

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0098013736:

JOSEPH AZURE,	)	Case No. 1055-2010
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
DUCK INN TAVERN,	)	ADMINISTRATIVE DECISION
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Joseph Azure filed a Human Rights complaint against Duck Inn alleging that Duck Inn retaliated against him for reporting sexual harassment of fellow co-workers.

A contested case hearing in this matter was held on October 5, 2010 in Havre, Montana. Randy Randolph, attorney at law, represented Azure. Chris Young, attorney at law, represented Duck Inn. Azure, head chef Charles Wolchesky, General Manager Trudy Meyer, Operations Officer Janna Faber, and CEO William Dritshulas all testified under oath. Charging Party's Exhibit 1 and Exhibit 2 were admitted into evidence.

Counsel for each party requested time for post-hearing briefing. These requests were granted and the last of the parties' briefs were timely filed on December 5, 2010 at which time the matter was deemed submitted for decision. Based on the evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

Did Duck Inn retaliate against Azure in violation of Mont. Code Ann. §49-2-301 by laying him off?

### III. FINDINGS OF FACT

1. William Dritshulas is the CEO of an entity that owns several businesses in the Havre area. Among these businesses is the Duck Inn Tavern and the Mediterranean Grill which are located in the same building complex. Janna Faber serves as the operations officer for Dritshulas' companies. Trudy Meyer is the general manager of both the Duck Inn and the Mediterranean Grill. Charles Wolchesky is the head chef at the Duck Inn and was Azure's direct supervisor while Azure was employed there.

2. The Duck Inn offers a low end menu consisting of such items as hamburgers and sandwiches. In contrast, the Mediterranean Grill offers fine dining (such as crab, lobster and higher end meat dishes). A cook working at the Mediterranean Grill must have substantial culinary talents in order to prepare the meals on the menu at the Mediterranean Grill.

3. The Duck Inn Tavern hired Azure as a part-time prep cook for the Duck Inn in August, 2008. The Duck Inn does not have full time cooks. Azure did not have the culinary skills and know how to work as a cook for the Mediterranean Grill side of the operation.

4. Azure was scheduled to work from 4:00 p.m. until closing. Azure was not fond of working days and he liked the time slot that he had at the Duck Inn. Azure performed his job well and liked his position.

5. Sometime during March, 2009, Azure noticed that the other prep chef, Gary Leary,<sup>1</sup> placed more taco meat on a customer's tacos being served by one female waitress than he placed on another customer's tacos being served by a different female waitress. Azure interpreted this as sexual harassment.

6. Azure complained to Wolchesky that Gary's conduct amounted to sexual harassment. Wolchesky told Azure that he did not believe such conduct amounted to sexual harassment. Wolchesky explained to Azure that sexual harassment involved such things as unwelcome touching and jokes or harassment and things of that nature.

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<sup>1</sup>The hearing officer neglected to ask the parties to spell this person's last name. The hearing officer has spelled it phonetically based upon what he heard in the recording.

7. On occasion, Azure overheard Meyer speaking to Bob. Bob is hard of hearing. In some instances, Bob would be playing the radio loudly while the dishwashing machine was operating. Sometimes Bob would not have his hearing aid in place and Meyer would have to raise her voice to get Bob's attention. Bob was having some problems completing his work. Meyer would tell him "Bob, you have to let people help you."

8. Azure told Wolchesky that he had been visiting web sites to learn about getting even with management. Azure also told Wolchesky that he (Azure) would be owning the Duck Inn and that Dritshulas would be working for him.

9. By April, 2009, Duck Inn experienced a substantial loss in revenue (\$20,000.00) due to the economic recession. This was the worst revenue loss that Duck Inn had sustained in the 20 years that Faber had been employed there. For the first time, Duck Inn was in the position where it had to lay off employees.

10. Dritshulas directed Meyer to cut back expenses where ever she could. He told her that if she could cut expenses at Duck Inn by ten thousand dollars per month, that would be good.

11. Meyer took Dritshulas directive and decided to accomplish it by whatever method she could. This included dissolving positions and cutting hours.

12. That spring, one of the Duck Inn employees died and one left his employment. In addition, a maintenance worker also left. This reduction in staff was still inadequate to accomplish the cuts Dritshulas sought. After viewing all options, Meyer decided to lay off Azure as his position was the most expendable.

13. One other person, Junior Lawrence, was hired for the Mediterranean Grill in October, 2009. He, however, had cooking skills (he had previously worked at Uncle Joe's Steak House, a fine dining establishment in Havre) for the Mediterranean side of the restaurant that Azure did not possess.

14. On April 15, 2009, Meyer called Azure into her office and told him that Duck Inn was laying him off "until business picked up." Testimony of Trudy Meyer. She told him that she was hoping in the spring after May, going into June, that if travelers started coming back then "they could put people back to work." She also advised Azure to apply for unemployment.

15. Azure said nothing during this meeting about any complaints of sexual harassment or anything about any type of discrimination. All he told Meyer was that he was upset about Leary putting more taco meat on one female server's plate than another female server's plate.

16. Wolchesky never told Meyer, Dritshulas or Faber about Azure's complaint. At the time that Azure was discharged, neither Meyer, Dritshulas or Faber had any knowledge that Azure had made any allegations about sexual harassment.

17. Wolchesky was not involved in the decision to lay off Azure.

18. About one week after being laid off, Azure came barging into Faber's office. He was very upset and for the first time mentioned to Faber about what he perceived to be sexual harassment.

19. On May 14, 2009, Azure filed this retaliation claim with the Montana Human Rights Bureau (MHRB). Upon being served with notice of the complaint, Faber spoke with the MHRB investigator Travis Tilleman. Tilleman informed Faber that no one from Duck Inn should have contact with Azure. As a result, Duck Inn did not contact Azure about any rehiring opportunity. Likewise, Azure, despite Meyer's direction to do so, never checked back with Duck Inn about employment.

20. Prior to his layoff, Azure was injured while lifting a keg at Duck Inn. He initially sought those damages in this proceeding even though this tribunal has no authority to award such damages.

#### IV. OPINION<sup>2</sup>

Montana law prohibits retaliation in employment practices for protected conduct. Mont. Code Ann. §49-2-301. Under this statute, it is unlawful to take any significant adverse action against a person because the person has opposed any practices forbidden by the human rights act. Complaining about a co-worker's sexual harassment is considered protected conduct by the Montana Human Rights Commission. *Wilson and Schumacher v. Diocese of Great Falls, H.R. # 0049011005* (2006), *aff'd sub. nom., Diocese of Great Falls v. Wilson and Schumacher*, 207 Mont. Dist. LEXIS 111 (January 3, 2007) (holding the charging

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<sup>2</sup> 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.

parties engaged protected activity where they complained to management about pornography on a computer).

A charging party can prove his claim of retaliation under the Human Rights Act by proving that (1) he engaged in protected activity, (2) thereafter his employer took an adverse action against her and (3) a causal link existed between her protected activities and the employer's actions. *Beaver v. D.N.R.C.*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. See also, Admin. R. Mont. 24.9.610 (2). Circumstantial or direct evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence (as it is Azure's case), the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect 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 (9<sup>th</sup> Cir. 1996). Azure, however, 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.

Temporal proximity between the protected conduct and the adverse action can be sufficient to show a causal link in retaliation case. See, e.g., *Woodsen v. Scott Paper Co.*, 109 F.3d 913 (3<sup>rd</sup> cir. 1997)(temporal proximity can be sufficient to show causal link to prove retaliation). Azure's prima facie case exists, but only because of the timing of the discharge. Therefore, the burden now shifts to the respondent to demonstrate legitimate, non-discriminatory reasons for the adverse employment action.

Duck Inn has articulated legitimate reasons for Azure's discharge. The highly credible testimony of Wolchesky, Dritshulas, Meyer, Faber and Wolchesky demonstrates two things. First, the testimony shows that Azure did not engage in protected activity. Second, the testimony eviscerates any causal link between Azure's layoff and Azure's complaint to Wolchesky because (1) management was unaware of complaints to Wolchesky and (2) the sole basis for Azure's lay-off was economics, not an intent to retaliate about complaints of sexual harassment.

Wolchesky credibly testified that the only complaint he received from Azure was related to Leary placing more taco meat on one female server's order than on another female server's order. Wolchesky correctly told Azure that such conduct was

not discrimination and Azure had no objectively reasonable basis to believe that such conduct was discrimination. A person alleging retaliation must have a subjective good faith belief that he was opposing illegal discrimination and his belief must also be objectively reasonable. See, e.g., *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1187 (11<sup>th</sup> Cir. 2001). On an objective basis, a complaint that a manager is placing more taco meat on one female server's order than on another female server's order does not show disparate conduct based upon sex. Sex discrimination can only occur when a person is subjected to adverse employment action because of that person's membership in a protected class. Admin. R. Mont. 24.9.610 (2). Where all comparators are members of the same class, that cannot happen.

Moreover, Dritshulas, Meyer and Faber credibly testified and demonstrated (1) that they had no knowledge of complaints made to Wolchesky at the time Azure was laid off and (2) that the lay off was due to economic circumstances. There was clearly a slow down and substantial drop in revenue. In addition, Meyer credibly testified that she never berated Bob the dishwasher on the basis of his sex. In light of these facts, the respondent has met its burden of proof and the case now shifts to the charging party's efforts to show pretext.

Azure has failed in his burden to show pretext. First, Azure's testimony is not credible. He obviously has an axe to grind regarding the injury he received while lifting a keg at Duck Inn for which he is seeking compensation. Second, Meyer is credible and the hearing officer finds that as a matter of fact she never berated Bob the dishwasher on the basis of sex. Third, there is no evidence to rebut the employer's credible evidence that the decision makers in the layoff had no knowledge prior to the layoff that Azure had any complaints and that the layoff was for legitimate economic reasons. Dritshulas, Meyer and Faber did not hear of any complaint prior to Azure's layoff. Wolchesky was not involved in the decision to layoff Azure. Accordingly, there is no causal link between the adverse employment action and the protected conduct. Azure's efforts to show pretext by pointing out that a later hired person was not discharged is not persuasive. It is uncontradicted that the later hired person had greater skills in food preparation that were of real and legitimate use to the employer. The later hired person had the ability to fit into the Mediterranean Grill side of the operation because of his experience in working at a fine dining establishment that Azure lacked. Under the circumstances of this case, Azure has failed to show pretext and, therefore, has failed to carry his burden of persuasion to show discrimination.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).

2. Duck Inn did not retaliate against Azure for engaging in protected activity. Azure did not show that the legitimate business reasons proffered for the actions were false or that retaliation was the real reason for laying him off.

VI. ORDER

Judgment is found in favor of Duck Inn and Azure’s case is dismissed.

Dated: January 20, 2011

/s/ GREGORY L. HANCHETT  
Gregory L. Hanchett, Hearing Officer  
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Randy Randolph, attorney for Joseph Azure, and Chris Young, attorney for Duck Inn Tavern:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)©

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission  
c/o Katherine Kountz  
Human Rights Bureau  
Department of Labor and Industry  
P.O. Box 1728  
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Staci Green (406) 444-3870 immediately to arrange for transcription of the record.