

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 9-2011:

MONTANA PUBLIC EMPLOYEES)	Case No. 366-2011
ASSOCIATION,)	
)	
Complainant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND RECOMMENDED ORDER
STATE OF MONTANA, MONTANA)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

On September 7, 2010, the Montana Public Employees Association (MPEA) filed an unfair labor practice charge with the Montana Board of Personnel Appeals, alleging that the Montana Department of Transportation (MDT) retaliated against its employees by refusing to allow them to work an alternate schedule. On October 13, 2010, Board Agent John Andrew issued an Investigative Report and Finding of Probable Merit, transferring the charge to the Hearings Bureau for hearing.

The Hearings Bureau issued a Notice of Hearing and Telephone Conference on October 18, 2010 which named David Scrimm as the hearing officer. In December 2010, the parties asked for additional time to reach a stipulation of facts upon which they would base their briefing of the issues. The hearing officer granted the motion, giving the parties until February 3, 2011 to submit their stipulated facts and until March 18, 2011 to file the last brief based on those stipulated facts. The parties were unable to stipulate to a set of facts so on February 17, 2011 the hearing officer issued an order giving the parties until February 25, 2011 to file any dispositive motions. On that date MDT filed a motion for summary judgment. After briefing by the parties, the hearing officer granted the department's motion for summary judgment. MPEA appealed from the summary judgment order to the Montana Board of Personnel Appeals (BOPA), which found that the granting of summary judgment was

premature and that the hearing officer should consider evidence of whether an unfair labor practice was committed by MDT.

BOPA remanded the matter to the Hearings Bureau on June 30, 2011. On October 27, 2011, a hearing in this matter was held in Helena, Montana. Carter Picotte represented MPEA. Marjorie Thomas represented MDT. Exhibits 1, 2, 3b, 3d, 3e, 4, A, D, E, F, and G were admitted into the record.

Kevin Fuller, J.D. Buck, Rickie Johnson, Bill Shegina, Jim Sturm, Tonia Kane, Dick Letang, Jeff Ebert, Bill Fogarty, and Dwane Kailey testified under oath. After the hearing, the parties submitted proposed findings of fact, conclusions of law and briefs, the last of which was filed on December 14, 2011.

II. ISSUE

Did MDT commit an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(1)?

III. FINDINGS OF FACT

1. The Montana Public Employees Association (MPEA), Complainant, is the exclusive bargaining agent for the MDT employees working in the Butte District, Construction Engineering Technicians.

2. Under the collective bargaining agreement, Exhibit 1, the union employees were entitled to overtime if they worked more than eight hours in any one day or if they worked more than 40 hours in a week.

3. According to the Supplemental to the Master Agreement, an employee and the employer may “mutually agree” to work an alternate schedule when “dictated by the efficiency of operations.”

4. An alternate schedule may be a 40-hour week, where the employee is paid overtime only after working 40 hours in a week regardless of how long the employee may work in a day, or, a 4-10 schedule, where the employee receives overtime pay for working more than 10 hours in a day or more than 40 hours in a week.

5. Early in 2010, upper management in MDT gave the Butte District the directive to manage overtime better. In 2009, the Butte District had incurred the highest overtime rate of all the MDT districts even though it was third in the dollar value of projects.

6. Bill Fogarty, the Butte District Construction Engineer, asked Kailey, Chief Operating Officer, and Jennifer Jensen, Chief Human Resources Officer, to come to the project manager's quarterly meeting in Butte on March 10, 2010, to explain to project managers how they may manage overtime.

7. Kailey spoke at the meeting. Some of the options for reducing overtime he mentioned were the use of split shifts, seeking the cooperation of crews to work 4-10s or 40 hour weeks, seeking the cooperation of employees when management knows the employee plans to take vacation leave to manage the schedule so there is no overtime for management and no need to take vacation leave for the employee. Other options included sending employees home after eight hours, assigning employees to duties that did not require overtime, and disallowing time off. The purpose of the meeting and the suggested methods were aimed at reducing the amount of the overtime pay received by the field crews. The meeting did not instruct managers to threaten union members with punishment or retaliation. MDT wanted to reduce overtime and clearly hoped it could convince union members to work in a way that would have that effect, but there is no evidence that managers were directed to go outside the bounds of the CBA.

8. Johnson did not use any of these options and let his crew decide the schedule they each wanted to work.

9. Some employees agreed to work alternate work schedules upon request. Some employees refused and continued to be paid according to the 5-8s schedule, even if they worked 4-10s.

10. One employee, Kevin Fuller, initially, in late April 2010, agreed to work an alternate schedule of 4-10s, and later demanded by grievance his pay according to a 5-8s schedule. He was allowed to change his time sheet and pay to show eight hours of pay and any hours over eight hours in a day as overtime as he had requested. Exhibits E and F.

11. On May 10, 2010, Bill Fogarty forwarded an email to his project managers that was sent by Dick Letang, the union field representative for MDT. Letang's email describes the various scheduling definitions and tells union members what to do in the event they are ordered to work a schedule with which they do not agree. Fogarty's email included his comment that Letang did an "excellent job of providing input on various scenarios." Fogarty's agreement with Letang's position on scheduling issues demonstrates management's intentions regarding overtime were consistent with the collective bargaining agreement.

12. Management's directive to manage overtime did not have a "chilling effect" on union members throughout the summer as many did not agree to work an alternate schedule.

13. During the week beginning on August 30, 2010, Fuller, William Shegina, and James Sturm worked a 4-10 schedule. They left work at 4:30 on Thursday, September 2, 2010, except for Fuller, who left five hours earlier on vacation leave.

14. At 9:26 a.m. on September 2, 2010, Bill Fogarty sent an email to the Butte Project Managers stating in its first bullet point that alternate work schedules would not be approved for staff that refused to work an alternate work schedule during the construction season. Exhibit 4. This email was, as Fogarty expected, eventually forwarded to MPEA members.

15. Michael Arvish, project manager, forwarded this email to his crew, which included Fuller, Shegina, Sturm, Tonia King, and J.D. Buck.

16. Arvish directed his crew to work 5-8s during the following week.

17. Sturm contacted Tim Fellows, union member president, to complain about Fogarty's email on September 2, 2010.

18. Fellows contacted Letang who contacted Jennifer Jensen.

19. Jensen contacted Jeff Ebert, Bill Fogarty's supervisor, who had received the email but had not yet read it until Jensen's call. They discussed the email, determined it was retaliatory, and decided that Ebert would rescind the email, as Fogarty had gone home with a sick child for the day.

20. Ebert sent an email rescinding the first bullet of Mr. Fogarty's email to the project managers and Mr. Fogarty, copying Ms. Jensen and Tom McCormick, another manager. This email was sent on the same day, September 2, 2010, at 5:01 p.m.

21. Arvish was a recipient of the email as a project manager. However, Arvish had left for the day when Ebert's rescission was issued and was on scheduled vacation on September 3, 2010 and the following week so he was not available to forward the rescission email to his crew. Arvish's crew could have learned of the rescission from other sources on Friday, September 3, 2010. Shegina was in charge of the crew the following week.

22. Letang became aware of the rescission on Thursday, September 2, or Friday, September 3, 2010, and told Fellows that Fogarty's email had been rescinded.

23. The testimony at hearing and the exhibits demonstrate that when an important issue involving MDT and the union's members arose, most everyone knew about it in a very short period of time.

24. Letang filed the unfair labor practice complaint on Tuesday, September 7, 2010.

25. Monday, September 6, 2010, was Labor Day, a holiday. Arvish's crew, led by Shegina, worked eight hour shifts from Tuesday, September 7, through Friday, September 10, 2010, and were paid for eight hours for the holiday.

26. The construction contractor the crew was working with worked from Tuesday through Friday that week. The crew was directed to work with the contractor, except for Jim Sturm, who was surveying.

27. The crew testified they were not aware of the rescission until Wednesday, September 8, 2010. They then requested that Shegina make a request to Fogarty to allow them to go back to 4-10s the following week. Fogarty granted this request.

28. No one in the crew complained to Fogarty or Ebert, nor noted on their time sheets, that they objected to working the eight hour schedule during the week from September 6 to September 10, 2010. When they learned Fogarty's email was rescinded, on Wednesday, it was too late to change their schedule to work 4-10s.

29. Letang thought the rescission email would have addressed the situation but since the crew complained they had to work the eight hour schedule, he filed this ULP.

30. Arvish's crew would have had to work the 8-hour schedule rather than 4-10s during the week of September 6 through 10, 2010 as it was a holiday week and the contractor was working a 5-day schedule that week. Arvish's crew worked the same schedule it would have if Fogarty's email had never been sent and were therefore not harmed by its directive.

31. Sturm was required to work the same schedule as the rest of the crew as a result of Fogarty's second bullet on the September 2, 2010 email.

32. Fogarty held a meeting with Arvish's crew in September of 2010. He spoke to them about changing to an alternate work schedule the following summer. Fogarty said he would like to revisit the issue in the spring. The crew told him they would be working 5-8s during the next construction season. The union members were not intimidated by Fogarty's statements nor did they have a chilling effect on

them. The members' testimony at hearing on this specific issue clearly demonstrated that they are not easily intimidated and that they are firm in their desire to hold to the CBA requirements.

IV. DISCUSSION¹

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. An employer violates Mont. Code Ann. § 39-31-401(1) "interfering with, restraining or coercing employees in their exercise of the rights guaranteed in 39-31-201." MPEA argues that Fogarty's email interfered with its members' rights by retaliating against them for exercising their rights to an alternative work schedule. The elements of retaliation are: (1) a plaintiff engaged in protected activity; (2) thereafter, an employer took an adverse action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. *Rolison v. Bozeman Deaconess Health Services, Inc.* 326 Mont. 491, 496, 111 P.3d 202, 207 (2005). In this matter, only the first element is met because no adverse action occurred.

The Circuit Courts of Appeal are split on the applicable standard for determining whether an adverse employment action has occurred. The majority of the circuits require that the action must "materially [affect] the terms, conditions, or privileges of employment" in order to be considered an adverse employment action. Cf. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1051 (Cal. 2005). The Ninth Circuit finds adverse employment action has occurred when the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity. See *Id.*

Under the deterrence standard, "[O]nly non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation." Cf. *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

On Thursday, September 2, 2010, at 9:26 a.m., MDT, manager Fogarty sent out a clearly retaliatory message to his subordinates telling them that alternate work week schedules would not be approved for employees who had not agreed to work them during the construction season. Arvish read the email and told his crew they would have to work 5-8s the following week after moving to 4-10s during the

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

previous week. Arvish then left for vacation. At 5:01 p.m. that same day, Ebert rescinded the retaliatory portion of Fogarty's email and sent it out to all his managers. Letang received Ebert's rescission that same day or early on Friday, September 3, 2010, and thought the matter was resolved. While there is no testimony that Letang contacted Fellows or other union members about the rescission, given the fact that Fellows had contacted Letang about the email in the first place, it is highly likely that he did so and that Fellows would have spread the word. It is also likely given the propensity for communications to quickly spread throughout the district. Perhaps Arvish's crew did not learn of the rescission until Wednesday, September 8, 2010, a day after MPEA filed the instant ULP charge because they were out of touch due to the Labor Day weekend. For the reasons discussed below, it is not necessary to make a credibility determination on the issue of when the crew learned of Ebert's rescission.

Even if the crew did not know about Ebert's rescission until September 8, 2010, the email had no adverse impact on the crew. Given the fact that September 7 to 10 was a holiday week and the contractor they worked with was going to be working 8 hour days, they would have had to change back to 8 hour days anyway. Under the majority definition of adverse impact, the schedule change cannot be considered as an action that materially affected the terms, conditions, or privileges of employment. Even by the 9th Circuit standard the claimants have not been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity. First, by their own testimony these employees were not deterred by this action. They clearly asserted their rights to work the schedule identified in their CBA when Fogarty later raised the possibility of discussing alternative work schedules on or about September 10, 2010, immediately after the email was issued and rescinded. Secondly, such a trivial act would not deter a reasonable employee from complaining about other violations. There being no adverse impact, the hearing officer finds that there is no interference with the claimants' collective bargaining rights under Mont Code Ann. § 39-31-401(1).

Even if there was a minimal adverse impact, the hearing officer would not find that it rose to the level of an unfair labor practice. The National Labor Relations Board has addressed circumstances as those present here and held that when "the conduct involved was so minimal and has been so substantially remedied by the Respondent's subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy." *American Federation of Musicians, Local 76, AFL-CIO v. Jimmy Wakley Show and John C. Wakely*, 202 N.L.R.B. 620 (N.L.R.B. 1973). Such a finding would be appropriate here.

Counsel for MPEA argues that the Fogarty email was the result of an upper management scheme to punish, retaliate, and intimidate MPEA members for

asserting their contract rights. The evidence does not support such a theory. While MDT desired to reduce its costs in the Butte District and elsewhere, there is simply no evidence of any scheme to punish, retaliate, or intimidate MPEA members. The only evidence of retaliatory conduct is the Fogarty email which was rescinded within hours of its issuance.

Counsel for MPEA also appears to argue that the Fogarty email in and of itself is a violation while at the same time arguing that it had an adverse impact on the claimants. This argument fails to take into consideration the element of time and intervening events. Nowhere in the record is there any evidence that the moment that the crew heard about the Fogarty email they immediately felt that they should capitulate to management's demands and forego any rights under the CBA. Instead, their response was to contact their union leaders and demand enforcement of their rights. The hearing officer does not see a chilling effect here.

Moreover, a determination of whether an unfair labor practice occurred must involve an analysis of all the alleged conduct and circumstances. At the time Fogarty sent the email he was certainly concerned about overtime costs in his district and upper management's desire to lower those costs. However, the meeting in March 2010 instructed managers to reduce overtime costs consistent with the CBA, not in conflict with it. Senior management rescinded the retaliatory aspect of the Fogarty email within hours and that fact was relayed to union leaders within minutes or at most within a few hours. The fact that Arvish told his crew that, based on the email, they would have to work 8-hour days the following week is of no consequence because they would have had to do so in any case because the contractor they were working with was working that same schedule because of the Labor Day holiday. After reviewing all the facts and circumstances surrounding the Fogarty email, the hearing officer is still left with conduct, like that in *Wakley*, that is so minimal because it was so quickly remedied it is of little consequence and it should not form the basis of either a proceeding or a remedy under the act. *Wakely*, 202 N.L.R.B. at 621.

In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employee.

Mont. Code Ann. § 39-31-101

The facts of this case demonstrate that the union and the MDT are working together to resolve disputes in a relatively friendly manner. That relationship may have been hard fought and may not be perfect, but when an MDT manager went too

far in trying to manage his budget, the union called him on it and the manager's superiors quickly remedied the situation. To the hearing officer this demonstrates the kind of working relationship that the Act seeks to foster. This case may simply be the result of someone being on vacation and others being incommunicado during a three-day Labor Day weekend. For the reasons cited above and to promote the policy cited immediately above, the hearing officer recommends that BOPA dismiss this matter.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this Unfair Labor Practice Complaint. Mont. Code Ann. § 39-31-405.

2. MDT did not commit an unfair labor practice as defined in Mont. Code Ann. § 39-31-401(1).

VI. RECOMMENDED ORDER

Unfair Labor Practice Complaint No. 9-2011 is dismissed.

DATED this 5th day of March, 2012.

BOARD OF PERSONNEL APPEALS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 201503
Helena, MT 59620-1503