

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

_____)	
Larin Backbone,)	Human Rights Act Case No. 9801008371
)	
Charging Party,)	<i>Final Agency Decision</i>
)	
versus)	
)	
Ron Aafedt, dba MR Concrete,)	
)	
Respondent.)	
_____)	

I. Procedure and Preliminary Matters

Charging party, Larin Backbone, filed a complaint with the Department of Labor and Industry on November 3, 1997. He alleged that the respondent, Ron Aafedt¹ discriminated against him in employment by reason of his race or national origin (Native American) by subjecting him to racial slurs and racial jokes, causing him to leave employment. On May 29, 1998, the department gave notice Backbone’s complaint would proceed to a contested case hearing before Terry Spear as hearing examiner.

On August 27, 1998, the contested case hearing convened in Bozeman, Gallatin County, Montana, in the conference room of Kummers & Roth, 517 22nd, Suite 5. Backbone was present with his attorney, John Frohnmayer. Aafedt was present, with his attorney, Karl Seel. The hearing examiner excluded witnesses on Backbone's motion. Backbone testified under oath on his own behalf. Aaron Aafedt (Aafedt’s son) and Aafedt testified under oath on behalf of Aafedt. The parties did not offer any exhibits.

Backbone moved to call Joe Manual by telephone to testify in Backbone’s case in chief. Aafedt objected. The hearing examiner sustained the objection.

The parties agreed to oral closing arguments. Counsel for both parties appeared by telephone and argued the case on September 22, 1998. The hearing examiner deemed the case submitted for decision on that date.

II. Issues

The issue in this case is whether the comments that Backbone proved amount to racial discrimination. A full statement of the issues appears in the final prehearing order (August 25, 1998).

¹ Amendment of the caption by agreement of the parties, and thereby amendment of the pleadings, occurred at hearing.

III. Findings of Fact

1. Aafedt, doing business as “MR Concrete,” hired Backbone as a laborer. Backbone had a variety of experiences as a laborer, but had not worked framing, preparing and pouring concrete. He answered an ad in the newspaper for concrete workers. He called the number in the ad, and spoke with Aafedt. Aafedt ascertained that Backbone had no experience in concrete work. Backbone came to Aafedt’s home the next evening (September 27, 1997) for an interview. Aafedt hired Backbone at the end of the interview. Testimony of Backbone and Aafedt.

2. Both Backbone and Aafedt are Native American. Both knew the other was Native American by the end of the telephone conversations and interview. Testimony of Backbone and Aafedt. Aafedt thought he was being friendly and supportive in relating to Backbone, even going so far as to show Backbone his collection of Native American artifacts. Testimony of Aafedt. Backbone thought Aafedt was being condescending. Testimony of Backbone.

3. Backbone worked for Aafedt as a laborer on September 28, 1997. Backbone, because of his inexperience, required considerable supervision and direction. Because of his inexperience, he also worked more slowly than an experienced worker did. Testimony of Backbone, Aaron Aafedt and Aafedt. Backbone thought he picked up the essentials of the job quickly, and did a good job. Testimony of Backbone. Aaron Aafedt thought Backbone was a poorly motivated worker, whose efforts were minimal. Testimony of Aaron Aafedt. Aafedt left his son to work with and supervise Backbone for most of the day. Aafedt himself did not directly supervise Backbone for most of the day’s work, and often was not within hearing of Aaron Aafedt and Backbone as they worked. At the end of the day, Aafedt arranged to call Backbone to work with them again. Testimony of Aafedt.

4. Backbone considered Aaron Aafedt’s critical view of his work to be racially motivated. He heard racial animus in every critical comment Aaron Aafedt made about his work. Testimony of Backbone. Aaron Aafedt called Backbone “Gonzalez,” a sarcastic reference to the cartoon character, Speedy Gonzalez. Aaron Aafedt considered Backbone the opposite of speedy. Testimony of Aaron Aafedt. Backbone considered this a racial slur, assuming that Aaron Aafedt had mistaken him for a Mexican-American. Testimony of Backbone. Later in the day, when Aaron Aafedt became more critical of his work, Backbone believed the hostile attitude of Aaron Aafedt was racially motivated towards him as an Indian. Testimony of Backbone.

5. Aaron Aafedt disliked Backbone because he had not picked up the nuances of concrete work as rapidly as Aaron Aafedt thought he should. Aaron Aafedt did not hide from Backbone his feelings that Backbone was unmotivated and a poor worker. Testimony of Backbone and Aaron Aafedt.

6. Aafedt told a joke, at some point during the day, about why there were no Indians in the cast of “Star Trek” (“Even in the future, Indians don’t work.”) Testimony of Backbone, Aafedt and Aaron Aafedt. Backbone considered the joke a confirmation

that he was working for a father-son team of bigots. Testimony of Backbone. Backbone heard other comments made during the working day as all part of the same theme--hostile towards him as a Native American. Testimony of Backbone.

7. Backbone thought he was going to return to work the next day, but Aafedt did not call him. The following day, Backbone, wanting his pay for the one day of work, contacted Aafedt and said he had found another job and was no longer available. Testimony of Backbone.

8. Backbone had not found another job. He decided he could not work for Aafedt because of his perception that Aafedt was biased against him because of his race. His decision was heavily influenced by his perception that Aaron Aafedt disliked him. This dislike Backbone also attributed to racial animus. Testimony of Backbone.

9. Backbone did not tell Aafedt his true reasons for declining further work. Testimony of Backbone and Aafedt. Aafedt never discovered that Backbone considered himself to be the victim of racial bias until the Human Rights Bureau staff sent Aafedt notice of the discrimination complaint. Testimony of Aafedt.

IV. Opinion

Montana law prohibits discrimination in the workplace on the basis of race or national origin. §49-2-303(1)(a) MCA. Backbone contends that he was exposed to racial slurs and jokes in the workplace. He contends the pervasive comments made the work environment so oppressive that resigning was the only reasonable action he could take.

The appropriate legal standard by which to measure Backbone's contentions appears in *Snell v. Montana-Dakota Utils. Co.*, 198 Mont. 56, 643 P.2d 841 (1982). In *Snell*, the claimant contended that ethnic jokes and racial epithets were so pervasive that he had to resign to escape a work environment populated with "Indian haters." *Snell* at 61, 643 P.2d at 844. The Montana Supreme Court affirmed a decision for the employer.

It is obvious the hearing examiner determined that the objectionable remarks were merely casual conversation. Title VII cases indicate that the sensitivity of an employee to casual remarks, isolated incidents of harassment or an occasional racial slur is not sufficient to support a Title VII complaint:

". . . [A]lthough a pattern of practice of harassment directed at a single employee can violate Title VII, casual or isolated manifestations of a discriminatory environment, such as a few ethnic or racial slurs, may not raise a cause of action. *Cariddi v. Kansas City Chiefs Football Club Inc.*, 568 F.2d 87, 88 (8th Cir. 1977); *Fekete v. U.S. Steel Corp.*, 353 F.Supp. 1177, 1186 (W.D.Pa.1973); *see Int'l Brhd. of Teamsters v. United States*, 431 U.S. 324, 336 n. 16, 97 S.Ct. 1843, 1854, 52 L.Ed.2d 396 (1977)." *Bundy v. Jackson* (D.C.Cir.1981), 641 F.2d 934, 943 n.9 (sexual harassment).

"After a painstaking review of the transcript, we conclude that as a matter of law the racial slurs, if any, used at Bunny Bread did not violate

Title VII. We find no steady barrage of opprobrious racial comment. The use, if any, of racial terms was infrequent, was limited to casual conversation among employees, and with possible rare exceptions was not directed toward appellants." *Johnson v. Bunny Bread Company* (9th Cir. 1981), 646 F.2d 1250, 1257 (failure of proof of constructive discharge).

Snell at 63, 643 P.2d at 845.

The circumstances of Backbone's employment were not identical to those of the claimant in *Snell*. Backbone worked for a much smaller employer, for a much shorter time. Backbone experienced genuine hostility from Aaron Aafedt--the claimant in *Snell* experienced a crude working environment with little personal hostility from coworkers. Still, the questions *Snell* addressed are the questions Backbone's claim presents.

What Backbone perceived as Aaron Aafedt's racial bias was actually Aaron Aafedt's intolerance of an inexperienced worker. The sarcastic reference to Backbone as "Gonzalez" (i.e., "Speedy," the cartoon mouse) was not racially inspired. Aaron Aafedt's comments about Backbone's work speed and comprehension of the tasks were unrelated to Backbone's heritage. Those comments may have been insensitive, unduly harsh and overbearing, but Aaron Aafedt did not subject Backbone to a steady barrage of opprobrious racial comment. He instead subjected Backbone to a withering stream of disapproval based on Backbone's job performance.

There is no evidence that Backbone was a poor worker. There is no evidence that Backbone was a slow worker. There is evidence that Backbone, because he was inexperienced, was neither as good nor as fast as an experienced concrete worker is. Aaron Aafedt professed a complete absence of any racial bias. He demonstrated a considerable bias against a worker who did not keep up with him.

Aafedt's "Star Trek" joke can be analyzed two ways. It can be taken as facially biased, as Backbone understood it. On the other hand, it can also be considered a comment upon the prejudices of producers of the television programs and movies bearing the name. If there are no Native Americans in the "Star Trek" programs, it may be because the people who produce the programs do not think that Native Americans will be a visible part of the future work force in some galaxy far, far away.² By this rationale, the teller of the joke is not a bigot, but rather is accusing the producers of the program of racial stereotyping.

Standing alone, the "Star Trek" joke does not rise above the "casual remarks" analysis of *Snell*. Backbone's testimony of additional racial jokes, slurs and slighting references is not credible. He read racial animus into every comment, raised eyebrow,

² It could also be that the producers of "Star Trek" did not consider Native Americans a large enough audience to merit casting someone who appeared Indian. The number of explanations for the purported fact upon which the joke turns--no Indians in the cast of "Star Trek"--are limited only by the ingenuity of the explainer.

snort or gesture from Aaron Aafedt. He considered Ron Aafedt's friendliness patronizing and demeaning. He has not supported those feelings with facts from which a reasonable person would conclude that either Aafedt was motivated by racial bias. On this record, the hearing examiner can only find that Backbone was too sensitive, and read far too much into comments and behavior not demonstrably stemming from any racial bias.

In virtually every contested issue of fact except the telling of the "Star Trek" joke, the witnesses have radically different recollections. There are conflicts about how the job interview took place, where and when comments were made, who was working with whom or lunching with whom--even how it was that Backbone did not work the next day. All three witnesses--Backbone, Aafedt and Aaron Aafedt--have personal interests in the outcome of the case. All three have emotional and financial stakes in the case.

One potential witness was apparently disinterested. Joe Manual had no visible stake in the outcome of this case. However, he was not in Montana at the time of the hearing. Neither party deposed him. Backbone sought to call Manual by telephone, but Aafedt objected. Lacking Manual's testimony (assuming it would have corroborated Backbone's account), Backbone was overly sensitive instead of being subjected to a barrage of racial jokes, slurs and epithets.

The Montana Human Rights Act (1997) permits telephone testimony, where the parties stipulate to it. §49-2-505(5) MCA. Here, with the opponent interposing an objection rather than a stipulation, it would be error for the hearing examiner to permit the telephone testimony, particularly when witness credibility was an essential part of the issue. *In re Marriage of Bonamarte*, 263 Mont. 170, 866 P.2d 1132 (1994).

V. Conclusions of Law

1. The Department has jurisdiction. §49-2-509(7) MCA.
2. Backbone did not prove discrimination by reason of race or national origin.

VI. Order

1. Judgment is found in favor of Aafedt and against Backbone, on the charge of discrimination in employment by reason of race or national origin.
2. The complaint is dismissed.

Dated: January 20, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry