

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0131015756:

JON CRUSON,)	
)	Case No. 1683-2013
Charging Party,)	
)	ORDER GRANTING
vs.)	MEC’S MOTION FOR
)	SUMMARY JUDGMENT
MISSOULA ELECTRIC COOPERATIVE,)	ORDER OF DISMISSAL
)	NOTICE OF APPEAL RIGHTS
Respondent.)	

* * * * *

The Missoula Electrical Cooperative (“MEC”) seeks summary judgment on the age discrimination in employment complaint of Jon Cruson, a former employee of MEC. The critical question for this motion is whether the Joint Apprenticeship Training Committee (“JATC”) acted on behalf of MEC in taking actions which Cruson alleged were discriminatory regarding which applicants to recommend for apprentice linemen positions. Because JATC acted independently in making its decisions, and not as an agent for MEC, the Hearing Officer now grants the motion.

I. PROCEDURE

On October 15, 2012, Cruson filed a Charge of Discrimination with the Montana Department of Labor’s Human Rights Bureau. On May 14, 2013, the Human Rights Bureau sent the complaint to the Hearings Bureau (now the Office of Administrative Hearings, “OAH”) for contested case proceedings. OAH assigned this Hearing Officer to the case, the parties accepted service of Notice of Hearing and the case was originally scheduled for hearing in September 2013. Extensive discovery and scheduling delays within discovery led to multiple resettings of the hearing, which was last set for October 20-24, 2014, until the Hearing Officer vacated that setting on October 6, 2014, so that he could complete and issue this order.

On March 24, 2014, MEC filed a Motion for Summary Judgment supported by five Affidavits. MEC sought a ruling that it could not be held liable for the acts of JATC, which acted independently in determining which applicants to recommend for the positions of apprentice linemen. In addition, MEC argued that Cruson had not been subject to an adverse employment action because he was eventually offered the position for which he applied.

In the course of briefing, Cruson requested additional discovery time to address the motion. On May 13, 2014, the Hearings Bureau issued its Order Postponing Oral Argument without Date, providing the parties with additional time to complete discovery before a decision would be made as to the Motion for Summary Judgment. The Order also provided the opportunity for the parties to file supplemental briefs based on the additional discovery.

Accordingly, Cruson filed a supplemental response to MEC's summary judgment motion on August 15, 2014, arguing that an agency relationship existed between JATC and MEC. MEC filed a supplemental reply on August 27, 2014, and the Hearing Officer heard oral argument by telephone on September 22, 2014.

II. SUMMARY JUDGMENT STANDARDS

Any party may move, with or without supporting affidavits, for summary judgment on all or part of the claim. Rule 56(a) M.R.Civ.P. The judgment sought is mandatory if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3) M.R.Civ.P.; *Peterson v. Eichhorn*, ¶12, 2008 MT 250, 344 Mont. 540, 189 P.3d 615.

Summary judgment fosters judicial economy by eliminating unnecessary litigation. *Abell v. Travelers Ins., Co.*, 204 Mont. 156, 663 P.2d 335, 337 (1983); *Hughes v. Pullman*, ¶20, 2001 MT 216, 306 Mont. 420, 36 P.3d 339; *Boyes v. Eddie*, ¶16, 1998 MT 311, 292 Mont. 152, 970 P.2d 91 (citing *Kane v. Miller* (1993), 258 Mont. 182, 186, 852 P.2d 130, 133); *Olson v. Osmolak*, ¶13, 2003 MT 151, 316 Mont. 216, 70 P.3d 1242.

Summary judgment is appropriate when the movant demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *Albert v. City of Billings*, ¶15, 2012 MT 159, 365 Mont. 454, 282 P.3d 704. Once the movant party has met its burden, the opponent must present substantial evidence essential to one or more elements of the case to raise a genuine issue of material fact. *Styren Farms, Inc. v. Roos*, ¶10, 2011 MT 299, 363 Mont. 41, 265 P.3d 1230. The opponent cannot raise a genuine issue of material fact with conclusory or speculative statements, but only with material and substantial evidence. *Lee v. USAA Cas. Ins. Co.*, ¶26, 2001 MT 59, 304 Mont. 356, 22 P.3d 631; *Simmons v. Jenkins* (1988), 230 Mont. 429, 432, 750 P.2d 1067, 1069.

Cruson argued that summary judgment is an extreme remedy that should not be a substitute for a trial on the merits if a material factual controversy exists. *Calcaterra v. Montana Resources*, ¶9, 1998 MT 187, 289 Mont. 424, 962 P.2d 590. This is a simple judicial restatement of the movant's initial burden to show there are

no genuine issues of material fact. *Motarie v. N. MT. Joint Refuse Disposal Dist.*, 274 Mont. 239, 907 P.2d 154, 156 (1995). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party who opposes summary judgment. *Id.*

III. MEC’S FACTS SUPPORTING ITS MOTION

On December 21, 2010, MEC and Local Union 44 of the International Brotherhood of Electrical Workers (“Local”) signed a Collective Bargaining Agreement (“CBA”) which was in full force and effect at all times relevant to this litigation. Affidavit of Mark Hayden (hereafter “Hayden”) ¶2, Attachment A. The CBA governed the relationships among the Local as bargaining agent, the employees (including Cruson) in the bargaining unit, and MEC as the employer. The CBA set forth the employees’ working hours and wages, holidays and paid leave, personal annual leave, benefits, seniority rights, working rules, grievance and arbitration procedure, and apprentice training procedure. The CBA specifically provided for an apprentice training procedure, through a committee formed for that purpose:

Article XV

Apprentice Training

- Section 15.00 There shall be a Joint Apprenticeship and Training Committee of equal representation, two (2) members representing the Cooperative and two (2) members representing the Union. This Committee shall make local standards governing the administration, supervision, selection, education and training of all apprentices . . .
- Section 15.01 Members of the Joint Apprenticeship and Training Committee shall be selected by the party they represent . . .
- Section 15.04 The Committee shall supervise all matters involving apprenticeship and training in conformity with the provisions of the Agreement and the Local Apprenticeship Standards. In case of a deadlock, the matter in dispute shall be referred to the parties to this Agreement for settlement. . . .

The CBA provides for the implementation of a Joint Apprenticeship Training Committee (“JATC”) with representatives appointed by the union and MEC. Affidavit of Neal Fugere (hereafter “Fugere”) ¶2; Affidavit of Bart Peterson (hereafter “Peterson”) ¶2; Affidavit of Nick Labbe (hereafter “Labbe”) ¶2; Affidavit of Erik Langaunet (hereafter “Langaunet”) ¶2. JATC is responsible for all matters relating to the administration, supervision, training, education, and selection of applicants for apprenticeships. Fugere ¶4; Peterson ¶4; Labbe ¶4; Langaunet ¶4. Under the terms of the CBA, when MEC decides to hire an apprentice lineman, the committee makes a recommendation to management, and management either approves or rejects the recommendation. *Id.* Management does not have the right under the agreement to select its own candidate if the recommended candidate is not acceptable. Hayden

¶¶7-8. The standards are set forth in the Apprenticeship Standards for Electrical Lineman. Hayden ¶3, Attachment B (“Apprenticeship Standards”). The Apprenticeship Standards provide, in part, as follows:

2. AUTHORITY AND COMPOSITION OF THE COMMITTEE

...

The Joint Apprenticeship and Training Committee established under these Standards shall be the sole administrative body for the apprenticeship and training program outline in these Standards. The Committee shall have full authority and responsibility to install, regulate, supervise, control and operate the apprenticeship program and shall have complete authority to establish and enforce rules and requirements governing the qualifications, education, training, selection, and supervision of apprentices.

...

3. DUTIES AND RESPONSIBILITIES OF THE COMMITTEE

A. Cooperate in the selection of qualified candidates for apprenticeship as outlined in this program.

...

6. APPRENTICE SELECTION

Selection into the apprenticeship program will be in accordance with the selection procedures made a part of these Standards.

In August 2012 MEC decided to look for a new apprentice lineman and opened the position to persons who were already in the employ of MEC. Fugere ¶3; Peterson ¶3; Labbe ¶3; Langaunet ¶3. Cruson was one of the individuals to apply for the apprentice lineman position. He was forty-nine (49) years old at the time of his application for the position. See Exhibit “A”, October 15, 2012 Charge of Discrimination.

JATC constructed a scoring system for the selection process. Fugere ¶6; Peterson ¶6; Labbe ¶6; Langaunet ¶6. At the time of the interviews, it was MEC management’s opinion that Jon Cruson was the person best qualified for the apprentice position. Hayden ¶5. However, MEC’s management had no influence or control over which candidate JATC recommended. Hayden ¶7. JATC recommended a person other than Jon Cruson for the apprentice lineman position. Hayden ¶6. MEC management chose to reject the applicant who was recommended by JATC for the position. See Exhibit “A”, Charge of Discrimination.

JATC members are responsible for following the Apprenticeship Standards for Electrical Lineman in the administration of the apprenticeship program. Fugere ¶4; Peterson ¶4; Labbe ¶4; Langaunet ¶4. The members of JATC had a duty to act in accordance with the Apprentice Standards for Electrical Lineman to JATC. Fugere ¶7; Peterson ¶7; Labbe ¶7; Langaunet ¶7. JATC acts completely independently of both MEC and the Local in carrying out its duties provided under the Apprentice Standards for Electrical Lineman. Fugere ¶8; Peterson ¶8; Labbe ¶8; Langaunet ¶8.

The opinions and desires of MEC and the Local had no impact on the decisions of JATC members. Fugere ¶9; Peterson ¶9; Labbe ¶9; Langaunet ¶9; Hayden ¶9.

Clearly, if the standards and requirements of JATC were followed, as the affidavits indicate they were, MEC had no control over who was recommended by JATC. In addition, MEC would have hired Cruson if he had been recommended. Hayden ¶¶4, 7.

A CBA is a specialized contract, binding MEC and the Local to its terms. Pursuant to the terms of the CBA, JATC was independent from MEC.

IV. CRUSON'S OPPOSITION TO SUMMARY JUDGMENT

Cruson responded that JATC (which his counsel sometimes called the "MEC-JATC" or other such terms to emphasize MEC's "ownership" of JATC) was not a wholly separate and independent entity over which MEC had no control. This assertion did not create a genuine issue of material fact about whether JATC was an agent of MEC's.

To support this argument, Cruson pointed out that JATC agreement listed JATC's name, on the first page of the agreement, as the "Missoula Electrical Cooperative JATC," and that the "Forward" set forth on Page 2 of the agreement identified the controlling entity as the "Missoula Electric Cooperative Joint Apprenticeship and Training Committee" and that there was no other power supplier entity described other than MEC. These facts did not create a genuine issue of material fact about whether JATC was an agent of MEC's. Absent sufficient evidence that the four members of JATC, or at least three of them together, departed from the terms of the CBA in ways dictated by MEC, the terms of the CBA established JATC's independence.

Cruson also asserted that the entire purpose of JATC was to serve as an apprenticeship hiring system for MEC, allowing for some union member input, but that JATC worked only for MEC. The problem with this bald assertion is that it contradicts the CBA, which provides, in Art. XV, Sec. 15.04, that "[t]he Committee shall supervise all matters involving apprenticeship and training in conformity with the provisions of the Agreement and the Local Apprenticeship Standards. In case of a deadlock, the matter in dispute shall be referred to the parties to this Agreement for settlement." Further, the Apprenticeship Standards for Electrical Lineman provide, in Sec. 2, "Authority and Composition of the Committee," that JATC "shall be the sole administrative body for the apprenticeship and training program" and that JATC "shall have full authority and responsibility to install, regulate, supervise, control and operate the apprenticeship program and shall have complete authority to establish and enforce rules and requirements governing the qualifications, education, training,

selection, and supervision of apprentices.” Assertions about the role of the employer did not create a genuine issue of material fact about whether JATC was an agent of MEC’s.

Cruson also asserted that JATC was made up entirely of MEC employees – two MEC non-union managers selected by MEC and two union MEC employees selected by the union. The fact that a joint apprenticeship training committee created by a single CBA between one employer and one collective bargaining agent who represents the employees of that one employer is almost always going to have all committee members employed by that one employer. It adds nothing to the question of JATC’s independence that the CBA requires appointment of MEC employees for JATC’s members, when two out of four are union employees. This provision of the agreement did not create a genuine issue of material fact about whether JATC was an agent of MEC’s.

Cruson also asserted that the agreement designated JATC as the “program sponsor” responsible for lawful administration of the program. Indeed, the language of the agreement places responsibility on JATC for assuring that federal and state equal opportunity laws are followed in what JATC does. JATC consisted of two MEC management employees and two MEC union employees. Its responsibility for conforming its own actions to the requirements of the law did not raise a genuine issue of material fact about whether JATC was an agent of MEC. The agreement that created JATC said JATC was independent. The standards JATC was to follow said that JATC was independent. Union employees, acting in that capacity as members of JATC, are not somehow under the direction of the employer, based upon argument alone, when the CBA says otherwise.

Cruson also found something sinister in the absence of a prohibition against age discrimination in JATC agreement. JATC did not write the agreement – the Local and MEC dictated its contents. The absence of a prohibition against age discrimination did not create a genuine issue of material fact about whether JATC was an agent of MEC’s.

Cruson also argued that JATC was comprised entirely of management level MEC employees. Area foremen who belong to the union are, by definition, not management, even though they may supervise other union employees. If they were management, they would very likely not be members of the Local. There is no evidence that the two union selected members of JATC were “MEC management” employees. The argument that they were did not create a genuine issue of material fact about whether JATC was an agent of MEC’s.

Cruson also contended that the actions of MEC's General Manager showed that JATC was under the control of MEC management. The "evidence" in support of this contention was that the general manager asked JATC to choose between Cruson and Greg Flesch, as the only two candidates for an apprenticeship position, shortly after both of them had obtained cause findings from the Human Rights Bureau on their age discrimination complaints. There was nothing untoward about MEC presenting the list of candidates to JATC. There was nothing untoward in MEC asking JATC to choose one of the candidates. JATC had the power to choose either or neither candidate, under the agreement. Evidence that MEC's general manager demanded that JATC choose either Cruson and Flesch for a lineman apprentice position was not enough to create a genuine issue of material fact about whether JATC was an agent of MEC's because it did choose one of the two.

During the August 2012 application process, JATC member Neal Fugere stated to Greg Flesch that he was "wasting his time" by applying for the apprenticeship position and "should have applied years ago when h[e] was younger." (Ex. 2 at 54-55.) This could be evidence of age bias by Fugere, which could have impacted JATC's decision-making, but did not show any MEC control or influence over the process. It could also be a comment that applying for an apprentice position at Flesch's age was not going to be very profitable because the much higher wages that would come with greater seniority would not accrue to Flesch before he retired. Fugere was one of the two members selected by the Local. Evidence about Fugere's statement was not enough to create a genuine issue of material fact about whether JATC was an agent of MEC's.

Another MEC-JATC member, Bart Peterson, stated in a management meeting that he would never hire an older lineman apprentice because he wanted to get his money's worth out of them. This could be evidence of age bias by Peterson. But JATC had no power to "hire" anyone. MEC did "hire" lineman apprentices, and offered Cruson a position as a lineman apprentice after JATC selected Cruson over Flesch. Peterson was one of the two members selected by MEC. Evidence of his statement was not enough to create a genuine issue of material fact about whether JATC was an agent of MEC's.

Evidence that three of the older apprentice candidates filed discrimination complaints against MEC through the Local, and "got nowhere" does not create any genuine issue of material fact about whether JATC was an agent of MEC's.

Cruson, despite a valiant and able effort by his attorneys, has not established any genuine issue of material fact about whether JATC was an agent of MEC's. Since the alleged discriminatory acts were those of JATC, there is, as a matter of law, no proof of discriminatory acts by MEC itself.

V. ORDER

MEC's summary judgment motion is granted. There is no material and substantial evidence that JATC was an agent of MEC's. Cruson did not make any claims against JATC. As a matter of law, Cruson cannot prove a case against MEC. His complaint must be dismissed in its entirety. IT IS SO ORDERED.

DATED: October 23, 2014.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: David C Berkoff, Berkoff Law Firm PC, and Nate S. McConnell, McConnell Law Office, PLLC, attorneys for Jon Cruson; Dave Cotner and Kyle Ryan, Datsopoulos, MacDonald & Lind, P.C., and Edward Murphy, Murphy Law Offices, PLLC, attorneys for Missoula Electric Cooperative ("MEC"):

The decision of the Hearing Officer, above, granting summary judgment to MEC, is an administrative decision appealable to the Human Rights Commission, and it 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 Marieke Beck
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 Office of Administrative Hearings, 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).

THERE IS NO HEARING TRANSCRIPT.