

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS 0141016802 &
0141016820:

COURTNEY CRAWFORD & TIMOTHY)	Case Nos. 478-2015 & 479-2015
DELHAGEN,)	
Charging Parties,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
MRI CENTER, LLC,)	
)	
Respondent.)	

* * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Courtney Crawford brought this complaint alleging her employer, MRI Center, LLC, discriminated against her on the basis of sex when she was subjected to unwanted touching and comments in the workplace. Both Crawford and Timothy Delhagen brought forth complaints alleging the employer retaliated against each of them for their engaging in protected activity by filing complaints with the Human Rights Bureau.

Hearing Officer Caroline A. Holien conducted a contested case hearing in this matter on March 3, and March 4, 2015 in Helena, Montana. Attorneys Brian Spoon and Patrick Flaherty represented Crawford and Delhagen. Attorney John Doubek represented the MRI Center, LLC.

At hearing, Courtney Crawford, Timothy Delhagen, Jack Avery, Eli Buchmiller, Lynnette Avery, Kara Fenton, Katherine Leyan, Jennifer Burr, Daniel Owens, Dr. Randy Sibbitt, Dr. Dennis Palmer, Linda Coursey, and Dr. Hassan Massouh, all testified under oath.

Charging Party's Exhibits 1 through 10 were admitted. Exhibits 11, 12, and 14 through 17 were also admitted. Exhibit 14 included an email from Jackie McGurran,

which included a statement regarding her and Jeff Benedetti's experience working with Avery. Exhibit 17 included copies of MRI Center's grievance and dress code policies, which the parties indicated should be treated as one exhibit. See Tr., Vol. II, page 432. Respondent's Exhibit J, which included a copy of a seven-page decision of the Independent Contractor Central Unit dated May 6, 2014 was admitted without objection by the Charging Parties. See Tr., Vol. I, pages 76 through 77.

At the time of hearing, Charging Parties renewed their Motion in Limine seeking to limit the introduction of evidence related to Delhagen's financial issues. The Motion in Limine was denied on the grounds that it was unclear as to whether such evidence could be relevant to the issues before the Hearing Officer. The Charging Parties also renewed their motion to exclude Respondent's exhibits on the grounds the exhibits had not been timely submitted or identified as required by the Scheduling Order dated October 9, 2014. Charging Parties' motion was granted as Respondent had failed to comply with the Scheduling Order.

On or about February 26, 2015, Respondent notified Charging Parties and OAH that it wished to call Jeff Benedetti and Jackie McGuran and wanted to remove approximately 11 witnesses from its witness list. Charging Parties did not object to the Respondent's request at the time of the final pre-hearing conference on February 17, 2015. Charging Parties requested at the time of hearing to exclude Benedetti and McGuran as witnesses. The motion was denied as the Respondent had notified both the Charging Parties counsel and the Hearing Officer prior to hearing of its intent to cut several witnesses in exchange for calling two new witnesses and Charging Parties had not offered an objection at the final pre-hearing conference.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received on May 8, 2015. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did the MRI Center, LLC, discriminate against Courtney Crawford in the area of employment on the basis of her sex in violation of the Montana Human Rights Act (Title 49, Chapter 2, Mont. Code Ann.) by subjecting her to a hostile work environment?

2. Did the MRI Center, LLC, retaliate against Courtney Crawford by terminating her employment because she had engaged in a protected human rights activity in violation of the Montana Human Rights Act (Title 49, Chapter 2, Mont. Code Ann.)?

3. Did the MRI Center, LLC, retaliate against Timothy Delhagen in the area of employment in violation of the Montana Human Rights Act (Title 49, Chapter 2, Mont. Code Ann.) when he informed the owner about alleged sexual harassment of an employee and her intent to file a complaint?

III. FINDINGS OF FACT

1. MRI Center, LLC, (MRI Center) is a Montana Corporation that provides magnetic resonance imaging (MRI) imaging services for individuals referred to them by physicians at St. Peter's Hospital (St. Peter's) in Helena, Montana.

2. The MRI Center was opened by Jack Avery, Dr. Dennis Palmer, and Dr. Randy Sibbit in 2005. Avery owned 50% interest in the business. Dr. Palmer and Dr. Sibbit each owned 25% interest in the business.

3. Avery was the managing partner and responsible for overseeing the daily operations of the business. Avery had the authority to make decisions on behalf of his partners relative to the business' operations and consulted Dr. Sibbit or Dr. Palmer only on the more complicated issues. Neither Dr. Sibbit nor Dr. Palmer had a regular presence in the office. Avery was an agent for the MRI Center.

4. Avery sold his interest in the MRI Center during the pendency of this proceeding. Dr. Sibbit and Dr. Palmer each currently own 50% in the MRI Center.

5. Avery previously worked as a Lead Technologist at St. Peter's for several years. Avery was well respected by his co-workers and regarded as a consummate professional. Avery came to know Timothy Delhagen, who worked as an MRI Technician at St. Peter's on a part-time, temporary basis in 2008 or 2009.

6. Delhagen has held multiple jobs as an MRI Technician for mobile units, health care facilities and manufacturers during the past ten years. Delhagen has typically worked as an independent contractor and, at one time, formed his own corporation at the request of a client company for tax purposes. The MRI Center treated Delhagen as an independent contractor, and he received a 1099 form at the end of the tax year.

7. Delhagen was known as a “player” during his tenure at St. Peter’s. Delhagen frequently discussed his sexual activities while at work and shared sexually explicit photographs and videos with his co-workers. At one point, Dr. Palmer advised Daniel Owens, who was the Director of Diagnostic Imaging at St. Peter’s at the time, that he believed Delhagen’s behavior was inappropriate and potentially harmful to St. Peter’s.

8. In 2011, Dr. Sibbit encouraged Avery to hire an MRI Technician due to concerns he had that Avery might burn himself out if he continued working alone while contending with his health issues. Avery has been diagnosed with Multiple Sclerosis and other serious health issues that required frequent hospitalizations during this period. Avery continued working but struggled with overseeing the daily operations of the MRI Center in addition to performing his duties as an MRI Technician.

9. In September 2011, Avery contacted Delhagen to inquire about his willingness to return to Montana and work as an MRI Technician for the MRI Center. Avery loaned Delhagen money to buy a car and helped him to find a place to live when Delhagen moved to Helena. Delhagen and Avery frequently socialized outside of work and generally had a congenial relationship.

10. Delhagen frequently shared sexually explicit photos with Avery both at work and outside of work. Avery was uncomfortable receiving such photos but did not tell Delhagen to stop. Delhagen shared with Avery a nude photograph of a woman with whom he had a brief sexual relationship and who had also previously worked at St. Peter’s radiology department. The photograph had been taken by a professional photographer and bore a copyright stamp. Delhagen obtained the photograph from a private account held by the woman without her knowledge or permission. Neither the woman nor the photographer gave Delhagen permission to publish or otherwise disseminate the photograph.

11. Delhagen also showed Avery a photograph or video of a topless woman using a hula hoop. The woman appeared to Avery to be Courtney Crawford, who was Delhagen’s girlfriend at the time and who is currently Delhagen’s fiancée.

12. In the summer of 2012, Delhagen met Crawford while she was working at Wal Mart. As a favor to Delhagen, Avery hired Crawford as a part-time receptionist. Crawford began working for the MRI Center on or about January 29, 2013. Crawford was also attending the Helena College of Technology during this period.

13. Crawford, being a female, is a member of a protected class.

14. Crawford had been sexually assaulted by a former boyfriend approximately six months prior to starting work at the MRI Center. Delhagen was aware of this assault at the time he arranged for her to work at the MRI Center. Delhagen was also aware of Crawford's difficulties dealing with the assault, which caused her to become withdrawn and negatively affected her self esteem.

15. Crawford worked primarily with Linda Coursey, who is Avery's sister. Coursey has been the office manager for the MRI Center since it opened in 2005.

16. Crawford's duties included filing, scheduling patients, cleaning the office, and completing some billing. Crawford initially worked in what used to be the fax room, which was separate from the main office, examination rooms and Coursey's office. Renovation of the MRI Center was completed in the summer of 2013. After the renovation was completed, Crawford and Coursey worked together in an open office area.

17. Coursey previously worked as a paralegal for private law firms and state agencies in Michigan before retiring and moving to Montana to care for her and Avery's mother.

18. Crawford felt Coursey was overly critical of her work and found it difficult to work with Coursey. Coursey thought Crawford did a good job on the phones but was not detail oriented enough in the performance of her clerical duties. Coursey was not delicate or shy in addressing concerns she had with Crawford's work. Coursey and Crawford did not socialize outside of work.

19. Coursey and Delhagen also had a difficult working relationship. Delhagen had yelled at Coursey when she inadvertently opened his personal mail that he had arranged to have delivered to the office. At one point, Delhagen swore at Coursey in the office. Delhagen and Coursey were not friendly at work and did not socialize outside of work.

20. Coursey reviewed the policies and procedures of the MRI Center with Crawford shortly after she began working for the MRI Center. Coursey directed Crawford to review a notebook kept at the front of the office which contained all of the policies and procedures, including the dress code and the grievance procedure. Coursey ascribed to the adage of, "CYA (Cover You're a- -)" and prepared the

notebook for the MRI Center during her early years as the office manager. Crawford never reviewed the notebook despite being directed to do so by Coursey.

21. The MRI Center has a dress policy that requires all employees to dress professionally while at work. Coursey typically wears a pant suit or other conservative dress, which is a remnant of her years of working as a paralegal. Coursey was not required to wear a lab coat. The MRI Technicians typically wear lab coats when working with patients.

22. Avery directed Crawford to wear lab coats approximately six weeks after Crawford had started working for the MRI Center after Coursey had complained about Crawford's office attire being too revealing and inappropriate for the office.

23. The MRI Center either purchased or reimbursed Crawford for approximately three lab coats, which she wore at work as directed. The bottom of Crawford's lab coats hit her mid-thigh and each had a conservative neckline.

24. At some point, a heating technician made a comment to Crawford about her appearing younger than her actual age that made her feel uncomfortable. Crawford mentioned the incident to Avery, who made the heating technician apologize to Crawford.

25. Delhagen frequently reported to Crawford that Avery was making comments about her that were of a sexual nature. Delhagen also reported to Crawford that Avery had made comments about their sexual activities.

26. Neither Crawford nor Delhagen informed Coursey, Dr. Sibbit or Dr. Palmer about any concerns they may have had regarding Avery's behavior.

27. The MRI Center uses security cameras throughout the facility and outside of the building. The cameras were primarily located at the exits and areas frequented by patients. After a renovation of the building, some of the cameras were moved to cover work areas and were angled to cover a large portion of the office area. Avery did not install or use the security cameras for surreptitious viewing of female employees or patients for prurient reasons.

28. In February 2014, Delhagen informed Crawford that Avery was planning to install a security camera right over her desk so he could watch her at work. Delhagen encouraged Crawford to file a human rights complaint.

29. On February 11, 2014, at approximately 2:30 p.m., Avery was in the back office getting ready to leave for the day while Delhagen was attempting to complete a scan of a patient. Delhagen grew frustrated with the MRI machine and twice threw the computer mouse and repeatedly turned the machine on and off. Delhagen left the MRI room and approached Avery in the back office. Delhagen said, "Thanks for firing me." Avery, taken aback, said, "I didn't fire you." Delhagen then said, "Fine, I quit." Delhagen directed Crawford, who was approaching the back office, to get her stuff. Avery asked what was going on and Delhagen told him that he had discriminated against Crawford by making her wear a lab coat. Delhagen demanded his final wages. Crawford asked Avery if they were being fired to which Avery did not respond. Crawford left her lab coat on the floor before leaving the building at Delhagen's direction.

30. Avery was unable to pay Delhagen his final wages because he could not locate the business' checkbook. The patient Delhagen was working with was still in the MRI tube for a thoracic/spinal exam. Avery asked Delhagen to assist him with the patient while he looked for the checkbook. Coursey had just left for the day and there was a patient in the waiting room. Avery had to call Coursey, who had just arrived at home after leaving work, and ask her to return to the office.

31. Delhagen quit his employment with the MRI Center, and Crawford chose to follow suit.

32. Avery did not create a hostile working environment for Crawford by subjecting her to lewd comments or actions at work or outside of work. The work conditions were not so extreme or offense so as to cause Crawford to have been constructively discharged. Indeed, it was Delhagen who reported to Crawford what Avery was allegedly saying and doing, which Crawford may have believed. The substantial and credible evidence of record did not support the contention that Avery actually behaved inappropriately towards Crawford.

33. The MRI Center did not discharge either Delhagen or Crawford. The MRI Center did not take any adverse action against either Delhagen or Crawford because of protected activity.

34. On March 7, 2014, Crawford filed a complaint against the MRI Center with the Human Rights Bureau alleging sex discrimination and retaliation, even though she had already quit her job at the MRI Center and had not been subjected to any adverse action by the employer.

35. On March 20, 2014, Delhagen filed a complaint against the MRI Center with the Human Rights Bureau alleging retaliation, even though he had quit his job at the MRI Center and had not been subjected to any adverse action by the employer.

IV. DISCUSSION¹

A. The MRI Center, LLC. Is Responsible for the Actions of Jack Avery as an Agent for the Business.

Crawford and Delhagen named only the MRI Center, LLC in the complaints each filed with the Human Rights Bureau. Jack Avery was not named individually, and it is necessary to determine whether the MRI Center can be held responsible for Avery's alleged actions.

The Montana Human Rights Act defines "employer" to include "an agent of the employer." Mont. Code Ann. § 49-2-101(11). An employer is "liable for all damages caused by the acts and omissions of [its] employees while acting within the scope of his/her employment." Mont. Code. Ann. § 28-10-602. Employers are liable for intentional sexual harassment in which supervisory personnel engage in the course of their employment and sexual harassment complaints need not specify acts committed personally by the employer under the theory of respondeat superior. See *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596.

Avery was the majority partner during the period of the employment of both Crawford and Delhagen. Avery managed the daily operations of the business and was free to make decisions that bound the business legally and contractually with little to no input from his partners. Avery hired both Delhagen and Crawford and was ultimately responsible for supervising their performance in their respective roles. It is, therefore, determined that Avery was an agent of the MRI Center. Therefore, the MRI Center would be liable for any actions by Jack Avery determined to constitute sexual harassment or retaliation.

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¹ 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.

B. The Testimony of Crawford and Delhagen was less Credible than the Evidence Offered by the MRI Center.

In civil cases, a preponderance of the evidence is sufficient to establish the truth of any fact at issue. Mont. Code Ann. §26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder decides credibility and weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P.2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064. In this regard, the standard for deciding facts remains the preponderance of evidence standard. Cf., *Pannoni v. Bd. of Trustees*, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance standard as "more likely than not").

The department follows the Montana Rules of Evidence in making contested case fact determinations. "Notice of Hearing," October 25, 2013, p. 2; see also Admin. R. Mont. 24.8.704 and 24.8.746. Applying those Rules, the evidentiary framework for department discrimination cases is the same as that applicable in District Court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. § 26-1-401. In discrimination cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. *Id.*; *Heiat v. Eastern Mont. College* (1996), 275 Mont. 322, 912 P.2d 787, 791, citing *Texas Dpt. Com. Aff. v. Burdine*, (1981), 450 U.S. 248, 253; *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818.

Mont. Code Ann. §26-1-302, provides, in pertinent parts:

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;
- (8) an admission of untruthfulness by the witness;
- (9) Other evidence contradicting the witness' testimony.

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Mont. Code Ann. §26-1-303(3) provides:

A witness false in one part of his testimony is to be distrusted in other.

To begin the analysis of the credibility of the evidence offered by the parties, it is necessary to note the evidence which was not considered by the Hearing Officer. The MRI Center spent a good deal of time and energy seeking to impeach Delhagen with evidence related to Delhagen's tax problems and other legal issues. Evidence related to those issues was not considered. The MRI Center failed to produce substantial credible evidence showing what precisely those issues were and how they reasonably related to Delhagen's credibility. Further, Coursey's supposition that both Crawford and Delhagen filed their human rights complaints to secure money for cosmetic surgery was given no consideration as there was no proof offered to support her theory.

The testimony of Jennifer Burr alleging that Delhagen was a drug dealer was also not given any consideration given that no substantial evidence was produced to show Delhagen was engaged in such an enterprise or that he had ever been charged or convicted of such a crime. Additionally, Burr's testimony that Delhagen took her to Eli Buchmiller's home where Buchmiller observed her and Delhagen engage in sexual intercourse was not considered because she was not a party to the action and there was no proof offered to corroborate her testimony.

The Hearing Officer also did not consider the testimony of Dr. Hassan Massouh, which was rife with hearsay and allegations wholly unrelated to the issue before the Hearing Officer. Dr. Massouh offered opinions about what he considered to be Delhagen's psychological disorders. Dr. Massouh is not qualified to offer such opinions despite his medical school training. Dr. Massouh is not a licensed counselor, psychologist or psychiatrist and certainly never conducted a thorough examination of Delhagen that might have provided the Hearing Officer at least some basis for considering his opinions.

The Hearing Officer carefully considered the testimony offered by Crawford and Delhagen, who worked at the MRI Center, regarding the working conditions and the relationship between the parties. The Hearing Officer did not find Crawford to be a credible witness. Crawford's testimony appeared exaggerated and was not corroborated except through the testimony of Delhagen, who, for the reasons stated below, was also not found to be a credible witness.

For instance, Crawford complained of an incident involving Avery in which he allegedly “lunged” between her legs to grab a ribbon or string from her underwear that she inadvertently caught in the zipper of her pants. Given the description of the lab coats Crawford was required to wear, it is difficult to believe that Avery “lunged” between her legs. If the incident occurred at all, it would seem the string would be hanging closer to her knees and not her crotch area. Also, Crawford never specifically stated where the ribbon or string was hanging or how close it was to her body. If there was a time at which Avery pulled a ribbon or string off of Crawford’s clothing when the ribbon or string was hanging below the bottom of her lab coat, that would not be an “incident” involving a provocative invasion of her personal space.

It also seems odd that so many “incidents” could have occurred without any witness other than Crawford or Delhagen. Coursey was in the office most days and is not the type of individual who would remain aloof from the alleged goings on in the office. Given Coursey’s demeanor and her professional experience, more likely than not she would have put a stop to any untoward activity of her brother even if it were to hurt his feelings. In fact, given the dynamic between Coursey and Avery, it seems Coursey would be more likely to act if she could take a “dig” at her brother. It also is incredible that no one else was ever in a position to observe the activity or overhear the alleged comments, given the number of patients coming through the office during the work day. In short, Crawford’s testimony did not persuade the Hearing Officer that Avery made any lewd comments or acted in an inappropriate fashion toward her at work or outside of work.

The Hearing Officer found Delhagen’s testimony even less credible. While the Hearing Officer did not consider much of the impeachment evidence offered against Delhagen, the Hearing Officer did consider Delhagen’s conduct toward Crawford and the other females in his life. Delhagen clearly did think of himself as a “player” and, apparently, an amateur pornographer. Many aspects of the case troubled the Hearing Officer. However, what was most troubling is Delhagen’s insistence that Crawford join the staff of the MRI Center.

Delhagen and Avery engaged in inappropriate and immature behavior. At work as well as outside of work, they exchanged photographs and videos of nude women and discussed their own and others’ private lives. Avery and Delhagen were free to engage in such behavior, but the question begging to be asked is why Delhagen would act to bring his girlfriend, now his fiancé, into employment in such an environment. Delhagen was aware Crawford had been the victim of a sexual assault just weeks prior to her beginning work at the MRI Center. Delhagen was also aware of the difficulties Crawford was having in dealing with the assault. It is

incredible that Delhagen could think that Crawford could work comfortably at the MRI Center. It was not just his testimony about the debauchery he and Avery enjoyed together that was most incongruous. It was the fact that Delhagen began telling Crawford lurid tales about what Avery was saying about her and what he allegedly had in mind for her.

Delhagen's behavior toward Crawford was very troubling, but it was consistent with his disrespect for her when he and Avery indulged their appetites for inappropriate mutual arousal. Avery's testimony that Delhagen showed him a nude photograph of Crawford at or near the time she started working at the MRI Center was detailed and forthright. Avery would be in a position to identify Crawford in the photograph based upon his prior interactions with her. What possible reason could Delhagen have had to share such a picture with Avery? Delhagen apparently was not satisfied with exacerbating the situation for Crawford by reporting to her various lewd comments he attributed to Avery, and even ultimately reporting to Crawford that Avery wanted to place a camera over her head, although the evidence does not establish the truth of the report. Delhagen may also have been trying to manipulate Avery into directing inappropriate behavior toward Crawford. The substantial and credible evidence does not support any finding that Avery ever did direct inappropriate behavior toward Crawford.

Delhagen's relationship with Kara Fenton, who worked with him at St. Peter's, was also troubling. Two adults are free to engage in a consensual and casual sexual relationship. The Hearing Officer has no reason to or interest in judging the propriety of their relationship. However, the Hearing Officer found it disturbing that Delhagen thought it appropriate to share nude photographs of Fenton with Avery.

The Hearing Officer does not find Delhagen's testimony credible that Avery surreptitiously accessed those photographs, which Delhagen claimed Fenton had saved onto his iPad without his knowledge. Fenton's testimony that Delhagen accessed those pictures through her private account without her knowledge or permission is more credible, given that when she appeared at hearing she was obviously embarrassed that the pictures had been shared and had even become an issue at a legal proceeding to which she was not a party. Delhagen's attempt to impeach Fenton's testimony through the use of a blog in which the character of her former boyfriend was attacked was not persuasive. Delhagen offered no substantial evidence showing Fenton or her current boyfriend or spouse was responsible for the blog. Further, Delhagen offered no credible evidence showing Fenton to be some jilted lover still pining away for him or that she was bent on destroying him through

some misguided notion of revenge. Their relationship, which was casual at best, had ended several years earlier.

In short, the testimony of Crawford and Delhagen was found to be less credible than the evidence offered by the MRI Center.

C. Crawford has not shown she was subject to a hostile work environment based upon Avery's actions.

Montana law expressly prohibits employment discrimination because of sex. Mont. Code Ann. § 49-2-303(1). The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), aff'd sub. nom. *Vainio v. Brookshire*, 852 P.2d 596 (1993). As the Montana Supreme Court has explicitly recognized, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" and violates the Montana Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204, (1990) citing *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57,64 (1986) .

A charging party establishes a prima facie case of sexual harassment with proof that she was subject to "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). "Harassment need not be severe and pervasive to impose liability; one or the other will do." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted).

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere

offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23; see also Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998). The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. Oncale, supra, quoting Harris, 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party's claim, to assume the perspective of the reasonable victim. See Ellison, op. cit. at 879.

It is clear that the work environment at the MRI Center was sexually charged at times. However, Crawford has not met her burden of persuasion. Crawford's uncorroborated and sometimes exaggerated testimony regarding the actions, demeanor and comments by Avery did not show the behavior, even if it had occurred, was severe or pervasive enough as to alter the working conditions. Rather, it was Delhagen's conduct that set the tenor in the office and adversely affected Crawford's ability to continue in the employment. Crawford has not shown the MRI Center subjected her to a hostile work environment due to Avery's actions.

D. Crawford and Delhagen have not shown the MRI Center retaliated against them because of protected activity.

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove a claim under the Human Rights Act by proving that (1) the charging party engaged in a protected practice, (2) thereafter the employer took an adverse employment action against the charging party, and (3) a causal link existed between the charging party's protected activities and the employer's actions. Beaver v. D.N.R.C., 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; see also, Admin. R. Mont. 24.9.610(2).

Crawford and Delhagen contended they were discharged in retaliation after Delhagen informed Avery that Crawford intended to file a human rights complaint. Avery denied discharging Crawford and Delhagen and contends Delhagen announced he was quitting without any prior notice. Again, this requires a credibility determination.

Delhagen's testimony regarding the final sequence of events leading to his and Crawford's separation from the MRI Center was exaggerated. Delhagen described Avery as being visibly angry and emotional to the point he appeared to have tears in

his eyes. Delhagen posited Avery became so upset because he felt betrayed that “his buddy Tim” would file a complaint against him. Assuming Delhagen’s description to be accurate, it is puzzling that Avery would take the time to attempt to find the business checkbook to pay Delhagen his final wages and allow him to remain in the office when there was a patient in the MRI machine and a patient waiting in the outer office. If Avery had ordered him to leave the facility as Delhagen testified, it makes no sense that Avery would not have ensured both Delhagen and Crawford had actually left the office before continuing with his work. Further, Delhagen’s description of Avery’s behavior was at odds with his behavior during the hearing. Even under strenuous questioning and in the face of adverse testimony, Avery appeared stoic and showed little to no emotion.

Delhagen’s testimony regarding the sequence of events leading to his separation is deemed less credible than the testimony of Avery. Avery’s testimony described a more plausible series of events. The preponderance of the evidence shows Delhagen made the decision voluntarily to quit the employment and Crawford chose to follow suit, at Delhagen’s specific direction. The evidence does not show the MRI Center discharged either Crawford or Delhagen or took any adverse employment action against them based upon their “protected” activity. Further, the evidence does not show the voluntary separation of Crawford and Delhagen from their employment flowed from the “hostile work environment” Crawford alleged. Therefore, Crawford and Delhagen have failed to prove they were retaliated against because of protected activity.

The substantial and credible evidence shows that Delhagen quit and Crawford chose to follow suit. Crawford and Delhagen chose to argue that they were discharged and presented no evidence or argument that they were constructively discharged. But since the evidence does not establish that either Delhagen or Crawford was fired or that Crawford was subjected by Avery to a hostile working environment, Crawford’s separation from employment did not result from an adverse action by the employer, and so lost wages and front pay do not flow from the alleged hostile working environment. Neither charging party can recover lost wages and front pay.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. Courtney Crawford failed to prove the MRI Center, LLC discriminated against her illegally because of her gender. Mont. Code Ann. § 49-2-303(1).

3. Courtney Crawford and Timothy Delhagen failed to show they were retaliated against for filing a Human Rights complaint (which neither had done until after both left employment with the MRI Center). Mont. Code Ann. § 49-2-301.

4. For purposes of Mont. Code Ann. § 49-2-505(8), the MRI Center, LLC is the prevailing party.

VI. ORDER

Judgment is granted in favor of the MRI Center, LLC and against Courtney Crawford and Timothy Delhagen. The complaints of Crawford and Delhagen are dismissed with prejudice as lacking merit.

DATED: May 29, 2015

Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Parties Courtney Crawford and Timothy Delhagen, and their attorney, Bryan Spoon, Spoon Gordon Ballew PC: and Respondent MRI Cener, LLC, and its attorney, John Doubek, Doubek Pyfer and Fox LLP:

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 original transcript is in the contested case file.