

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0131016489:

ROCHELLE COFFEY,	)	Case No. 1725-2014
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
ALLEN CONSTRUCTION COMPANY,	)	ADMINISTRATIVE DECISION
INC.,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Rochelle Coffey filed a complaint with the Department of Labor and Industry on September 18, 2013. She alleged that Allen Construction Company, Inc. discriminated against her because of her age and her sex when it paid her lower wages than younger male workers and when it discharged her when there was still work for her to do. On April 16, 2014, the department’s Human Rights Bureau (“HRB”) forwarded Coffey’s complaint to the Office of Administrative Hearings (“OAH”), requesting contested case proceedings. OAH gave notice Coffey’s complaint would proceed to a contested case hearing and appointed Terry Spear as hearing officer.

The contested case hearing convened and concluded on September 4-5, 2014, in Great Falls, Montana. Rochelle Coffey attended with counsel Daniel J. Flaherty and Paul Gallardo, Flaherty Law Office. Allen Construction Company, Inc.’s owner and designated representative, Bruce Allen, attended with counsel Antonia P. Marra and Barbara E. Bell, Marra, Evenson & Bell PC. Bruce Allen, Josh Nelson, Dean Coffey, Rochelle Coffey, Marcia Houtman, Brady Walker, Corin Fisch, Travis Jensen, Dylan Jennings, Joseph Lange, Amanda Neiss<sup>1</sup> Lange (previously Amanda Neiss) and

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<sup>1</sup> The corporation spelled this witness’ name “Nace” in its prehearing “Witness List of Respondent, Allen Construction Company, Inc.” Thus, her name was spelled “Nace” in the “Final Prehearing Order.” In its “Proposed Hearing Officer Decision” the corporation spelled her name “Neiss.” The employer is more likely to know the name of one of its employees who was also a witness than Coffey, therefore the most recent spelling by the employer is used in this decision, since the

Robyn Wiseman testified. Exhibits 1, 4-11, 15 and 101-105 were admitted into evidence. Exhibit 13 was refused on hearsay and relevance objections.

Having reviewed, considered and weighed the evidence of record, the proposed decisions and the briefs, the Hearing Officer now makes the following findings and conclusions and issues the following order.

## II. Issues

The dispositive issue is whether Allen Construction Company, Inc. paid Rochelle Coffey lower wages than it paid to male workers and/or younger workers, and discharged her while there was still work to do on the job site, because of her sex and age. The final prehearing order contains a complete issue statement.

## III. Findings of Fact

1. Respondent Allen Construction Company, Inc. (“the corporation”) is a South Dakota company doing business in surrounding states, including Montana. The corporation is an agricultural construction company, primarily doing seasonal work constructing grain bins. The corporation had more than 100 employees in 2013, including full time permanent, part time and seasonal employees. Most employees were and are men. Women do not generally seek employment with the corporation building grain bins, but it typically hires some women every year. A few women have worked multiple years for the corporation in grain bin construction. In 2013, the corporation had two construction jobs in Montana. One job, in the summer of 2013, required building multiple 90 foot diameter grain bins as a subcontractor on a project near Power, Montana.

2. Because of the seasonal nature of constructing grain bins, the corporation has fewer than 10 full time permanent employees, primarily an office person and the foremen. Workers with additional skills, such as heavy equipment operators who can do a few different jobs during the off-season (winter), sometimes also hold permanent positions. The length of the grain bin building season varies according to weather in the spring and fall. The season typically starts in May and lasts until the contracted or subcontracted jobs are completed (there typically are no jobs building grain bins in the winter in the northern United States), lasting six months more or less – a shorter than six month season would be unusually short, and a seven or eight month season would not be unusual.

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Hearing Officer does not have a copy of a transcript. She is called “Amanda Neiss” and then “Neiss” for events while she was Lange’s fiancé, but her married name appears above, for current identification.

3. The corporation has a varying number of regular seasonal workers, who come back to work in the spring when the grain building season begins and there is work for them. In building bins, the corporation uses “teams” of workers, all under the foreman’s supervision, with each team consisting of one or two permanent workers (if available), some returning seasonal workers and some new workers. Depending upon the number of jobs successfully bid by the corporation that year, it will recruit additional workers, who either worked for the corporation in the past or are new to employment by the corporation, to come and work on a crew that needs more hands. Not all of the workers stay for the entire construction season, so the need for more hands fluctuates according to both the amount of work being done and the number of workers currently doing it. The corporation’s new employees can come from the local labor market or from further away. Grain bin building requires hard physical labor and long hours, often for more than five days a week. The corporation offers raises in pay based upon performance. New employees who perform well often are invited to stay on for the crew’s next job and can continue in employment until the end of the season if the corporation and the laborer are mutually satisfied with the arrangement. As the final building jobs are completed in the fall, the remaining seasonal workers are let go.

4. Bruce Allen is the president and owner of the corporation, and lives in South Dakota. He ultimately makes all hiring, pay rate and discharge decisions, with input from his foremen on the ground. The corporation regularly builds bins at remote job sites. Allen necessarily entrusts considerable responsibility and authority to his many foremen, including Joseph (Joe) Lange. Allen allows the foremen to hire, to assess employee performance, to recommend wage increases or decreases, and to discharge employees, all with his approval. Allen talks regularly with the foremen, discussing the workers, the job progress and any problems with that progress. He typically does not interfere with the decision-making of the foremen and usually relies on their recommendations, although he will periodically visit the corporation’s work sites, to observe for himself how the work is progressing and how the workers are performing. He visited the Power work site on more than one occasion in 2013, at least in part because it posed some special problems.

5. Charging Party Rochelle Coffey, a woman, was more than 40 years of age when the corporation hired her as a laborer on the Power, Montana job. She was offered the job by the corporation’s job supervisor, foreman Joe Lange, after he interviewed her on July 22, 2013. Coffey’s initial regular pay rate was \$10.00 per hour. Her son Dean Coffey also was hired at the same time, at the same wage. She began work the next day, July 23, 2013.

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6. The corporation has a 90-day probationary period for all employees, about which all employees are told upon their hire. Coffey and the other workers hired to work on the Power grain bins were each informed of the probationary period and of the \$10.00 starting wage rate. Amanda Neiss (then Lange's fiancé, now Amanda Neiss Lange, his wife) kept track of the worker's hours on the Power job, based on the starting times for each worker each day and the ending times for each worker each day. Coffey was told, as were all new hires, that if they worked hard, did not miss work, and consistently tried, they could be eligible for a raise, which could even be reflected in their first paycheck. If Joe Lange requested a raise for a worker, Allen decided whether a raise would be given, and for what amount. Lange typically would not even know the worker's new pay rate.

7. There were many problems and delays on the Power job. The work area for the corporation at the job site was neither properly nor most conveniently set up. When Lange and his crew arrived, they had to haul two million pounds of material around a block and a half to their job site. Lange felt that the site was a disaster from the beginning. As time went by, the Power job crew was not meeting its deadlines to complete the subcontract, and the work got further and further behind schedule. For Allen, this was both a personal and a business problem. He and the general contractor on the job were long time friends. The general contractor regularly hired the corporation. Having their subcontract terminated and being "thrown off" the site for failure timely to finish could have impacted Allen's business generally and could have damaged both his business and personal relationships with that general contractor.

8. At the beginning of the Power job, all employees from all subcontractors went to the general contractor's trailer daily to sign in and then to sign out at the end of work each day. That changed as the job grew and each subcontractor was then requested to sign their own crews in and out. For employees of the corporation, the job was six days a week and sometimes seven. Start time was 6:30 a.m. and the end time varied, depending upon how fast work was going. A 60-hour work week was fairly average. The Power job started at the beginning of July 2013. It was expected that a bin of this type could be raised within 10 days.

9. On the job, the corporation's standard operating procedure for putting up the grain bin utilizes two worker "teams" from the crew, erecting the "rings" or walls of the bin. One person on a "team" works inside the bin and the other works outside the bin. The inside person holds up the portion of the "ring" or wall, and punches a hole through the wall for insertion of a bolt. The outside person uses a securing "stiffener" or "stabilizer," and runs a bolt through the hole, then the "team" moves to the spot for the next bolt and repeats the procedure. Coffey worked as an outside worker, doing bolt placement. The evidence suggests that she worked with an

employee named Chris Bender and for a time with both Josh Nelson and Brady Walker at the same time. According to testimony from Lange and Neiss, Coffey slowed down the work by needing an extra person to work with her on the outside and by not wearing her tool belt or “pouch.” From the reports of Lange and later from his limited on-site observation, Allen concluded that Coffey, despite her report of prior work building grain bins, did not act like an experienced worker. When she worked with Nelson and Walker, Nelson did the hole punching from the inside and Walker held the stabilizer on the outside, for Coffey to push the bolts through, which meant that three workers were doing a job that two workers ordinarily could perform.

10. Coffey started work in the second week of the two-week pay period from July 15–28, 2013. Her first working day was Tuesday, July 23, 2013. She missed work on July 26 and 27, 2013, a third of the working days from July 23-28, 2013. In the next pay period, July 29–August 11, 2013, Coffey missed 2 hours of work July 29, 2013. On July 30, 2013, Coffey hurt her back at 11:30 a.m. and was out for the remainder of the day as well as for the entire day July 31, 2013. She missed work August 8, 2013. She was away from work for nearly three out of fourteen days, or almost 21.4% of the pay period. During the next and final pay period for Coffey, August 12–25, 2013, she began work at 1:30 p.m. on August 13, 2013. On August 15, 2013, she worked 1:00 p.m. to 6:00 p.m. On August 17, 2013, she left work early at 4:00 p.m. She missed more than a day out of the six days she worked during this pay period, or more than 16.6% of the available work time. She was discharged on August 18, 2013. Over the 26 days of her employment, she missed approximately 6 days of work altogether, which was 23% of her time. Even if she had worked as well as an experienced grain bin builder could, missing almost a quarter of the work days still made her an ineffective worker.

11. Coffey received her first paycheck, dated August 7, 2013, some time after that date, due to the spotty priority mail service between the South Dakota office and the Power, Montana job site. When she did receive that first paycheck, Coffey discovered that her son Dean was paid \$10.50 per hour and she was paid \$10.00 per hour. Coffey attempted to obtain information from other crew members about their wages, and then complained about her wages, in the presence of other employees.

12. Coffey also testified that Joe Lange and others called her “Mom” on the work site and that Joe Lange made comments on occasion that she should not lift something because she was “too old.” However, on her eighth day on the job, Coffey hurt her back, which limited her working. Concern about Coffey limiting her lifting was not related to her age, but to her potential for further injury.

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13. Coffey was discharged by Joe Lange on August 18, 2013. Eventually, most of the crews on the Power job were let go, to be replaced with workers Allen believed could do the work in a timely fashion.

14. Wages scales were set in the South Dakota home office by Allen. Coffey was paid the same hourly wage, or a higher wage, than other construction laborers working for the corporation, including Dylan Jenniges, a 20-year-old male, who was paid \$9.52 per hour. Her hourly pay was within the usual range for her position within the company, which was that of a heavy laborer, and was at the same level as the initial rate paid to others hired, both men and women, as new workers on the Power, Montana work site. Coffey, Walker and Nelson were all started at \$10.00 per hour and had the same job position. Dean Coffey made \$10.50 per hour in his first paycheck as he had been recommended by Lange for a raise within the first week and the raise was paid retroactively to the beginning of his employment. Such raises, consistent with the corporation's standard practices, were based on recommendations by foremen and decided by Allen. The starting rate had increased from 2012 and from earlier in the season on jobs in other states. Montana was the first state in which the \$10.00 wage scale was offered in 2013. Raises were given based upon skills, work ethic or time with the company, not upon sex or age.

15. Allen made the decision to terminate Coffey after watching her work at the site. The decision was made for several reasons, including the fact that she was a slow worker, she removed her safety equipment on more than one occasion while he was watching the workers, and she appeared to be idle while others worked. Allen also observed, while he was walking around the job site with supervisors from the general contractor, that she was talking to other workers rather than working. The primary reason for her termination was for safety violations and safety concerns, in addition to slow work and frequent absences.

16. Coffey often took off her safety equipment, particularly her safety glasses because she preferred wearing her sunglasses. She also had to be told many times to wear her earplugs. Coffey was verbally reprimanded for her failure to wear the safety equipment by Lange, who told her it could be a firing offense. The general contractor was requiring that all workers have all safety equipment on at all times. More than two infractions cited by the general contractor's safety supervisors could subject the corporation to losing the subcontract.

17. Finally, Coffey also displayed hostility toward supervision and often complained about the work, thus being a negative influence on the work site.

18. Coffey was not specifically replaced by a younger person or by a man. No one person was replaced by another specific person – one heavy duty laborer is

interchangeable with another. Workers older than Coffey were brought in to work on the Power job after Coffey left, specifically P.B., age 53. When Joe Lange went to another job site in early October, four people from the Power job went with him, one of them being older than Coffey.

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

Coffey testified that Lange told her with past grain bin building experience (which she told him she had), she would start at \$12.00 per hour. Lange, Allen and Neiss Lange all denied that she was promised more than \$10.00 per hour. Coffey also filed a wage claim with the department just three weeks (August 29, 2013) before filing her discrimination complaint. She signed the wage claim under oath. Ex. 101, p. 2, bottom of page. In that sworn statement she affirmed that she had a written agreement that her rate of pay was \$10.00 per hour. Ex. 101, p. 1 (“Do you have a wage agreement in writing?” – “YES” box marked) and p. 2 (“List your rate of pay” – “\$10” written). Her wage claim said nothing about any higher rate based upon experience.

Mont. Code Ann. §26-1-302 provides, in pertinent part: “A witness is presumed to speak the truth. The jury or the court in absence of the jury is the exclusive judge of his credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness' testimony; such matters include but are not limited to: . . . . (7) inconsistent statements of the witness . . . .”

Coffey stated under oath, in her wage claim, that her initial wage was exactly what Lange and Allen testified it was. Yet in the present case she testified that she was assured by Lange that it would be two dollars an hour higher. This inconsistency by itself controverts the presumption that she was telling the truth in her testimony. Pursuant to Mont. Code Ann. §26-1-303(3) (a jury instruction, to be given on all proper occasions), a witness false in one of part of her testimony is to be distrusted in other parts of her testimony.

Coffey attempted to explain and to buttress her testimony that she was promised a higher wage, rather than her prior sworn statement that she had the lower rate of pay that Lange and Allen testified that she had. Her son, Dean Coffey, who was hired by the corporation at the same time she was, testified that he heard this statement. So did Brady Walker and Josh Nelson, also employees of the corporation at times. These same three former employees also testified that Coffey was a good worker.

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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.

The substantial and credible evidence of record showed that Dean Coffey began the grain bin construction job with enthusiasm. His initial performance led Lange to recommend and Allen to approve a raise for Dean Coffey to \$10.50 per hour. When his mother discovered she was not being paid as much as he was and began to complain about the job, Dean Coffey's performance began to decline to below par. Eventually, he was let go at the same time as his mother.

Brady Walker and Josh Nelson were asked to leave the job site as neither could produce his OSHA 10 training card, a requirement to remain on the job site. Neither retook the OSHA classes on-line or returned to the work site. Walker and Nelson shared with Coffey a strong tendency to blame the employer for the consequences of their own conduct. Nelson and Walker each testified that Lange made a statement similar to that about which Coffey testified, that women either were being paid less because Allen would not pay a woman as much as a man, or that women were not entitled to as much money as men. Both testified that this had occurred when they received their first paychecks and compared their hourly wage with Coffey.

The substantial and credible evidence of record established that Brady Walker worked August 9–15 and 17, 2013, and Josh Nelson worked August 12–15, 2013. Neither worked on August 7, 2013. When Coffey got her paycheck dated August 7, 2013, neither Walker nor Nelson could have compared paychecks to see their hourly wage in comparison to Coffey. They had not worked long enough to receive a paycheck dated August 7, 2013. Neither Nelson nor Walker knew the exact dates of their employment with Allen. Neither knew the hourly amount of their pay. Neither knew the hourly amount of Coffey's pay. Thus, the corroborating witnesses upon whom Coffey relied were not at all credible.

#### V. Conclusions of Law

1. The Montana Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. §49-2-512(1).

2. Rochelle Coffey failed to prove that Allen Construction Company, Inc., discriminated against her because of her age and her sex by allegedly paying her lower wages than younger male workers and by discharging her when there was still work remaining on the job site. Mont. Code Ann. §49-2-303(1). Allen Construction Company, Inc., is the prevailing party for purposes of Mont. Code §49-2-505(8).

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VI. Order

1. Judgment issues in favor of Allen Construction Company, Inc., and against Rochelle Coffey. Coffey’s complaint is dismissed with prejudice as lacking merit.

Dated: May 29, 2015.

/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: Daniel J. Flaherty and Paul Gallardo, Flaherty Law Office, attorneys for Rochelle Coffey, and Antonia P. Marra and Barbara E. Bell, Marra Evenson & Bell, PC, attorneys for Allen Construction Co., Inc.:

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 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).

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 ANNAH HOWARD, (406) 444-4356 IMMEDIATELY TO ARRANGE FOR TRANSCRIPTION OF THE RECORD.