

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

ANNE BOLVES,)	Case Nos. 1461-2009
)	1462-2009
Charging Party,)	
v.)	
)	
HOLIDAY VILLAGE MALL and GK)	
DEVELOPMENT D/B/A NORTH GRAND,)	
)	
Respondents.)	
)	
)	
DARCIE DAVEY,)	Case No. 1545-2009
)	
Charging Party,)	
v.)	
)	
IPC International Corporation,)	
)	
Respondent.)	

Charging Party, Anne Bolves (Bolves) filed a complaint with the Department of Labor and Industry asserting that her former employer, Respondent, GK Development, owner of the Holiday Village Mall, in Great Falls, had discriminated against her by permitting her to be subjected to a hostile work environment. Charging Party, Darcie Davey (Davey), filed a complaint against her former employer, Respondent, IPC International Corporation (IPC), asserting that IPC discriminated against her on the basis of gender and further that IPC retaliated against for reporting the sexual harassment of Bolves.

Because the two cases were factually intertwined, the parties agreed to present their cases in the same hearing. Following a contested case proceeding, the hearing officer issued a single decision finding in favor of the named Respondents. The hearing officer determined that Bolves was not subjected to a hostile work environment, and further that Davey was unable to show that she was discriminated on the basis of gender nor was she able to establish that she was subject to retaliation.

Both Bolves and Davey filed appeals with the Human Rights Commission and the Commission considered the matter on May 18, 2010. After careful review and discussion, the Commission affirmed, in part, and reversed, in part, on the issue of liability. Charging Party Davey and Respondent IPC were afforded the opportunity to brief the issue of damages and the Commission considered their damage arguments on July 21, 2010.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of the administrative rules in the hearing officer's decision but it may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order the findings that were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. *Admin. R. Mont. 24.9.123(4)*.

The Commission's standard of review for conclusions of law is whether the hearing officer's interpretation and application of the law is correct. See *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3d 284, ¶ 39.

ANALYSIS ON LIABILITY

After careful and due consideration, the Commission determined that the hearing officer's findings of facts and conclusions of law are correct, as they pertain to Charging Party, Anne Bolves, and Respondent, Holiday Village Mall and G.K. Development d/b/a North Grand. However, the Commission reversed the hearing officer on his determination regarding Charging Party, Darcie Davey. The Commission determined that Davey established discrimination based on sex and retaliation by her former employer, IPC International Corporation. Accordingly, the Commission reversed and modified Conclusions of Law Nos. ¶ 4, ¶ 5, and ¶ 6, and corresponding discussion contained on pages 13 through 16 of the Hearings Bureau decision, as it pertains to Davey.

A. Discrimination Based on Gender

The Commission determined that the hearing officer erred in his conclusion that "Davey's discrimination claim fails because she has failed to demonstrate that she was treated differently on the basis of sex and [her supervisor's] conduct was not based on an intent to discriminate based on sex." *See Hearings Bureau Decision at 17, ¶ 4.* Accordingly, the Commission determined it was clear that Davey was treated more harshly by her supervisor than male counterparts.

Therefore, the Commission reverses on this issue of discrimination based on sex.

B. Retaliation

In addition to discrimination based on sex, Davey also alleged retaliation. In his decision, the hearing officer found that she was unable to establish retaliation because

she was unable to set forth a *prima facie* case for retaliation. The elements of a *prima facie* case for retaliation are: (1) Davey was engaged in protected activity, (2) thereafter her employer took an adverse employment action against her and (3) a causal link existed between her protected activity and the employer's actions. See *Beaver v. Dep't of Natural Resources and Conservation*, 2003 MT 287, ¶ 71, 318 Mont. 35, ¶ 71, 78 P.3d 857, ¶ 71.

In his decision, the hearing officer focused on language that states that “a charging party need not prove that a violation of the act actually occurred; however, it is imperative that a charging party at least prove that she had an objectively reasonable belief that the employer has engaged in an unlawful employment practice which the act prohibits. *Hearings Bureau Decision at 16 (citing 45 A Am. Jur. 2d Job Discrimination §222. See also, Little v. Windemere Relocation, Inc., 301 F. 3d 958, 969 (9th Cir. 2001).* The hearing officer concluded that Bolves was not an IPC employee and while Davey's conduct in reporting the alleged harassment of Bolves was appropriate, it was not in and of itself a protected activity. *Id.*

The Commission disagrees with this narrow interpretation of the retaliation statute. See *Mont. Code Ann. § 49-2- 301*. The statute states it is unlawful discriminatory practice to discriminate against an individual because she “has opposed any practices forbidden under this chapter or because [she] has filed a complaint, testified, assisted or participated in any manner in an investigation or proceeding under this chapter.” *Id.* According to the hearing officer's findings, Bolves informed Davey she was being harassed by an IPC employee, Kelly Bruggeman (Bruggeman). *Hearings Bureau's Decision at 9, ¶ 42 – 44.* Davey then counseled Bruggeman to stay

away from Bolves. *Id.* Then, after conferring with a co-worker, Davey notified her supervisor of Bruggeman's conduct. *Id.* Having admonished Bruggeman for his behavior toward Bolves and then informing her employer of this behavior, it seems clear Davey "was opposing a practice that is forbidden under the Montana Human Rights Act," specifically sexual harassment. Shortly after Davey reported this conduct, Davey was terminated.

Therefore, the Commission reverses on this issue and determines that Davey's action to oppose a practice forbidden under the Montana Human Rights Act is protected under the Act's retaliation provision.

C. Damages

Turning then to the issue of damages, having determined that the hearing officer erred in respect to liability with regards to Davey, the Commission afforded the parties an opportunity to brief the issue of damages that would be commensurate with a finding of discrimination and retaliation (from arguments and evidence presented at the contested case proceeding).¹

In briefing to the Commission, Davey asserts that she has suffered lost wages and fringe benefits, emotion and bodily injury, a diminished quality of life and other damages. Davey requested damages in the amount of \$350,000 "an amount to make her whole."² It appears that Davey is requesting lost wages in the amount of \$80,288.³

¹ Attached to Davey's brief on damages is a letter from Darcie Davey that was written after the contested case proceeding, this will not be considered as evidence by the Commission since it was not admitted at the prior proceeding.

² The Commission notes that Davey has failed to provide any sort of break down or calculation that reflects how she arrived at the requested amount.

In briefing, Davey also addresses the fact that there is substantial evidence in the record to support an award of emotional distress damages, but Davey never specifically argues in favor of any particular amount. It is unclear from the record (as well as the additional briefing) what amounts Davey is seeking to recover for medical bills and other miscellaneous bills.⁴ In addition to monetary damages, Davey requests the appropriate affirmative relief.

In response, IPC argued that there is no basis for an award of damages under the law, because the Hearing Officer has not made any factual determinations on damage issues. With regard to the compensatory damages, in addition to the lack of findings, IPC notes that Davey failed to refer to the record (in any meaningful manner) as to support a damage award. IPC asserts Davey failed to take any deduction for mitigation and even testified that she could have only worked ten or 20 percent of the time since her termination due to illness. As for emotional distress, humiliation, or bodily injury, IPC argues in favor of complete denial of these damages because Davey failed to reference “competent or sufficient evidence in the record” to support the request.

With regards to IPC’s contention that without findings of fact, the Commission cannot award damages, the Commission disagrees. The Commission has the authority

³ According to Davey’s calculations in her brief this amount is her hourly wage, \$9.65 times 50 hours a week, times four years; but that amount would be \$100,360, not \$ 80,288. It is presumed Davey miscalculated or intended for 40 hours a week to be the appropriate multiplier.

⁴ From the record, it appears that evidence regarding “financial damages” was admitted *en masse* as Exhibits no. 81 through 126, but there is no testimony to explain the exhibits nor is the documentation itself sufficiently explanatory as to relay what is actually owing. See *Hearings Bureau Contested Case Proceeding, Tr. at 407, Ins. 17 – 21*⁴; also attached to *Davey’s Damage Br. Attachment C*.

under Section 49-2-505(5), MCA, to "affirm, reject, or modify" a hearing officer's decision in whole or in part. (Assuming, of course, the amounts are supported by argument and the record.)

Having concluded it has the authority to modify the damage award, the Commission finds the compensatory damages are appropriate given their determination of liability. In discussion, the Commission concluded that Davey was entitled to two years of lost wages at a rate of \$9.65 an hour, times 40 hours in a week, times 52 weeks in a year, for a total of \$ 40,144.00. Additionally, the Commission determines that the record supports an award of \$20,000.00 in emotional distress damages. The Commission also awarded affirmative relief and interest.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Section 49-2-505(5), MCA.

2. The Commission adopts, affirms and incorporates the findings of facts as they pertain to Anne Bolves. The Commission concludes that Anne Bolves has not proven violations of the Montana Human Rights Act. Therefore, the issue of damages is moot in relation to Bolves' claims.

3. The Commission concludes that the substantial evidence does not support a conclusion that Davey was not discriminated against on the basis of sex. The Commission specifically finds that Davey demonstrated that she was treated differently on the basis of sex and her supervisor's⁵ conduct was based on an intent to discriminate based on sex.

⁵ Scott Buenemeyer

4. The Commission concludes that Davey's prevails on the retaliation claim and that substantial credible evidence supports the conclusion that she engaged in a protected activity under the Montana Human Rights Act.

5. Davey is entitled to be compensated for back pay and interest as well as emotional distress damages. Pursuant to Section 49-2-506(1), MCA, IPC International Corporation must pay the sum of \$40,144 in damages for lost wages and \$6,021.60 in prejudgment interest on those damages through May 18, 2010, as well as \$20,000 in damages for emotional distress.

6. The circumstances of this complaint mandate the imposition of affirmative relief in order to eliminate the risk of continued violations pursuant to Section 49-2-506(1), MCA.

ORDER

1. Judgment is in favor of Holiday Village Mall and G.K. Development d/b/a North Grand and against Ann Bolves.

2. Judgment is in favor of Darcie Davey and against IPC International Corporation.

3. The Commission reverses and modifies the hearing officer's conclusion of law Nos. ¶¶ 4 – 6, to reflect its conclusions of law set forth above.

4. Within 90 days of this order, IPC International Corporation's human resource management and staff (that handle staffing for Montana) must complete four (4) hours of training conducted by a professional trainer in the field of personnel relations and/or civil rights laws, on the subject of discrimination and retaliation and the terms and conditions of employment, with prior approval of the training by the Human

Rights Bureau. Within 30 days of completion, IPC International Corporation shall provide verification to the Human Rights Bureau.

5. Within 90 days of this order, IPC International Corporation is ordered to post in a prominent and accessible location a notice of employees' rights under the discrimination laws, specifically the Montana Human Rights Act.

6. IPC International Corporation is enjoined from discrimination or from taking any adverse employment action or retaliating in any way against an employee who engages in any activity protected by the Montana Human Rights Act.

7. IPC International Corporation must pay Darcie Davey the sum of \$66,165.60, representing \$40,144 in compensatory damages, \$6,021.60 in prejudgment interest on those damages, and \$20,000.00 for emotional distress damages.

DATED this ____ day of August, 2010.

Chair of the Human Rights Commission
Ryan Rusche

CERTIFICATE OF SERVICE

The undersigned employee of the Montana Human Rights Commission certifies that a true copy of the foregoing ORDER was mailed to the following persons by U.S. Mail, postage prepaid, on this _____ day of August, 2010:

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Montana Human Rights Commission