

of Tamela Vezane, by stipulation of the parties. The parties submitted the case for decision on remand.

II. Issues

The issue on remand is whether the additional wage information now part of the record (a) changes the fact-finding regarding the amount of lost wages due to Vezane and (b) changes the hearing examiner's determination of Vezane's credibility, thereby requiring other fact-finding changes.

III. Findings of Fact

The hearing examiner now adopts and recites the facts as found after Commission appeal, with no changes.

1. Davis Pipe and Machinery was a sole proprietorship owned and operated by Dawson Glazier. Testimony of Vezane and Glazier.

2. Glazier hired Tamela Vezane in October of 1993, to work as a bookkeeper for the business. Glazier also employed his son, Jeff Glazier, Vezane's husband, Rick Vezane, and an experienced bookkeeper, Alvina Lyford. Uncontested facts, testimony of Vezane.

3. Glazier hired Vezane because Lyford needed some help with the book work of the business. Vezane started by helping Lyford, who had worked for Glazier for over 25 years. Lyford trained Vezane to take over the bookkeeping for the business. Lyford retired in 1993, after training Vezane. After her retirement, Lyford occasionally came into the office to assist Vezane. Testimony of Vezane and Lyford. Lyford never observed inappropriate comments or behavior between Vezane and Glazier. Testimony of Lyford.

4. Vezane liked her job, and liked her boss, Glazier. After Lyford's retirement, Glazier and Vezane were often alone together at the business. Vezane visited with Glazier about mundane personal matters, including occasional comments about her marriage and her husband, and explanatory comments about personal phone calls at work (involving legal problems for members of her family). Testimony of Vezane and Glazier. Glazier considered himself a friend and confidante of Vezane. Testimony of Glazier.

5. In the summer of 1995, Rick Vezane was absent from work and home for his annual National Guard training. Before he left, Vezane visited with him about her concerns that Glazier was making some sexual advances toward her. Rick Vezane wanted to confront Glazier, but they both agreed

that they could not afford to lose one of their two incomes. She and her husband decided, after discussing it for several days, that she would be able to handle the situation. They agreed she would tell him if she could not handle it. Testimony of Vezane and Rick Vezane.

6. During Rick Vezane's absence for training, in May or June of 1995, Glazier began more overt sexual innuendoes toward Vezane. Initially he made comments about how good her clothing (usually her jeans, sometimes her shirts) looked on her. He also began standing so close to her in the office that their bodies were in contact. He made this contact both when Vezane was standing and when she was sitting in her chair. Testimony of Vezane and Glazier.

7. Beginning in 1995, Vezane talked to a friend, Kathy Barlow, about Glazier's conduct. These conversations continued over the course of Vezane's employment, on an irregular basis. Barlow initially agreed with Vezane that she should continue to work, because the family needed the money. Testimony of Barlow.

8. Glazier only initiated the contact and made the comments when Vezane and Glazier were alone in the office. No one else observed any of the incidents. After Rick Vezane returned, the frequency of the contact and the comments decreased. However, when Rick Vezane and Jeff Glazier, the only other employees, were either in the shop or out in the field working (a fairly frequent occurrence), Glazier still occasionally engaged in the same behavior. Testimony of Vezane and Glazier.

9. Vezane did not actively and directly discourage Glazier's conduct, except with comments that her husband would violently object to Glazier's attentions toward her. She was concerned about losing her job, which she needed. During 1995, when the conduct began, it was not "too bad," although it made her uncomfortable. Because the conduct "slowed down" after her husband returned from training, Vezane tolerated it. She was afraid her husband would lose his temper and do something extreme if she told him. Testimony of Vezane.

10. Glazier interpreted the absence of active and direct discouragement as encouragement. He began overt flirtation with Vezane. He called her into his office at the business when the two of them were alone there, and pulled her onto his lap to "play computer games" on the office computer system. He went into the tiny coffee area when she was already there, to initiate additional body contact.

11. Although the frequency of Glazier's attentions varied, eventually both the frequency and the degree of the comments and contacts worsened. He grabbed Vezane around the waist, usually from behind. He became more aggressive about pushing up against her. By 1996, Glazier's increasingly aggressive overtures were making Vezane very nervous, and even afraid. He grabbed her and attempted to pull her into the coffee area or back room, which had no windows. When she became more evasive, staying in the front area of the office and moving away from him, he grew more insistent, and even angry. He told her on one occasion that he would rather stay and chase her around the office than go to lunch. In one incident, Glazier grabbed Vezane and held onto a belt loop on her jeans, so that when he pulled and she pulled away, the loop was torn from her jeans. Testimony of Vezane.

12. Rick Vezane entered the office soon after the belt loop incident, and found his wife shaky and unresponsive. She was holding her belt loop and looking for a pin to fasten it to her jeans. She did not explain what had happened. Testimony of Rick Vezane.

13. Vezane reported to Barlow that Glazier was becoming more aggressive. Vezane still wanted to continue working, and Barlow essentially offered a sympathetic ear--someone with whom Vezane could discuss what was happening, without fear of triggering an angry response. By September of 1996, Barlow had moved to Missoula to go to school, but the two women continued to talk together about the situation at Vezane's workplace. Testimony of Vezane and Barlow.

14. Vezane now believed she had no choice but to ask Glazier to stop. Reluctant to confront her employer, she continued to try to pull away from him when he initiated contact. She made such statements to him as, "No, Dawson, stop." Testimony of Vezane. He interpreted her comments and behavior as playful fear that her husband would find out. He interpreted her choice of clothing to wear to work (which he characterized as "revealing" and "low-cut") as indicative of her desire to continue what he perceived as flirtation. Glazier initiated these episodes when the two of them were alone at work. Testimony of Glazier.

15. Vezane's fear grew. By late 1996 or early 1997, she could tell that Glazier was now holding on to her harder and pulling harder to get her closer to him or further from public view. Glazier now acted as if he did not care if somebody walked in, taking away the only effective discouragement Vezane had found. In one instance, she had succeeded in deterring Glazier by saying, "Stop, Rick's coming back." Now, Glazier seemed almost unconcerned about discovery by others. He attempted to unbutton her blouses, or pull them out

of her pants. He also tried, and began to succeed, to get his hand inside her pants. Vezane thought about quitting her job, but she feared that if she did, her husband would lose his job, also. She also was afraid of her husband's temper, and what he might do if he found out the reason for her increased interest in quitting her job. Testimony of Vezane.

16. Glazier still considered Vezane's resistance to be playful--a kind of subtle encouragement. In one instance, when he was pulling out her blouse to slide his hand onto her back, she jumped away and said, "Rick'd kill us both." He, by his own admission, now was making sexual advances, still believing the advances were not unwelcome. Testimony of Glazier.

17. Rick Vezane noticed the change in his wife's emotional state. In late 1996 and early 1997, he saw a "drastic change in a bad way." He thought it was his own behavior, or problems with the family, or tight finances. Vezane was distant and jumpy. She fell asleep on the couch or the rocking chair, avoiding going to bed. She smoked heavily and suffered from nightmares, but was unwilling to talk with her husband about what was wrong. Testimony of Rick Vezane.

18. Barlow noticed that as Vezane's reports indicated Glazier was getting more aggressive, Vezane seemed more and more depressed. Vezane complained to her of nightmares and of a change in her marital relationship (from "real affectionate" to "jumpy"). Barlow changed her mind in 1997 and urged Vezane to quit her job. Testimony of Barlow.

19. On or about February 21, 1997 Vezane terminated her employment with Davis Pipe & Machinery. Uncontested Facts. She believed she had no choice. The situation kept getting worse, to the point where she was afraid to go into work if she would be alone with Glazier. She was afraid to talk to her husband. Their joint decision in 1995 that she could handle Glazier was not true now – she could not handle him. She finally told her husband. Together they decided it was time for her to quit. Testimony of Vezane.

20. After Vezane shared with her husband her problems at work with Glazier, Rick Vezane talked to Jeff Glazier. He told Jeff Glazier that Vezane was quitting, and told him why. Rick Vezane then himself quit.

21. Jeff Glazier did not believe what Rick Vezane told him. Rick said Jeff's father, Glazier, "almost raped my wife." Jeff had never seen any inappropriate behavior by his father toward Vezane. Jeff Glazier did consider Rick Vezane potentially violent, and did hear from Vezane's father about

reports of Rick Vezane's conduct, but had no first-hand knowledge of it, either. He did know that Vezane was not an assertive person, from the time he had spent in her presence. Testimony of Jeff Glazier.

22. At the time she quit, Vezane was earning \$5.50 per hour, for hours ranging from 20 to 40 per week. An average week would probably have been 32 hours, except that Vezane missed work to avoid Glazier. Testimony of Vezane. Vezane would have continued to work for Glazier but for the harassment, and would have earned \$176.00 per week (32 hours times \$5.50 per hour). This is \$9,177.17 per year (\$176.00 times 52.143 weeks per year), or an average of \$764.76 per month (\$9,177.17 divided by 12 months). Testimony of Vezane.

23. Through November 13, 1998, Vezane has lost 20.742 months' wages, or \$15,862.77 (\$9,177.17 plus 8.742 times \$764.76). She will lose an additional \$764.76 each month, until she finds comparable employment. Accrued prejudgment interest through November 13, 1998, is \$1,304.88, at 10% per annum simple.

24. The emotional impact upon Vezane of Glazier's continued course of conduct was considerable. She was upset and on edge. Glazier's conduct caused increased friction between Vezane and her husband--they separated for a time in the winter of 1997. The financial strain of Vezane and then her husband leaving their jobs increased the emotional stress. For a long time after quitting, Vezane could hardly bring herself to leave her home. She felt isolated, depressed and tired--she did not want to be around anyone. Vezane had previously experienced clinical depression. She had ("a long time ago") taken a prescription anti-depressant (Zoloft). She has not sought treatment for the depression brought on by the impact of Glazier's conduct, because she and her husband can neither afford a therapist nor medications. Testimony of Vezane.

25. Vezane has a pattern of difficulty asserting herself. She had previously complained of sexual harassment by an investigating Highway Patrolman in an accident she had witnessed. Recounting that incident during cross-examination, Vezane again consistently demonstrated her difficulty confronting an aggressive male, and her fear of angering an aggressive male. Testimony of Vezane.

26. Since quitting her job with Glazier, Vezane has called a couple of prospective employers for work. She also has looked through the local newspaper, and has been to Job Service and applied for unemployment insurance. She is still unemployed. Her ability to seek work has been

substantially diminished by her emotional distress. She has very limited qualifications to find a job as suited to her as the position at Davis Pipe & Machinery. She and her husband would still be working for Glazier but for the incidents involved in this case. Testimony of Vezane.

27. Vezane's relationship with her husband still shows the impact of the long-standing problems she experienced with Glazier. She remains depressed and nonresponsive. Testimony of Vezane and Rick Vezane. Not only does she still noticeably struggle with her own emotional aftermath, but she also must deal with her husband's. Rick Vezane also still deals with his own feelings of shame, stupidity and foolishness for his failure to recognize what was happening to his wife. His feelings, resulting from the harassment she endured, also affect her marital relationship. Her husband's feelings have an effect upon her capacity to recover.¹ Testimony of Rick Vezane.

28. Within three months before this hearing, Rick Vezane called the police because his wife was behaving and talking in a fashion that caused him to fear for her safety. She was very upset, holding some of her medications, and talking about "being no good to anyone" and "look at all the trouble" she had brought. He had never seen his wife in such a depressed and self-destructive state. Testimony of Rick Vezane.

29. Vezane's emotional distress entitles her to recover \$10,000.00, apart from recovery of lost wages and interest.

30. After filing her complaint against Glazier, Vezane called Pam Jones, a potential witness, to discuss with her an incident in the shop in 1996. Vezane recounted to Jones what she, Vezane, recalled, and asked Jones to provide a statement for the investigator. Vezane prepared and sent the statement, and Jones signed it under oath. Exhibit 204. Douglas Buck, present during the telephone conversation between Jones and Vezane, heard Vezane ask Jones to recount her own recollection and "put it in your own words."

IV. Opinion

The hearing examiner now adopts and incorporates by reference the entire opinion contained in the department's first final decision, which the

¹ Rick Vezane's emotional distress and lost wages are not part of Vezane's claim. Her emotional distress, according to the testimony of both Vezanes, has been deepened in part by the financial distress resultant from his also quitting, and in part by his negative emotions about the situation with Glazier at work.

Commission did not change when deciding the appeal. To that opinion, the hearing examiner adds the following discussion:

Decision on Remand

During the original hearing, Tamela Vezane testified that her working hours, during the last months of her employment, ranged from 20 to 40 hours a week. The hearing examiner found, from her testimony, that she would have averaged 32 hours of work a week but for her avoidance of work out of fear of being alone with Dawson Glazier.

Vezane gave her testimony without the benefit of Exhibit 206, which would have allowed her to refresh her recollection. At rehearing, with the exhibit in front of her, she declined to change her testimony. The exhibit, counsel for respondent argued, reflects actual average working hours of 29 hours a week. There is no appreciable discrepancy between the exhibit and the testimony of Vezane.

Counsel for respondent maintained that the prior argument of Vezane's counsel should be considered testimony of Vezane subject to impeachment. Vezane's counsel argued, in closing at the initial hearing, that the evidence supported a lost wages award based on 40 hours of work per week. The hearing examiner rejected the argument. Vezane's credibility as a witness is not subject to challenge based upon an unsuccessful good faith argument of counsel for a higher award.

Counsel for respondent also argued that impeachment of Vezane's credibility about her hours should also call into question her testimony about the harassment by Glazier. Since the evidence adduced at rehearing does nothing at all to shake the credibility of Vezane, the argument is inapplicable. Even if Vezane's testimony about her hours had conflicted with the exhibit, her ability at hearing to recall her hours worked would not be comparable to her ability to recall the scope and seriousness of unwelcome sexual advances made by her boss.

Because the hearing examiner finds nothing presented at the rehearing to have any impact upon the credibility of Vezane, the hearing examiner makes the same decision as that previously issued.

V. Conclusions of Law

The hearing examiner now adopts the previous conclusions of law as they existed after the Commission decision on appeal, with no changes.

1. The Department has jurisdiction. §§49-2-501, 49-2-505, 49-2-509(7) MCA.

2. Respondent Dawson Glazier engaged in an unlawful discriminatory practice in employment by sexually harassing Tamela Vezane for a period of years culminating in her constructive discharge from employment on February 21, 1997, by which time Glazier's pervasive pattern of sexual comment, innuendo and contact rendered working conditions so oppressive that resignation was Vezane's only reasonable alternative. §49-2-301(a) MCA.

3. Pursuant to §49-2-506(1)(b) MCA, Vezane is entitled to the sum, through November 13, 1998, of \$15,295.25 for lost wages, and \$4,588.56 for front pay beyond the date of satisfaction of judgment. Prejudgment interest through November 13, 1998, is \$1,304.88. Each month that the judgment is not satisfied, an additional \$764.76 shall be added to the amount owed. Vezane is also entitled to the sum of \$10,000.00 for emotional distress.

4. Affirmative relief is necessary in this case. §49-2-506(1)(a) MCA. Glazier must refrain from engaging in any further unlawful discriminatory practices. Within 60 days of the entry of this order, Glazier must obtain from the Human Rights Bureau designation of an approved training course designed to education Glazier both to his responsibilities as an employer and to the limits the law places upon his behavior as an employer in dealing with female employees. Within 60 days thereafter, Glazier must file written proof with the Human Rights Bureau that he has enrolled in and commenced or if possible completed the approved training course. Glazier must also comply with any additional conditions the Human Rights Bureau places upon his continued activity as an employer, or at once cease doing business in Montana as an employer.

5. For purposes of §49-2-505(4), MCA, the charging party is the prevailing party at the hearing of this matter.

VI. Judgment (Final Order)

The hearing examiner now issues the following judgment (final agency decision), which is the order previously issued by the Commission on appeal

(with the second paragraph modified to reflect the interest accrued from November 18, 1998, through the Commission's ultimate decision on this proposed order):

1. Judgment is found in favor of Tamela Vezane and against Dawson Glazier on the complaint of sexual harassment in employment.

2. Tamela Vezane is awarded a monetary judgment against Dawson Glazier of \$31,756.21 as of November 18, 1998. Each month after November 18, 1998, the judgment is not satisfied, an additional \$764.76 shall be added to the amount owed.

3. Dawson Glazier is enjoined from engaging in any further unlawful discriminatory practices, and must further comply with the provisions of paragraph 4, Conclusions of Law, herein.

Dated: June 14, 2000.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry