as discrimination and retaliation.

90. Shepherd created a PowerPoint presentation that he presented to all SHFLC staff. While the AmeriCorps Service Members had received some training on these subjects during their orientation, Shepherd wanted to ensure that the facilitators' training was refreshed.

91. Shepherd's training included training on "reasonable accommodations" and provided specific examples of the types of accommodations that may or may not be reasonable. Shepherd stressed in the training that staff should accommodate when possible without concern as to whether the accommodation was necessary. Shepherd also stressed that no staff member was free to treat an individual requesting or requiring accommodation in a discriminatory manner. Shepherd also explained staff should provide reasonable accommodations without going beyond the scope of the services generally available to the public.

92. Shepherd also revised the Literacy Agreement to include a verification section that is to be signed by both the customer and SHFLC staff member indicating the information entered on the form is accurate. SHFLC offices were using this version of the Literacy Agreement at the time of hearing.

93. Shepherd increased the time spent on discrimination and retaliation during the AmeriCorps orientation. Shepherd also implemented a system by which SHFLC staff are required to contact Harris prior to denying any requests for accommodation.

94. Harris also added additional time during AmeriCorps Service Member orientation to include training on discrimination, reasonable accommodations, and retaliation.

95. On December 17, 2019, Bautista's estranged wife's counsel filed a Motion for Status Conference in the dissolution matter, advising the court that nothing had been filed in the case since Bautista's motion to extend deadlines that was filed on January 29, 2019. After a status conference, at which Bautista appeared telephonically, the court set the matter for hearing. Bautista did not appear but filed an untimely motion for continuance and/or to appear telephonically, which the District Court denied. On March 2, 2020, the court entered its findings, conclusions, and decree of dissolution of marriage. The court further issued a permanent order of protection against Bautista on March 9, 2020. Ex. 105-165.

96. SHFLC did not discriminate against Bautista because of disability in November or December 2018.

97. SHFLC did not retaliate against Bautista for protected activity when Willard informed him on January 15, 2019, that SHFLC would "limit interaction" with him until his complaint was resolved.

#### IV. DISCUSSION<sup>11</sup>

Bautista alleges SHFLC denied him services due to his disability on at least three occasions – November 6, November 20, and December 20, 2018. Bautista argues SHFLC staff, specifically Benloch, knew or should have known without him using "any magic words," that as a person with a vision impairment he required additional assistance. SHFLC argues Bautista was never denied requested assistance at any time in November 2018 or December 2018.

##### A. SHFLC staff did not discriminate against Bautista because of his disability.

The Montana Human Rights Act (MHRA) prohibits the State and its political subdivisions from discriminating against persons with disabilities in the provision of services, goods, facilities, advantages or privileges. Mont. Code Ann. § 49-2-308(a). A qualified person with a disability proves discrimination with evidence of denial of a reasonable accommodation. Mont. Code Ann. § 49-2-101(19)(b). In addition, the

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<sup>1</sup> <sup>1</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Montana Governmental Code of Fair Practices (GCFP) requires that all services of a state agency be performed without discrimination based upon mental or physical disability. Mont. Code Ann. § 49-3-305(1). A state or local facility may not be used in furtherance of any discriminatory practice. Mont. Code Ann. § 49-3-305(2).

A qualified person with a disability can also establish discrimination by demonstrating that he received disparate treatment because of his disability. This claim requires proof that a qualified person with a disability sought services or benefits, and when he did, he received adverse treatment in a manner that raises “a reasonable inference” that he was treated differently because of his disability. Admin. R. Mont. 24.9.610(2)(b)(ii).

The Ninth Circuit recently held:

Under the applicable regulations, a public accommodation has an obligation to "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." 28 C.F.R. § 36.303(a). A public accommodation is relieved of this obligation only if it "can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense." *Id.*

. . . .

While "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication," the regulations make clear that "the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." *Id.* § 36.303(c)(1)(ii).

*Tauscher v. Phoenix Bd. of Realtors, Inc.*, 931 F.3d 959, 962-63 (9<sup>th</sup> Cir. 2019).

Applying these authorities in the present context, the duty to accommodate a qualified disabled individual in accessing state services must permit that individual to enjoy equal benefits and privileges as are enjoyed by non-disabled persons receiving those services. If the policy behind the discrimination statutes with respect to provision of state services is to have any force, the duty of the provider to engage in an interactive process with an otherwise qualified recipient must be discharged with

at least the same rigor as is required in employment contexts. For the provision of state services, a reasonable accommodation, when requested, should be undertaken unless, of course, such an accommodation would present a danger to others or would otherwise require an unfeasible modification of the provider's operations. *Cf.*, *McDonald*, *supra*.

SHFLC has stipulated that Bautista is a person with a disability, as that term is defined in Montana Code Annotated §§ 49-2-101 (19) and 49-3-101(3)(a). Bautista is substantially limited in the major life activity of seeing due to his vision impairment. *See* 29 C.F.R. §1630.2(h),(i)(1)(i) (major life activity includes seeing).

There is no serious dispute that Bautista was qualified for the services offered by SHFLC. Mont. Code Ann. §§ 49-2-101(19), 49-3-101(3). A person must also be "qualified" to be entitled to protection under state law). The governmental service involved in this case was the provision of forms and informational materials in civil legal matters. Bautista was clearly qualified for this service.

What remains for consideration, then, is the issue of whether Bautista was provided a reasonable accommodation. A public entity that fails to provide a reasonable accommodation to a qualified person with a disability has discriminated against that person. Mont. Code Ann. § 49-2-101(19)(b). The duty to make a reasonable accommodation, or "reasonable modification" in federal law, includes modifying "policies, practices or procedures" to avoid illegal discrimination. 28 C.F.R. § 35.130(b)(7). There are numerous different types of accommodations that a public entity may have a duty to provide. Identifying, for a particular qualified person, a reasonable accommodation requires "fact-specific, case-by-case inquiry that considers among other factors, the effectiveness of the modification in light of the nature of the disability in question . . ." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1077, 1085 (9<sup>th</sup> Cir.) citing *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995). Bautista, the charging party, always carried the burden of persuasion that SHFLC illegally discriminated against him. *M.R.L. v. Byard* (1993), 260 Mont. 331, 860 P.2d 121, 129; *Crockett v. Billings* (1988), 234 Mont. 87; 761 P.2d 813, 818; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 213.

### **1. Bautista did not request assistance on November 6, 2018.**

Bautista argues Atkins and he went to SHFLC seeking assistance after Atkins informed him that he would need to file a motion seeking an earlier hearing date. Atkins accompanied Bautista to SHFLC, where Bautista obtained the appropriate paperwork. Atkins assisted Bautista in completing the form. Ex. 46. Atkins did not complete all of the paperwork Bautista had with him, because he wanted to complete

the paperwork at home using his personal computer. Ex. 104-25-38. Bautista's motion was ultimately filed on November 9, 2018. Ex. 104-25.

Benloch testified he could not recall meeting Bautista prior to December 2018. Benloch denied he ever told Bautista that he would not assist him when asked to do so. Benloch's testimony was sincere and evinced a real need to serve his fellow man. Benloch is no longer an AmeriCorps Service Member and is no longer living in Montana. Benloch has little to no reason to fabricate testimony or to otherwise suffer from a selective memory. It makes little sense Benloch would provide Bautista greater assistance than he typically provided to other customers just a few weeks later, if he flippantly denied Bautista assistance on November 6, 2018, as alleged.

Further, Benloch's testimony is consistent with the testimony of Gabriel, who spoke with Bautista on December 5, 2018, about how to obtain a recording of the hearing before Judge Townsend and how to get assistance with district court forms. Gabriel denied Bautista ever complained that SHFLC denied him assistance in filling out legal forms. Gabriel testified that, based upon her conversation with Bautista, it sounded like he had no contact with SHFLC. Bautista called Gabriel as a witness. Gabriel had no reason to lie or to exaggerate her testimony. Gabriel's testimony, which was refreshed with notes and calendar entries she made at or near the time of her interactions with Bautista, was consistent with SHFLC's argument that Bautista did not request assistance from SHFLC staff on November 6, 2018.

The credible evidence of record shows Bautista obtained a form from SHFLC that he knew had to be filed with the Clerk of Court's office and sought assistance from the Clerk of Court's office to complete the form so it could be timely filed. It is therefore determined that SHFLC did not deny Bautista any requested services on November 6, 2018.

## **2. Bautista did not request assistance from SHFLC on November 20, 2018.**

By his own admission, Bautista did not request assistance from SHFLC on November 20, 2018. Bautista wrote in his response to SHFLC's proposed findings of fact:

As I have already explained many times, I have never considered relevant my first visit to the SHC on November 20th 2018; because, fact of the matter is, when I went to the courthouse that day, I was not expecting to receive assistance filling out forms from the SHC, but from the Clerks of Courts, since the staff at the SHC had already told me two weeks earlier they could not assist me with that task and Ms. Atkins had

to do it instead. It is so much so that I do not find relevant that first visit on November 20th, 2018, that it is a marginal detail in my reasoning to explain how the SHC discriminated against me and, so, I barely make any mention to that visit in my Proposed Findings of Facts and Conclusions of Law.

Bautista Response to SHC Prop. FOFCOL, p. 17.

Even if Bautista had not conceded he did not seek services from SHFLC on November 20, 2018, the evidence suggests that, if he did attempt to access SHFLC, he did so after its closing time. It is therefore determined that SHFLC did not deny Bautista requested services on November 20, 2018.

### ***3. SHFLC did not deny Bautista services on December 10, 2018.***

It is undisputed Bautista spent much of the morning of December 10, 2018, at the University of Montana Law School receiving assistance from a law student and Kuhn. It is further undisputed Bautista arrived at the courthouse after 3:00 p.m. in search of additional assistance after he was unable to complete his dissolution paperwork that morning.

Benloch testified he had not yet read Kuhn's email when he first met Bautista. Benloch testified, after speaking with Bautista, he realized his deadline was rapidly approaching, so he escorted Bautista to the Clerk of Court's office to determine what Bautista needed to file in order not to be found in default. Benloch and Bautista spoke with Reynolds, who assisted Bautista in completing an Affidavit of Inability to Pay Filing Fees and Other Costs, which was filed on December 11, 2019.

Bautista generally argues Benloch knew or should have known he required additional services based upon his physical appearance. He alleges he requested help from Benloch, which Benloch declined to provide.

Bautista's argument is not persuasive. There was no evidence offered to show Benloch had, in fact, read Kuhn's email prior to Bautista's arrival. Further, it would have been contrary to Benloch's training as an AmeriCorps Service Member to assume anyone required assistance due to their physical appearance. Such assumptions would also be offensive to people like Kelley who do not wish to be defined by their physical limitations.

Benloch provided Bautista with the form he needed to file the Affidavit of Inability to Pay Filing Fees and Other Costs. He then escorted Bautista to the Clerk of Court's office, where Bautista spoke with Reynolds, who had greater knowledge

than Benlloch about the applicable procedures and who ultimately helped Bautista timely file the appropriate paperwork. While Benlloch did not assist Bautista in completing the form, he provided the assistance necessary to enable Bautista to timely file his affidavit with the court. It is therefore determined that SHFLC did not deny Bautista services on December 10, 2018.

4. *SHFLC did not deny Bautista services at any time in December 2018.*

Before leaving the courthouse the afternoon of December 10, 2018, Bautista informed Benlloch that he would be returning to the courthouse the next day to continue working on his dissolution paperwork. Bautista requested and received permission from Benlloch to work on his personal laptop at a desk located inside the offices of SHFLC the next day. Benlloch agreed to such an arrangement, in part, so he could be accessible to Bautista throughout the day and available to answer Bautista's questions quickly so as not to hinder Bautista's ability to timely file his paperwork with the court.

Benlloch testified it was not until he had an opportunity to speak more with Bautista on December 11, 2018, that he realized Bautista required assistance beyond that which he typically provided to SHFLC customers due to his vision impairment. Benlloch asked Bautista if he wished to sign a Literacy Agreement, which would allow him to physically write down Bautista's answers. Bautista initially declined, because he thought he would be speaking with a lawyer that day. After his telephone consultation with an attorney later that morning, Bautista informed Benlloch at approximately 2:00 p.m. that he would be willing to sign the Literacy Agreement, which he did that afternoon.

Benlloch testified he worked with Bautista at various times throughout the day as he continued serving other SHFLC customers. Benlloch estimated he spent more than a half an hour with Bautista at least three times that day assisting Bautista in completing his paperwork. Bautista was able to submit his dissolution paperwork to the Clerk of Court's office on December 11, 2018. Ex. 105-40-41. However, it was not considered filed until a Certificate of Service was filed on December 20, 2018. Ex. 105-42.

It is unlikely Bautista requested services from Benlloch in December 2018 that he did not receive. While Benlloch may not have offered the Literacy Agreement on December 10, 2018, when he likely first met Bautista, the evidence does not show Bautista requested services he did not receive. Once Benlloch understood Bautista required additional assistance, he had him sign the Literacy Agreement, provided Bautista work space inside the offices of SHFLC, and assisted Bautista throughout the day of December 11, 2018. The evidence shows Benlloch provided sufficient



assistance to Bautista so as to allow him to timely file his paperwork. The evidence further shows Benlloch continued to provide Bautista with services after December 10, 2018.

Much of Bautista's argument in this matter appears to be a misguided attempt to collaterally attack the protective order issued in November 2018. Bautista seems to be of the opinion that he would have achieved a different result if 250 or more pages of documents had been admitted at that hearing. Bautista never offered the documents at hearing; nor does it appear he ever informed the court he was unable to file the documents due to a failure of SHFLC to provide him with requested service. SHFLC provides generalized legal information and court forms to unrepresented parties. It cannot and does not provide legal advice to its customers or assist any customer in his or her litigation. Contrary to Bautista's argument, it would not have been a reasonable accommodation for any SHFLC staff member to go through his pictures, emails, diaries, and other documentary evidence to assist him in preparing his case. Further, it would not have been a reasonable accommodation for SHFLC staff to attend court proceedings with Bautista to assist him in reading the documents or otherwise present his case. The purpose of SHFLC is limited and it appears, based upon the evidence of record, SHFLC staff provided services to Bautista when requested and in conformance with its purpose. Bautista's claim that SHFLC discriminated against him in the provision of governmental services because of his disability is without merit.

**A. SHFLC did not retaliate against Bautista for protected activity.**

Bautista contends SHFLC retaliated against him on January 15, 2019, when Willard advised him that SHFLC would "limit interactions" with him until his complaint was resolved. SHFLC argues Willard's actions, while ill advised, were not retaliatory, but an attempt to ensure that any mistakes that may have been made were corrected and not repeated in the future.

The elements of a prima facie retaliation case are set forth in Admin. R. Mont. 24.9.610(2):

(2) A prima facie case of discrimination or retaliation based on disparate treatment means evidence from which the trier of fact can infer that adverse action against the charging party was motivated by respondent's consideration of charging party's . . . protected activity . . . .

(a) The elements of a prima facie case will vary according to the type of charge and the alleged violation, but generally consist of proof:

(i) That charging party . . . engaged in protected activity;

. . . .

(iii) That charging party was . . . subjected to adverse action by respondent in circumstances raising a reasonable inference that charging party was treated differently . . . because of protected activity.

(b) Examples of evidence establishing a reasonable inference that charging party was treated differently . . . because of protected activity include:

. . . .

(ii) proof that similarly situated persons [who did not engage in protected activity] . . . were treated more favorably;

(iii) proof that there was a close proximity in time between protected activity of the charging party and adverse action by the respondent;

. . . .

Bautista must show he engaged in protected activity, suffered an adverse action, and a causal connection exists between the protected activity and the adverse action. Bautista may rely upon circumstantial evidence to establish a prima facie case of retaliation. 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).

Bautista clearly engaged in protected activity when he spoke with an HRB Investigator on December 20, 2018. Further, Bautista was treated differently than other SHFLC customers on January 15, 2019, when Willard advised him that SHFLC staff would “limit interactions” with him until his complaint was resolved. Bautista is left with the burden of showing a causal link between his protected activity and the adverse action. *See Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998).

Proof of a causal connection between a protected activity and a material adverse action can be established with evidence of a close proximity in time between the protected activity and the adverse action, different and more favorable treatment of persons who did not engage in protected activity, departures from established rules or procedures, proof that the respondent intended to take adverse action because of the protected activity or other proof that the adverse action was motivated in whole or in part by the protected activity. Mont. Admin. R. 24.9.610(2)(b).

Bautista "must make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity." *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185, 1197 (9th Cir. 2003). If the decision maker has no knowledge of the protected activity, generally there is no causal link. *See Id.*; *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982); *Gunther v. County of Washington*, 623 F.2d 1303, 1314 (9th Cir. 1979).

Both Willard and Benloch testified they were unaware Bautista had filed a Charge of Discrimination with HRB, or that he was alleging SHFLC staff discriminated against him because of disability. Willard testified he first became aware of the nature of Bautista's complaint and with what entity he filed his complaint on February 25, 2019, when he received an email inquiry from HRB and a copy of the Charge of Discrimination.

Bautista testified he told Benloch that he had filed a complaint with HRB when he spoke with him on January 14, 2019. Benloch testified he understood Bautista's complaint was generally related to his dissatisfaction with Judge Townsend's order of protection and the ongoing dissolution matter. Benloch testified Bautista told him that SHFLC was "implicated" in the matter, which he understood to mean that SHFLC was an involved party because it had provided him services during his court proceedings. Benloch denied Bautista ever told him that he had filed a human rights complaint against SHFLC.

Benloch and Willard both testified Benloch called Willard shortly after Bautista left that evening and informed him that Bautista had reported filing a complaint. Willard denied Benloch used the term "human rights complaint," or that Benloch provided him with any details suggesting Bautista was accusing SHFLC of discriminating against him because of disability.

Bautista's testimony throughout the hearing was generally exaggerated and he often strayed from the matter at hand. Bautista is clearly still upset with the order of protection and dissolution proceedings. Despite being advised several times to focus on the issues raised in his Charge of Discrimination, he continued to focus on the breakdown of his relationship with his estranged wife and the various betrayals he

had suffered. By his own account, he was depressed, anxious, and heartbroken during the period in question. Given his demeanor at hearing, it is doubtful he was as direct in his dealings with Benloch as he claimed at hearing.

Bautista made much of Benloch's demeanor and manner of testimony at hearing. The Hearing Officer agrees Benloch often appeared confused and nervous at hearing. Benloch, however, was able to answer questions when they were asked clearly and directly and faltered only when questions became muddled and circuitous. Benloch, overall, appeared to be committed to performing his job duties as an AmeriCorps Service Member to the best of his ability and to provide the best service possible to SHFLC customers.

Willard's testimony was clear, direct and described a likely series of events. Willard is not timid, and he did not appear unwilling to question Benloch and others when he felt it necessary. If Benloch had reported to him that a discrimination complaint had been filed, it seems more likely than not Willard would have communicated that when meeting with Harris on January 17, 2019. As an attorney and admittedly mindful of the potential liability that could arise from Bautista's complaint, Willard would have understood the importance of apprising Harris of the particulars of Bautista's complaint in order to allow SHFLC sufficient time to prepare an answer to Bautista's complaint when called upon to do so.

Bautista's testimony that he informed Benloch that he filed a discrimination complaint with HRB during their conversation on January 14, 2019, is less credible than the testimony of Benloch, Willard, and Harris, all of whom denied knowing that Bautista had filed a Charge of Discrimination with HRB prior to the email received by Willard on February 25, 2019. Ex. 117.

Even if one was to find SHFLC had knowledge of the HRB complaint as early as January 14, 2019, and, as a result, Bautista was able to establish all three elements of the prima facie retaliation case, SHFLC has proven that it had a legitimate, nondiscriminatory reason for the January 15, 2019, events.

Willard credibly testified his decision to "curtail" services to Bautista was not intended to punish Bautista for having filed a complaint. Willard testified he initially believed Benloch had made an error when completing a court form with Bautista. Willard testified his instinct was to limit interactions with Bautista while he attempted to determine the exact nature of Bautista's complaint. Again, Willard's testimony was clear and direct. It seems unlikely Willard was motivated by any retaliatory animus when he decided to "curtail" services to Bautista, given Benloch was never disciplined for providing forms to Bautista later that same day.

SHFLC has shown it had legitimate, nondiscriminatory reasons for Willard's decision to "curtail" services to Bautista. *See St. Mary's Honor Ctr.*, 509 U.S. 502, 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). Bautista is now left with the ultimate burden of showing a retaliatory reason motivated SHFLC or that the reasons offered were not the true reasons for its action or that the reason offered is pretext for retaliation. *Crockett*, 234 Mont. at 95 (citations omitted). "[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*, 275 Mont. 322, 328, 912 p.2d 787, 791 (quoting *St. Mary's Honor Center*, 509 U.S. at 515). *See also Vortex Fishing Sys., Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶15, 38 p.3d 836, ¶15. "To establish pretext, [Bautista] 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the] proffered legitimate reasons for its actions that a reasonable [fact finder] could rationally find them unworthy of credence'." *Mageno v. Penske Truck Leasing, Inc.*, 213 f.3d 642 (9<sup>th</sup> Cir. 2000)(quoting *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4<sup>th</sup> 807 (1999)).

Bautista offered little by way of credible evidence to discredit the testimony of SHFLC's witnesses or otherwise show the reasons proffered for "curtailing" services to Bautista was pretext for retaliation. Bautista has failed in his burden of persuading the Hearing Officer that SHFLC retaliated against him for protected activity.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

1. Self Help Family Law Center did not illegally discriminate against Javier Bautista because of disability or retaliate against him for protected activity. Mont. Code Ann. §§ 49-1-301 and 49-2-308.

1. For purposes of Mont. Code Ann. § 49-2-505(8), Self Help Family Law center is the prevailing party.

## VI. ORDER

Judgment is granted in favor of Self Help Family Law Center and against Javier Bautista. Bautista's complaint is dismissed with prejudice as lacking merit.

DATED this 29th day of January, 2021.

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

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Javier Bautista, Charging Party and Respondent Self Help Family Law Center, and its attorney, Jeanine Blaner:

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 appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.**