IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0341

NUGGETT CARMALT

Petitioner – Appellant,

v.

FLATHEAD COUNTY; GLENDA HALL, Glacier County Clerk and Recorder; and MICHAEL DESROSIER, Glacier County Commissioner,

Respondent – Appellee,

RESPONDENT – APPELLEE'S ANSWER BRIEF

On Appeal from the Eleventh Judicial District Court, Cause No. DV 16-707,
the Honorable Heidi J. Ulbricht presiding.

APPEARANCES:

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I. STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion by excluding evidence of alleged acts of unlawful retaliation not filed with the Montana Human Rights Bureau (MHRB)?

2. Did the District Court correctly apply the criteria of Rule 56, Montana Rules of Civil Procedure in reaching its determination the County is entitled to judgment?

II. STATEMENT OF THE CASE

The saga of this case began in 2014 when Appellant Nuggett Carmalt (Carmalt), a clerical employee in the Fair Office, filed an employment discrimination complaint against Flathead County (the County). The parties settled the claim in April 2015 and Carmalt left the County's employment. On November 23, 2015, Carmalt filed a retaliation complaint against the County alleging she had been subjected to unlawful retaliation because of her prior MHRB complaint. (AR 46.)

The MHRB found no cause to believe discrimination occurred and issued a Notice of Dismissal and Right to Sue. (AR 47-57.) Carmalt appealed the decision to the Montana Human Rights Commission (MHRC). The MHRC issued a Final Agency Decision dismissing Carmalt's claim. (AR 58-60.) Her counsel at the time, Bartlett, subsequently filed this lawsuit. (AR 1-7.)

The litigation was delayed for a period of time after Bartlett's death. Eventually, when the case entered the discovery process, it became clear that Carmalt intended to litigate alleged claims of retaliation that had not been filed with the MHRB. She sought to include alleged acts of retaliation based on events that occurred subsequent to her MHRB complaint. Specifically, she alleged her applications to operate a food booth during the 2016 and 2018 Northwest Montana Fair (the Fair) were rejected because she filed an employment discrimination complaint in 2014. The County moved to exclude evidence of such claims on the grounds that she had not filed a complaint with the MHRB with regard to either claim. (AR 34-65.) The District Court granted the Motion. (AR 88-91.)

In March 2021, the County moved for summary judgment on the grounds that, considering all admissible evidence in her favor, Carmalt could not state a prima facie case of unlawful retaliation against the County. On June 9, 2021, the District Court granted the County's Motion. (AR 93-109.) Carmalt appealed both Orders. Carmalt's opening brief suggests that, but for the exclusion of evidence, the District Court would not have had grounds to grant the County's Motion for Summary Judgment.

III. STATEMENT OF THE FACTS

Carmalt's November 23, 2015 MHRB complaint alleged as follows:

a. On or about July 7, 2015, I requested public documents from the County Fairgrounds office. In the normal course of business,

Respondent would have copied the documents and released them to me without delay.

b. Respondent denied my request and stated that if I wanted documents from the County Fairgrounds office, I would need to submit a written request to the County Attorney.

c. On or about August 5, 2015, I submitted a written request for information to the County Attorney. Respondent then provided me with the wrong documents and charged me a fee.

d. This is a different process than applied to other persons outside of my protected class.

e. Employees in the office were told not to give me any public information stated by employees Cheryl Bergeson and Lana Amour.

f. I was not given the same rights as other ladies (*sic*) racers.

g. I've been denied the right to continue having a food booth at the fair. I own the equipment in the booth. I was told I had to reapply and find a nonprofit agency to partner with.

h. I was denied copies in 11/13/15 from Fair Office. Had to put in writing a request on 11/18/15 to get copies a week later.

(AR 46.)

The crux of Carmalt's complaint is that she was treated differently than other County residents with regard to the dissemination of documents from the Fair Office in that she was referred to the Flathead County Attorney's Office to obtain the documents and that she was charged for copies. Carmalt made two requests of Deputy Flathead County Attorney David Randall (Randall) and he responded to both. He also corresponded with Carmalt's attorney, James C. Bartlett (Bartlett),

who contacted Randall on Carmalt's behalf. (AR 20-33; 123-146.) Carmalt described her limited experience obtaining documents from Randall as an "inconvenience." (AR 20.)

On or about August 19, 2015, Randall advised Bartlett that Carmalt was free to address future requests for information directly to the Fair Office. (AR 132.) She did so on November 18, 2015 by completing a Flathead County Fairgrounds Public Information Request. (AR 133.)

The second subject giving rise to her November 2015 complaint is the allegation that she "was not given the same rights as other ladies racers." As evidenced by her briefing to the District Court, as well as by her opening brief on appeal, Carmalt has dropped this claim.

Finally, Carmalt alleged that she was "denied the right to continue having a food booth at the fair." Carmalt admitted she had never applied for a food booth at the time she filed her administrative complaint. Rather, she felt she should be permitted to inherit the 24 Hours of Flathead vendor spot after the organization's contact person, Arric Bryan, notified the Fair that the nonprofit would not have a booth at the Fair after 2015. Carmalt's perceived entitlement to such a transfer stemmed from her allegations that she worked in the 24 Hours of Flathead booth with her boyfriend during the 2015 Fair and because she owned the equipment used in the booth.

IV. STANDARD OF REVIEW

This Court reviews a district court's grant or denial of summary judgment *de novo*, applying the criteria of M. R. Civ. P. 56. *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶ 16, (citations omitted.) Summary judgment may only be granted "when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 33. When assessing whether a genuine issue of material fact exists, all evidence is viewed in the light most favorable to the nonmoving party. *Borges*, ¶ 16. If the moving party shows the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law, the burden then shifts to the nonmoving party to prove, "by more than mere denial and speculation, that a genuine issue does exist." *Borges*, ¶ 16 (citing *Valley Bank v. Hughes*, 2006 MT 285, ¶ 14). This Court reviews a district court's conclusions of law by determining whether the district court's interpretation and application of the law was correct. *Borges*, ¶ 16.

The standard of review for evidentiary rulings is whether the district court abused its discretion. *See State v. Gollehon*, 262 Mont. 293, 301. Trial courts are vested with broad discretion to determine whether evidence is relevant and admissible, and this Court has declined to overturn an evidentiary determination in the absence of an abuse of discretion. *See State v. Link*, 1999 MT 4, ¶ 20. The fact

that discretion is permitted, infers that there may be more than one permissible way to resolve an evidentiary issue and that the District Court is in the best position to make that decision. In other words, there is not a purely correct or incorrect answer to every evidentiary issue. *Benjamin v. Torgerson*, 1999 MT 216, ¶ 15.

We consider "not whether this Court would have reached the same decision, but whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *Newman v. Lichfield,* 2012 MT 47, ¶ 22). A court abuses its discretion "if its certification order is premised on legal error." *Mattson v. Mont. Power Co.,* 2012 MT 318, ¶ 17; *United States v. Welsh*, 879 F.3d 530, 536 (4th Cir. 2018) (a district court abuses its discretion only where it "has acted arbitrarily or irrationally, ... has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises.")

V. SUMMARY OF ARGUMENT

The Ninth Circuit has held that, under limited circumstances, in employment discrimination cases, subsequent acts which were not specifically included in an EEOC complaint may be heard by the federal district court if, and only if, those claims "fell within the scope of the EEOC's actual investigation or an EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." That is not the case here.

The subsequent alleged instances of retaliation are allegations of discrete acts that were not part of the MHRB investigation and could not reasonably be expected to grow out of the November 23, 2015 charge of discrimination. Under such circumstances, federal law is in synch with Montana law. Unless the alleged subsequent conduct is the same conduct investigated by the MHRB, or amounts to an ongoing hostile work environment (not at issue here), discrete acts of discrimination and retaliation must be filed with the administrative agency within the actionable time period (180 days under Montana law and 300 days under federal law). *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002).

With regard to the County's entitlement to summary judgment, Carmalt failed to produce admissible evidence sufficient to state a prima facie case of unlawful retaliation. Carmalt essentially concedes that without the support of the alleged acts of retaliation in 2016 and 2018, acts she failed to bring before the MHRB, she cannot state a prima facie case in this lawsuit. She is not entitled to introduce evidence supporting stale claims which are no longer actionable to bolster a case that cannot stand on its own.

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VI. ARGUMENT

A. The District Court Did Not Abuse its Discretion by Excluding Claims Not Raised in the November 23, 2015 Charge of Discrimination filed with the Montana Human Rights Bureau.

Acts constituting an alleged violation the Montana Human Rights Act (MHRA), including the Governmental Code of Fair Practices, and "acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana Constitution or 49-1-102" may not be entertained by a district court without first obtaining an adjudication of that claim by the MHRB. Mont. Code Ann. § 49-2-512(1).

Once a complaint is filed with the MHRB, the agency "shall 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." Mont. Code Ann. § 49-2-504(1), (emphasis added). It is up to the charging party to amend the complaint to cure defects or omissions and/or to allege new facts and matters arising out of continuing violation of law." Admin. R. Mont. 24.8.752(1). Montana law requires that the person bringing the complaint provides the MHRB with the information necessary to conduct its investigation.

Nevertheless, Carmalt asks this Court to abandon these longstanding requirements and allow her to litigate in district court alleged acts she did not raise

in her November 23, 2015 MHRB complaint. Specifically, she wants to include allegations that she was unlawfully retaliated against when the Fair did not select her application to be a food vendor for either the 2016 or 2018 Fair.

In Carmalt's November 2015 administrative complaint, she alleged the last discriminatory act took place on November 18, 2015. She had the opportunity to correct or amend that complaint during the course of the MHRB investigation to include other alleged violations of the MHRA or the Governmental Code of Fair Practices, if any. She did not. Certainly, the law afforded her the clear-cut option of filing separate charges of discrimination with the MHRB if she felt her alleged efforts to obtain a food booth at the Fair in 2016 and 2018 were thwarted by unlawful retaliation.

With regard to amendment of the 2016 MHRB complaint, Carmalt testified that she knew in 2015 that she likely was not going to be selected as a Fair food vendor in 2016. (AR 148 94:3-95:23.) The MHRB did not issue a final investigative report until May 11, 2016. (AR 47-54.) Carmalt had ample time to amend her complaint to include the fact that she had evidence indicating she would not get a food booth in 2016. (AR 95:1-23.)

In *Borges*, the plaintiff did not amend his administrative complaint to allege new facts arising out of his employer's alleged continuing discrimination even though he had ample time to do so. *Id*. at ¶ 22. This Court held that Borges "was

obligated to supplement his claim with new evidence of 'the particulars of the [County's] alleged discriminatory practice,' § 49-2-501(3), MCA, in order to allow the HRB to consider 'new ... matters arising out of continuing violation of law.' Admin. R. Mont. 24.8.752(1)." *Id*. His failure to do so resulted in the MHRB's decision being "uninformed by those facts." *Id*. at ¶ 22.

Carmalt contends this Court "has never addressed whether at district court is prohibited from considering like acts of retaliation which arise after the HRB has concluded its consideration of a claim," but that "the Ninth Circuit has continuously held that 'incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are like or reasonable related to the allegations contained in the EEOC charge.'" (Appellant's. Br. at 15-16.) While this Court may not have specifically carved out the exception in *Lyons*, since the exception would not apply to Carmalt's claims, it is a nonstarter. This Court has made clear that the MHRA "constrains a district court to entertain only those claims that the HRB adjudicates after a thorough investigation. (citations omitted). *Id*. at ¶ 22; *Lay v. State Dept. Military Affairs*, 2015 MT 158, (the MHRA is explicit that a claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in the MHRA); *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 39 (the MHRA requires that an

administrative compliant of discrimination be filed before a party may proceed with a discrimination claim in district court).

This Court further held in *Borges* that the District Court properly declined to consider additional facts to the extent that the additional facts supported allegations of separate acts of discrimination. *Borges* at ¶ 25. While this Court noted that the law does not necessarily foreclose the introduction of evidence that may be relevant to an existing claim of discrimination, a plaintiff would have to show the relevance of that evidence to the existing claim. In this case, Carmalt would have to show how not being selected for a food booth in 2016 and 2018 is relevant to the existing MHRB claim. She has not done so.

In *Lyons v. England*, the case on which Carmalt most heavily relies to support her bid to skirt the mandatory administrative process, the Ninth Circuit held that it would be error for the district court to deny jurisdiction over claims of discrimination that arose subsequent to the EEOC's investigation if those claims "fell within the scope of the EEOC's actual investigation or an EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Lyons v. England*, 307 F.2d 1092, 1104 (9th Cir. 2002) (citing *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994).) The Court noted that precedent dictated it "consider a plaintiff's allegations to be reasonably related to allegations in the charge 'to the extent that those claims are consistent with the plaintiff's

original theory of the case (citation omitted) as reflected in the plaintiff's factual allegations and his assessment as to why the employer's conduct is unlawful.'" *Id.*

The plaintiffs in *Lyons* alleged in their 1996 EEOC charge that their employer (the United States Navy) had intentionally and systematically eliminated black males from the GS-13 and GS-14 level of management by denying qualified candidates promotions and favorable details. *Id*. The EEOC complaint did not include allegations of discrimination related to promotions in 1997. The Ninth Circuit held the federal court nevertheless had standing to adjudicate those allegations, allegations not made in the 1996 EEOC complaint, because they mirrored the plaintiffs' original theory of the case:

> (1) that NADNI (Naval Aviation Depot North Island) discriminated against them over the course of several years by denying them favorable details; (2) that, because they had been denied these details they were disadvantaged in terms of the ability to obtain promotions to positions higher than GS-12; and 3) that NADNI had discriminate against them by issuing promotions to two specific GS-13 positions on a noncompetitive basis. On these facts, any additional EEOC investigation regarding the 1997 promotions would have been redundant because the appellants clearly articulated in their charges their theory that the appellee had systematically restricted the access of African-American employees to positions at the GS-13 level or above. The district court's conclusion to the contrary is in error.

Id. at 1104-05.

The Circuit Court found that, "any additional EEOC investigation regarding the 1997 promotions would have been redundant because the appellants clearly articulated in their charges their theory that the appellee had systematically

restricted the access of African-American employees to positions at the GS-13 level or above." *Id*.

Antithetically, Carmalt did not clearly articulate a theory of liability which would encompass her allegations of unlawful retaliation in 2016 and 2018. Her MHRB complaint alleged she was subjected to unlawful retaliation by being 1) directed to the County Attorney's Office for documents related to the Fair; 2) treated her differently than "other ladies (*sic*) racers;" and 3) advised that if she wanted to operate a food booth at the 2016 Fair she would have to submit an application rather than inherit the space left vacant by the departure of 24 Hours of Flathead. The subsequent incidents of alleged retaliation – the selection of applicants other than Carmalt to occupy a handful of vacant food booth slots at the 2016 and 2018 Fairs – did not fall within the scope of the MHRB's actual investigation nor could the success or failure of Carmalt's future food booth applications have been "expected to grow out of the charge of discrimination." *Id*. These alleged acts are discrete acts of alleged unlawful retaliation subject to the mandatory administrative process.

Carmalt argues that she "alleged in her HRB complaint that the County refused to allow her to have a food booth at the 2015 Flathead County (*sic*) Fair. (Appellant's Br. 27.) This statement is wholly inaccurate. Carmalt did not apply for a food booth in 2015. (Dep. Nuggett Carmalt 84:17-18, Feb. 5, 2019, attached

as Ex. 1.) Her boyfriend ran the booth and she was neither the applicant nor the contact person for the nonprofit group to which it was attached. (Ex. 1 29: 2-20; 78:7-25.) Carmalt submitted her first application to be a food vender in 2016. The 2016 Food Vender Committee did not select her application. She goes on to contend that "after the HRB had dismissed her complaint in August 2016, she was again denied the chance to have a food booth at the fair. (Appellant's Br. 27.) This statement is inaccurate. The two events were unrelated and not proximate in time. Carmalt admittedly believed she was not likely to get a food booth in the Fall of 2015. (AR 148 94:19-95:23.)

The District Court correctly found that the limited exception in *Lyons* has not been applied except in the context of employment discrimination cases. Carmalt cannot disagree but contends there is no good reason not to apply in other situations, such as the one she alleges she is in. She is mistaken.

Employment cases are most certainly unique because they involve regular contact between an employee and his or her employer/supervisor. They are unique in terms of one having authority over the other. The allegations presented by Carmalt are not based on a workplace dynamic but of wholly separate and discrete interactions. The United States Supreme Court has made abundantly clear that these are not the type of cases that lend themselves to bypassing the requirement that such claims be fully presented and investigated by the EEOC or, in this case,

the MHRB. (cite Morgan) To extend the *Lyons* holding to the situation at bar would nullify the mandatory administrative process required by the MHRA.

B. The District Court Did Not Err When it Granted the County's Motion for Summary Judgment.

1. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3); *Tvedt v. Farmers Ins. Group of Companies,* 2004 MT 125, ¶ 18. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials.

Once the moving party has presented its supporting evidence, the opposing party must establish a substantial issue of material fact that is neither fanciful, frivolous, or conjectural. *Id.* ¶ 22. Summary judgment shall be entered "against a party who fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The purpose of summary judgment is not "to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 467. Rather, it is designed to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining

to be tried." *Anderson v. Viking Pump Div., Houdaille Indus., Inc.,* 545 F.2d 1127, 1129 (8th Cir.1976) (citations omitted.)

2. Carmalt Cannot Establish a Prima Facie Case of Retaliation.

A circumstantial prima facie case of retaliation, as alleged by Carmalt, requires a showing that (1) she engaged in a protected activity, (2) the County took adverse action against her, and (3) a causal link existed between protected activity and the adverse action. *See Puskas v. Pine Hills Youth Corr. Facility*, 2013 MT 223, ¶ 47; *see also Rolison v. Deaconess Health Servs.*, 2005 MT 95, ¶17; *Beaver v. D.N.R.C.*, 2003 MT 287, ¶71; Admin. R. Mont. 24.9.610(2).

Carmalt must clear this this three-pronged hurdle before the burden shifts to the County to articulate a legitimate nondiscriminatory reason for its actions. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Carmalt's inability to establish a prima facie case ends the *McDonnell Douglas* analysis and her claim against the County.

The first prong is not at issue. Carmalt engaged in a protected activity when she filed and participated in an employment discrimination claim against the County.

The second prong mandates that Carmalt demonstrate the County subjected her to an "adverse action." An adverse action is one that would dissuade a reasonable person from engaging in a protected activity and includes:

> (a) violence or threats of violence, malicious damage to property, coercion, intimidation, harassment, the filing of a factually or legally baseless civil action or criminal complaint, or other interference with the person or property of an individual;
> (b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action;
> (c) expulsion, blacklisting, denial of privileges or access, or other action adversely affecting the availability of goods, services, facilities, or advantages of a public accommodation;
> (d) eviction, denial of services or privileges, or other action adversely affecting the availability of housing opportunities; and
> (e) denial of credit, financing, insurance, educational, governmental or other services, benefits or opportunities.

Admin. R. Mont. 24.9.603(2).

The overwhelming body of case law defining adverse action in a retaliation case is found in the area of employment discrimination. In such cases, not every unpleasant employment decision is an adverse action. *Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000). Ordinarily, "petty slights, minor annoyances, and simple lack of good manners" do not meet the criteria because such acts are not a deterrence to engaging in protected activity. *Id*. at 1243. Whether an action is materially adverse is judged by an objective standard considering "the context and circumstances of the particular case." *Burlington N. and Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68-69, 71 (2006).

In *Kortan v. California Youth Authority,* 217 F.3d 1104 (9th Cir. 2000), the Ninth Circuit found that an undeserved rating on an official evaluation was not an adverse employment action since it was not disseminated, and it was not

accompanied by a change in workload or assignments, reduction of salary, denial of a raise, suspension, or termination. *Id.* at 1113. In *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir. 2002), the court held that mediocre performance evaluations were not adverse actions since the evaluations were published, did not cause the plaintiff to lose any responsibilities or take on burdensome tasks. Such cases are instructive in their insistence than an adverse action be material or significant. Carmalt's alleged adverse actions are neither material nor significant.

a. Providing Public Documents

Carmalt alleges she was retaliated against in the provision of public documents in that 1) she was required to put her request in writing, 2) she was required to go through the Flathead County Attorney's Office to obtain the requested documents, and 3) in one instance, she was provided with the wrong documents and required to pay a fee. (AR 3 ¶ 10.)

Carmalt made her initial request for documents on or about July 7, 2015. (AR 100 ¶ 7.) Randall responded to the request on July 27, 2015. (AR 100 ¶ 7.) She followed with a second request on July 28, 2015. Randall responded in a timely manner to this request as well as to correspondence from Bartlett. (AR 100 ¶ 8.) By August 19, 2015, Randall advised Bartlett that Carmalt could address future requests for information to the Fair Office. (AR 100 ¶ 9.) She did so by completing a Flathead County Fairgrounds Public Information Request on

November 18, 2015. The requested documents were provided to Carmalt. (AR 100 ¶ 9.)

Carmalt testified that she believes it is a good idea for members of the public to fill out a written request for public records. (AR 100 ¶ 10.) She also admitted having charged another individual, Ron Thibert, for documents from the Fair Office thereby establishing that there is precedent for such a charge, even when she worked there. (AR 100 ¶ 10.) Moreover, she describes having to work with Randall on two information requests as an "inconvenience." (AR 101 ¶ 11.) To the extent the documents existed, Carmalt was provided with all she requested. (AR 101 ¶ 11.)

The County is within its right to charge a fee for copying public records. Mont. Code Ann. §§ 2-6-103 (pre-Oct. 2015), 2-6-1006 (post-Oct. 2015). The sum is, and was in Carmalt's case, insignificant. These minimal charges and temporary referral to the County Attorney's Office for public documents - which she labeled an "inconvenience," do not amount to actions which are significant and would deter a reasonable person from engaging in protected activities.

b. Food Vendor Application for 2016 Fair

Carmalt claims she was subjected to an adverse action when Fair Manager Mark Campbell told her he would not substitute her name for that of Aaric Bryan or Andrew Escalante on the food booth operated by Escalante and Bryan. Carmalt

worked in the booth in 2015 and claims to have owned the equipment. Campbell simply told her she would need to submit a new application, which she did and which Campbell accepted for consideration by the Food Vendor Committee.

A food booth at the Fair is not a government service, privilege or benefit to which every member of the public is entitled. A new potential vendor has an opportunity to submit an application and, if successful, to operate a food booth at the Fair. Carmalt had the same opportunity as any other member of the public. Campbell invited her to apply, something she eventually did. The requirement that she submit an application is not an adverse action as that term is defined by 24.9.603(2), Administrative Rules of Montana.

c. Application of the Disputable Presumption Requires a Significant Adverse Action.

If the Court finds Carmalt was subjected to an adverse action, she must then establish a causal connection between the protected activity and the adverse action. Montana law affords Carmalt an advantage in establishing the final prong in a prima facie case in the form of a disputable presumption. Admin. R. Mont. 24.9.603(3). The disputable presumption applies only where there is a significant adverse action. As discussed in detail in the preceding section, in the absence of an adverse action Carmalt cannot establish a prima facie case of retaliation. The District Court correctly held that her complaint against the County fails as a matter of law because she is unable to state a prima facie case of unlawful retaliation.

VII. CONCLUSION

The District Court did not abuse its discretion in excluding evidence of alleged acts of unlawful retaliation that Carmalt failed to file with the MHRB. The law requires that she do so and it was well within the Court's discretion to hold her to this well-settled requirement. The Court also correctly applied the standards of Rule 56, Montana Rules of Civil Procedure and, under the prevailing law, correctly granted the County's Motion for Summary Judgment. The County respectfully requests this Court affirm the District Court's holdings.

DATED this 17th day of December 2021.

MACo Defense Services

/s/ Maureen H. Lennon
Maureen H. Lennon

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,946 words, excluding certificate of compliance.

/s/ Maureen H. Lennon
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CERTIFICATE OF SERVICE

I, Maureen H. Lennon, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-17-2021:

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