

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

RANDY BACHMEIER,
Charging Party,

-v-

MONTANA STATE UNIVERSITY
NORTHERN,
Respondent.

HRB CASE NO.0131016284

REMAND ORDER

Charging Party, Randy Bachmeier, filed a complaint with the Department of Labor and Industry (Department), which alleged unlawful discrimination in employment on the basis of sex and retaliation. The case went before the Office of Administrative Hearings of the Department of Labor and Industry, which held a contested case hearing, pursuant to § 49-2-505, MCA. The hearing officer issued a Decision on May 13, 2015. The hearing officer determined that Bachmeier had not been subjected to discrimination, but had been subjected to retaliation. As a result, Bachmeier was awarded \$75,000.00 in damages.

Bachmeier and Montana State University Northern (MSU-N) both filed appeals with the Montana Human Rights Commission (Commission). The Commission considered the matter on September 18, 2015. Colette Davies and John Heenan, attorneys, appeared and presented oral argument on behalf of Bachmeier. Elizabeth L. Griffing and Jessica Brubaker, attorneys, appeared and presented oral argument on behalf of Montana State University Northern.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the

proceedings on which the findings were based did not comply with essential requirements of law. *Admin. Rules of Mont. 24.9.123(4)*. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record. 2-4-621(3), MCA. The Commission reviews conclusions of law to determine whether the hearing officer's interpretation and application of the law is correct. *See, Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, 198 P.3d 284.

DISCUSSION

After careful consideration of the complete record and the argument presented by the parties, the Commission determines that certain findings of fact and conclusions of law made by the hearing officer were not based upon competent substantial evidence or were incorrect.

Retaliation:

As stated by the hearing officer, Bachmeier was subjected to retaliatory actions by MSU-N. The Commission affirms the hearing officer's findings of fact and conclusions of law as to that matter. On appeal, MSU-N alleged the "but for" standard for retaliation precludes a finding of retaliation where there was a simultaneous legitimate business purpose. The Commission determines, however, the findings of fact by the hearing officer are based on competent substantial evidence and that, but for Bachmeier's protected activity, he would not have suffered the adverse actions of discipline and singling out even though there were legitimate business reasons on which the actions could have been based. FOF ¶43. Because the findings of fact are affirmed as supported by substantial evidence in the record, and because the hearing officer correctly applied those facts to the law, the hearing officer is affirmed as to the issue of retaliation.

However, the Commission determines that the hearing officer's award of \$75,000 in damages for that retaliation was clearly erroneous and not based on substantial evidence. While retaliation occurred, the Commission determines that the actions taken do not justify such a high

award because the substantial evidence in the record shows both minor discipline and certain legitimate business issues. The current award is excessive in light of those retaliatory acts. As such, the Commission modifies the damage award as to retaliation by reducing it to \$20,000.

Discrimination:

On appeal, Bachmeier argued that the hearing officer incorrectly found that discrimination had not occurred, and found that the conduct Bachmeier suffered was not objectively severe enough to warrant a finding of discrimination. The Commission determines the findings of fact are not based on substantial evidence and that the conclusions of law are incorrect.

At page 27, paragraph 3, the HOD states: “Whatever the exact frequency of the touching of Bachmeier, similar touching was not perceived as unreasonably intimate and inappropriate by MSU-N employees subjected to it.” Bachmeier cited to numerous portions of the record directly contradicting this finding, and argues that the finding is not supported in the record. The Commission agrees with Bachmeier based on its review of the record. Therefore, this finding of fact is rejected by the Commission because it is not based upon competent substantial evidence in the record. Indeed, the record supports the opposite conclusion: that other MSU-N employees found that touching to be inappropriate when directed at them. *See e.g.* Tr. 30:10-24; 90:6-13; 166:1-172-3; 223:20-225:1; 490:6-491-9.

At page 28, paragraph 1, the HOD states: “it was Bachmeier alone who found the touching unreasonably interfered with his work performance.” Once again, the Commission determines that this finding of fact is not based on substantial evidence. The record supports an alternative conclusion: that most all employees found Templeton’s touching to be inappropriate. *Id.* The Commission finds that competent substantial evidence in the record does not support a finding that only Bachmeier found the touching offensive. As such, this finding of fact is rejected by the Commission.

At page 29, paragraph 4, the HOD states: “It was not so obviously outrageous that she should reasonably have known it was unwelcome. Once he asked her to stop, she stopped.” This finding of fact is rejected by the Commission because it is not based on competent substantial evidence. As noted above, the record reflects a history of inappropriate touching. Further, evidence in the record reflects that Templeton’s touching of Bachmeier continued following his request that it stop. *See, e.g.* Tr. 29:12-30:9; 74:16-76:4; 89:13-24; 210:17-211:5; 290:2-12. As such, the hearing officer’s contrary finding of fact is not based on substantial evidence in the record. The Commission further notes that, throughout the HOD, reference is made to the erroneously concluded fact that once Bachmeier requested Templeton stop touching him, she did. Because this finding is not supported by substantial credible evidence in the record, it is rejected by the Commission wherever it appears: including, page 28, paragraph 2; and, page 29, paragraph 3.

Based upon the Commission’s review of the complete record, the Commission determines the above findings are not based on substantial evidence and further determines the record shows that an objective person would find the touching suffered by Bachmeier objectively offensive and unreasonable. Witness testimony cited above shows numerous others found the touching unreasonable and offensive. As a matter of law, then, conclusion of law 2 is incorrect. Therefore, the Commission rejects conclusion of law 2 on page 34 of the HOD. That conclusion states that Bachmeier failed to present sufficient evidence to support his discrimination charge. The Commission concludes that the hearing officer misapplied the facts of the case to the law of discrimination.

The Commission concludes Bachmeier was discriminated against when he was subjected to unwanted touching. As outlined above, the Commission determines the findings of fact are clearly erroneous and the conclusion of law is incorrect which supported the opposition conclusion; those are therefore reversed or rejected.

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 5th day of November, 2015.

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