

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 747-2021:

SCOTT COOK,)	HRB Case No. 0200177
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
MONTANA DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES -)	
MONTANA STATE HOSPITAL,)	
)	
Respondent.)	

* * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Scott Cook filed a Charge of Discrimination with the Montana Human Rights Bureau (HRB) on February 13, 2020, alleging Respondent Montana Department of Public Health and Human Services – Montana State Hospital (MSH) discriminated against him on the basis of race and color in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann. The department issued a Notice of Dismissal, to which Cook filed an objection with the Montana Human Rights Commission (Commission).

On December 21, 2020, the Commission remanded the matter for hearing finding the department’s dismissal of Cook’s complaint was an abuse of discretion. The Commission noted there were facts in the record supporting reasonable cause to believe Cook was subject to a hostile work environment even if he did not hear racist and discriminatory words used by MSH employees firsthand.

Hearing Officer Caroline A. Holien conducted a contested case hearing in this matter via Zoom upon the agreement of the parties on July 15, and July 16, 2021. Cook appeared pro se. MSH was represented by Kenneth Varns, Attorney at Law.

Cook, John Gillis, Duane Thomas, Ken Green, Dan Jurcich, John Johnson, Raul Luciani, Thomas Wyant, Holly Callarman, Lloyd Sparks, and Steve Gross testified under oath. Callarman's testimony was sealed because it dealt with personnel issues involving non-parties and the demand of individual privacy exceeds the merits of public disclosure of that information as protected by Article II, Section 10 of the Montana Constitution.

Charging Party Exhibits D through W and Respondent's Exhibits 101,102, 106, 107, 110, 111, 113 and 1114 were admitted into the record.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings.

II. ISSUES

1. Did MSH discriminate against Cook on the basis of race and color in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?
2. If MSH did illegally discriminate against Cook on the basis of race and color 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 MSH did illegally discriminate against Cook on the basis of race and color as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

1. MSH is a division of the Montana Department of Public Health and Human Services (DPHHS).
2. Cook is an African American man.
3. MSH hired Cook as an engineer in 2004. Cook was promoted to Chief Stationary Engineer in 2009.

4. From September 2017 through May 2021, Raul Luciani was the Maintenance Supervisor and Cook's direct supervisor. Luciani supervised the engineers, carpenters, plumbers, mechanics, and Teamsters. Luciani had the authority to direct the performance of workers in those trades without going through the worker's supervisor.

5. Luciani owned his own business prior to working for MSH. Luciani previously contracted with the federal government to maintain border patrol stations, air force bases, veteran's hospitals and other federal facilities. Luciani supervised 135 employees from a variety of cultural and racial backgrounds.

6. Luciani grew up in South Africa and attended Montana State University as an exchange student.

7. Tracey Thun, MSH Chief Financial Officer, was Luciani's supervisor.

8. Holly Callarman, MSH Human Resources (HR) Manager, oversees other HR generalists and other HR employees.

Conflicts Between Luciani and MSH Employees

9. Luciani had a difficult working relationship with Cook and other MSH employees. Cook felt Luciani belittled him in front of others and micro-managed him. Cook regularly refused tasks assigned to him by Luciani. On one occasion, Cook told Luciani in front of other employees, "Only my mom speaks to me like that, and you're not half the man my mom is."

10. Luciani's duties also included being MSH's housekeeping supervisor, which required him to travel throughout the MSH complex. Engineers were assigned a 2-wheel rear wheel drive vehicle that was difficult to drive after a snowfall.

11. Cook was required to check the facility's sewer lagoon, which is off campus and difficult to access after a snowfall. Luciani and Cook agreed that Luciani would share his truck with the engineers.

12. Cook and Luciani regularly battled over the use of the 4-wheel-drive truck. At one point, there was a checkout procedure used whereby the truck's keys would be checked out on a log. Ex. S. Cook used the truck most regularly of the engineers.

13. Cook was not alone in his dislike of Luciani's management style. Several Maintenance Department employees regularly complained about Luciani. Most of the complaints were about Luciani requiring employees to "cross crafts" and performing work outside of their job descriptions.

14. Complaints were also made that Luciani was demanding, micro-managed employees' work and did not allow the experienced employees to do their work their own way. Cook and other employees frequently complained Luciani made them "cross crafts," e.g. a plumber being asked to perform the duties of an engineer and vice-versa.

15. Employees other than Cook who complained Luciani made them "cross crafts" included Ken Green, Dave Anderson, Kevin May and Robert Milosovich, all of whom are white.

16. Cook's complaint about being made to "cross crafts" came about after Luciani indicated he wanted the engineers to complete minor repairs and maintenance on the feeder pumps that provided water to the boiling system.

17. Complaints against Luciani that did not include an allegation of discrimination were forwarded to Thun. Callarman handled those complaints that alleged discrimination.

18. Thun counseled Luciani not to engage with the resistant employees and to "pick his battles." Thun also coached on engaging in a professional manner and to use a proper tone of voice.

19. One female employee complained of being sexually harassed by Luciani. MSH Human Resources investigated the complaint and determined it was a situation in which the female employee did not like how Luciani spoke to her but it was not related to her sex. One male employee filed a complaint with the Human Rights Bureau, which issued a no cause finding.

20. Luciani initiated an investigation regarding himself and a pregnant employee who he had tapped on her belly in front of another female painter. Luciani brought the painter to Callarman due to the rumors and innuendo that resulted from the incident. The female painter denied feeling offended or uncomfortable at Luciani's behavior and denied there was anything sexual about his conduct.

Callarman determined there was no sexual discrimination. MSH management, however, determined Luciani had used poor judgment and took corrective action.

Luciani's Assessment Regarding Boiler Operations

21. MSH's heating system was changed from a high-pressure boiler system to a low-pressure system in approximately 2010. The low-pressure system is housed in the same building as the domestic water pumps that supply the MSH complex potable water. A geothermal pump uses naturally heated water to heat the potable water. The boiler system relies on feeder pumps to supply water to the boilers. Pumps are also used to insert chemicals into the boiler system to prevent corrosion.

22. The low-pressure boiler system did not require monitoring 24 hours a day as was required by the older boilers. The low-pressure boiler system was largely automated and could be monitored remotely.

23. Luciani felt it would be more efficient for engineers to maintain the boiler room pumps because there were fewer plumbers than engineers and the engineers were usually in the heating plant where the boiler room pumps are located. Luciani attempted to have Lead Plumber Tom Wyant teach Cook how to perform this type of maintenance work.

24. On one occasion, Cook complained that Luciani wanted engineers, including Cook, to complete minor repairs and maintenance on the feeder pumps that provided water to the boiling system.

25. Engineers are required to maintain (clean, oil, adjust, and make minor repairs) all related boiler room equipment including feed water pumps, circulating pumps, chemical pumps, compressors and other boiler room mechanical equipment. Ex. 111, ¶ C(a).

26. Engineers are also required to maintain all high and low-pressure boilers (outside of the heating facility). Engineers' duties also include:

Tends, monitors, and adjusts feed water pumps, circulating pumps, deaerators, chemical feed pumps, water treatment systems, and other related boiler room equipment to maintain the flow of steam and/or hot water to meet load requirements.

Ex. 111, ¶B(c).

27. Luciani determined that the maintenance department was reactive in its handling of maintenance and he wanted the department to be more proactive. Luciani was aware that the job descriptions for several positions had not been updated for several years. Several of the job descriptions did not adequately address the duties of the position given the changes in the boiler operations and other changes at MSH. Luciani intended to revise the job descriptions to make the department more efficient. Luciani and Thun were working on that process when the COVID-19 pandemic began, which interrupted the process.

September 2019 Events

28. On September 23, 2019, Cook told Steve Gross, Union Representative, during a Craft Council meeting that he felt Luciani's treatment of him was harassing. Gross relayed Cook's complaint to Callarman, who responded:

[If] Scott feels he is being discriminated against based on his race or any other protected class, that information needs to be reported and he has many avenues to report – such as myself, Lloyd Sparks the ADA and EEO coordinator in Helena for DPHHS, HRB, and EEO Federal Agency.

Ex. 106.

29. On September 26, 2019, Callarman sent an email directly to Cook:

You had also mentioned the possibility of harassment. I wanted to let you know that if you feel you are being harassed or discriminated against, that needs to be reported. You can email or mail a report to me if you wish, or you can send it to our DPHHS ADA EEO Coordinator, Lloyd Sparks.

Ex. 113.

30. On September 28, 2019, Cook sent an email to Callarman, with a copy to Gross. Cook wanted to report several safety violations "which jeopardized the safety of me and other heating plant/maintenance employees. . . ." This involved an improper adjustment to a boiler by Luciani. Cook alleged other safety violations that put himself and other employees in jeopardy. Cook also complained about Dan Jurcich being required to work on generators without being qualified to do so. None

of Cook's complaints alleged racial discrimination or an allegation that he was being treated differently because of his race.

Ex. 114.

31. Cook filed a formal complaint with the professional board for boiler operators in Montana regarding Luciani having done a boiler adjustment without having the proper license. Luciani subsequently received a "notification" of the violation.

Cook's Complaints to Sparks

32. On January 21, 2020, Cook complained to Sparks that employee morale in the maintenance department was non-existent. Cook generally complained of harassment by Luciani and suggested he should be removed from his position. Cook reiterated his complaint that he was being made to do plumber's work.

33. Sparks did not consider Cook's complaints to be alleging racial discrimination. However, Sparks arranged to meet with Cook and Duane Thomas at the Butte Job Service on February 7, 2020.

34. In March 2020, Cook complained to Sparks about a March 20, 2020, telephone conversation he had with Luciani regarding a medical appointment. There was some confusion as the appointment had been rescheduled. Luciani asked Cook what time his appointment was and if he could return to work after the appointment. Cook became upset and raised his voice. Luciani then raised his voice, which was observed by Thom and John Gillis, who were outside Luciani's office. Sparks did not find the incident to be discriminatory. However, Luciani received corrective action for using an improper tone with an employee.

35. Cook later complained to Sparks that Luciani was operating a chainsaw, which was not permitted under the CBA. Cook took pictures of Luciani with the chainsaw using his cell phone. It was later determined that Luciani was demonstrating how to maintain the chainsaw, which was permissible.

36. Thomas, an African American man, was subject to discrimination based upon race by Wyant. Luciani had heard Wyant's use of racial epithets when referring

to Thomas. Thomas was also treated differently in the assignment of duties due to his race.¹

37. Cook did not personally observe any of the behavior directed toward Thomas.

38. Cook complained about Luciani directing him and other employees to “cross crafts.” Cook also complained Luciani did not have sufficient knowledge in boiler operation. Cook also alleged Luciani yelled at him and other employees.

39. On February 10, 2020, Cook filed his Charge of Discrimination with HRB alleging he was discriminated against in his employment due to his race. As a result, Sparks put his investigation on hold as to the allegations reported by both Cook and Thomas pending the outcome of HRB’s investigations. Ex. 101.

40. On July 20, 2020, Cook amended his Charge of Discrimination to allege Luciani had made “defamatory statements” about African American people and culture. Cook also alleged he was subjected to a “hostile work environment.” Ex. 102.

41. Cook’s Charge of Discrimination and Amended Charge of Discrimination were the first time he ever formally alleged Luciani treated him differently because of his race or color.

42. After HRB concluded its investigation regarding Thomas’ complaint, Sparks resumed his investigation. MSH subsequently took disciplinary action against Wyant, who was determined to have used racial epithets during his working hours. MSH ultimately terminated Wyant’s employment.

43. Luciani voluntarily terminated his employment with MSH in May 2021 due to the stress he experienced as a result of his working relationships with MSH employees.

44. Cook continues to work at MSH as the Chief Engineer. There has been no change in Cook’s job duties or terms of employment. Cook’s performance continues to be satisfactory and he has received no discipline since 2018. See Ex. 104, 105, and 107.

¹ Thomas also filed a Charge of Discrimination that was ultimately settled by the parties. Sparks investigated the allegations after HRB concluded its investigation and substantiated Thomas’ allegations. The employee referenced in Thomas’ complaint was terminated from MSH as a result.

45. The incidents involving Luciani as outlined by Cook did not amount to conduct so severe or pervasive that it created a work environment that a reasonable person would consider intimidating, hostile or abusive.

46. MSH responded appropriately and according to its anti-discrimination and anti-retaliation policies when Cook complained of Luciani's management style. *See* Ex. 108, 109. None of Cook's complaints prior to his filings with the Montana Human Rights alleged racial discrimination. Given his complaints were the same or similar to those voiced by Cook's white co-workers, MSH had no reason to suspect Cook's repeated complaints regarding Luciani were regarding race discrimination.

IV. OPINION²

Cook alleges MSH discriminated against him on the basis of race and color by subjecting him to a hostile work environment as a result of Luciani's conduct toward him in the workplace.

The Montana Human Rights Act prohibits discrimination in the terms and conditions of employment on the basis of race. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-3-201. The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

An employee has a right, under the MHRA and Title VII, "to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). A plaintiff may establish a discrimination claim "by proving the existence of a hostile work environment" or "by proving disparate treatment." *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991), *superseded by statute on other grounds as stated in Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1041 (9th Cir. 2005).

² 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.

A. Racial Discrimination

Cook argues Luciani treated him differently than his co-workers due to his race and color. Cook contends Luciani singled him out for performance issues that were not addressed with other MSH employees and subjected his performance to greater scrutiny. The other MSH employees pointed to by Cook in his argument are white whereas Cook, at one time, was one of two African American male employees.

To establish a claim for race-based discrimination under Title VII, "a plaintiff may offer direct evidence of discrimination," or he "may prove his case through circumstantial evidence, following the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002); *see Surrrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008). "Direct evidence typically consists of clearly . . . racist . . . statements or actions by the [defendant]." *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005).

The evidence shows Luciani never directed racist or discriminatory comments directly to Cook. However, Luciani made at least one joke to Thomas that was based on Thomas' race and color. Wyant regularly made racist and offensive comments regarding Thomas in Luciani's presence. MSH ultimately terminated Wyant for his conduct toward Thomas.

Cook was not present for any of the incidents involving Thomas and learned of them only after-the-fact. While Cook was aware of the racist and discriminatory conduct directed toward Thomas, there is no direct evidence showing Luciani or any other MSH employee discriminated against Cook based on his race or color.

Despite lacking direct evidence of discrimination, Cook may prove his case through circumstantial evidence. To establish a claim of discrimination based on race or color, Cook must show: (1) he is a member of a protected class; (2) he was qualified for the job that he or she was performing; and (3) he suffered an adverse employment action or was discharged. *See McDonnell Douglas*, 411 U.S. at 802; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-523 (1981).

Cook has worked for MSH for approximately 17 years. Cook clearly enjoys his job and has been successful as the Chief Stationary Engineer, a position he has held since 2009. *See* Exs. 104, 105 (performance appraisals). There is no evidence showing Cook has received any significant discipline since 2018 or otherwise

performed his job duties in an unsatisfactory fashion. Therefore, Cook has satisfied the first two elements of his claim of discrimination based on race or color.

To satisfy the final element of his disparate treatment claim, Cook must demonstrate MSH took one or more adverse employment actions against him because of his race. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93, 99-100 (2003). An adverse action is one that "materially affect[s] the compensation, terms, conditions, or privileges of [employment]." *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1126 (9th Cir. 2000). The adverse action must be a "tangible employment action." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2268-69, 141 L. Ed. 2d 633 (1998). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 2268.

"Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." *See Bishop v. Bell Atl. Corp.*, 299 F.3d 53, 59 (1st Cir. 2002) (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996)). To determine whether a particular action is materially adverse, the court must employ an objective standard and consider the context and circumstances of the particular case. *See Burlington N.*, 548 U.S. at 68-69, 71.

Cook has worked as the Chief Stationary Engineer for approximately 12 years, with no changes to his job title, job responsibilities, rate of pay, work schedule or benefits. There is no evidence showing Cook sought a promotion for which he was denied. Cook failed to prove the "cross crafts" issue was so significant that it was an adverse employment action. In short, Cook has not shown he suffered a tangible employment action because of his race. Therefore, Cook has failed to show he suffered disparate treatment because of his race. *See Sischo-Nowneja*, 934 F.2d at 1109.

B. Hostile Work Environment

Cook may also establish a discrimination claim "by proving the existence of a hostile work environment. *Id.* Cook testified Luciani regularly assigned him menial tasks and reprimanded him for behavior that was tolerated from white MSH employees. Cook argued Luciani regularly berated him over the use of the state truck and undermined him with the workers he supervised. Cook further argued Luciani regularly implied he was incapable of performing his job duties adequately while demonstrating a lack of knowledge of boiler operations.

To prove the existence of a hostile work environment, Cook must show: (1) he was subjected to verbal or physical conduct of a harassing nature based on his race; (2) that it was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. *Surrell*, 518 F.3d at 1108.

Cook's argument that he was subjected to harassment based on his race generally falls into two categories: Luciani's treatment of him personally and Luciani's treatment of Thomas and acceptance of Wyant's treatment of Thomas.

1. **Luciani's Treatment of Cook**

Cook offered no evidence showing Luciani used racial epithets in his presence or ever directed racially hostile language toward him. Further, there is no evidence such conduct by other MSH employees was ever personally observed by Cook. There is no evidence showing Luciani or any other MSH employee ever engaged with Cook in a physically hostile manner.

a. *Assigned Tasks*

Cook argued Luciani assigned him menial duties (e.g., cleaning out the electrical room and other areas of the MSH complex) and duties that required him to cross crafts (e.g. asking engineers to make minor repairs on the feeder pumps). Cook testified Luciani was rude and demeaning toward him and regularly implied Cook was incapable of performing his job duties. Cook testified at length about various incidents in which he contended Luciani prevented him from using the state-owned truck. Cook further argues Luciani disciplined him for behavior that was tolerated from his white co-workers (e.g. misuse of state computers).

Luciani's assignment of duties to Cook do not appear to have been so unreasonable as to show a racial animus. The type of work assigned appears to be consistent with Cook's job duties, which includes tending, monitoring and adjusting feed water pumps, circulating pumps, deaerators, chemical feed pumps, water treatment systems, and other related boiler room equipment to maintain the flow of steam and/or hot water to meet load requirements. Ex. 111, ¶ B(c). The contested assignments appear to be well within Cook's job description. On the face of it, Luciani reasonably exercised his authority by assigning tasks to Cook that were within his job description. Further, given that the change in the boiler operations lessened the maintenance and oversight required on a daily basis, it was not unreasonable for Luciani to try to find other work for Cook. Cook failed to offer a

Collective Bargaining Agreement or any other substantial evidence to show that the “cross crafts” work was of such significance as to rise to the level of a hostile work environment or that it was based on his race. Simply put, the substantial and credible evidence of record does not support a finding that the tasks Luciani assigned to Cook were based upon his race or color.

b. *Luciani’s Management Style*

Cook argued Luciani was regularly rude and abrupt and acted in a hostile fashion toward him in the workplace. The testimony of Cook’s current and former co-workers undercuts Cook’s argument. Each of the witnesses who testified were white, and most, if not all, of them had the same complaints regarding Luciani.

Carpenter Ken Green described Luciani as “a difficult man to work with” and a micro-manager who used an abrupt tone of voice with him several times. Green testified Luciani seemed tougher on Cook after Thomas left his employment with MSH, but conceded he never heard Luciani speak negatively about Cook or use racist language. Similarly, John Gillis, who retired from MSH after having worked there for 15 years as an electrician, testified Luciani had been demeaning with him and had raised his voice when speaking with him on several occasions. Gillis testified to one incident in which he overheard Luciani on the phone talking to someone about time off. Gillis described Luciani’s side in the conversation as heated and it sounded as though Luciani was berating the person on the other end of the conversation. Gillis, however, testified he was used to hearing Luciani talk like that to people.

While mechanic Dan Jurcich testified he never heard Luciani talk negatively about Cook’s performance, he testified he thought there was “something” between the two men given Luciani’s behavior toward Cook. Jurcich denied hearing Luciani use the same tone with other employees as he did with Cook.

Cook and Luciani had a difficult working relationship that was marked by conflicts that appear to be more due to personalities than due to a racial animus. For example, the incident in which Cook told Luciani that only his mother talked to him like that and Luciani was not half the man his mama was. While Luciani’s conduct may have been rude and demeaning, it appears he was that way with the majority of the department without regards to the race or color of the employee. The hearing officer is left with the overwhelming impression that Cook’s issues with Luciani stem from a personality conflict rather than any racial animus on the part of Luciani.

c. *The Work Truck*

Cook testified in great length about issues surrounding the use of Luciani's assigned truck. The conflict between the two escalated to the point where they used a system in which they signed out the keys to the truck. However, that system was not used for very long or very regularly. Whatever behavior Luciani engaged in related to the truck was more in line with a continuing battle Luciani and Cook had as to who was going to control the department rather than any racial animus Luciani had toward Cook.

While Cook was unhappy with Luciani's treatment of him, the evidence does not show that Luciani's conduct was directed toward him due to race or color. Therefore, Cook has failed to show that Luciani's treatment of him created a hostile work environment.

2. **Luciani's Treatment of Thomas**

While Cook succeeded in satisfying the first two elements of his hostile work environment claim, he has not shown that the complained of conduct was severe or pervasive so as to alter the working conditions. Cook points to Luciani's acquiescence in Wyant's treatment of Thomas and Luciani purportedly having made a racist joke to Thomas in support of his claim of a hostile work environment. However, none of the incidents pointed to by Thomas occurred in Cook's presence. Cook only learned of the incidents through secondhand reports.

The Ninth Circuit has held that a plaintiff may establish a hostile work environment claim by showing racial hostility pervades the workplace even if such hostility is not targeted at the plaintiff. *Id.* at 117(citing *Woods v. Graphic Communications*, 925 F.2d 1195, 1202 (9th Cir. 2001)). Similarly, the Ninth Circuit has also implied conduct that occurred outside of a plaintiff's presence was relevant to a hostile work environment claim. *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998); *see also Woods*, 925 F.2d at 1202 (holding that environment was "polluted" with racial hostility where plaintiff was surrounded by racial insults and subjected directly to some of them); *Stingley v. State of Arizona*, 796 F.Supp. 424, 428 (D. Arizona 1992) (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in the presence of plaintiff).

This "environmental" form of hostile work environment was recognized by the U.S. Supreme Court in *Meritor* where it found that the language of Title VII is not limited to "economic" or "tangible" discrimination. The court noted, "The phrase

‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” *Id.*, 477 U.S. at 64.

Environmental harassment was discussed by the court in *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590 (2d Dist. Ct. of App. 1989) in the context of a sexual harassment claim. California’s Fair Employment and Housing Act (FEHA), like the Montana Human Rights Act, recognizes the right of all individuals to seek and hold employment free from discrimination. FEHA, § 12920; *see* Mont. Code Ann. § 49-1-102(1)(a) (the right to be free from discrimination based on race or color includes “the right to obtain and hold employment without discrimination.”). While not binding authority, the court’s analysis in *Fisher* is helpful in considering Cook’s claim that the discriminatory treatment created a hostile work environment for him despite there being no evidence showing he either witnessed or heard the discriminatory conduct.

In *Fisher*, the court found that an employee who is not personally subjected to offensive remarks or touchings can successfully claim a hostile work environment if the employee establishes she personally witnessed the harassing conduct and that it was in her immediate work environment. *Id.*, 214 Cal. App. at 610-11. The court explained, “it is not enough to allege that harassment occurred in the [workplace]; a plaintiff who is not a direct victim must also allege exactly what occurred in her presence in her immediate work environment and describe that work environment.” *Id.* The court concluded that, while the plaintiff need not show any tangible job detriment, the plaintiff does need to show that the harassing conduct permeated the plaintiff’s work environment. *Id.*

Evidence was offered showing Thomas was subjected to racially discriminatory conduct by Wyant on several occasions. Wyant’s conduct included making racist comments to Luciani regarding Thomas without any effort by Luciani to address the offensive conduct. It also included Wyant assigning certain tasks to Thomas expressly because of his race or color. While the conduct was offensive and warranted the termination of Wyant’s employment, Cook has not shown the nexus between incidents involving Thomas and his work environment. There is no evidence showing Wyant discriminated against Cook or ever referenced Cook in his comments to Luciani. It is undisputed MSH terminated Wyant for that behavior. Therefore, while the treatment of Thomas was reprehensible, there has been no showing that it

directly impacted Cook's work environment. Therefore, Cook has failed to show that he was subjected to harassing behavior based upon his race or color.

3. Work Environment

Even if Cook had succeeded in showing that he was subjected to unwelcome verbal or physical conduct of a harassing nature based on his race, he has failed to show that it was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004).

"Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment." *Id.* at 1113. It is sufficient to show that the conduct "pollute[d] the [plaintiff's] workplace, making it more difficult for [him] to do [his] job, to take pride in [his] work, and to desire to stay on in [his] position." *Id.* (quotations omitted). In short, the "conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). The question is whether the conduct was sufficiently severe or pervasive to alter the conditions of Cook's employment and create an abusive working environment. *Manatt v. Bank of Am. N.A.*, 339 F.3d 792, 798 (9th Cir. 2003).

In evaluating the objective hostility of a work environment, the Ninth Circuit uses a "totality of the circumstances test to determine whether a plaintiff's allegations make out a colorable claim of hostile work environment," considering factors such as "frequency, severity and level of interference with work performance." *Id.* at 1113; *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000). In addition, "[w]hen assessing the objective portion of a plaintiff's claim, [the court] assume[s] the perspective of the reasonable victim." *Brooks*, 229 F.3d at 924 (citations omitted); *McGinest*, 360 F.3d at 1115 ("We now state explicitly . . . that allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.").

There is little doubt that Luciani and Cook had a combative working relationship. However, the evidence shows the incidents pointed to by Cook were either isolated or related to Luciani attempting to direct Cook's work performance as his subordinate. None of the incidents were severe or physically threatening. Rather, it appears to be a situation of two men attempting to exert dominance over the other in the workplace. This is supported by Luciani's attempts to suggest Cook was not

performing his duties adequately and Cook challenging Luciani's abilities in boiler operations. Surely, both men could have and should have conducted themselves more appropriately. However, the issue is whether Luciani's conduct created a hostile work environment based on race for Cook. The evidence does not show that it did.

The MHRA, like Title VII and Section 1981, is not a "general civility code." *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶30, 322 Mont. 434, 97 P3d 546. Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Farragher v. City of Boca Raton*, 524 U.S. 775, 778 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)(citations omitted). "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Id.* (internal citation omitted); see also *Jordan v. Clark*, 847 F.2d 1368, 1374-75 (9th Cir. 1988) (finding no hostile work environment where "off-color" jokes were told in workplace). The Supreme Court made clear that the "'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)). "[C]onduct must be extreme to amount to a change in the terms and conditions of employment." *Farragher*, 524 U.S. at 788.

In *Manatt*, the Ninth Circuit identified various cases in which the court found the conduct complained of was neither severe nor pervasive enough to alter the employment conditions:

Vasquez v. County of Los Angeles, 307 F.3d 884, 893 (9th Cir. 2002) (finding no hostile environment discrimination where the employee was told that he had "a typical Hispanic macho attitude," that he should work in the field because "Hispanics do good in the field" and where he was yelled at in front of others); *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir. 2000) (finding no hostile work environment where the supervisor referred to females as "castrating bitches," "Madonnas," or "Regina" in front of plaintiff on several occasions and directly called plaintiff "Medea"); *Compare Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (finding that a Korean plaintiff suffered national origin harassment where the employer verbally and physically abused the plaintiff because of his race); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 872-73 (9th Cir. 2001) (finding a hostile work environment where a male employee was called "faggot" and "fucking female whore" by co-workers and supervisors at least once a week and often several times per

day); *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999) (finding a hostile work environment where a supervisor repeatedly referred to the employee as "office sex goddess," "sexy," and "the good little girl" and where he humiliated the employee in public by drawing a pair of breasts on an easel while the employee was making a presentation and then told the assembled group that "this is your training bra session," and where the employee received vulgar notes and was patted on the buttocks and told she was "putting on weight down there"), abrogated on other grounds in *Morgan*, 536 U.S. 101, 153 L. Ed. 2d 106, 122 S. Ct. 2061; *Draper v. Coeur Rochester*, 147 F.3d 1104, 1109 (9th Cir. 1998) (finding hostile work environment where plaintiff's supervisor made repeated sexual remarks to her, told her of his sexual fantasies and desire to have sex with her, commented on her physical characteristics, and asked over a loudspeaker if she needed help changing her clothes).

Manatt, 339 F.3d at 798.

There is no evidence showing the complained of conduct in this case rose to the level of those cases in which other courts have found a hostile work environment. Cook was subjected to no physical threats, no epithets, and no regular or repeated discriminatory comments. Further, none of the incidents pointed to in Thomas' testimony occurred in Cook's presence or involved Cook at all. In short, Cook's work environment was not ideal but it was not hostile as a result of his race. Therefore, Cook's claim fails.

C. MSH Liability

Even if Cook had succeeded in showing MSH had subjected him to a hostile work environment based on his race, he has failed to show MSH failed to take adequate measures to stop the behavior. *See Nichols*, 256 F.3d at 875.

In *Vance v. Ball State Univ.*, 570 U.S. 421, 429-30 (2013), the Supreme Court identified under what circumstances an employer is liable for the hostile work environment created by a supervisor:

[E]ven when a supervisor's harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor's creation of a hostile work environment if the employer is unable to establish an affirmative defense. We began by noting that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor

always is aided by the agency relation.” But it would go too far, we found, to make employers strictly liable whenever a “supervisor” engages in harassment that does not result in a tangible employment action, and we therefore held that in such cases the employer may raise an affirmative defense. Specifically, an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided. This compromise, we explained, “accommodate[s] the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees.”

Id. (internal citations omitted).

Several MSH employees who were not in Cook’s protected class regularly complained Luciani required employees to “cross crafts” and to perform work outside of their job descriptions. Other complaints focused on how Luciani treated people and his management style, which was described as being demanding and obstructive. Cook lodged similar complaints about Luciani, in addition to his complaints about Luciani preventing him from using the state truck.

On September 23, 2019, Cook told a union representative that he felt Luciani was harassing him. Cook’s complaint was reported to Callarman, who responded:

[If] Scott feels he is being discriminated against based on his race or any other protected class, that information needs to be reported and he has many avenues to report—such as myself, Lloyd Sparks the ADA and EEO coordinator in Helena for DPHHS, HRB and EEO Federal Agency.

Ex. 106

Callarman followed up with an email to Cook:

You had also mentioned the possibility of harassment. I wanted to let you know that if you feel you are being harassed or discriminated against, that needs to be reported. You can email or mail a report to me if you wish, or you can send it to our DPHHS ADA EEO Coordinator, Lloyd Sparks.

Ex. 113

Cook sent an email to Callarman two days later indicating he wished to report several safety violations “which jeopardized the safety of me and other heating plant/maintenance employees. . . .” This involved an improper adjustment to a boiler made by Luciani. Cook alleged other safety violations that put himself and other maintenance employees in jeopardy. Ex. 114. Cook also complained about Jurcich being required to work on generators despite not being qualified to do so. None of Cook’s complaints alleged discrimination or any suggestion he thought he was being treated different because of his race or color.

In March 2020, Cook reported to Sparks that Luciani had asked the time of a medical appointment and asked if Cook could return to work after his appointment. The telephone conversation escalated and the two men began yelling at one another. Sparks found the tone Luciani used was inappropriate, but that it was not discrimination based on race. MSH took corrective action against Luciani.

On one occasion, Cook complained to Sparks that Luciani was operating a chainsaw, which was apparently not permitted. The investigation determined that Luciani was actually demonstrating how to maintain a chainsaw, which was permitted.

On January 21, 2020, Charging Party submitted another complaint to Sparks that the morale of the maintenance department is non-existent. He complained of general harassment and that Luciani should be removed. Cook complained about being directed to do plumber’s work and unprofessional behavior. Sparks determined there was no relation to Cook’s race.

Sparks subsequently arranged to meet with Cook on February 7, 2020 at the Butte Job Service. Thomas accompanied Cook, and both were interviewed by Sparks. Cook repeated his complaints that Luciani was directing him and others to cross crafts. Cook complained about Luciani’s lack of knowledge about boilers and Luciani yelling at other employees. Cook never complained that race was a motivating factor. Sparks subsequently initiated an investigation, largely based upon Thomas’ complaints.

Three days later, on February 10, 2020, Cook filed his Charge of Discrimination with the Montana Human Rights Bureau alleging he had been discriminated against in the area of employment because of his race. Cook repeated his complaints regarding being made to cross crafts and issues regarding the truck.

Cook, for the first time, formally complained that he had been subjected to different terms and conditions of employment “on the basis of my race.” *See* Ex. 101.

Due to the filing of this complaint, Sparks put his investigation, regarding the complaints of both Cook and Thomas on hold pending the outcome of the HRB investigations.

The evidence shows MSH exercised reasonable care to prevent and promptly correct any harassing behavior when reports of allegations of discrimination were reported. Cook’s various complaints prior to February 2020 were solely focused on job performance issues and never alleged race discrimination. Given that the same or similar complaints were being received from Cook’s white co-workers, MSH had no reason to assume Cook really intended to allege Luciani’s treatment of him, which was purportedly similar to how he treated other employees, was based on Cook’s race or color. Further, the evidence shows Cook failed to take advantage of the policies and procedures outlined in MSH’s policies and noted by Callarman in her emails to both Cook and his union representative in September 2019. Instead, Cook continued to submit complaints that were pertaining to everything but an allegation of race discrimination.

Even assuming Cook had succeeded in showing that he was subjected to disparate treatment because of his race or color and that Luciani created a hostile work environment due to racial discrimination, the evidence shows MSH took the steps necessary to appropriately address the complaints under its policies and procedures. The evidence further shows Cook failed to take advantage of the procedures MSH had in place to handle discrimination complaints. Therefore, even if Cook had succeeded in showing he was discriminated against in his employment based upon his race or color, MSH has shown it took adequate measures to stop the behavior. *See Nichols*, 256. F3d at 875.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this matter. Mont. Code Ann. § 49- 2-509(7).

2. The MHRA prohibits discrimination in employment based upon race. Mont. Code Ann. § 49-2-303(1)(a).

3. Scott Cook failed to prove that the Montana Department of Public Health and Human Services – Montana State Hospital either discriminated against him illegally because of race. Mont. Code Ann. §§ 49-2-303(1).

4. For purposes of Mont. Code Ann. § 49-2-505(8), Montana Department of Public Health and Human Services – Montana State Hospital (MSH) is the prevailing party.

VI. ORDER

Judgment is granted in favor of Montana Department of Public Health and Human Services – Montana State Hospital (MSH) and against Scott Cook. Cook's complaint is dismissed with prejudice as lacking merit.

DATED: this 23rd day of November, 2021.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Scott Cook, Charging Party; and Respondent, Department of Public Health and Human Services – Montana State Hospital, and its attorney, Kenneth Varns.

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)

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.