

**MONTANA DEPARTMENT OF LABOR & INDUSTRY
EMPLOYMENT RELATIONS DIVISION
HUMAN RIGHTS BUREAU**

<p>Bert Olson, Charging Party, vs. Fairview Police Department, Respondent.</p>	<p style="text-align:center">Final Investigative Report HRB Case No. 0170011</p>
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Recommendation: Based on my investigation, I find **no reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party's complaint.

I. ISSUE PRESENTED

Did Fairview Police Department (Fairview) discriminate against Bert Olson (Olson) in the area of employment based on his national origin (Mexican) in violation of the Montana Human Rights Act (MHRA) and the Governmental Code of Fair Practices (GCFP), when it a) suspended his employment; b) dismissed his grievance; c) refused to allow him to use accumulated leave; and/or refused to return him to work?

II. SUMMARY OF THE INVESTIGATION

This report constitutes a summary of the investigation conducted in this case. Content of this report is limited to witnesses, documents and other evidence relevant to the analysis of the issue presented. The case file may contain additional evidence not included in this report.

A. Charging Party's Position Statement:

Olson began working for Fairview in May 2014, as a Police Officer. In July 2016, Fairview suspended Olson on an alleged policy violation. Olson believed he was acting within the guidelines of the policy and grieved his suspension. Olson alleges Fairview gave his grievance only cursory attention.

Since the suspension, Olson asserts Fairview has refused to put him back to work, despite an agreement that he would return to work part time. Fairview has also refused to allow him to use accumulated leave.

In July 2016, Olson learned from a former co-worker, Don Smies that Police Chief, Calvin Seadeek (Seadeek), referred to him as a "fucking Mexican" in June 2015. Olson believes Fairview discriminated against him based on his national origin when they took the aforementioned actions against him.

B. Respondent's Position Statement:

In May 2014, Fairview appointed Olson as a Police Officer, at the request of Seadeek. On July 10 2016, Fairview suspended Olson for multiple policy violations including coercion of a juvenile to turn over evidence and allowing a juvenile to drive after Olson indicated he believed she was under the influence.

Olson grieved his 30-day suspension. On August 17, 2016, a grievance hearing was held and the Mayor, Bryan Cummins, and the Police Committee to the Fairview City Council, upheld Seadeek's disciplinary action against Olson.

Prior to Olson's suspension, Olson requested to move to part-time as he had accepted a full time position with the school district. Olson requested this take effect on August 1, 2016. There was never an agreement to how many hours Olson would work.

Fairview had budget cuts that effected the amount they were able to use part-time officers. One part-time officer had worked four shifts in two years and another is not on the schedule at all. Since Olson's reinstatement, Fairview has only used part-time officers for two shifts, both day shifts, which Olson cannot work due to his full time job.

Olson requested to use 80 hours of leave in August 2016, Seadeek originally approved the use of the leave but Human Resources later determined that Olson was not eligible for the requested leave. Seadeek had previously approved Olson's requests for vacation including one that left them shorthanded in January 2016.

Fairview denies that it discriminated against Olson in anyway based on his national origin. Seadeek was aware of Olson's national origin when he hired Olson. Seadeek denies that he ever made a racial remark towards Olson at any time.

C. Witnesses:

Bert Olson, is an Officer with Fairview. Throughout his employment, Olson complained to Seadeek about policy violations that the junior officers were making, such as improperly training new officers, patrolling oil fields, and improper uniforms. Olson did not receive any support from Seadeek in correcting these violations. Olson ended up going to the Mayor and complaining about Seadeeks lack of support.

Shortly after this, Seadeek called Olson into his office and suspended for 30-days due to a policy violation related to a traffic stop. When Olson called the Lieutenant Don Smies (Smies), Smies told him that he heard Seadeek refer to him as a "fucking Mexican" the year before. This lead Olson to believe that Seadeek based his actions on his national origin.

Prior to this, Olson had requested to work to part-time because he accepted a job with the school district. His last full time day was set to be July 31, 2016. Olson was suspended during that time and has never been brought back to work. Seadeek has hired two new officers since that time yet he denied Olson part-time shifts.

When Olson submitted a grievance for his suspension, Cummins refused to take it and told him he needed to give it to his attorney since Olson had gotten an attorney involved. Olson believes Fairview denied him his due process. Fairview gave Olson a hearing and after the hearing received harassing text messages from a number, he did not know. Furthermore, Fairview denied Olson leave pay while he was on suspension.

Olson asserts he is the only officer to be suspended over a policy violation and believed all of these adverse actions happened to him because of his national origin.

Calvin Seadeek, is the Fairview Police Chief. He hired Olson in 2014 and was fully aware of his national origin. Seadeek denies that he ever referred to Olson in derogatory terms and believes that allegation came from Smies, who has personal issues with him.

In July 2016, Seadeek received a call from a Juvenile Probation Officer, Kale Rasmussen regarding a traffic stop Olson made. He told him the ticket Olson had written was not going to be pursued, as Olson did not read the two occupants of the car, both minors, their Miranda warning and coerced them into providing evidence. Additionally, Olson did not contact their parents.

Seadeek also received a complaint from the mother of the driver, who was upset that Olson did not call her when he pulled her daughter over and that Olson allowed her daughter to drive home under the influence of marijuana.

Seadeek watched the video recording from Olson's body camera and car camera. He also spoke with the City Attorney about the case. Based on what he observed, suspended Olson for 30 days. Olson had a person riding along with him that night and told that person he believed the driver was impaired.

Despite this, Olson allowed the teenager to drive home. This was the main reason for the suspension. He also violated policy in the way he collected evidence, but that was not as major of an issue or a liability as allowing someone to drive while suspected of being under the influence. Seadeek put a lot of time and consideration into his investigation prior to determining appropriate discipline.

Olson did grieve the discipline, but Olson did not give his grievance to Seadeek. Fairview held a grievance hearing where the Mayor and the Police Committee upheld Seadeek's disciplinary action.

Prior to this suspension, Olson informed Seadeek that he planned to move to part-time as an officer as he had taken a full time job with the school district. His last day of full-time work was July 31, 2016. Seadeek agreed he could stay on part-time but not agree to any set amount of time that Olson would be working. Seadeek told him it would depend on funding.

There are three part-time officers, other than Olson, one has worked two day-time shifts, which Olson is unable to work, and the other has not had any shifts. Fairview uses part-time officers only to fill shifts as needed. When Fairview employed only one full time officer, it scheduled part-time officers regularly. That was not reliable so Fairview moved to having

more employees that are full-time and they utilize the full-time staff to cover shifts as much as possible.

Fairview has hired two full-time officers since Olson went to part-time. One to fill Olson's position and one to fill the position of an officer Seadeek knew was moving. They currently have five full-time officers.

Missy Smies, is the spouse of a former Fairview employee who has known Seadeek for many years. Missy Smies feels Seadeek is in general pessimistic and angry. He is always irritated with everyone. Seadeek is demeaning to many people and does not single Olson out for poor treatment.

Seadeek often calls people "idiot" and "stupid." This is especially true toward anyone who makes him work or do his job. Seadeek is not a good leader and it is "his way or no way." Missy Smies is familiar with Olson's suspension and believes that Seadeek suspended him to make the parents that complained happy. It is a small town and it can be hard to deal with upset parents.

Bryan Cummins, is Fairview's Mayor. In July 2016, Olson presented him with a grievance filed by his attorney. Cummins told Olson that would need to go to the City Attorney. Cummins is not the person who accepts Grievances. It is supposed to go to a supervisor to start with.

Cummins has never received complaints about Seadeek using derogatory terms or discriminating. It is not in Seadeek's character to behave like that. Olson's grievance was given the same attention any grievance would have. Fairview provided with a hearing where Cummins and the Police Committee determined to uphold Seadeek's disciplinary actions.

Kale Rassmussen, is a Juvenile Probation Officer. He notified Seadeek that the ticket written for the girls related to Olson's traffic stop on July 2, 2016. Rassmussen gave Seadeek the reason why. He has no other knowledge of Olson's employment other than that he has been good to work with since he has been working for the school district.

Don Smies, is a former Lieutenant with Fairview. In June 2015, he heard Seadeek refer to Olson as a "fucking Mexican" when discussing Olson working overtime. Smies told Seadeek he should not say that but could not recall what else Seadeek said during the conversation.

Smies has known Seadeek for 16 years. He feels Seadeek has changed over the years and seems to be short tempered more so than he used to be. Smies could not say if he believed Seadeek to have issues with Olson's national origin or not. He stated Seadeek had a positive reaction to hiring Olson and was happy to have him in the Department in 2014:

Smies was not working when Fairview suspended Olson in July 2016. Any information he received regarding the issues was from Olson but he feels the suspension was excessive. Smies feels that Seadeek had problems with Olson and that is why he suspended him. Seadeek follows policy when he wants to and when it is convenient for him.

Wyatt Uecker, is a part-time officer for Fairview. Since June 2016, he has worked two, day shifts for Fairview. Fairview rarely uses part-time help.

D. Documents:

Presented by Olson:

- Fairview Police Department Policy
- Affidavit of Don Smies, stating he heard Seadeek refer to Olson as “the Mexican” and “fucking Mexican.”
- Text message from Officer Mike Clabaugh to Olson on an undetermined date with a picture of a joke referring to Mexicans.
- Various photos of Office Clabaugh wearing uniforms that are not within policy, driving his police car to workout at the school and parking his police car near an oil well.
- A letter from Seadeek to a person who had made complaints against Olson in 2015. Seadeek defends Olson’s actions.
- Text messages to Olson from an unknown number on August 18, 2016. One message reads, “fuck the police.” These were sent the day after Olson’s grievance hearing and appear to be related.

Provided by Fairview:

- August 17, 2016, letter denying Olson’s request for leave pay. Cummins states that leave is used to cover shifts that would regularly be worked. Olson was not eligible because he was requesting to use vacation time for shifts he was not scheduled to work.
- Notes from the August 17, 2016, grievance hearing. The notes stated that Olson twice stated he believed the girls in the car were under the influence prior to allowing them to drive home. Seadeek identifies that as the main reason for the disciplinary action.
- July 10, 2016, Suspension without pay letter to Olson from Seadeek.
- Comparative data.
- Fairview Police Officer scheduling.

E. Comparative Evidence:

There are three part-time officers. Since Olson moved to part-time, only one of the three has filled shifts. Uecker has worked two day-time shifts, which Olson cannot work due to his full time job with the school.

Seadeek suspended a Caucasian, Male Officer in 2014, for 30 days due to not reporting a threat made to the school in a timely fashion. Seadeek ultimately terminated that employee for the offense.

F. Omissions:

Olson discussed a suspension in 2015 during his interview; however, that suspension is not included in Olson's Complaint of Discrimination.

Olson listed multiple witnesses. All of the witness were contacted, one declined an interview, many did not return calls and the rest were interviewed.

III. ANALYSIS

Olson alleges Fairview discriminated against him in employment based on his national origin (Mexican) when Fairview it a) suspended his employment; b) dismissed his grievance; c) refused to allow him to use accumulated leave; and d) refused to return him to work. Under the MHRA, complaints of discrimination must be filed within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. Olson filed his complaint with the HRB on September 30, 2016. Therefore, allegations that occurred on or before April 3, 2016, are generally untimely. Olson establishes he filed a timely complaint for those allegations that occurred on or after April 3, 2016. The Montana Human Rights Bureau has jurisdiction over the complaint.

Olson alleges disparate treatment. To establish a *prima facie* case of discrimination for disparate treatment in the terms and conditions of employment, Olson must show:

1. he is a member of a protected class;
2. he was subjected to an adverse employment action; and,
3. Respondent took adverse action against the charging party in circumstances raising a reasonable inference respondent treated him differently because of membership in a protected class.

National origin is a protected class. Olson was qualified for his position as Police Officer. I will address each adverse employment action/term and condition of employment in turn.

Employment Suspension

Olson states Fairview suspended him in July 2016, which is an adverse employment action. However, persons outside of his protected class have been subject to that same employment action.

In 2014, Seadeek took similar actions against another officer for failing to respond to a threat in a timely manner. That officer is Caucasian. Both Olson and the other suspended officer engaged in significant performance issues.

Olson fails to establish a *prima facie* case of disparate treatment.

Even if Olson were able to establish a *prima facie* case, the burden of production shifts to Fairview to articulate a legitimate non-discriminatory reason for suspending Olson.

Fairview alleges they suspended Olson for policy violations. Olson failed to properly Mirandize two teenaged females and coerced them into providing him evidence. Furthermore, Olson stated multiple times that he believed they were under the influence, yet

he allowed them to drive home. Additionally, Olson failed to notify either of the teenager's parents.

Fairview articulates a legitimate non-discriminatory reason for suspending Olson.

Once Fairview articulates a legitimate non-discriminatory reason, Olson may prevail by proving by a preponderance of the evidence that the reason offered was not the true reason for suspending him, rather, it was pretext for discrimination. Pretext may be proven by evidence that a discriminatory motive was the reason for Fairview's actions or that Fairview's explanations are not credible and are unworthy of belief.

First, Olson alleges that Seadeek made derogatory remarks about his national origin. Smies alleges this occurred in June 2015, more than a year before Olson's suspension. Furthermore, during his interview, Smies appeared to have personal issues with Seadeek that are unrelated to this case.

Seadeek hired Olson, fully aware of his national origin. It is a stretch to believe that Seadeek suspended Olson based on his national origin, more than a year after he allegedly made a derogatory remark.

Next, Olson alleges Clabaugh regularly violated policy but was never disciplined. While this may be true, Clabaugh's actions appear to be behavioral, such as wearing his uniform out of policy or driving his police car to the gym, and are not similar to the violation for which Seadeek suspended Olson.

Olson's policy violation was more significant and based on the evidence presented; Olson knowingly allowed a minor to drive, after he stated he believed her to be under the influence. Evidence shows this is a significant performance issue.

I find that Olson has not shown by a preponderance of the evidence that Fairview had a discriminatory motive for suspending his employment. I find that Fairview's explanations are credible and are worthy of belief. Olson has not shown by a preponderance of the evidence that the reason offered was pretext for discrimination

Grievance Dismissal

Olson alleges Fairview gave his grievance only cursory attention before dismissing it.

Based on evidence presented, Fairview dismissed Olson's grievance after a hearing in which his attorney was allowed to question Seadeek and his decisions. At the end of the hearing Cummins and the Policy Committee voted to uphold the suspension. Notes from the hearing show all the decision makers watched the video footage from the traffic stop in question and reviewed evidence.

Olson fails to show that Fairview gave his grievance only cursory attention.

Olson fails to establish a prima facie case of disparate treatment.

Refused to allow him to use accumulated leave

Olson states that he requested to use vacation leave after he completed his suspension. Fairview denied this request.

Once Olson establishes a *prima facie* case, the burden of production shifts to Fairview to articulate a legitimate non-discriminatory reason for denying Olson's leave.

In a letter written to Olson on August 17, 2017, Cummins states that he denied Olson's request because Olson was not scheduled to work the days he requested off. Since Olson had requested a switch to part-time to accommodate his new full time job with the school, Olson was not scheduled to work on the days he requested off. This would mean Fairview would essentially be paying out Olson's leave. Cummins states that Montana Code Annotated prohibits a pay out of leave unless an employee has terminated their employment.

Fairview articulates a legitimate non-discriminatory reason for denying Olson's vacation time.

Once Fairview articulates a legitimate non-discriminatory reason, Olson may prevail by proving by a preponderance of the evidence that the reason offered was not the true reason for its actions, rather, it was pretext for discrimination. Pretext may be proven by evidence that a discriminatory motive was the reason for Fairview's actions or that Fairview's explanations are not credible and are unworthy of belief.

The only evidence of pretext that Olson has provided is Seadeek's alleged comment from 2015. However, in this incidence Seadeek approved Olson's vacation time. It was later denied by Cummins after Human Resources determined Olson was not eligible due to not being schedule to work those days.

I find that Olson has not shown by a preponderance of the evidence that Fairview had a discriminatory motive in denying his vacation time. I find that Fairview's explanations are credible and are worthy of belief. Olson has not shown by a preponderance of the evidence that the reason offered was pretext for discrimination

Refusal to return him to work

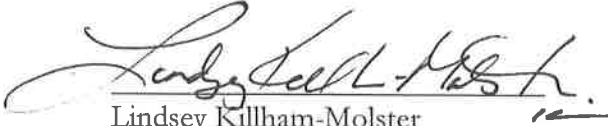
In April 2016, Olson requested to move to a part time shift as he was going to take a full time position with the school. This was scheduled to begin July 31, 2016, which ended up being during his suspension.

Fairview has three part-time officers. From the time Olson switched to part time, part time officers have covered only two shifts. Both of those shifts were weekday, daytime shifts that Olson cannot cover due to his job at the school. Officer Uecker has worked both of those shifts. The third officer has worked no shifts. Both other part time officers as Caucasian.

Olson fails to show that similarly situated persons, outside of his protected class, were treated better than he was. This does not raise a reasonable inference that Fairview treated Olson differently because of membership in a protected class. Olson fails to establish a *prima facie* case.

IV. CONCLUSION

Based on my investigation, I find **no reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party's complaint.



Lindsey Killham-Molster
Montana Human Rights Bureau

3-28-17

Date