

III. Findings of Fact

1. The respondent Great Falls Pre-Release Services, Inc., is a Montana corporation. Its principal place of business is Great Falls, Montana. The corporation owns and operates a pre-release center in Great Falls, housing prisoners who are accorded a degree of independence and freedom under the corporation's supervision during the time before those prisoners are released from residential custody. At all pertinent times, the Facility Administrator for the corporation was Paul Cory.

The Origin of the Women's Wing and the Staffing Practices for the Mid Shift

2. Originally, the corporation housed exclusively male prisoners in the pre-release center. In 1995, the Montana Department of Corrections, or "MDOC," began negotiations with the corporation for housing female prisoners in a separate wing of the pre-release center.¹ The corporation welcomed the business opportunity, and began evaluating how it could provide this contractual service.

3. Sheryl L. Hoffarth, Unit Manager for MDOC, participated in the negotiations with the corporation. Hoffarth was MDOC's liaison with the corporation because of her extensive experience and training in providing rehabilitation services addressing the unique needs of women in the correctional system.

4. Hoffarth had served as Director of the Women's Life Skills Center, a pre-release center in Billings, Montana from 1978 through 1993. She had also attended numerous seminars and conferences regarding provision of rehabilitative services tailored to the unique needs of female prisoners. From December 1993 through December 2001, Hoffarth was the contact person for the MDOC regarding problems in the State's four women's pre-release centers. She investigated alleged violations of policies and procedures at such facilities, including allegations of improper contact between pre-release center personnel and prisoners.

5. In summer and fall of 1996, Hoffarth and other MDOC personnel repeatedly visited the corporation and had in-person meetings and telephone conferences with Cory and other corporation personnel to discuss the differences between housing male and female prisoners, the necessity to tailor

¹ During the mid-1990's the MDOC experienced growth in the population of female prisoners in the correctional system which resulted in an increased need for rehabilitation facilities and services, including pre-release centers for women.

services to the needs of female prisoners, and the challenges and risks associated with providing rehabilitation services to female prisoners.

6. The corporation sent staff to visit women's pre-release centers in Butte and Billings and learned that those facilities restricted night shift, or "mid shift," positions exclusively to female employees.

7. Hoffarth warned the corporation that a women's pre-release center is an emotionally charged environment presenting risks for abuse of power different from pre-release centers for men. While many male and female prisoners have similar problems that led to their incarceration, *e.g.*, alcohol or substance abuse, many female prisoners have prior histories of physical, emotional, and sexual abuse at the hands of male family members, spouses and romantic partners. These women are vulnerable to future abuse and are at high risk of forming destructive relationships. Many female prisoners have histories of sex-related offenses such as prostitution. Female prisoners, like male prisoners, have a history of making bad life decisions. Female prisoners also often tend to attach to males, and frequently use their femininity or sexuality to manipulate men in positions of authority.

8. Hoffarth cautioned the corporation that romantic and sexual encounters between male personnel and female prisoners occurred with alarming frequency, related examples of such improprieties, and described such liaisons as the most perverted use of authority imaginable, resulting in potential criminal and civil liabilities.

9. Hoffarth particularly warned the corporation that sexual encounters between male staff and female prisoners contaminated the rehabilitation process and undermined the purpose of a pre-release center. Hoffarth told the corporation that training was not effective in alleviating the problems and risks of such sexual encounters.

10. Hoffarth also discussed privacy concerns of female prisoners that could be infringed during the monitoring of the prisoners the MDOC required.

11. Hoffarth and Cory discussed staffing the women's wing mid shift, (10:00 p.m. to 6:00 a.m.) at the corporation's pre-release center with two resident advisors (RAs). This meant that there would regularly be times when only one RA would be present in the women's wing at night. Female as well as male prisoners worked outside the facility, as part of their rehabilitation while in pre-release status. RAs on the mid shift in the women's wing would transport working female prisoners to and from their employment an average of 4 times per night. As a result, only one RA would remain in the women's wing for one to one and a half hours per night. Hoffarth cautioned against

having male RAs transport female prisoners because the time alone could lead to improper relationships.

12. RAs on the mid shift in the women's wing would regularly perform accountability checks an average of three times per night on female prisoners working mid shift jobs. The accountability checks involved going to the work locations to confirm the prisoners were actually at their employment. This duty would also remove one RA from the facility for one to one and a half hours per night.

13. Female prisoners in pre-release centers were allowed to move freely within the facility between their rooms, common areas and throughout the facility. This would present numerous opportunities for unsupervised contact between female prisoners and staff. The number of opportunities for such unsupervised contact would increase during the mid shift.

14. RAs on the mid shift in the women's wing would also enter female prisoners' rooms four to six times per night to verify that the prisoners were in the facility. This duty could involve encounters with female prisoners in various stages of dress or undress.

15. RAs on the mid shift in the women's wing would also perform at least three random body searches of female prisoners each mid shift to maintain security within the facility. They would often do more than the minimum three body searches. Such searches would require physical contact with and touching of intimate body parts. MDOC required that such searches be performed by female staff.

16. RAs on the mid shift in the women's wing would also collect a minimum of two to three urinalysis samples each shift, actually observing collection of the samples to insure validity. MDOC required that urinalysis sample collections be performed by female staff.

17. Based on her extensive experience and training, Hoffarth recommended that the corporation employ positive male role models in the women's wing, however, she specifically advised against employing males on the mid shift. The lack of management supervision of staff working the mid shift, as well as the other factors noted in previous findings, resulted in too great a risk of improper contact between male staff and female residents, which could jeopardize the safety and security of residents and RAs and undermine the rehabilitative mission of the corporation. Hoffarth warned the corporation it would be foolhardy to staff the women's wing mid shift with male RAs.

18. The women's wing of the corporation opened in October 1996 with 28 beds and a contract to provide services for 20 female residents. At the times involved in the charge in this case, the corporation had a 40-bed capacity and on average housed 30-34 female residents.

19. The corporation's Program Committee recommended that the women's wing mid shift be entirely staffed with women. The Board of Directors decided to follow that recommendation, although it never adopted a formal, written hiring policy stating the restriction. For seven and a half years between the opening of the women's wing and the events involved in the complaint in this case, Cory followed Hoffarth's recommendations regarding staffing the women's wing with positive male role models while restricting regular, full-time positions on the mid shift to female RAs.

20. Since opening, the corporation staffed the mid shift in the women's wing with one part time and two full time female RAs, so that there were two female RAs per shift during the seven weekly mid shifts. The corporation assigned male RAs occasionally to fill in on the mid shift of the women's wing on a temporary basis due to staffing shortages, as necessary.

Anderson's Employment and His Requests to Work Women's Wing Mid Shift

21. The corporation hired the charging party Tom Anderson as an RA for the pre-release center on December 26, 2002. His initial position was as a part time RA working 24 hours per week in the men's wing.

22. Anderson was attending school at the College of Technology when he started work for the corporation. He was not seeking full time employment because he did not want to work full time and attend school full time.

23. In February of 2003, the corporation asked Anderson to change his hours to accommodate a co-worker, Tana Sprenkel, whose husband was going to Iraq on a military assignment. Anderson agreed to the change, which increased his hours to 32 per week. One or two of the weekly shifts for his new position were on mid shift in the women's wing.

24. Anderson withdrew from school at the beginning of March 2003, and began to seek full time work with the corporation. Anderson spoke to Anthony Gribble, the corporation's RA supervisor, about an open full time position in the men's wing, on the swing shift. Gribble told Anderson that he did not have enough experience to work the swing shift, which was the busiest shift. Anderson was disappointed, but understood that he lacked experience.

25. The corporation published its position openings internally by posting Interoffice Memoranda from Gribble. For example, Exhibit 1 is an interoffice memo from Gribble, dated May 2, 2003, advertising an open shift leader position on the mid shift in the women's wing. It did not indicate the opening was only available to females.

26. In early May, Anderson spoke with Gribble about another full time swing shift position in the men's wing. Gribble again told him that the swing shift was the busiest shift. Gribble also said that this opening was for a shift leader position and that Anderson did not have the experience or seniority to get the position.

27. On or about June 6, 2003, Anderson asked Gribble about an open full time RA position on the mid shift in the women's wing. Anderson knew the mid shift was less demanding and was already familiar with the shift, having worked it for several months. Exhibit 3 is the Interoffice Memorandum advertising the position denied to Anderson. It did not indicate that males need not apply.

28. Gribble told Anderson that the corporation wanted to hire a female for that position rather than a male because of sexual misconduct concerns. Anderson remarked that sounded discriminatory to him. Gribble asked Anderson if he was going to go over his head.

29. Anderson raised the subject with Cory, who said Anderson wouldn't get the position because of possible sexual misconduct concerns of placing a male on the mid shift in the women's wing.

30. The corporation hired a woman ("Adrienne") for the mid shift women's wing position. She worked from May 14 through May 21, 2003, then transferred to a different position. After May 21, 2003, the corporation tried to hire Beverly Adams for that position. Adams was unable to obtain the necessary references for the job. Gribble knew by June 10, 2003, that the corporation could not hire Adams for the position.

31. In June 2003, Anderson submitted a letter to Gribble, indicating his continuing interest in the open full time mid shift RA position in the women's wing and asking for a response from Gribble.

32. On June 17, 2003, Anderson received a written response from Gribble, indicating it was a management decision that they would not place a man in a mid shift job in the women's wing and that the corporation intended to fill the position with a female. This was the first time the corporation put its policy regarding staffing the women's wing mid shift in writing.

33. On July 21, 2003, after Tana Sprenkel's husband returned from Iraq, Sprenkel returned to her shift and Anderson was transferred back to his original 24-hour per week shift. Anderson knew that this would occur.

34. In September of 2003, the corporation hired a woman for the mid shift women's wing position Anderson sought.

35. On September 30, 2003, the corporation hired Anderson for a different full time position and he continues to work in that full time position.

Staffing and Duties Pertinent to Exclusivity of Women's Wing Mid Shift Positions

36. Anderson worked the mid shift in the women's wing at least once per week from February 25, 2003 through July 14, 2003. Anderson never had a female prisoner accuse him of sexual misconduct and there were no problems between Anderson and the female prisoners. Other men have also occasionally worked that shift.

37. While he worked the mid shift in the women's wing, Anderson did not perform collection of urine samples. Either the female RA assigned to that shift or a female RA from the men's side collected urine samples.

38. While he worked the mid shift in the women's wing, Anderson did not perform pat-down searches. Either the female RA assigned to that shift or a female RA from the men's side did pat-down searches.

39. While he worked the mid shift in the women's wing, Anderson did not perform bed checks. The female RA assigned to that shift did bed checks.

40. While he worked the mid shift in the women's wing, Anderson did more transports than the female RA assigned to the shift.

41. The sharing of duties by all RAs on staff was supported and encouraged by the corporation.

42. Since Anderson started working for the corporation, there was always a female RA (Lisa Meyers) working the mid shift in the men's wing. Overall, female RAs comprised about half of the corporation's RA staff.

43. The corporation hired male RAs to work as permanent staff on the other two shifts in the women's wing. Female RAs work all shifts in the men's wing. Approximately half the RAs at the pre-release center are women.

44. Of the 25 RA positions at the corporation's pre-release center in Great Falls, 21 jobs involved 32 or more work hours per week. The other 4

jobs involve 24 work hours per week. One of the full time positions was held by Cale Augustine, the security RA, who had responsibilities beyond those of the regular RAs. There were only 20 RA positions of 32 hours or more available to Anderson. Of those 20 positions, the corporation denied Anderson any opportunity to work three of the 20 positions because he was a man.

45. The corporation decided to hire women to work as the mid shift RAs in the women's wing because the demands of that job made hiring women reasonably necessary.

IV. Opinion²

Montana law prohibits employment discrimination based upon sex, when the reasonable demands of the position do not require a sex distinction. Mont. Code Ann. § 49-2-303(1)(a). The standard of proof under Montana law for establishing this BFOQ defense is proof that "hiring of a [person of a particular sex] is reasonably necessary because of the demands of [the job], not that the essence of the entire business [otherwise] would be undermined." *Stone v. Belgrade School District No. 44* (1984), 217 Mont. 309, 317, 703 P.2d 136. This exception to the prohibition against employment discrimination because of sex is strictly construed. Mont. Code Ann. § 49-2-303(2).

The corporation met the heavy burden of proving the reasonable demands of the job required both full time mid shift RAs in the women's wing be women. *Stone* at 316; *citing Percy v. Allen* (Maine 1982); 449 A.2d 337, *Laugesen v. Anaconda Co.* (6th Cir. 1975), 510 F.2d 307, 313; *Roberts v. Union Co.* (6th Cir. 1973), 487 F.2d 387, 389; *Fesel v. Masonic Home of Delaware, Inc.* (D.C. Del. 1978); 447 F.Supp. 1346, 1350, *aff.* (3rd Cir. 1979), 591 F.2d 1334.

Out of necessity, the corporation sometimes only assigned one female RA to the mid shift in the women's wing, for lack of another female RA during that particular shift. Privacy concerns for the inmates as well as security issues for the facility (including the risks of alleged and actual sexual misconduct) militated against such a practice, and the corporation tried not to assign men, including Anderson, to any women's wing mid shifts. Fortunately for all concerned, no problems resulted from Anderson's occasional mid shifts. However, the fact that the corporation avoided any problems when forced to assign a man to one or two mid shifts a week in the women's wing did not disprove the reasonable business necessity of only assigning female RAs to that shift whenever possible. The substantial and credible evidence of record

² Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

established that reasonable business necessity. The occasional inability of the corporation to hire a woman for that position explained why the corporation did not advertise the position for women only.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over the complaint. Mont. Code Ann. § 49-2-509(7).

2. Great Falls Pre-Release Services, Inc., did not discriminate illegally against Tom Anderson because of sex (male) when it rejected him for a full time resident advisor position on the mid shift in the women's wing of the corporation's pre-release facility, because assigning only women (when at all possible) to work that shift in that wing was a reasonable business necessity. Mont. Code Ann. § 49-2-303(1)(a).

VI. Order

1. Judgment is found in favor of Great Falls Pre-Release Services, Inc., and against Tom Anderson on the charge that the corporation illegally discriminated against him because of sex.

2. The complaint is dismissed.

Dated: November 3, 2004.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

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