

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012513:

LINNDA DUMONT,)	Case No. 1400-2008
)	
Charging Party,)	
)	
vs.)	DECISION
)	
PABLO WATER AND SEWER DISTRICT,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Charging Party Linnda Dumont brought this complaint alleging that the Pablo Water and Sewer District discriminated against her on the basis of sex by failing to take disciplinary action against an employee whom Dumont managed.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Polson, Montana on June 17, 2008. Cynthia Walker, attorney at law, represented Dumont. Maureen Lennon, attorney at law, represented Pablo Water and Sewer District. Dumont, Charity Rowsey, Clay Sloan, Leslie Arneson, Mike Lee, Wayne Brown and Bob Long all testified under oath. Charging Party's Exhibits 7 (page 2 only), 14, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 34, 37, 38, 40, 41, 43 and Respondent's exhibits 101, 102, 103, 104, 110, 114, 116, 125, 126, 127, 128, 132 (pages 1-3, the September 16 through September 30, work logs only), 136, 138 and 139 were admitted into evidence.

The parties requested an opportunity to file post-hearing briefs and the last brief was received on October 1, 2008 at which time the record in this matter closed. Based on the evidence adduced at hearing and the arguments provided in closing briefing, the following findings of fact, conclusions of law, and final agency decision are made.

The parties have advised the hearing officer that a record transcript of the hearing has been prepared which is available for the use of the Montana Human Rights Commission in the event the matter is appealed. Accordingly, this matter is being issued outside of the Commission's prescribed issuance dates for matters which have no transcript.

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. The District employed Dumont as General Manager of the District from January 2, 2006 until she resigned in late May, 2007. Her job duties included, but were not limited to, management of District employees and ensuring that the District's personnel policies were followed. By statute, Dumont had "full charge and control of the maintenance, operation, and construction of all works and systems of the District, with full power and authority to employ and discharge all employees and assistants at pleasure and prescribe their duties, . . ." Mont. Code Ann. § 7-13-227.

2. The District hired Walter Gainan as a certified water operator several years before Dumont was hired. In her position as general manager, Dumont supervised Gainan. She had all necessary authority to discipline Gainan, including, if necessary, the ability to discharge him. Dumont did not need Board approval to take disciplinary action against Gainan or to discharge him from employment.

3. For the first six or seven months of her employment, Dumont got along very well with Gainan, who was District's only Certified Operator. In his July 10, 2006 Operator's Report, Gainan made very positive comments about Dumont. As Dumont noted at hearing, Gainan was very supportive of her during that time period.

4. Dumont did not document her first alleged confrontation with Gainan, which she believes occurred in June or July 2006, and involved his use of the company truck. Dumont told Gainan he was not permitted to take the company truck home. Dumont claims he called her a bitch, threw the keys in the driveway, said he did not have to take "this F-ing shit," and said he was quitting. Dumont claims she told him to do what he wanted to do, that she was not going to argue with him, and went back to her office. A few days later, Dumont claims Gainan was in a better mood. This was the only time that Dumont herself heard Gainan refer to her in a derogatory manner.

5. Gainan's unprofessional conduct was not uniquely directed at women. Clay Sloan, who at one time also managed Gainan, suffered Gainan's wrath on many occasions. Gainan directed foul language at all of his coworkers, men and women alike.

6. Dumont documented a second incident involving Gainan in August 2006. Gainan failed to follow instructions and Dumont issued him a written reprimand. When Dumont gave Gainan the write-up, he wadded it into a ball and threw it in the trash. He had no other reaction.

7. Dumont issued a third written reprimand to Gainan on September 5, 2006 indicating that “abusive screaming and raising your voice to any of your fellow employees will not be tolerated.” Charging Party’s Exhibit 14.

8. In September, 2006, Gainan was disciplined for calling an employee of Ronan Telephone Company (RTC) a derogatory name. The Board suspended him for two days without pay. After the incident with RTC, Gainan tried to stay out of the office and although Dumont claims to have had some “little” conflicts with Gainan, there was nothing worth documenting.

9. In December, 2006, Dumont evaluated Gainan. She recommended he not get a raise. Dumont noted in the evaluation that Gainan’s behavior included a failure to follow her directions, insubordination, making decisions without authorization, and ignoring the chain of command. She also noted that Gainan would become volatile and irate and verbally abusive to fellow employees. Dumont ended her evaluation with the following, “[B]ecause of this animosity, insubordination, and ignoring the rules and regulations of the District, I do not feel that Walt Gainan deserves a merit raise at this time.”

10. Dumont’s evaluation did not mention gender as a perceived basis for Gainan’s conduct. Indeed, the evaluation is devoid of any indication that Gainan was creating a sexually hostile working environment. Charging Party’s Exhibit 20. The District Board agreed with Dumont’s assessment and did not give Gainan a pay raise after that evaluation. In light of Dumont’s accusations in this case, it is almost certain that had Gainan’s abusive conduct been frequent and so obviously directed at women, she would have included it in her performance review of Gainan.

11. Dumont was aware that Gainan made demeaning remarks about a male seasonal employee in his Work Logs. She told Gainan on one occasion he could not make statements like that. She did not discipline Gainan. Gainan gave an Operator’s Report at every Board meeting. Dumont observed Gainan interact with Board members on a monthly basis. She found his conduct to be inappropriate and insubordinate. He would become angry, raise his voice, and use foul language. He called Board members “assholes.” Dumont did not discipline Gainan or in any way address his inappropriate behavior toward Board members.

12. Gainan’s behavior was not gender-based. Dumont’s performance review of Gainan, for example, repeatedly noted that Gainan’s “abusive” treatment extended to “fellow employees.” (The District employed both men and women.) Gainan behaved in a volatile manner toward male employees and the all-male Board of Directors. This finding is corroborated by the testimony of Arneson. Arneson sent a note to the Board stating that Gainan referred to Dumont as “Ice Cube” and that he made a “shove it up your ass” gesture behind Dumont’s back. Arneson felt the gesture was borne of gender neutral anger directed at Dumont. In addition, Arneson did not find that Gainan’s profanity was particularly offensive to women. Rather, Gainan was offensive to all employees, both male and female.

13. Other than the key throwing incident, Dumont did not witness Gainan make any gender-based gestures or comments.

14. On March 2, 2007, Dumont presented the Board with a complaint of sexual harassment. This was the first time that the Board had been apprised that Dumont had any concerns that Gainan's conduct was of a sexually harassing nature. Prior to the March 2, 2007 letter, the Board would have had no conceivable basis for believing that Gainan had ever harassed Dumont. The letter did not indicate what Dumont expected the Board to do about the alleged harassment.

15. On March 5, 2007, just three days after Dumont complained about Gainan to the Board, Gainan left the workplace because of a medical issue. Dumont had no contact with Gainan after he left the workplace. Counsel for the District, Robert J. Long, assured Dumont that Gainan's failure to return from medical leave was deemed a resignation.

16. Gainan placed a letter to the public in one or more local newspapers after his departure in March, criticizing Dumont and Mike Lee. He also wrote letters to the Board which were critical of operations, specifically Dumont and Lee. These letters also questioned Dumont's qualifications. These letters did not constitute any sort of sexual harassment. Dumont was obviously angered by the letters and felt they were an unwarranted attack on her qualifications for the position she held as general manager of the District.

17. At its April 2, 2007 meeting, the Board voted to terminate Gainan's employment. Long did not feel it was necessary to terminate Gainan's employment because, in his opinion, Gainan had resigned. As a result, the Board did not notify Gainan of its decision. Nevertheless, Dumont knew that Gainan was not a District employee and that he was no longer in a position to engage in the types of behavior about which she complained.

18. On April 13, 2007, Dumont wrote a letter to the Lake County Sheriff's Department seeking a restraining order against Gainan. In the letter, she referred to herself as Gainan's "former employer." Exhibit 30. In addition, she stated as a basis of her concerns that Gainan "will not accept that he no longer works here." *Id.* This further demonstrates that Dumont knew by that time that the District had discharged Gainan.

19. In May, 2007, Dumont asked the Board to take action to stop Gainan's harassing letters written to both the local newspaper and to Board members. Specifically, Dumont complained that Gainan had made defamatory statements about her in letters to the local newspaper and in letters written to Board members which damaged her reputation. Gainan's letters also made derogatory comments about a male Board member. None of Gainan's comments contained or could be construed to contain sexually harassing comments. Dumont's

anger over Gainan's letters emanated from the attacks upon her qualifications as general manager, not from any actual or perceived sexual harassment from Gainan.

20. Gainan's actions in writing his letters to the Board and to the newspaper was conduct which was outside of Gainan's employment with the District. These statements were unrelated to Gainan's employment and were made at a time when he was not an employee of the District. The Board had no authority to control statements made by Gainan as a private citizen.

21. Had Dumont experienced harassment or received complaints of unlawful harassment from her staff, she was required by District policy to immediately notify the Board President. She did not do so.

22. Dumont had the authority to reprimand Gainan, and did so while she was his supervisor. At no time did she reprimand him for gender-based harassment or any other type of unlawful harassment.

23. Long advised Dumont that the Board could do nothing to stop Gainan from expressing his opinions because he was no longer an employee, having abandoned his employment by failing to return from medical leave. Long also told Dumont that, should Gainan attempt to return to work, the Board would advise him that he was no longer employed by the District. Long assured Dumont that Gainan was in Long's words, "out the door," i.e., that Gainan had quit by failing to return to his job after his medical leave.

24. Dumont resigned on May 22, 2007, almost three months after Gainan had left the work place and almost two months after the Board discharged Gainan from his employment.

25. To the extent that the District was required to take action to protect Dumont from any inappropriate conduct exhibited by Gainan, it did so. Dumont's decision to resign was the result of her anger over Gainan's insubordinate attitude. It was not based upon any illegal conduct on the part of the District or Gainan.

IV. DISCUSSION¹

Dumont's contention in this matter is that Walter Gainan created a sexually hostile environment which the District condoned, thus making the Board liable to Dumont in damages. The credible evidence in this matter, however, demonstrates that Gainan at most created a gender neutral, not sexually, hostile work environment. Moreover, the evidence fails to show that the Board did not take adequate steps to curtail Gainan's conduct once the issue was properly brought to its attention.

¹ Statements of fact in this discussion and analysis are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

To be actionable under the Montana Human Rights Act and Title VII of the Civil Rights Act of 1964, sexual harassment must be because of gender. *Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶ 24, 332 Mont. 293, ¶ 24, 138 P.3d 419, ¶ 24. There are two forms of sexual harassment that violate the prohibition against workplace discrimination under state and federal law. *Id.*, ¶ 19 (citation omitted). The form of harassment at issue in this case is hostile or offensive work environment. *Id.* (citation omitted).

State and federal law afford employees the right to work in an environment free from discriminatory intimidation, ridicule and insult. *Id.*, ¶ 20 (citation omitted). Verbal or physical conduct of a sexual nature constitutes sexual harassment when such conduct has the purpose of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. *Id.* (citations omitted).

To be sufficiently severe or pervasive, the misconduct must create a working environment that is both objectively and subjectively offensive. *Beaver v. Montana DNRC*, 2003 MT 287, ¶ 31, 318 Mont. 35, ¶ 31, 78 P.3d 857, ¶ 31. As such, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived as hostile and abusive. *Id.* (citations omitted).

To determine whether an environment is sufficiently "hostile" or "abusive," courts must look at the totality of the circumstances. *Id.* These circumstances may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance. *Benjamin v. Anderson*, 2005 MT 123, ¶ 53, 327 Mont. 173, ¶ 53, 112 P.3d 1039, ¶ 53 (citations omitted). A hostile working environment is not created by the sporadic use of abusive language, gender related jokes, and occasional teasing. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

It is true that an employer can have vicarious liability for failing to take adequate steps to protect an employee from a discriminatory hostile working environment. *Beaver, supra, Altmaier v. Haffner*, 2006 MT 129, 332 Mont. 293, 138 P.3d 419. Where, however, there is no showing of a hostile work environment, it is unnecessary to reach the issue of the employer's vicarious liability. *Beaver*, ¶ 53. Additionally, Dumont carries the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. *Heiat v. E.M.C.* (1996), 275 Mont. 322, 912 P.2d 787, 792.

The major impediment to Dumont's claim here is the lack of a demonstration that Gainen's conduct was either sufficiently persistent to change Dumont's conditions of employment or that it was based on Dumont's sex. At most, the credible evidence here establishes that one time Gainen behind Dumont's back referred to Dumont as an "ice cube" and made a "shove it up your ass" gesture. While it may be a sign of the naivete of the hearing officer, the term "ice cube" does not appear to be anything particularly derogatory toward

women. Certainly there is no testimony in this case to show that it is. Likewise, Gainan's crass gesture, while rightfully condemned, is not sexual harassment.

Gainan may have been coarse and crude, but there is simply no substantial evidence to show that his crudeness was sexually oriented or contained anything other than gender neutral epithets. The most persuasive evidence in this hearing is that provided by Leslie Arneson and Clay Sloan. The gist of their testimony is that Gainan's conduct, while abusive, was not gender abusive.

The hearing officer also finds it very telling that Dumont, despite being Gainan's supervisor, did not reflect Gainan's alleged sexual harassment in any of her reviews of Gainan. Her December, 2006 employee performance review of Gainan unrestrainedly paints the picture of an insubordinate and inconsiderate employee. There is nothing in there that in any way implicates Gainan in creating a sexually harassing work environment. Had Gainan actually engaged in such illegal conduct, Dumont would assuredly have commented on it in some way. She did not and this only enhances the notion that Gainan may have been a jerk to all co-workers but did not create a sexually harassing environment.

Dumont's claim that the key throwing incident involved gender abusive language is simply not credible. Initially, Dumont related that Gainan threw his keys on the ground and stated that he did not have to take "this F-ing sh—" anymore. As the litigation in this matter progressed, however, the words Dumont ascribed to him morphed into epithets directed specifically to a woman. Her testimony about the key throwing incident containing the "c" word is rejected as having no basis in fact.

The charging party correctly notes that repeated exposure to sexually crude language and other conduct that is particularly offensive to women but not otherwise directed to a woman who is a complaining party may be sufficient to create a hostile working environment. *See, e.g., Reeves v. C.H. Robinson Worldwide*, 525 F.3d 1139, 1141 (11th Cir. 2008) (holding that frequent exposure to language and radio programming that was particularly offensive to women but not targeted at the female charging party was sufficient to satisfy the "based upon" and "severe or pervasive exposure" elements of a hostile working environment claim). In *Reeves*, the 11th Circuit Court of Appeals reversed a lower court's granting of summary judgment. In doing so, the court noted that the charging party had presented evidence that one of her co-worker's use of sexually offensive language "was consistent, [a]cross the board, day in and day out, in the sexually offensive language, phrase, jokes songs comments, remarks." *Id.* at 1142.

The case before this hearing officer stands in stark contrast to the facts outlined in *Reeves*. The only credible evidence presented in this case of offensive conduct is Gainan's remark to Arneson about Dumont being a "ice cube" and his gesture to Dumont. Even if the hearing officer could consider that evidence as sexual harassment, and even if the hearing officer could consider Gainan's conduct toward the Ronan Telephone Company employee (the hearing officer would not allow evidence of Gainan's conduct since it could only be

demonstrated through hearsay evidence), Gainan's conduct was neither pervasive nor was it based on sexual discrimination. Dumont has failed to prove that Gainan's conduct created a sexually hostile working environment. Accordingly, her claim must fail.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case, pursuant to Mont. Code Ann. § 49-2-512(1) (2007).

2. Dumont has failed to carry her burden of proof to show that a sexually hostile working environment existed as a result of the conduct of Gainan.

3. Because there has been no showing of a sexually hostile working environment, there is no conduct for which the District can be found to be liable under the Montana Human Rights Act.

4. Because Dumont has failed in her burden of proof, her claim must be dismissed.

VI. ORDER

Judgment is found in favor of Pablo Water and Sewer District and Dumont's case is dismissed.

DATED: November 21, 2008

/s/ GREGORY L. HANCHETT

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