

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0102014211:

LAURA LEE NEVA,	)	Case No. 211-2011
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
JIM BATES,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Laura Lee Neva filed a complaint with the Department of Labor and Industry on January 21, 2010. She filed an amended complaint on February 3, 2010. She alleged that Jim Bates discriminated against her because of sex in public accommodation by subjecting her to sexual harassment while delaying performance of the rental agreement for his property, to be used as an art gallery in which she would sell various kinds of art. On August 10, 2010, the department gave notice Neva’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on August 29 and August 30, 2011, in Columbus, Montana. Laura Lee Neva, charging party, attended with her counsel, Patricia D. Peterman, Patten Peterman Bekkedahl & Green PLLC. Jim Bates, respondent, attended and represented himself. Laura Lee Neva, Rolly Halverson, Deborah DePietro and Jim Bates testified under oath. Exhibits 1-10, 12, 101 and 102 were admitted into evidence.

On October 14, 2011, a “Transcript of Hearing” was filed. It is formatted with extremely wide lines (almost no margins on the left or the right sides of the paper), with fifty-one single spaced numbers on the left-hand margin of each page, with a blank line between each speaker’s statements of record. The Hearing Officer will defer to any reviewing body regarding the validity of said transcript, which is now part of the Hearings Bureau file in this proceeding.

The parties filed and served their post hearing proposed decisions and briefs. Having considered the evidence, the arguments and authorities and the proposed decisions of the parties, the Hearing Officer now issues this decision.

## II. Issues

The pivotal jurisdictional issue addressed in the “Opinion” herein is whether a rental transaction between an owner and a prospective or actual lessee of a commercial property, for retail sales by the lessee from within the property, comes within the scope of the prohibitions against discrimination in public accommodation under the Montana Human Rights Act. A full statement of the issues appears in the final prehearing order. The fact findings herein go beyond the jurisdictional issue to the extent necessary to frame that issue.

## III. Findings of Fact

1. Jim Bates, the respondent, is an owner of, and had apparent or actual authority to lease or to sell, commercial real property in Absarokee, Montana, known as 14-16 South Woodard Avenue. In January 2009, Laura Lee Neva, the charging party, approached Bates and expressed an interest in buying the property. Bates declined to sell it because of the condition of the roof. In June 2009, Neva contacted Bates again and expressed interest in renting 16 South Woodard for use as an art gallery. Bates agreed to pay for the materials and to work with Neva on repairs necessary to make the premises tenantable. The parties expected the necessary repairs to be completed in time for occupancy to begin by August 2009. A written rental agreement was contemplated, but Bates never completed and tendered a written agreement to Neva.

2. Neva and Bates had not agreed upon a specific lease term. They had agreed that it would be mutually beneficial for them if the art gallery could be open for Absarokee Days, commencing on July 25, 2009. Over the course of July, they worked together to repair the roof, to render the premises tenantable, and otherwise to make it more attractive and acceptable as a commercial art gallery. Despite repeated efforts, both before and after July 25, 2009, because of continuing problems with the roof and resulting additional repairs necessitated by damages to the structure caused by the roof leaking, the premises were never tenantable during the time Neva attempted to operate the art gallery therein.

3. Commencing approximately July 12, 2009, and continuing through late July 2009, Bates made multiple sexual comments and propositions to Neva, both in person and through e-mails, ranging from innuendo through explicit and crude proposals to perform sexual acts with or upon her. Neva never encouraged or accepted any of the comments and propositions. Bates had no reason to believe that his sexual comments and propositions were welcomed or in any way even marginally acceptable to her. Bates’ assistance in making the roof repairs necessary to render the building tenantable lessened when Neva did not allow him unfettered access to the premises and welcome and encourage his sexual comments and propositions.

4. After attempting and failing to complete the roof repairs necessary to make the premises tenantable, Neva was unable fully to open the art gallery during Absarokee Days. The leaks in the roof caused damage to the premises and created the risk of damage to the art works. Neva could neither keep the gallery open nor keep the art works placed with her by the artists for sale in the gallery. As a result, her income from the art gallery was almost non-existent, and her costs of trying to operate it were far greater than she had expected.

5. After the roof repairs were finally finished, with financing from a partner of Bates, contacted by Neva after Bates had stopped providing any assistance on the roof, Neva could not afford the costs of further repairs that the premises now required, including repairs to the electrical system. She vacated the premises voluntarily, without notice and without ever having paid rent, sometime in March 2010. She moved her art gallery across the street to another building where the gallery is now located, with quadruple the overhead expected at the original location.

#### IV. Opinion<sup>1</sup>

Mont. Code Ann. §49-2-304(1)(a) prohibits an owner of a public accommodation from refusing, withholding from or denying to a person any services, goods or facilities of the public accommodation because of sex (with limited exceptions that are inapplicable here). If that prohibition applies to the owner of premises, whose premises the target of his sexual harassment is attempting to lease to open a public accommodation (art gallery) therein, then Bates is liable for sexual discrimination, sexual harassment, shutting down Neva's business, fear, dread, sleepless nights for months, the expended time and expenses of hundreds of hours of repairs and preventive action to keep the ceiling from collapse, and the costs of relocating the business to other premises.

Given the truth of the charges of sexual harassment, as found above, does the above provision of the Montana Human Rights Act (MHRA) make it illegal for an owner of commercial premises, during interactions and transactions between that owner and a prospective tenant of the premises, to inflict sexual harassment on the prospective tenant, who seeks to rent the premises as a location from which to operate an art gallery and offer works of art for sale to the public? The parties have not cited nor has the Hearing Officer been able to find any Montana case law that directly answers this question. Thus, it is a matter of statutory construction.

It is clear that sexual harassment is sex discrimination, where the harassment is directed toward a member of a protected class in a situation covered by the MHRA.

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<sup>1</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.

Harrison v. Chance (1990), 244 Mont. 215, 797 P.2<sup>nd</sup> 200, 205, applied and followed, Shields v. Helena School D. No. 1 (1997), 284 Mont. 138, 943 P2<sup>nd</sup> 999, 1005. Unquestionably, Bates directed his sexual comments and propositions towards Neva because she is a woman. Bates' jurisdictional issue is whether Neva was a person who, because of his sexual harassment of her, was being denied any services, goods or facilities of the public accommodation.

Neva was seeking to lease Bates' premises, so that she might offer from within those premises a public accommodation, to any customers who chose to enter therein and examine her wares (art on display and for sale). The business transaction between Bates and Neva was not a public accommodation, but a business lease of commercial premises. The Hearing Officer cannot see how that transaction, a circuitous and incomplete attempt to enter into a lease of Bates' premises, fits within the definition of "public accommodation" under the MHRA.

"Public accommodation" means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.

Mont. Code Ann. §49-2-101(20(a) and (b).

Bates' sexual harassment of Neva was severe, persistent and patently unwelcome. Nonetheless, it neither involved nor caused "refusing, withholding from or denying to a person any services, goods or facilities of the public accommodation." Bates was offering his business premises for a commercial lease between private parties. Neva was attempting to accept that offer. As between them, there was no public accommodation, even though Neva wanted the commercial lease so that she, as the lessee, could open a public accommodation on the leased premises. The MHRA does not address illegal discrimination in commercial, as opposed to housing, leases between private individuals.

There is one MHRA decision that an owner/lessor had engaged in illegal discrimination in public accommodation. Angel v. Baxter Homeowners Assoc., Case Nos. 851&852-2009, HRB Nos. 0083012911-12, "Findings of Fact; Conclusions of

Law; and Decision after Remand and Notice of Issuance of Administrative Decision” (Aug. 27, 2010). That case is entirely distinguishable from the present case. In it, the lessor was held to have engaged in disability discrimination by turning off the elevator during business hours, thereby denying access to the lessee’s law office (the public accommodation) for the lessee’s clients whose mobility disabilities prevented them from climbing stairs. The discrimination was denying members of the public with disabilities access to the public accommodation, thereby causing direct harm to the lessee by keeping his clients from reaching his office. In the present case, the alleged discrimination was sexual harassment of the lessee by the owner/lessor, linked with the lessor’s failure to do enough to provide tenantable premises to the lessee. No action denying access to the public accommodation by members of the public is involved at all in the present case.

Because the sexual harassment alleged and proved herein did not violate any of the prohibitions within the MHRA, the department does not have jurisdiction over this complaint. Mont. Code Ann. §49-2-501(1).

#### V. Conclusions of Law

1. The Department does not have jurisdiction over Neva’s claims of sexual harassment, because she has not alleged nor proved a violation of the MHRA which would give the Department jurisdiction. Mont. Code Ann. §49-2-512(1).
2. The complaint herein must be dismissed.

#### VI. Order

1. The discrimination complaint of Laura Lee Neva against Jim Bates is dismissed.

Dated: November 25, 2011

/s/ TERRY SPEAR

Terry Spear, Hearing Officer  
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Patricia D. Peterman, Patten Peterman Bekkedahl & Green PLLC, attorney for charging party Laura Lee Neva, and respondent Jim Bates:

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)(c)

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 Kathy Helland  
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. There is an original transcript in the contested case file, although its format is unorthodox. Contact Tamara Newby, (406) 444-3870, with any questions about the transcript.