

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

JAN HODGES,)	CASE NO. 9909008607
CHARGING PARTY,)	
)	ORDER SUSTAINING APPEAL
vs.)	OF FINAL AGENCY DECISION
)	ON REMAND AND REMANDING
SCHELLINGER CONSTRUCTION,))		FOR MONETARY AND
RESPONDENT.)	AFFIRMATIVE RELIEF

The above-captioned matter came before the Montana Human Rights Commission (Commission) on January 17, 2001, for consideration of the Final Agency Decision on Remand dated October 16, 2000. Appearing before the Commission on January 17, 2001, were Michael Viscomi for the charging party Jan Hodges (Hodges) and Alice Hinshaw for the respondent Schellinger Constr. Co., Inc.(Schellinger).

A contested case hearing in this matter took place on June 14,16,24, and 25, 1999, in Kalispell, Montana. The Hearing Examiner issued the department's final decision on November 29, 1999, dismissing charging party's complaint. In his decision, the Hearing Examiner found that Hodges proved the first three elements of the first tier of the three-tier standard of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), because she was a member of a protected class (female), she applied for and was qualified for a job opening with the company, and she was rejected in spite of her qualifications. The Hearing Examiner concluded, however, that she did not prove the fourth element in the first tier because the positions for which she applied were filled by applicants with superior qualifications. The Hearing Examiner did not proceed to the second and third tier of the test. Hodges appealed and the matter was heard by the Commission on May 15, 2000. The Commission disagreed with the Hearing Examiner's legal conclusions and found that charging party had satisfied the fourth element of the *McDonnell Douglas* test because individuals no more qualified than charging party were offered the positions for which she had applied. Finding that Hodges had established a prima facie case under the first tier of the test, the Commission remanded the case to the Department for the Hearing Examiner to apply the second and third tiers of the *McDonnell Douglas* test.

The department issued its Final Agency Decision on Remand on October 16, 2000. The Hearing Examiner dismissed the case again, concluding that even if Hodges had stated a prima facie case, she failed to meet her burden of proving that Schellinger's articulated reasons for hiring other applicants instead of Hodges were a pretext for unlawful discrimination against her. The Hearing Examiner concluded that Schellinger's willingness to hire gradesetters it had previously fired, showed that Schellinger "consistently exercised its preference for experience." *Final Agency Decision on Remand, Page 13*. The Hearing Examiner found this "employment choice" was genuine and non-discriminatory. *Id.* Charging party filed her notice of appeal on October 30, 2000, asserting that the Hearing Examiner's conclusions of law were erroneous.

After consideration of the record and the arguments of the parties, the Commission determines that the Hearing Examiner erred as a matter of law in concluding that charging party failed to satisfy the third tier of the *McDonnell Douglas* test because she did not meet her burden of proving that respondent's proffered reason for not hiring her was a pretext for discrimination. The Hearing Examiner found that respondent choosing to hire "experienced workers in essentially all instances," *Final Agency Decision on Remand, Page 13*, was a legitimate business reason. The Commission disagrees. The Hearing Examiner's acceptance of the term "experienced" for the *McDonnell Douglas* test's term "qualified" is misplaced. The fourth element of the first tier of the *McDonnell Douglas* test states, "After rejection, the position either remained open with the employer seeking applicants from persons of complainant's qualifications or the position was filled with a person of complainant's qualifications." *McDonnell Douglas, supra, at 802; Crockett v. City of Billings, 234 Mont. 87,93(1988)*. In his Findings of Fact, Paragraphs 13 and 21, the Hearing Examiner found that Hodges was qualified for the positions for which she applied. In Findings of Fact, Paragraph 24, the Hearing Examiner stated that respondent's son was hired over Hodges although he had "less experience than Hodges." *Final Agency Decision on Remand, Page 7*. The record shows that individuals with experience may have been hired over Hodges, but in at least two instances, respondent hired individuals with extremely poor work histories and experience who were not more qualified than Hodges. Accordingly, the Commission finds that Hodges has satisfied the third tier of the *McDonnell Douglas* test. She has succeeded in persuading the Commission that a discriminatory reason more likely motivated respondent by "showing that the employer's proffered explanation is unworthy of credence." *Crockett, supra, at 95*.

IT IS HEREBY ORDERED, that the charging party's appeal is sustained and the matter is remanded to the Department for a determination of monetary and affirmative relief.

Dated this __ day of «month», «year».

Gloria "Patt" Etchart, Chair, Montana Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the foregoing **«document name»** was served on the following persons by U. S. Mail, postage prepaid on the day of «month», «year».

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