

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012102:

TAMARA COPLEY,)	Case No. 1687-2007
)	
Charging Party,)	
)	
vs.)	DECISION
)	
MAJESTIC COVE PARK,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Charging Party Tamara Copley brought this complaint alleging that the employer Frank Dvorak discriminated against her on the basis of sex by creating a sexually hostile work environment and retaliated against her by filing a theft complaint against her with the Yellowstone County Sheriff. Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Billings, Montana on December 4, 2007. J. Gregory Tomicich, attorney at law, represented Copley. Randy S. Laedeke, attorney at law, represented Dvorak. Copley, Dvorak, Paul Van Cleave, Toni Van Cleave, Ruby Genereaux, Kermit Fladland, and James Horn all testified under oath. The parties agreed to provide post hearing briefs to the hearing officer. However, the respondent's brief, which was filed over one month late without excuse or even any request for extension of time to file, was not considered by the hearing officer. Charging Party's Exhibits 1, 2, and 3 and Respondent's Exhibits A, B, and C were admitted into evidence.

The preponderant evidence in this matter demonstrates that Dvorak created a sexually hostile environment and retaliated by filing his theft complaint against Copley. Copley is entitled to emotional distress damages because of Dvorak's unlawful conduct. The basis for this decision is set out below.

II. ISSUES

A complete statement of the issues in this case is set forth in the November 27, 2007 final prehearing statement issued in this case. Those issues are incorporated into this decision by this reference.

III. FINDINGS OF FACT

1. Frank Dvorak is the sole proprietor of Majestic Cove Park, a mobile home park located in Billings, Montana.

2. On January 9, 2006, Copley began working for Dvorak at Majestic Cove as an administrative assistant. She was hired through an employment agency, Sanfernel Staffing.

3. Shortly after Copley began working at Majestic, Dvorak decided to have Copley work directly for him as a cost saving measure. Dvorak began to pay Copley directly for her work and Sanfernel no longer employed Copley.

4. Dvorak paid Copley \$8.00 per hour and Copley worked full time. Copley is the mother of four minor children and her job at Majestic was important to her because it permitted her to maintain her independence and provide for her children.

5. Copley assisted Dvorak with many of the administrative duties of running the park, including bookkeeping and serving eviction notices. Majestic Cove Park had run afoul of Montana Department of Environmental Quality (DEQ) rules with respect to some of the mobile homes in the park. Copley also assisted Dvorak with gathering and presenting information to DEQ in order to resolve the problems with the violations of the DEQ regulations.

6. On February 8, 2006, Dvorak and Copley drove up to Helena to meet with personnel at the Department of Environmental Quality. On the way up to Helena, Dvorak suggested to Copley that they should run away together. This made Copley feel uncomfortable.

7. On February 13, 2006, while they were both at the Majestic Cove Office, Dvorak hugged Copley and then began rubbing his hands up the back of Copley's shirt. Copley told Dvorak not to do this and he stopped.

8. On February 16, 2006, Dvorak rubbed his hands on the back of Copley's shirt and attempted to kiss her. Copley told Dvorak to stop and she did not want him to engage in such conduct.

9. On February 23, 2006, Dvorak again tried to hug Copley and he also ran his hands across Copley's breast. Copley told him to stop and that she did not like what he was doing. Dvorak stopped.

10. On March 4, 2006, Dvorak and Copley were at a bar after work. Dvorak grabbed Copley on the thigh and rubbed his hand across her breast. Copley told him once again not to do this and that she wanted him to stop.

11. On March 7 and March 10, 2006, Dvorak tried to kiss Copley and tried to slide his hand across Copley's breast. Both times she told him not to do this anymore. Dvorak claimed that his inappropriate touching was merely an accident.

12. On April 6, 2006, Dvorak asked Copley to spend the night with him to "keep him warm." (Testimony of Tamara Copley). Copley refused to do so.

13. On April 11, 14 and 19, 2006, Dvorak repeatedly touched Copley on the breasts, thighs and/or buttocks. Copley repeatedly told him not to do this.

14. Dvorak asked Copley to accompany him on a business trip to Helena on May 14, 2006 to meet with DEQ. Copley agreed to do so because she thought they would be staying in separate rooms. Once they arrived in Helena, Dvorak stated that he could not afford two rooms. Because Dvorak was unwilling to pay for separate rooms, Copley and Dvorak stayed in the same room which has two separate beds.

15. Dvorak and Copley went to dinner. Dvorak got drunk at dinner. When the two returned to the room, they went to sleep in the separate beds. The very next morning, while Copley was still in her bed, Dvorak got up out of his bed, yanked the covers off of Copley, and began touching her thigh and vaginal area. Dvorak responded that he wanted to make love to her. Copley told him to stop and he did so.

16. On four separate occasions between May 19, and May 26, 2006, while Copley and Dvorak were working together in the office at Majestic Cove Park, Dvorak made comments to Copley about wanting to make love to her. Dvorak would also hug her and rub his hands on her body. Each time, Copley told Dvorak to stop and she did not like his conduct. Dvorak would then stop.

17. On June 9, 2006 while Copley and Dvorak were in the Majestic Cove Park Office, Dvorak grabbed Copley's breasts. Copley told Dvorak to leave her alone.

18. After the June 9, 2006 incident, Copley made sure that she would not be alone with Dvorak at anytime. No further incidents of inappropriate touching occurred after that time.

19. On June 26, 2007, Dvorak discharged Copley because he could no longer afford to pay her. At no time during her employment did Dvorak ever accuse Copley of stealing from him.

20. Dvorak gave Copley the authority to write checks to pay vendors for services and to write checks to herself for her pay. On May 6 and May 19, 2006, Copley wrote two checks to herself. In July, 2006, Dvorak learned of two checks that Copley had written to herself. He questioned the legitimacy of Copley writing the checks to herself, but he decided at that time that he would not do anything about it.

21. On August 30, 2006, Copley filed her sex discrimination claim with the Montana Human Rights Commission. Dvorak was served with notice of the claim on September 12, 2006. On September 13, 2006, shortly after being served with the human rights complaint, Dvorak requested that the Yellowstone County Sheriff begin a criminal investigation into Copley's conduct in writing the two May 2006 checks to herself. As Dvorak admitted at hearing, and the hearing officer finds as a matter of fact, Dvorak initiated the criminal investigation of Copley because he was upset about Copley's filing a sexual discrimination case against him.

22. Copley wrote the two checks to herself for legitimate reasons. In addition, no charges were ever brought against her with regard to the two checks which formed the basis of Dvorak's complaint to the Yellowstone County Sheriff's Office. Dvorak's theft report was unfounded.

23. Copley experienced emotional distress as a result of Dvorak's inappropriate and continuing sexual advances toward her during her employment. Copley could not quit her job with Dvorak, which provided her sole source of income to support herself and her four children. She thus continued to endure his inappropriate and unwanted advances in order to ensure that she had a paycheck. She suffered additional emotional distress when Dvorak, in order to retaliate against her for filing the sexual harassment claim, had her investigated by the Yellowstone County Sheriff for alleged criminal conduct. Under the circumstances adduced at hearing in this case, Copley suffered at least \$30,000 in emotional distress from Dvorak's conduct.

IV. OPINION¹

A. *Dvorak Discriminated Against Copley By Creating A Sexually Hostile Work Environment.*

Montana law prohibits employment discrimination based on sex. §49-2-303(1), MCA. An employer directing unwelcome sexual conduct toward an employee violates that employee's

¹ 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.

right to be free from discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), *aff'd sub. nom. Vanio v. Brookshire* (1993), 852 P.2d 596. As the Montana Supreme Court has explicitly recognized, “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" and violates the Montana Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 221, 797 P.2d 200, 204, citing *Meritor Savings Bank FSB v. Vinson*, (1986) 477 U.S. 57,64.

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 have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816.

A charging party establishes a *prima facie* case of sexual harassment with proof that she was subject to “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). “Harassment need not be severe and pervasive to impose liability; one or the other will do.” *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted). A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23; *see also Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998).

The standard for finding a hostile environment must be “sufficiently demanding to ensure that [anti-discrimination law] does not become a ‘general civility code.’” *Faragher, supra*, citing *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). The correct standard when properly applied will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Oncale, supra*, quoting Lindemann & Kadue, *Sexual Harassment in Employment Law* 175 (1992). In other words, only extreme conduct can discriminatorily alter the terms and conditions of employment. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances. *Oncale, supra*, quoting *Harris*, 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party’s claim, to assume the perspective of the reasonable victim. *See Ellison, op. cit.* at 879.

Unwelcome, intentional touching of a charging party’s intimate body areas can be sufficiently offensive to alter the conditions of her working environment, according to the

EEOC's Policy Guidance on Sexual Harassment, (see 8 BNA FEP Manual 405:6681, 405:6691, Mar. 19, 1990); accord, *Barrett v. Omaha Nat. Bank*, 584 F. Supp. 22, 23-24, 30 (D. Neb. 1983) *aff'd*, 726 F.2d 424 (8th Cir. 1984).

Direct evidence “speaks directly to the issue, requiring no support by other evidence,” proving the fact in question without either inference or presumption. *E.g.*, *Black's Law Dictionary*, p. 413 (5th Ed. 1979); see also, *Laudert v. Richland County Sheriff's Department*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. Direct evidence of discrimination establishes a violation unless the respondent proffers substantial and credible evidence either rebutting the proof of discrimination or proving a legal justification. *Laudert, supra*; see also, *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985).

When a charging party establishes a *prima facie* case of sexual harassment with direct evidence, the burden is then on the employer to prove, by a preponderance of evidence, “that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief.” 24.9.610(5) A.R.M. *applicable to complaints filed after July 1, 1997*, 24.9.107(1)(b) A.R.M.; *cf.*, *EEOC Compliance Manual*, “EEOC: Policy Guidance on Sexual Harassment”, No. 137, No. 4046-47, pp. 104-05 (BNA, April 1990).

The credible evidence in this case demonstrates that Dvorak created a sexually hostile work environment in his actions toward Copley while in the office at Majestic Cove Park and on the business trip to Helena. As Copley's testimony proves, on several occasions during her employment Dvorak touched Copley on the buttocks and breast areas despite her repeated exhortations not to do so. He continued in his conduct by touching her in the vaginal area while on their trip to Helena in May, 2006. Dvorak violated the Montana Human Rights Act by creating a sexually hostile environment through his repeated inappropriate and unlawful touching and groping of Copley.

B. Dvorak retaliated Against Copley By Filing The Theft Report With the Yellowstone County Sheriff's Office.

Montana law prohibits retaliation in employment practices for protected conduct. Protected conduct includes filing a charge of discrimination and assisting or participating in any manner in an investigation. Admin. R. Mont. 24.9.603 (1). Retaliation under Montana law exists where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove her claim under the Human Rights Act by proving that (1) she engaged in a protected practice, (2) that thereafter her employer took an adverse employment action against her, and (3) a causal link existed between protected activities and the employer's actions. Admin. R. Mont. 24.9.610 (2).

Direct or circumstantial evidence can provide the basis for making out a prima facie case. Where there is evidence of statements made by a decision maker related to the decisional process being challenged which reflect unlawful discrimination, then the case is one of direct evidence of discrimination. *Laudert, supra*, 2000 MT 218, ¶29, 301 Mont. 114, ¶29, 7 P.3d 386, ¶29. Where a prima facie claim is made out by direct evidence, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. Admin. R. Mont. 24.9.610(5); *Reeves v. Dairy Queen*, 1998 MT 13, ¶17, 287 Mont. 196, ¶17, 953 P. 2d 703, ¶17.

Direct evidence of Dvorak's retaliatory conduct in this case came out through his own testimony at hearing. He candidly admitted that he would have taken no action to report any alleged theft but for the fact that he was mad that Copley had filed her human rights claim. His testimony is underscored by the fact that he discovered the alleged theft in July, 2007, but did nothing to report it until the day after her got notice of Copley's human rights claim, some two months after he discovered the alleged theft. Under these circumstances, Copley has made out her prima facie case of retaliation.

As this is a direct evidence case, once the charging party shows by direct evidence that an unlawful consideration played a motivating role in an employment decision, the respondent employer must show by a preponderance of the evidence that it would have made the same decision even if it had not allowed the unlawful consideration to play a role in the decision. *Laudert, supra*, citing *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228. Dvorak has not suggested that he would have taken any action against Copley in the absence of the filing of the discrimination claim. To the contrary, he essentially testified that he would have taken no action but for Copley's filing of her human rights complaint. Furthermore, the fact that retaliation was his sole motivation for filing the complaint is powerfully corroborated by the fact that he did nothing to report Copley to the Yellowstone County Sheriff until the day after he was served with the complaint in this matter, some two months after he discovered the alleged theft. In addition, Copley's testimony establishes that Dvorak's report of theft to the Yellowstone County Sheriff was unfounded. Copley had the authority to write out the two May checks to herself and she did so for legitimate reasons. As Dvorak has not really offered any rebuttal to Copley's direct evidence of retaliation, and the theft report itself was unfounded, Copley has proven her retaliation claim.

While the hearing officer asked the parties to brief an issue regarding the applicability of a mixed motive to the case of retaliation, it is now patently clear to the hearing officer that this is not a mixed motive case.² The *sine qua non* of a finding of mixed motive is that the action would have taken place in the absence of the illegal retaliation. Admin. R. Mont. 24.9.611. Here, Dvorak's testimony at hearing conclusively demonstrates that he would not have filed the

²As the charging party correctly points out, a successful showing of a mixed motive in taking action affects a respondent's liability for damages, but not the finding of illegal conduct. Admin. R. Mont. 24.9.611.

theft report with the Yellowstone Sheriff's Office. This testimony obviates the applicability of mixed motive to this case.

In her closing brief, Copley also contended for the first time that her firing was in retaliation for her spurning Dvorak's sexual advances. The hearing officer rejects this argument as a basis for finding retaliation. Copley's argument in this regard requires an analysis of the case as an indirect evidence case. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. A charging party can prove her retaliation claim under the Human Rights Act by proving (1) that she is a member of a protected class, (2) that her employer took an adverse employment action against her, and (3) that a causal link existed between protected activities and the employer's actions. Admin. R. Mont. 24.9.610 (2).

Where the prima facie claim is made out by circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, then the charging party may demonstrate that the reason offered was mere pretext. The charging party can do this by showing that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9th Cir. 1996). Again, however, the charging party bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by retaliatory animus. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632.

Copley failed to produce any evidence at hearing to show that there was any causal link between her discharge and her spurning Dvorak's advances. Indeed, she made no such claim until after the hearing had concluded. She has thus failed in her prima facie case to show that a causal link exists between her firing and her spurning of Dvorak's advances. And even if she had made out a prima facie case, the preponderant evidence in this case shows that the only basis for Dvorak's discharging her was because he could no longer afford to keep her on as an employee. Accordingly, while Copley has proven that Dvorak unlawfully retaliated against her by filing the theft report with the Yellowstone County Sheriff, she has failed to prove that her discharge from her employment with Majestic Cove Park was the result of unlawful conduct.

C. Damages.

The relief the department may award to a charging party subjected to illegal discrimination includes any reasonable measure to rectify any resulting harm she suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521.

In her closing brief, Copley has not sought nor argued that she is entitled to lost wages. Indeed, she could not as there is no proximate cause between Dvorak's decision to discharge Copley and his illegal discriminatory conduct. Copley has correctly argued, however, that she is entitled to an award of emotional distress as a result of Dvorak's unlawful conduct. The Montana Supreme Court has recognized that compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836, 841. The severity of the harm governs the amount of recovery, not the availability of recovery. *Id.*

Here, the severity of the harm is clear. Copley was forced to endure the humiliation of repeated sexual harassment from Dvorak as she needed to keep her job because she was the sole support for her four children. She had no other viable opportunity for employment at the time, given her circumstances. This caused her a great deal of emotional distress. In addition, she was subjected to the emotional distress of Dvorak's retaliatory conduct in filing a report with the Yellowstone County Sheriff, a report that was unfounded. This caused Copley further distress because she was forced to endure the anxiety that would accompany being the focus of an unfounded criminal prosecution. Under these circumstances, Dvorak should pay Copley \$30,000.00 in emotional distress damages.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).
2. Frank Dvorak d/b/a Majestic Cove Park violated the Montana Human Rights Act by discriminating and retaliating against Charging Party Tamara Copley in violation of Montana Codes Annotated §49-2-301 and § 49-2-303 (1)(a).
3. Copley is entitled to be compensated for emotional distress damages in the amount of \$30,000.00.
4. The circumstances of the retaliation in this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Tamara Copley and *against* Frank Dvorak d/b/a Majestic Cove Park as Dvorak discriminated and retaliated against Copley in violation of the Montana Human Rights Act.

2. Within 90 days of this order, Dvorak must complete eight (8) hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of discrimination and terms and conditions of employment, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Dvorak shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred and that Dvorak attended for the entire period. Dvorak must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. Frank Dvorak d/b/a Majestic Cove Park is enjoined from taking any adverse employment action or retaliating in any way against any employee who engages in any activity protected by the Montana Human Rights Act.

4. Frank Dvorak d/b/a Majestic Cove Park must pay Tamara Copley the sum of \$30,000.00 for emotional distress she suffered as a result of his illegal conduct.

5. For purposes of Montana Code Annotated § 49-2-505(7), Tamara Copley is the prevailing party in this matter.

DATED: March 10, 2008

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry