

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011400:

JILL LOVELESS,)	Case No. 506-2006
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
ONE STOP WIRELESS,)	
)	
Respondent.)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Jill Loveless filed a complaint with the Department of Labor and Industry on January 20, 2005. She alleged that One Stop Wireless, a Montana corporation, discriminated against her because of sex by subjecting her to a sexually hostile and offensive work environment from April 27, 2004 through her discharge from her position as a sales representative on December 9, 2004. On September 15, 2005, the department gave notice Loveless' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The parties jointly agreed that the department could extend administrative contested case proceedings beyond twelve months after complaint filing. Thereafter, the parties reached a tentative settlement of this case, but One Stop's principals were unable to obtain financing for the settlement. One Stop's lawyers then moved to withdraw because the settlement was not being effectuated. One Stop consented to the withdrawal, but its principals were unable to find another lawyer to represent it.

An in-person contested case hearing proceeded on October 26, 2006. Loveless attended with her lawyer, Dustin L. Gahagan, Gahagan Law Office, PLLC. One Stop, being a corporation, could only appear and participate in the hearing through counsel admitted to practice in Montana. *ASI v. Frontier West, Inc.* (1992), 252 Mont. 142, 827 P.2d 1242; *Cont. Realty, Inc. v. Gerry* (1991), 251 Mont. 150, 822 P.2d 1083; *Weaver v. Graybill* (1990), 246 Mont. 175, 803 P.2d 1089. The principals of One Stop, Greg McFadden and Cammy McFadden (who is also the registered agent for the corporation), attended the hearing, but could not speak on behalf of One Stop.

Loveless testified under oath. The hearing examiner admitted Exhibits 2 (letter to Loveless from Cammy McFadden, 12/2/05) and Exhibit 110 (One Stop Wireless Payroll Summary for Loveless) and provisionally admitted Exhibit 3 (letter to Loveless allegedly from

Cammy McFadden, 1/12/06), subject to subsequent comparison of this exhibit with Exhibit 2, to determine whether this exhibit was more likely than not authored by Cammy McFadden. Having compared the documents, the hearing examiner now finds it is more likely than not that Cammy McFadden authored the exhibit, which therefore remains admitted. Likewise, the hearing examiner provisionally admitted Exhibit 9 (another letter to Loveless from Cammy McFadden, 3/30/06), subject to subsequent determination of whether failure sooner to disclose this exhibit to the corporation renders its admission improper. The hearing examiner now finds that even though the corporation was unable to participate, Loveless was not free to offer evidence she failed timely to identify, and Exhibit 9 is refused for failure to show sufficient good cause for untimely disclosure.

Loveless filed her proposed findings and conclusions on November 27, 2006. A copy of the hearing examiner's docket accompanies this decision.

II. ISSUES

The issues here are whether One Stop Wireless subjected Loveless to a hostile work environment because of sex and, if so, what reasonable measures are appropriate to rectify any harm to Loveless and to correct this discriminatory practice and what conditions should be prescribed upon One Stop Wireless' future conduct relevant to the type of discriminatory practice found. A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. One Stop Wireless, Inc., hired Jill Loveless on April 27, 2004. Loveless' job duties included selling cellular plans, phones and accessories to new and existing customers. She also sold Dish Network plans to new and existing customers and provided customer support to Cellular One and Dish Network customers, and opened and closed the store located in Hamilton, Montana.

2. Loveless' beginning wage was \$7.00 per hour plus commissions on her sales. She received a raise to \$7.25 per hour on or about August 28, 2004 and a further raise to \$7.75 per hour on or about November 8, 2004. Working for One Stop, Loveless earned wages of \$16,679.81, including her commissions.

3. Greg McFadden and Cammy McFadden, husband and wife, are the principals of One Stop. Greg McFadden was Loveless' supervisor at work. Cammy McFadden was not regularly at the business. Greg McFadden made regular sexual advances to Loveless, beginning when he commented during her job interview that she had a "nice body." By late May, Greg McFadden was inappropriately requesting hugs (saying it was okay because they were friends) and smelling Loveless' hair while hugging her. He also began to ask Loveless inappropriate questions such as asking about her sexual preferences.

4. In early June 2004, Greg McFadden first tried to kiss Loveless on the mouth. She was able to turn away and he kissed her on the cheek and then kissed her on her neck as she pulled away from him. He again attempted to kiss Loveless a few days later. As she tried to pull away he told her, "It's okay, Cammy won't know." In late June 2004, Greg McFadden began asking Loveless extremely personal questions about her sexual relationship with her boyfriend including her preference of sexual positions, as well as questions about oral sex and about the size of her boyfriend's penis. About this same time Greg McFadden began to complain to Loveless that his sexual relationship with his wife was not satisfactory to him.

5. In early August of 2004, Greg McFadden again hugged Loveless, this time hugging her very tightly and pushing her up against the window where he ran his hands down her back and onto her buttocks. As Loveless pulled away he ran his hands over her breasts. Loveless repeatedly told him not to do that while he kept doing so and tried to kiss her. After Loveless repeatedly told him to stop he told her it was okay because Cammy McFadden wouldn't find out. He also told Loveless to think of it as "job security." Loveless eventually got away from Greg McFadden because customers entered the store.

6. In mid-August, Greg McFadden gave Loveless \$50.00 and told her to "go buy something sexy for me." After giving Loveless the money he repeatedly asked her what she had purchased. In September 2004, Greg McFadden slapped Loveless on her buttocks and again pressed his body against hers while trying to touch her breasts. He again told Loveless it was "job security" and also said that it was okay for her to want him because he would not fire her. In October 2004, McFadden continued to ask if Loveless had bought any lingerie to wear for him. In October, Greg McFadden asked Loveless to give him back rubs and to scratch his back. He also tried to get Loveless to sit on his lap and asked her if she watched pornography (which she denied). He also asked her to lock the door and watch pornography with him (which she refused to do). When Loveless tried to tell him his actions and conversations were inappropriate, he would repeat that it was okay because "nobody would find out" and it was their "little secret" and "job security" for her.

7. In October 2004, Greg McFadden offered Loveless money (\$100.00) to buy "something sexy" to wear for him. McFadden also offered to do a strip tease for her. He then asked if she would ever touch him and look at him the way she looked at her boyfriend. Loveless told McFadden that she would not ever touch him and McFadden responded by offering her \$200.00 to "stroke him off." Loveless refused his advance. He increased his offer to \$500.00 which she also refused. McFadden then changed the subject back to work-related topics.

8. Loveless always refused Greg McFadden's advances and resisted his harassment. Early in her employment she did take money from him, because she needed the money, not to buy "something sexy" to wear for him. She remained with the company despite his unwelcome attention toward her because she was making a good income, which she needed to support herself and her children.

9. Greg McFadden's behavior continued until Loveless could no longer tolerate it. On or about October 30, 2004, Loveless made it very clear to him that she would never have the relationship with him that he wanted. After that day, Greg McFadden became rude toward Loveless and started making accusations against her. Finally, on December 8, 2004, Greg McFadden came to the store and falsely accused Loveless of using the store computer to look up pornographic sites and other inappropriate sites.¹ Loveless refused to sign the statement he had prepared, as written, because it was false.

10. Loveless asked Greg McFadden to reword the letter to say that Loveless would not use the computer for non-work purposes. He refused and instructed her to turn in her keys. The actual reason One Stop terminated Loveless was because she resisted Greg McFadden's sexual advances.

11. Loveless was able to get another job in the cellular phone industry, but she now makes almost \$1,000.00 per month less than she was making at One Stop. At least some of this lost income resulted from her discriminatory discharge, although some of it may also reflect market changes. She is reasonably entitled to recovery the sum of \$15,000.00 for lost wages over the past 24 months. It is not reasonable to assume that she will continue to lose wages in the future due to the discriminatory conduct of One Stop—she has had sufficient time to regain her rightful place in the market.

12. The 24 months of lost wages began on December 9, 2004, and ended on December 8, 2006. Loveless lost \$625.00 per month (\$15,000.00 divided by 24). Prejudgment interest on her lost wages began on January 9, 2005, and runs to the date of this decision, March 16, 2007. The prejudgment interest calculations are thus for periods ranging from 27.23 months down to 3.23 months, with loss per month for each period amounting to \$5.21 (\$625.00 times .1 divided by 12). Her total losses are thus for the total months during which she has not had the use of the monthly lost wages (27.23 plus 26.23 . . . plus 4.23 plus 3.23) times \$5.21 (the prejudgment interest per month, which is \$1,983.71 (380.75 months times \$5.21).

13. After Loveless no longer worked for One Stop, Cammy McFadden wrote Loveless at least two letters that were hostile and threatening. The letters clearly indicated that Cammy McFadden blamed Loveless for any problems with Greg McFadden and believed that Greg McFadden and Loveless engaged in mutually consensual sexual talk, and/or activity at work. There is no evidence in this record to support those beliefs. The only identifiable source for Cammy McFadden's apparently false beliefs would be Greg McFadden.

¹ In fact, Loveless had previously complained about pornographic pop ups to Greg McFadden and DeRell Coates of Hamilton Computer had looked at the computer. Greg McFadden had also invited Loveless to join him in viewing pornography on the office computer system. Other part-time employees also had access to the system. Greg McFadden had no basis in fact to accuse Loveless of office computer use involving pornography.

14. In the course of applying for jobs in the local community as well as any time her former customers would see her, Loveless has had to deal with her feelings about Greg McFadden's harassment and ultimate discharge of her, responding to questions about why she no longer worked at One Stop. Loveless also experienced the emotional distress of explaining to her mother what Greg McFadden had done to her. Subsequently, Loveless' fiancé broke off their engagement after he found Loveless' journal which documented Greg McFadden's actions toward and harassment of Loveless. Although Greg McFadden is not responsible for the conduct of Loveless' fiancé, that conduct again forced Loveless to deal anew with the emotional reactions to her supervisor targeting her for sexual harassment at work.

15. Loveless has consulted Dr. John Sisson, Ph.D. Because she could not afford Sisson's rate, Loveless has been seeing counselor Hank Winters, which has helped Loveless, reducing her nightmares concerning Greg McFadden. Loveless has also participated in meetings of SAFE, a self-help group that assists targets of harassment to live comfortably while assuring a safe environment.

16. Greg McFadden's sexual harassment and discrimination toward Loveless have resulted in her now being a much less secure and trusting person. She may require additional counseling, and has resolved all of the emotional distress which she still suffers. Based upon all of the evidence of her emotional distress, it is reasonably necessary to award Loveless \$30,000.00 to remedy the harm of that emotional distress.

17. The department must enjoin further violations of the Montana Human Act by One Stop of the type found in this case.

18. To correct the discriminatory practice and prescribe conditions upon the respondent's future conduct, the department reasonably must require that One Stop adopt a written sexual harassment policy that identifies a person other than Greg McFadden to whom complaints of sexual harassment at work can be directed, including therein an express provision that no action will be taken against an employee for a good faith complaint of such harassment. One Stop must also require Greg McFadden to undertake and successfully complete training regarding Montana law against sexual harassment in employment as a condition to his further activity as supervisor and principal in the corporation. In all these matters, One Stop must comply with the directions of the Human Rights Bureau regarding how to implement these requirements.²

² The contents of Cammy McFadden's letters to Loveless suggest it would be wise to have an alternative person in management of One Stop to whom sexual harassment complaints about Greg McFadden can be directed. There may not be any such person. The Human Rights Bureau may need to approve a reporting policy identifying Cammy McFadden as the person to whom such complaints are reported, perhaps with some specific safeguards required by the Bureau in handling such reports.

IV. OPINION³

Montana law prohibits discrimination in employment because of sex. Mont. Code Ann. § 49-2-303(1)(a). An employer directing unwelcome sexual conduct toward an employee violates this prohibition when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips*, HRC No. 8901003707 (4/1/1991), *aff'd sub. nom. Vanio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596.

Any employer who brings into the workplace sexual innuendo, contact and advances, directed toward a female employee who displays even the slightest signs of dismay, dislike or disapproval, skates upon exceedingly thin ice. The record is clear about what this employer, through Greg McFadden, did. Greg McFadden did engage in sexual innuendo, contact and advances, over a significant period of time. He apparently concealed his conduct from his wife, while ignoring Loveless' resistance and avoidance of his escalating sexual harassment. He used his position as her boss to pressure her to acquiesce to his advances. There is no reasonable dispute, with this evidentiary record, that Greg McFadden's conduct was unwelcome, sexual and sufficiently abusive to alter the terms and conditions of Loveless' employment, creating a hostile work environment. There is likewise no reasonable explanation for her discharge except that her boss punished her for increasing her resistance and rejection of his advances.

Upon a finding of illegal discrimination the department can "require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise," suffered by the person subjected to the discrimination. Mont. Code. Ann. § 49-2-506(1)(b). Damage awards in employment discrimination have the statutory purpose of rectifying the harm caused, thereby making the victims whole. *P. W. Berry Co. v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord, Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

Loveless is entitled to recover the wages she lost as a result of her illegal discharge. It is not credible that her entire wage loss, over a period of now over two years, resulted solely from the discharge, but a substantial portion of her wage loss did. Loveless must prove the amount she lost, but not with unrealistic exactitude. *Horn v. Duke Homes*, 755 F.2d 599 (7th Cir. 1985); *Goss v. Exxon Off. Sys. Co.* (3rd Cir. 1984), 747 F.2d 885; *Rasimas v. Mich. Dept. Mental Health* (6th Cir. 1983), 714 F.2d 614 (fact that back pay is difficult to calculate does not justify denying award).

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.* at 779 P.2d 523; *see also Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). Calculation of prejudgment interest is based on the elapsed time without the lost

³ 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.

income for each pay period times the appropriate rate of interest applied over the elapsed time. *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. 10% per annum simple interest, which applies to tort losses capable of being made certain by calculation, Mont. Code Ann. § 27-1-210, is reasonable. Thus, the appropriate calculation of prejudgment interest is based upon, for each month of lost wages, the time from the end of each month to the date of decision, in months, times the interest rate divided by 12 times the amount lost per month, adding together the result for each month of lost wages.

Loveless' only evidence regarding her counseling expenses, aside from her feelings about it, was pure hearsay regarding Dr. Sisson's statements about what she needed and what it might cost. The corporation, lacking counsel, could not interpose an objection to Loveless' testimony about Dr. Sisson's opinions.. Nonetheless, the department must, even in a less formal proceeding than a Human Rights contested case, base its findings upon admissible evidence, not upon inadmissible hearsay. *Bean v. Mt. Bd. Labor Appeals*, ¶ 14, 1998 MT. 222, 290 Mont. 496, 965 P.2d 256. Loveless failed to present substantive admissible evidence from which the hearing examiner could find a reasonable time and amount of counseling expenses for which One Stop is liable.

Reasonable measures to rectify the harm Loveless suffered because of the sexual harassment and discharge includes an award to compensate her for emotional distress. Mont. Code. Ann. § 49-2-506(1)(b); *Vainio*. The evidence supports an award of \$15,000.00, under the legal standard set in *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836, for all the reasons stated in the findings. Freedom from unlawful discrimination is a fundamental human right in Montana. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, because of the violation of a fundamental human right. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; **cited in** *Vortex at* ¶33; *Vainio*; *Campbell v. Choteau Bar & Steak Hse.* (1993), HR No. 8901003828. The violation involved here stretched over months and was a serious and on-going dilemma for a young woman who needed the income from her job. Loveless' emotional distress, as revealed by the evidence, was severe, and continues to plague her.

Upon a finding of illegal discrimination, the law requires an order imposing affirmative relief that enjoins any further discriminatory acts and the department may further prescribe any appropriate conditions on the respondents' future conduct relevant to the discrimination found. Mont. Code Ann. § 49-2-506(1)(a). On these facts, the affirmative relief imposed is reasonable, appropriate and necessary to correct and prevent recurrence of sexual harassment by Greg McFadden.

V. CONCLUSIONS OF LAW

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

2. One Stop discriminated against Loveless because of sex by subjecting her to a sexually hostile and offensive work environment from April 27, 2004 through her discharge from her position as a sales representative on December 9, 2004. Mont. Code Ann. § 49-2-303(1)(a).

3. The harm Loveless suffered as a result of the unlawful discrimination, for which she is entitled to recover from One Stop, consists of lost earnings valued at \$625.00 per month for 24 months, from December 9, 2004 through December 8, 2006, for a total of \$15,000.00, with prejudgment interest in the amount of \$1,983.71 to the date of this decision, and emotional distress valued at \$30,000.00. Mont. Code Ann. § 49-2-506(1)(b).

4. The department must order One Stop to refrain from engaging in such discriminatory conduct and should prescribe conditions on their future conduct relevant to this discriminatory practice. Mont. Code Ann. § 49-2-506(1) and (1)(a) through (1)(c).

VI. ORDER

1. Judgment is in favor of charging party **Jill Loveless** and against respondent **One Stop Wireless** on the charges that the respondent discriminated against her in employment because of sex.

2. The department orders respondent **One Stop Wireless** to make immediate payment to charging party **Jill Loveless** of the sum of \$46,983.71, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past lost earnings of \$15,000.00 for December 9, 2004, through December 8, 2006. Interest accrues on this judgment as a matter of law.

3. The department permanently enjoins respondent **One Stop Wireless** from illegally discriminating against female employees by allowing or requiring them, as a condition of their continued employment, to be subjected to sexual harassment by One Stop principal and supervisor Greg McFadden.

4. The department orders respondent **One Stop Wireless**, within 60 days after this decision becomes final, complying throughout with the directions of the Human Rights Bureau regarding how to implement these requirements:

(A) to submit to the Human Rights Bureau proposed policies that expressly state that One Stop Wireless will not engage in the specific conduct prohibited by the permanent injunction; to adopt a written sexual harassment policy that identifies a person other than Greg McFadden to whom complaints of sexual harassment at work can be directed,⁴ with an express provision that no action will be taken against an employee for a good faith complaint of such harassment; to define the means of publishing the policies to present and future employees; and to adopt and to implement

⁴ See Finding 18, Footnote 2, page 6, herein.

those policies, with changes mandated by the Bureau, immediately upon Bureau approval of them, and

(B) to require and to finance Greg McFadden undertaking and successfully completing training of 4-6 hours regarding Montana law against sexual harassment in employment as a condition to his further activity as supervisor and principal in the corporation, with the prior approval of the **Human Rights Bureau** for the particular training, and to document to the Bureau the successful completion of the training.

Dated: March 16, 2007

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry