

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

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Travis Campbell,)	HRC Case No. 0011009539
Charging Party,)	
vs.)	<i>Final Agency Decision</i>
Garden City Plumbing and Heating, Inc.)	
Respondent.)	
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I. Procedure and Preliminary Matters

Travis Campbell filed a complaint with the Department of Labor and Industry on January 10, 2001. He alleged that the respondent, Garden City Plumbing and Heating, Inc., discriminated against him on the basis of sex (male) when it subjected him to a sexually hostile and offensive work environment beginning in 1999 and continuing until he quit on October 31, 2000. On September 11, 2001, the department gave notice of contested case hearing and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on January 3 and 4, 2002, in Missoula, Montana. Travis Campbell attended with counsel, Robert Terrazas (P.C.) and Bryce R. Floch, Terrazas Law Offices. The corporation attended through its designated representative, Dale Rausch, with counsel, Joe Seifert, Keller Reynolds Drake Johnson & Gillespie (P.C.). The hearing transcript reflects the witnesses who testified and the exhibits the parties offered. The parties filed their last post-hearing brief on March 15, 2002. The hearing examiner's file docket accompanies this decision.

II. Issues

The issue in this case is whether the conduct of his co-workers and supervisor toward Travis Campbell constituted sexual harassment. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Garden City Plumbing and Heating, Inc., is a plumbing and heating contractor with offices in Missoula. The corporation is wholly owned by Bill Schaff, who started the business 16 years ago. Garden City employs 50-60 employees.

2. Travis Campbell obtained a job with Garden City in February 1999. Campbell was not a high school graduate, but had obtained a GED.

His brother worked for Garden City, and had helped him obtain the initial employment as a parts runner. While he worked as a parts runner, various Garden City employees (including plumbers) addressed Campbell with vulgar, profane comments. This mode of address was fairly common between Garden City field employees, and Campbell was not a more frequent target than others.

3. As a parts runner, Campbell worked in the company shop, located at 4025 Flynn Lane in Missoula. That building also contained Garden City's administrative offices. The offices of Bill Schaff, project manager Dale Rausch, and the company's human resources manager, Marcie Kessler, were all approximately 50 feet from the shop in the same building. The shop and administrative offices were separated by the time card room where employees (including Campbell) clocked in and clocked out. The corporation posted legal notices, including posters referring employees to the Human Rights Bureau for workplace discrimination, in the time card room.

4. Schaff delegated most personnel matters to Rausch. Rausch saw or spoke with Campbell on a nearly daily basis while Campbell worked in the shop. Rausch also was responsible for determining and taking disciplinary actions for inappropriate behavior by Garden City employees.

5. In July of 2000, Campbell moved up from parts runner and began working as a laborer with the plumbing crew, with plans of becoming a plumbing apprentice. His first plumbing crew assignment was at the Missoula Community Hospital work site. Dan Shriver primarily supervised Campbell at the work site, and Chris Mann, another crew member and sometimes a supervisor, occasionally supervised Campbell. Campbell had interacted several times with both men before he joined the plumbing crew.

6. While he worked with the entire plumbing crew on two large jobs, the C'Mon Inn, a motel construction project, and the large contract at Community Hospital, Campbell experienced a barrage of offensive comments from many of his coworkers.¹ Coworkers, including Campbell's job site supervisors, threatened to "butt fuck" him if he did not hurry in completing a task, invited him to give them a "blow job," made comments to others (in Campbell's presence) implying they had sex with Campbell and generally communicated with profane, sex-themed language. The images they used were often (but not always) violent.

¹ Sometimes Campbell assisted a plumber on a smaller job and did not experience the same degree of vulgar comments as on the larger jobs.

7. Campbell was not the only object of these comments. Coarse, vulgar, sexually-themed language was prevalent among all of the members of the plumbing crew at the C'Mon Inn and Community Hospital job sites. As the newest member of the crew, Campbell was a major target of such comments. Keith Merseal and Mann were primary authors of such comments to Campbell.

8. None of his coworkers ever had or objectively evidenced any actual interest in sexual contact with Campbell. However, Campbell was intimidated by the ceaseless stream of gratuitous sexual comments. Although the comments were presented as jokes, the number of them and the degree of vulgarity and violence embodied within them began to wear on him. He began to fear that some of his coworkers, all of whom were considerably larger and stronger than he was, might actually mean some of the comments. He recognized that his fear was unrealistic, but could not shake it off.

9. During Campbell's employment, Garden City had neither a written sexual harassment or discrimination policy nor any written procedure for receiving and investigating sexual discrimination or harassment complaints. The only grievance procedure known to employees, including Campbell, was an informal one of reporting problems to the immediate job site supervisor. New employees, including Campbell, did not receive a written description of the informal procedure at orientation, because the informal procedure was not in writing.

10. One day on the Community Hospital job site, Schaff was present when Campbell was digging a trench. Mann stood by the trench and commented that Campbell was at "the perfect height" (to perform oral sex on Mann). Both Mann and Schaff laughed. After Mann left, Schaff told Campbell that he, Schaff, had been digging ditches at Campbell's age, and that with time and hard work Campbell could end up where Schaff was.

11. By October 2000, Campbell was depressed as well as frightened.² He had discussed the sexual comments and his dislike of them with his wife. They had decided that the best thing for him to do was to ignore the comments and to keep on working. Campbell had tried to do so. He carefully avoided showing his coworkers that the comments bothered him. He sometimes joined in the banter, and other times cursed a coworker who directed particularly obnoxious comments toward him. By this time,

² Campbell and his wife were having marital and financial difficulties, for reasons unrelated to the workplace harassment.

sexually derogatory comments toward Campbell (suggesting he was the willing object of oral and anal intercourse by other crew members) had become part of the standard workplace humor for the plumbing crew at the large job sites.

12. Campbell tried the only methods he knew to deflect or end the stream of sexual comments. He initiated sexually explicit conversations with the crew members who made the comments, although another employee had warned him not to. Tales of his sexual prowess and marital promiscuity did not stem the tide of suggestive and abusive comments.³

13. On October 5, 2000, growing desperate, Campbell approached Shriver, the crew's main supervisor, during a work break.⁴ He asked if Shriver thought a man could turn in another man for sexual harassment. Shriver responded that he thought so, but the complainer probably would not live to testify. Shriver did not follow up on the conversation, which he had dismissed as a joke. While he remained an employee, Campbell never again suggested to anyone at Garden City that he was being harassed.

14. Campbell did not follow up with Shriver, or his other supervisor, Mann, who was a major perpetrator of the sexual harassment. Campbell could not bear to discuss details of the harassment with other crew members, his supervisors, Schaff or Rausch. He was too humiliated. His self-esteem, never very high, had plummeted. He grew more fearful that his coworkers might force him to engage in sexual intercourse with them. His anxiety about his coworkers became obsessive. He feared that something about his appearance or behavior made him the object of sexual attraction for his coworkers.⁵ He began to call in sick on days when he was not.

15. At the end of October 2000, Campbell lied to Rausch in a meeting at the Garden City offices, telling Rausch that his grandmother in Butte was very ill and that he needed to spend some time in Butte to assist her. Campbell asked Rausch to lay him off, so that he could collect unemployment insurance benefits. Rausch refused. Campbell did not return to work after the end of October.

³ Campbell also testified to physical contact ("sexual assault") incidental to the harassment, but his testimony, inconsistent with his reports to the Human Rights Bureau investigator, was not credible regarding the physical contact.

⁴ Shriver occasionally gave Campbell rides to work, so Campbell could have approached him away from the job site.

⁵ Campbell was 5' 3" tall and weighed 120 pounds. Sometimes he wore ear rings, two in one ear, one in the other, and a red glass beaded necklace that his son made for him. He had a relatively soft speaking voice.

16. On November 8, 2000, Campbell called Rausch and recorded the telephone conversation without Rausch's permission. In this conversation, Campbell first told Rausch that he "took off from work" "because of the harassment." Rausch told Campbell that there were other assignments than the plumbing crew. Campbell declined any reassignment, saying that he would still have to face the crew members and that Shriver had responded to his complaint by threatening him. Rausch invited Campbell to come in and continue the conversation, telling him that he, Campbell, had been doing good work. Campbell's next contact with Garden City was the filing of his complaint.

17. A week after his conversation with Rausch, Campbell's attorney referred him to Dr. William Stratford, a Missoula, Montana, psychiatrist. Dr. Stratford diagnosed Campbell as suffering from anxiety and depression and prescribed immediate medication. Although he has not continued with regular treatment with Dr. Stratford (because of the cost), Campbell reported that his depression, anxiety and gastrointestinal upset have continued since he left Garden City, with little diminution. Dr. Stratford, based on three visits with Campbell, agreed that this appeared to be true.

18. Garden City did not undertake any meaningful investigation after Campbell's contact with Rausch. Schaff told Rausch to deal with it.⁶ Rausch directed the plumbing crew to stop using profane, sex-themed language with each other at work. He scolded Mann and Shriver. No meaningful disciplinary action was taken, although Mann understood that another such complaint about his conduct could jeopardize his job.

19. After Campbell filed his complaint, Garden City adopted a written policy regarding sex discrimination and harassment, properly posting it for employees.

IV. Opinion

Montana law prohibits employment discrimination based upon sex. §49-2-303(1)(a) MCA. An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination based upon sex when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work

⁶ After Campbell quit work, other employees and former employees of Garden City reportedly made supportive comments about Campbell, so Schaff had three reasons to address the allegations—the loss of a good employee, a claim of discrimination by the former employee, and rumors that abusive treatment of newer and less senior employees prevalent and might continue.

environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), *affirmed sub nom. Vanio v. Brookshire*, 852 P.2d 596 (Mont. 1993); *see also Houghton v. Medtrans*, HR Case No. 9901008749, “Final Agency Decision,” pp. 7-8 (May 3, 2000).

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 follow 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).

This case involves alleged same sex harassment in the workplace. The United States Supreme Court decided that same sex harassment in the workplace was actionable under Title VII of the Federal Civil Rights Act. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998). The decision carefully limited such claims, excluding claims based upon harassment done with sexual content or overtones, but not committed because of the victim’s gender. *Oncale* distinguished between discrimination because of sex and verbal or physical harassment in the workplace that was not motivated by gender even though the words used had sexual content and connotations. A plaintiff could prove gender motivation by establishing actual sexual advances toward the victim (one method being proof that the harasser was sexually attracted to persons of the same sex) or hostility toward the victim’s gender. Hostility toward the victim that was not based on gender was not within the scope of the Title VII prohibition.

The Montana Human Rights Commission had applied the same analysis under the Human Rights Act two years earlier. *Zimmerman v. Neer*, HRC 9301005625 (1996). In that case, the Commission ultimately held, as a matter of law, that the Human Rights Act prohibited gender-based harassment in the workplace, including harassment by a worker of the same sex as the complainant, however (as *Oncale* would later hold) unless the evidence established the harasser’s motive was gender-based, sex-themed content would not suffice in a same sex harassment case to establish illicit motive. The Commission found in *Zimmerman* that the employer timely and properly responded to the complaints of harassment and commented that the harasser, on the evidence, was neither making sexual advances toward the victim nor acting upon a particular hostility toward males, thus

suggesting that even without timely employer action, the charging party had failed to prove sexual harassment.⁷

Campbell failed to prove that his harassers either were hostile toward men generally or acting out their sexual desires toward him. Although he credibly testified to the conduct of coworkers, he did not establish an illicit motive. Under *Zimmerman*, an employer who sexually harasses both men and women could be liable for both, if in both instances the conduct is motivated by sexual attraction, sexual hostility or both. *Zimmerman* may also provide a rationale for actionable sexual harassment motivated by the target's atypical behavior or appearance, such as a man's "feminine" appearance or behavior or a woman's "masculine" appearance or behavior. That issue is not presented here, because Campbell failed to prove such a motivation. His speculation that his physical characteristics or behavior made him a target did not prove such a motive.

It seems odd that more proof is required of the charging party in a same sex harassment case than in the more typical opposite sex harassment case, where sex-themed comments are presumptively sexual in nature. Both *Oncale* and *Zimmerman* were also decisions in favor of charging parties, so it seems odd that they develop a doctrine that precludes recovery here. However, in *Oncale* the Supreme Court held that same sex harassment was illegal under Title VII when the harassment was motivated by the gender of the target (reversing a summary judgment that same sex harassment was never illegal under Title VII). *Oncale* on its face was a ruling in favor of the kind of claim Campbell asserted here, but *Oncale* only remanded the case to permit the claimant to put on proof of his claim, articulating the requisite causal connection that he had to satisfy. It was the same causal connection that the Commission required in *Zimmerman*, where the charging party did prevail, but on his retaliation claim rather than his sexual harassment claim.

Many of the classic cases of same sex harassment, where the issues of actual sexual attraction or hostility arise, occur in predominantly or exclusively male work environments requiring heavy manual labor. Thus, it seems that the law is developing a special heightened proof requirement applicable largely to such blue collar milieus, a curious anomaly. Nonetheless, illegal discrimination only exists if the motive for the harassment is the victim's membership in a protected class. The existing

⁷ *Zimmerman* presented a stronger case than Campbell did. In *Zimmerman*, the evidence supported a finding that the harasser was at least a latent homosexual even though he did not have a sexual motive for the harassment. Campbell failed to present any credible evidence that his harassers were sexually attracted to other males.

precedent provides the requisite standard of proof to establish that such protected class membership triggered the same sex harassment, and Campbell failed to meet the standard. Absent adequate proof that the harassment was motivated by either sexual attraction or hostility toward men as males, the wretched treatment Campbell endured does not constitute illegal discrimination in employment because of sex.

V. Conclusions of Law

1. The Department has jurisdiction over Campbell's complaint of discrimination. §49-2-509(7) MCA.

2. Garden City Plumbing and Heating, Inc., did not illegally discriminate against Travis Campbell on the basis of sex (male) by subjecting him to a sexually hostile and offensive work environment during his employment there in 1999 and 2000. §49-2-303(1)(a) MCA.

VI. Order

1. The department grants judgment in favor of Garden City Plumbing and Heating, Inc., and against Travis Campbell on the charge of illegal discrimination against Campbell on the basis of sex (male) by subjecting him to a sexually hostile and offensive work environment during his employment in 1999 and 2000, in violation of the Montana Human Rights Act.

2. The department dismisses the complaint.

Dated: May 29, 2002

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry