

DA 21-0341

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 78N

NUGGETT CARMALT,

Petitioner and Appellant,

v.

FLATHEAD COUNTY,

Respondent and Appellee.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-16-707C
Honorable Heidi J. Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Quentin M. Rhoades, Rhoades Siefert & Erickson PLLC, Missoula,
Montana

For Appellee:

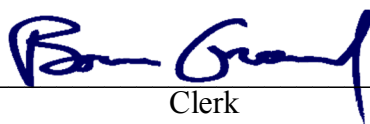
Maureen H. Lennon, MACo Defense Services, Helena, Montana

Tara Fugina, David Randall, Deputy Flathead County Attorneys, Kalispell,
Montana

Submitted on Briefs: February 23, 2022

Decided: April 12, 2022

Filed:


Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Nuggett Carmalt appeals from the June 11, 2021 Judgment and June 9, 2021 Order of the Eleventh Judicial District Court granting Flathead County's motion for summary judgment and dismissing Carmalt's retaliation claim for continuing discrimination. Carmalt argues the District Court erred by failing to consider allegations of discrimination that occurred after she filed her complaint, and thus erred in granting summary judgment to the County. We affirm.

¶3 In 2014, Carmalt filed a complaint with the Montana Human Rights Bureau (MHRB) against Flathead County, alleging employment discrimination by her supervisor, Mark Campbell, while she was a clerical employee in the Flathead County Fair office. On April 2, 2015, the parties settled and Carmalt resigned as a condition of the settlement agreement.

¶4 On November 23, 2015, Carmalt filed a retaliation complaint with the MHRB, alleging that the County had retaliated against her "by subjecting [her] to different terms and conditions of governmental services" because she had pursued her initial employment discrimination complaint. Following the resolution of her MHRB claim, Carmalt claimed that Fair employees were distant and unaccommodating to her requests for public information. The Fair required her to obtain the information in writing via the

Flathead County Attorney's Office and to pay for copies. Carmalt claimed this was not the usual Fair policy.¹ She further claimed that she was "denied the right to continue having a food booth" at the 2015 Northwest Montana Fair when she was told that she had to "reapply and find a nonprofit agency to partner with."

¶5 After an investigation, on May 11, 2016, the MHRB concluded Carmalt's allegations did not amount to a "reasonable cause to believe unlawful discrimination occurred as alleged." Carmalt appealed the MHRB's decision to the Montana Human Rights Commission (MHRC). The MHRC issued a final agency decision dismissing the complaint on August 3, 2016. While Carmalt's appeal was pending with the MHRC, the Fair's food vendor committee denied an application Carmalt submitted to host a food booth at the 2016 Northwest Montana Fair and reassigned the nonprofit Carmalt was associated with to a booth that was unsuited for her equipment.

¶6 On August 18, 2016, Carmalt appealed the MHRC decision to the District Court. Carmalt expanded her accusation that Campbell instructed Fair employees to withhold public information from her to encompass the broader claim that she was "shunned" after he instructed them to not interact with her at all, even in a personal capacity. Carmalt reiterated that the County required her to "jump through hoops and otherwise be inconvenienced" to obtain public documents that were normally given to members of the

¹ Carmalt acknowledged in her deposition that it was not unprecedented and does not dispute that the County has the legal right to charge for copies.

public free of charge and without delay directly from the Fair office. The Complaint added additional allegations related to her 2016 denied food vendor application.²

¶7 The County moved to exclude all evidence of retaliatory acts occurring after Carmalt filed her November 2015 complaint on the grounds that subsequent claims had not been considered by the MHRB. The District Court granted the County’s motion in limine on September 18, 2019, citing to § 49-2-512(1), MCA, and reasoning that “the MHRA [(Montana Human Rights Act)] constrains a district court to entertain only those claims that the MHRB adjudicates after a thorough investigation.”

¶8 The County filed a motion for summary judgment, arguing that Carmalt could not establish a prima facie case of retaliation because the alleged retaliatory acts were not material or significant and did not have the effect of deterring Carmalt from engaging in any protected activity. The District Court granted the County’s motion, concluding Carmalt had failed to establish a prima facie case for retaliation because, while requiring her to apply for a food booth, request documents from the county attorney’s office, and pay a minimal charge for copies may have been an inconvenience, the challenged acts did not rise to a level that would dissuade a reasonable person from engaging in a protected activity. Carmalt appealed.

² During her deposition, Carmalt admitted that she had not applied for a food booth at the time she filed her administrative complaint in November 2015; rather, she felt she should be permitted to inherit the 24 Hours of Flathead vendor spot after the organization notified the Fair that it would not apply for a booth in 2016. Carmalt’s application was also denied for the 2018 fair, which she has discussed on appeal but was not part of her 2016 Complaint filed with the District Court.

¶9 Montana’s retaliation statute provides, in part, that it is unlawful to discriminate against an individual because he or she has filed a complaint or participated in a proceeding under Title 49, chapter 2, MCA. *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶ 15, 326 Mont. 491, 111 P.3d 202 (citing § 49-2-301, MCA). The MHRA establishes the “exclusive remedy for acts constituting an alleged” discriminatory practice under the Act’s provisions; a party claiming discrimination or retaliation may not file a claim in district court without first obtaining an adjudication of that claim by the MHRB. *Borges v. Missoula Cty. Sheriff’s Office*, 2018 MT 14, ¶ 19, 390 Mont. 161, 415 P.3d 976 (citing § 49-2-512(1), MCA). The MHRB must “informally investigate the matters set out in the complaint promptly and impartially to determine whether there is reasonable cause to believe that the allegations are supported by a preponderance of the evidence.” Section 49-2-504(1), MCA. The MHRB investigator seeks “to gather sufficient information to allow a thorough scrutiny of the circumstances” surrounding the complaint. Admin. R. M. 24.8.212(1) (2008). A complainant may amend the complaint to cure defects or omissions, “and to allege new facts and matters arising out of continuing violation of law.” Admin. R. M. 24.8.752(1) (2008).

¶10 We review a district court’s ruling on a motion for summary judgment de novo, applying the same M. R. Civ. P. 56 criteria as the district court. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7, 374 Mont. 12, 322 P.3d 1029. A party seeking summary judgment must 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.” M. R. Civ. P. 56(c)(3). “In determining whether a genuine

issue of material fact exists, we view all evidence in the light most favorable to the non-moving party.” *Borges*, ¶ 16.

¶11 To establish a prima facie case of retaliation, Carmalt was required to show that (1) she engaged in a protected activity; (2) the County subjected her to an adverse action; and (3) a causal link existed between the protected activity and the adverse action. *Puskas v. Pine Hills Youth Corr. Facility*, 2013 MT 223, ¶ 47, 371 Mont. 259, 307 P.3d 298; *see also* Admin. R. M. 24.9.610(1)-(2) (1996).

¶12 The parties agree that, as applied to the facts of this case, an “adverse action” is one that would “dissuade a reasonable person from engaging in a protected activity.” Admin. R. M. 24.9.603(2) (2017); *see also BNSF v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415 (2006) (“[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse,” which in the context of that case meant “it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” (Internal quotations and citations omitted.)). Generally, “petty slights, minor annoyances, and simple lack of good manners” do not rise to the level of an adverse action because such acts are not a deterrence to engaging in protected activity. *BNSF*, 548 U.S. at 68, 126 S. Ct. at 2415; *Ray v. Henderson*, 217 F.3d 1234, 1241-43 (9th Cir. 2000) (“mere ostracism by co-workers does not constitute an adverse employment action”). Whether an action is materially adverse is judged by an objective standard, considering the context and circumstances of the particular case. *BNSF*, 548 U.S. at 68-69, 71, 126 S. Ct. at 2415, 2417.

¶13 The parties agree that Carmalt engaged in a protected activity, satisfying the first element of her prima facie case, by filing her original employment discrimination complaint with the MHRB. Carmalt argues on appeal that the District Court's erroneous decision to exclude the County's subsequent acts of retaliation against her led to the court's incorrect determination that she did not suffer any adverse action and its improper decision to grant summary judgment to the County. The County counters that the District Court did not abuse its discretion by excluding Carmalt's subsequent alleged instances of retaliation because those allegations are discrete acts that were never part of the MHRB investigation. The County contends that, regardless of that decision, because the totality of Carmalt's alleged adverse actions—having to apply to run a food booth and being required to put her public document request in writing to the county attorney's office and pay for copies—were neither material nor significant, Carmalt cannot satisfy the second or third essential elements of her prima facie case of retaliation.

¶14 The undisputed facts show that even if the District Court had denied the County's motion to exclude subsequent evidence of alleged retaliation related to Carmalt's 2016 and 2018 food booth applications, requiring Carmalt to apply to run a food booth is not a significant adverse action, as she was given the same opportunity to operate a food booth at the Fair as any other member of the public. While the County's alleged retaliatory acts related to obtaining public documents and paying a minimal fee for copies may have been an inconvenience to Carmalt, the undisputed facts show that such procedure was not unprecedented at the Fair office and was within the County's legal right to impose. These actions were not significantly adverse and would not dissuade a reasonable person from

engaging in a protected activity, such as requesting public documents or making or supporting a charge of discrimination.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court did not err by granting summary judgment to the County. The undisputed facts show that Carmalt's retaliation complaint fails as a matter of law because she cannot establish a prima facie case of unlawful retaliation by the County. Because this issue is dispositive, we decline to address Carmalt's challenge to the District Court's decision to exclude subsequent acts of alleged retaliation on appeal. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH

/S/ BETH BAKER

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR