

**BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY**

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<b>Kasey R. Franklin,</b>	(	<b>Human Rights Act Case No. 9801008288</b>
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Charging Party,	(	<i>Final Agency Decision</i>
	(	
versus	(	
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<b>Lyle Nalivka, dba Acoma Lounge and Restaurant,</b>	(	
	(	
Respondent.	(	

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**I. Procedure and Preliminary Matters**

Charging party Kasey R. Franklin filed a complaint with the Department of Labor and Industry on August 25, 1997. She alleged the respondent Lyle Nalivka, doing business as Acoma Lounge and Restaurant, discriminated against her on the basis of her sex )female( when he fired her on or about July 13, 1997. On April 20, 1998, the department gave notice Franklin's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on July 16, 1998, in Butte, Silver Bow County, Montana, in the courtroom of Silver Bow County District Judge Whelan. Franklin was present with Robert Kelleher, Sr., her attorney. Nalivka was present with Mark Vucurovich, his attorney. Franklin called Nalivka, Angela Casey, Stacy Pettersen, Heather King, Chadine Simmons and Franklin, both in her case in chief and in rebuttal. Franklin moved for the admission of the deposition testimony of psychiatric social worker Frances Honsharuk, and the hearing examiner granted the motion over the objections of Nalivka. Nalivka called Nalivka, Marci Cameron and

Katy Nalivka as witnesses. The parties stipulated to the admission of Franklin's Exhibits 1-2 and 7-12 and Nalivka's Exhibit 201. The hearing examiner refused Franklin's Exhibit 5 on a hearsay objection.

Franklin filed her closing argument on July 28, 1998. Nalivka filed his closing argument on August 12, 1998. Franklin filed her reply argument on August 18, 1998.

## **II. Issues**

The issue in this case is whether Nalika engaged in unlawful sexual harassment of Franklin by asking her for sexual favors and eventually firing her because of her refusal. A full statement of the issues appears in the final prehearing order )July 15, 1998(.

## **III. Findings of Fact**

1. Effective May 11, 1997, Lyle Nalivka, doing business as Acoma Lounge and Restaurant, hired Kasey R. Franklin as a bartender )for \$6.50 per hour plus tips( and cocktail waitress )\$5.00 per hour plus tips(. Final Prehearing order, "IV. Facts and Other Matters Admitted."

2. Nalivka hired Franklin based on her interview and job application. He had no personal knowledge of her abilities and experience as either a bartender or a cocktail waitress. He hired her to work as a cocktail waitress on Friday and Saturday nights )the busier shifts( and to bartend on Sunday and Monday nights )the slower shifts(. Testimony of Nalivka.

3. After being hired on or about May 6, 1997, Franklin helped clean the restaurant and lounge before the grand opening. Because of illness, Franklin was absent during her initial two shifts--Friday and Saturday of the week of the grand opening. Testimony of Franklin.

4. Franklin missed another shift on June 2, 1997. She reported a “family problem” to the employer. Testimony of Franklin and Nalivka. She was, in fact, attempting to help a friend )considered by her to be family( who was the victim of domestic violence. Testimony of Franklin, King and Pettersen.

5. Before July 5, 1997, Nalivka frequently pointed out to Franklin work she needed to do, from emptying ashtrays to serving customers. Franklin failed to perform satisfactory work. Testimony of Nalivka and Cameron. Nalivka was pleasant in his conversations with Franklin about additional work during this two month period. Testimony of Franklin and Nalivka.

6. On July 5, 1997, Franklin and Nalivka finished the normal night shift at the business, and the two of them completed the normal clean up and lock up of the business. During the course of that work, the two discussed Franklin’s job performance. Although Franklin asserts that Nalivka also asked her for sexual favors, nothing else that occurred during that evening has been proved. Testimony of Franklin and Nalivka.

7. After July 5, 1997, Franklin was puzzled and upset by the hostility Nalivka began to display toward her. Testimony of Franklin. After she missed an additional shift, on July 13, 1997, Nalivka terminated Franklin’s employment. Testimony of Franklin and Nalivka. Franklin returned her work shirts to Katie Nalivka, Nalivka’s wife. Franklin said nothing to Katie Nalivka about any improper advances toward her by Nalivka. Testimony of Franklin and Katie Nalivka.

8. Nalivka had legitimate business reasons for terminating Franklin, who was still in her initial 90-day probationary period. Franklin’s immediate supervisor, Marci Cameron, seldom observed good job performance by Franklin. Cameron believed Franklin capable of good performance. Testimony of Cameron. Nalivka had not observed any improvement in Franklin’s performance despite his continuing directions to her, and Nalivka had discussed this problem with his wife. Testimony of Nalivka and Katie Nalivka.

#### **IV. Opinion**

Montana law prohibits sexual harassment in the workplace. Sexual harassment in the workplace is discrimination by reason of sex, an unlawful discriminatory practice. §49-2-303(1), MCA. An employer who targets an employee for unwelcome sexual advances sufficiently abusive to alter the terms and conditions of employment creates a hostile working environment that violates the employee's right to be free from discrimination. *Vaino v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993).

This case involves direct evidence of discrimination, through the testimony of Franklin. Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" and proves a fact without resort to inference or presumption. *Black's Law Dictionary* 413 (5th Ed. 1979). Unless answered by sufficient proof disputing its truth, direct evidence of discrimination establishes a civil rights violation. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). In employment cases under the Human Rights Act, direct evidence relates both to the particular conduct affecting the charging party and to the intention of the respondent to discriminate. *Foxman v. MIADS*, HRC Case #8901003997 (June 29, 1992) (race discrimination); *Edwards v. Western Energy*, HRC Case #AHP86-2885 (August 8, 1990) (disability discrimination); *Elliot v. City of Helena*, HRC Case #8701003108 (June 14, 1989) (age discrimination).

Nalivka disputes Franklin's testimony with his own testimony both that he did not ask for sexual favors as a condition of Franklin's continued employment and that his reasons for terminating her employment were strictly related to her performance. Although there is some limited circumstantial evidence offered by each side (discussed *infra*), the heart of this case turns on the credibility of the two parties--Franklin and Nalivka.

Franklin and Nalivka are each entitled to the presumption that they spoke the truth under oath. Controversion of this presumption follows the usual statutory tests:

A witness is presumed to speak the truth. The jury or the court in the absence of a jury is the exclusive judge of his credibility.

This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness' testimony; such matters include but are not limited to:

- )1( the demeanor or manner of the witness while testifying;
- )2( the character of the witness' testimony;
- )3( bias of the witness for or against any party involved in the case;
- )4( interest of the witness in the outcome of the litigation or other motive to testify falsely;
- )5( the witness' character for truth, honesty, or integrity;
- )6( the extent of the witness' capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which he testifies;
- )7( inconsistent statements of the witness;
- )8( an admission of untruthfulness by the witness;
- )9( other evidence contradicting the witness' testimony.

§26-1-302 MCA.

Neither Franklin nor Nalivka displayed by their respective demeanors any obvious signs of untruthfulness. The character of Franklin's testimony--that her employer, given an opportunity alone with her after hours, made sexual advances, and when she rebuffed him, became a hostile boss who later fired her--is not inherently incredible. The character of Nalivka's testimony--that he made no such advances and fired Franklin solely because of her performance--is likewise not inherently incredible. The two parties shared the precise same interest in the outcome--each stood to gain by winning the case, and each faced financial harm by losing the case. Any "bias" either had reflects these interests. Both parties were, on

this record, alert, awake and sober at the time of the events in question on the night of July 5, 1997, and in their right minds during the hearing. In short, with some very minor exceptions involving the last three factors in the statute, nothing renders either party's disparate account of what happened that night anything other than believable.

Based solely upon the testimony and demeanor of the two parties, the hearing examiner finds both parties credible. Yet clearly only one party is truthful. It is not possible for the only two participants in that late night conversation at the Acoma Lounge and Restaurant to have such diametrically opposed recollections of what was said. The hearing examiner cannot tell from weighing the demeanor and delivery of the parties, and the substance of their testimony, which party testified falsely.

Therefore, the party with the burden of proof, Franklin, has failed to meet her burden. The initial burden of producing evidence as to a particular fact is upon the party who would be defeated if no evidence were given on either side. §26-1-401 MCA. If neither side produced any evidence regarding whether Nalivka asked Franklin for sexual favors on July 5, 1997, Franklin would lose the case. Without proof that Nalivka made sexual advances and that she rebuffed him, Franklin has no credible evidence of a discriminatory motive in her eventual discharge.

Franklin attempted to corroborate her testimony through the opinion testimony of Francis Honsharuk, a Montana licensed clinical social worker. Franklin first saw Honsharuk on March 13, 1998. Honsharuk deposition, p. 52. Franklin filed her Human Rights Act complaint on August 25, 1997. Complaint /Charge of Discrimination. Thus, after Franklin had filed her complaint of discrimination she began meeting with Honsharuk. Franklin's statements to Honsharuk, offered by Franklin, are hearsay, rather than prior consistent statements offered to rebut a charge of recent fabrication.<sup>1</sup> *See, e.g.*, Rule 801(d)(1)(B), M.R.E. Thus, the admissibility of Honsharuk's opinion testimony )that she had no

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<sup>1</sup> Franklin admittedly did not make the accusations to Katie Nalivka, Nalivka's wife, when she picked up her last check, at a time when the events would have been most immediate.

reason to disbelieve Franklin's account of the sexual advances( is at the crux of the proffered testimony.<sup>2</sup>

As a rule, Montana law does not permit expert testimony about the credibility of a witness. *In re Renewal of the Teaching Certificate of Thompson*, 270 Mont. 419, 427, 893 P.2d 301, 306 )1995(. If a minor testifying in a criminal case about being the victim of sexual assault is the subject of the credibility question, then an exception to the general rule applies, and expert testimony on credibility is proper. *Id.*; *see also State v. Harris*, 247 Mont. 405, 410, 808 P.2d 453, 455 )1991(; *and State v. J.C.E.*, 235 Mont. 264, 269, 767 P.2d 309, 312 )1988(. However, if the victim testifying in the criminal trial is at least sixteen years old, a competent witness and under no physical or mental disability, the exception is inapplicable, and the expert testimony is inadmissible. *Thompson, supra*; *State v. Hensley*, 250 Mont. 478, 481, 821 P.2d 1029, 1032 )1991(. On July 5, 1997, Franklin was not a minor. The same analysis specifically applies to a civil administrative proceeding. *Thompson, supra*.

The problems generated by reliance upon expert testimony addressing witness credibility are set forth in detail in *Thompson*. The Montana Supreme Court succinctly stated the concern that triggers exclusion of expert testimony about credibility:

While qualified experts possess specialized knowledge regarding certain aspects of credibility, their capacity to detect lying and coaching is too limited to justify admission of generalized credibility testimony.

John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb.L.Rev. 1, 127 )1989(.

*Thompson* at 429, 893 P.2d at 307.

It is reversible error to defer to the expert on the question of Franklin's credibility. To the extent that Franklin offered the testimony of Francis Honsharuk

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<sup>2</sup> Nalivka interposed numerous procedural and technical objections to the testimony, regarding timely disclosure and foundation. Given the inadmissibility of the opinion testimony on the merits, these objections are moot. *Final Agency Decision, Page 7*

to buttress Franklin's credibility, the hearing examiner must ignore that testimony. Thus, Franklin's testimony remains without corroboration through Honsharuk.

Franklin also attempted to corroborate her account of Nalivka's actions with circumstantial evidence that she was, indeed, an exemplary employee, one that Nalivka liked and praised until after July 5, 1997. However, the evidence of her friend, Stacey King )consistent with Franklin's own testimony( goes no further than to confirm two facts. First, Nalivka was courteous during the first two months of Franklin's employment when reminding Franklin of additional tasks to perform. Second, Nalivka changed from a friendly boss to a hostile boss near the end of her employment. It is plausible, as Franklin asserts, that Nalivka stopped being "nice" because she rebuffed his advances. It is equally plausible, as Nalivka claims, that he became frostier because despite two months of reminders, Franklin still failed to perform her job acceptably.

Franklin likewise could not establish that she was an exemplary employee through the testimony of other friends and family )her mother(. Their objectivity was questionable, and their actual experience with her prior work in Texas was both limited and remote in time and place. Additional proffered evidence of satisfaction with Franklin's work in Texas, contained in Exhibit 5, was hearsay, and of questionable relevance because it addressed another job in another state at another time.

On the other hand, Nalivka produced testimony from Franklin's immediate supervisor, Marci Cameron, who no longer worked for Nalivka, that essentially corroborated Nalivka's account of problems with Franklin. Franklin suggested that Cameron took a personal dislike to her, but there is no evidence to support that suggestion.

Franklin also attempted to corroborate her account of Nalivka's actions with evidence of other instances of inappropriate behavior. Franklin and her friend, Heather King, alleged that Angela Casey reported that Nalivka made improper contact with her )Casey allegedly told King that Nalivka "grabbed her butt"(. However,

Franklin subpoenaed Casey, who testified under oath that the incident did not happen and that she never said it did. The testimony proffered did not corroborate Franklin.

Finally, Franklin was less than convincing in her explanation of why she did not report her tips, and obviously had been less than candid in explaining her last two absences from work to her employer. Neither instance was decisive or sufficient to justify concluding that Franklin's account of Nalivka's advances was false, but the cumulative effect of evidence also did not tip the scales in favor of Franklin. On the entire record, Franklin failed to establish it was more probable than not that Nalivka made the advances and then fired Franklin because she refused them.

#### **V. Conclusions of Law**

1. The Department has jurisdiction over this case. §49-2-509)( MCA.
2. Franklin failed to prove that Nalivka discriminated against her in employment by reason of sex.

#### **VI. Order**

1. Judgment is found in favor of Respondent Lyle Nalivka, doing business as Acoma Lounge and Restaurant, and against Kasey R. Franklin on her complaint that Nalivka discriminated against her in employment by reason of her sex.
2. The complaint is dismissed.

Dated: December 28, 1998.

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**Terry Spear, Hearing Examiner**  
**Montana Department of Labor and Industry**