

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,)	
)	
vs.)	ON REMAND:
)	HEARING OFFICER DECISION
)	AND NOTICE OF ISSUANCE OF
JIM BATES,)	ADMINISTRATIVE DECISION
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Charging Party Laura Lee Neva filed a complaint on January 21, 2010 and an amended complaint on February 3, 2010 with the Department of Labor and Industry, alleging that Respondent Jim Bates had 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. On November 25, 2011, after a contested case hearing and submissions of proposed decisions and briefs, Hearing Officer Terry Spear issued a Hearing Officer Decision that Bates' sexual harassment of Neva was severe, persistent and patently unwelcome, but Montana Human Rights Act (MHRA) did not cover illegal discrimination in a commercial, as opposed to a housing, lease between private individuals, and Bates had not violated the MHRA.

On February 6, 2014, the Montana Twenty-Second Judicial District Court, Carbon County, issued its order which held that the MHRA did prohibit sex discrimination in commercial lease transactions. On February 27, 2014, the District Court amended its decision and order and remanded the case to the Hearings Bureau of the Montana Department of Labor and Industry for further proceedings including a determination of damages. On March 20, 2014, Bates filed his Notice of Appeal. On December 23, 2014 the Montana Supreme Court affirmed the District Court's order that the MHRA applied to Neva's claim of sexual harassment in her lease of commercial property from Bates. *Bates v. Neva*, ¶1, 2014 MT 336, 377 Mont. 350, 339 P.3d 1265. The Supreme Court remanded the matter for proceedings consistent with the District Court's February 27, 2014 Order. Thereafter, a substantial period of time elapsed before the file was ultimately returned to the Department for further proceedings.

After a January 21, 2015, teleconference with the parties, the Hearing Officer issued a scheduling order setting February 6, 2015, as the deadline for filing and serving initial briefs and February 20, 2015, for filing and serving reply briefs addressing which remedy statute each party advocates as applicable and including any argument either party elected to present about whether there was any need or entitlement to file further briefing or proffer further evidence regarding the order on remand directing determination of damages.

Neva's initial brief argued that Bates had subjected her to discrimination in public accommodation because of sex and that she had proved her entitlement to the damages she originally requested pursuant to Mont. Code Ann. § 49-2-506. She also argued that she was entitled to a civil penalty against Bates of \$10,000.00 pursuant to the provisions of Mont. Code Ann. § 49-2-510(2)(a) (2009) based upon the District Court's decision, affirmed by the Montana Supreme Court. Bates' initial brief argued that Neva had not proved sexual harassment in violation of Mont. Code Ann. § 49-2-305 and had not proved any damages resulting from the interactions and commercial transactions with Bates.

In reply briefs, Neva argued that the Montana Human Rights Commission ("Commission") held on appeal that Bates had discriminated against Neva in violation of Mont. Code Ann. § 49-2-305, that the District Court ultimately held that Mont. Code Ann. § 49-2-305 applied to commercial lease transactions, and that the Montana Supreme Court upheld those decisions. Neva argued the Department had the discretion to award civil penalties under Mont. Code Ann. § 49-2-510(2) as well as the remedies in Mont. Code Ann. § 49-2-506. Bates argued that with "no housing violation," Mont. Code Ann. § 49-2-510 was entirely inapplicable that Neva did not prove her lost profits and that any award against him should be offset by the unpaid rent.

II. Issues

The legal issue originally decided in favor of Bates by the Hearing Officer has been reversed. MHRA's prohibitions against "discrimination in housing" does cover rentals of "improved or unimproved property." Mont. Code Ann. § 49-2-305(1). Bates' severe, persistent and patently unwelcome sexual harassment of Neva was illegal and was a violation of Mont. Code Ann. § 49-2-305(1)(b). The only issue here, is the amount of damages caused by that illegal sexual harassment. No party argued for any new evidence and the case is ripe for decision. Having fully considered the evidence of record and the arguments and authorities submitted by the parties, the Hearing Officer finds that the original Findings of Fact 1-4 are correct and still applicable. The further findings that follow include portions from original Finding of Fact 5 and also address damages and affirmative relief, based upon the evidence of record and the legal authorities applicable thereto.

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 ceased when Neva refused him unfettered access to the premises and neither welcomed nor encouraged his sexual comments and propositions.

4. Neva spent her own money on the roof repair because Bates refused to do the repairs as landlord and as part of the rental agreement. As owner of a small art gallery, Neva was very concerned about protecting the contents of her rented space. After trying and failing to finish the roof repairs necessary to make the premises tenantable, Neva was unable to open the art gallery during Absarokee Days. The leaks in the roof damaged the premises and created risks 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 sales. Her income from the art gallery became almost nonexistent and her costs of trying to operate it were far greater than expected.

5. Bates persistently sexually harassed, threatened, and frightened Neva via email, phone, and in person. When she rebuffed his advances, he withdrew his assistance with the building. That withdrawal burdened her with many hours attempting repair and preventive action to keep the ceiling from collapse. Ultimately, a few feet of heavy wet snow led to the roof leaking, causing the sheet rock to wash out in the ceiling, and the ceiling to collapse. Bates promised to provide help to Neva, inducing her to lease the premises. Withholding his assistance and continuing his active and unwelcome efforts to insinuate himself into her life, he precipitated the shut down of Neva's business, causing her fear and dread, and triggering for her many sleepless nights for months.

6. Bates wanted access to the property through the alarm code, which Neva refused to provide. While trying to get her to give him her alarm code, Bates also made sexual comments and advances through his emails. She continued to refuse to provide him with the alarm code. His unwelcome declarations of love, or at least lust, in the face of her rebuffs, reasonably seemed to Neva to be threats and bullying. Bates, on at least one occasion, left the premises door unlocked when he left the gallery, Neva saw as an additional threat to her personal security and the security of the art works in her gallery. Under these circumstances, Neva reasonably refused to give Bates a security code for ready access to the Gallery at any time, day or night, without notice. Neva told Bates she would provide him with access when he needed it if he would contact her and arrange a time. He would not accept that restraint on his access.

7. Total sales for the two months the gallery was open were \$10,426.25, and then it was closed almost 10 weeks. The momentum and traffic generated by an article in Montana Art and Culture magazine was lost, word was out that the gallery was closed, and several artists pulled out. Neva had lost profits on sales for ten (10) weeks at \$2,508 per month for a total of \$5,771.82 ($\$2,508.00 \times 12 \div 52.143 \times 10$). In addition, future lost profits for 10 additional months amounted to \$25,080.00, for a total loss for a year of \$30,851.82, which is a reasonable period of time for her to recover her income losses.

8. Neva spent more than \$1,097.14 for repair items. Neva had Rolly Halvorson come in repeatedly to help shovel the roof and sweep off water to keep it from coming in. Neva covered the roof with a huge tarp to keep what water she could off, but the water still got under it due to the low spot where the water collected. Neva spent \$1,147.00 on a security system and provided for the installation of the outdoor horn alarm as well. Neva paid Northwestern Energy bills in the amount of \$433.64 to heat her side of the building and the other (old laundry) side also, to keep pipes from freezing. Neva paid monthly bills and more as she had to come in most days while closed to check on security, insurance, phone, internet service, advertising and contracts that she was responsible for. She had no income to

cover anything. The itemized costs she proved, which may not have covered all her costs, total \$2,677.78.

9. Bates promised the rental premises would be ready by the start of Absarokee Days, July 25, 2009, and agreed that Neva's work constituted rent for August 2009. The premises were not ready, and Bates now seeks an offset against damages for unpaid rent contrary in both instances to his promises.

10. The roof was repaired with financing from Bates' partner, contacted by Neva. Neva then discovered that electric outlets and switches had shorted out. Neva fixed some of the electrical problems, but could not afford the costs of further repairs that the premises now required and the local electrician would not work on Bates' property. She vacated the premises "voluntarily," (she had no choice) 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.

11. It would not be reasonable to reduce Neva's losses by rents she did not pay. She never was provided with either tenantable premises or the assistance promised, for the public accommodation she was attempting to offer the public. As a result, she never owed rent to the landlord whose illegal discrimination denied her the benefit of the bargain she had made with him in good faith.

12. Neva also suffered prolonged and extreme emotional distress as a result of the sexual advances and other sexual harassment she endured, the withdrawal from her of the assistance she was promised when she rebuffed the sexual advances and harassment, and the resulting collapse of her business because of both indignities. The reasonable amount necessary to remedy her emotional distress, during and after the time she was struggling to open the gallery and keep it open is \$50,000. Her demeanor during her testimony and the content of her testimony combined to present a very credible depiction as well as description of the dismay and misery she faced in her lonely efforts to open, keep open and then eventually just to salvage something out of a business venture for which she initially had reasonable hopes. Through this same time, she was besieged by a landlord who was trying to become a stalker rather than simply an unwelcome suitor.

13. The sum necessary to rectify the harm resulting from Bates' illegal discrimination because of sex is \$83,529.60 for the harm, pecuniary and otherwise, caused to her by Bates' violation of her rights. Interest accrues on that amount at the statutory rate until paid. Prejudgement interest is not appropriate here.

14. To vindicate the interests of the public, a civil penalty in an amount not exceeding \$10,000.00 may be assessed against Bates, pursuant to the provisions of Mont. Code Ann. § 49-2-510(2). There is no evidence that he has been adjudged in

any prior judicial or formal administrative proceeding to have committed any previous discriminatory housing practice in violation of Mont. Code Ann. 49-2-305. Given the outrageous nature of his conduct, the maximum civil penalty applicable for a respondent's first discriminatory housing practice in violation of the statute is appropriate and reasonable.

15. In addition to the mandated permanent injunction, it is appropriate to condition any further active participation by Bates in rentals of commercial property in Montana upon prior completion of training on the federal and state sex discrimination laws applicable to such transactions in this state.

IV. Opinion¹

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). Mont. Code Ann. § 49-2-305(1)(b) prohibits an owner of improved or unimproved property to discriminate against a person because of sex in a term, condition or privilege relating to the rental of the property. If those prohibitions apply 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 until it was no longer possible, and the costs of relocating the business to other premises. Both the District Court and the Montana Supreme Court held that the prohibitions do apply. That is now the law of the case.

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. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2nd 200, 205, applied and followed, *Shields v. Helena School D. No. 1* (1997), 284 Mont. 138, 943 P2nd 999, 1005. Unquestionably, Bates directed his sexual comments and propositions towards Neva because she is a woman. His sexual harassment of Neva was severe, persistent and patently unwelcome. The sexual harassment alleged and proved did violate prohibitions within the MHRA, the department does have jurisdiction over this complaint, and the Department, having found illegal discrimination because of sex, must enjoin Bates from any sex harassment in the rental of his property in Absarokee, Montana. In addition, the Department should and does prescribe conditions upon Bates' future conduct relevant to the type of discriminatory practice found and

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.

require reasonable measures to rectify the harm, pecuniary or otherwise, set forth in the judgment herein, pursuant to Mont. Code Ann. § 49-2-506(1)(a) and (b).

V. Conclusions of Law

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

2. Respondent Jim Bates illegally discriminated against Charging Party Laura Lee Neva because of sex in both public accommodation and in rental of improved property by subjecting her to sexual harassment while delaying and refusing performance of the rental agreement for his property, to be used as an art gallery in which she would sell various kinds of art. Mont. Code Ann. §§ 49-2-304 and 305.

3. A mandatory permanent injunction barring Bates from any further such discriminatory practice must issue. Mont. Code Ann. § 49-2-506(1). In addition, the Hearing Officer may (a) prescribe conditions on Bates' future conduct relevant to the type of discriminatory practice found and (b) require any reasonable measure by Bates to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to Neva. Mont. Code Ann. §49-2-506(1)(a) and (b).

4. Attorney fees and costs are recoverable by the prevailing party in an action in district court, in that court's discretion. Mont. Code Ann. § 49-2-505(8).

VI. Order

1. Judgment is found in favor of Laura Lee Neva and against Jim Bates on the charge that he subjected Neva to sexual harassment in public accommodation and in rental of his improved property by subjecting her to sexual harassment while delaying and refusing performance of the rental agreement for his property, all in violation of the prohibitions against discrimination in public accommodation and in rental of improved or unimproved property because of sex.

2. Bates is permanently enjoined from sexual harassment of any females with whom he transacts agreements for public accommodation and/or rental of property.

3. Within two calendar months of this decision Bates must undertake and successfully complete four hours of training in prohibited sexual harassment in Montana by both state and federal law, as approved by HRB, and paid for by Bates. HRB may modify any provision within this Paragraph 3 for good cause shown.

4. Within one calendar month of completing the training required above, Bates must adopt notices for inclusion in any written rental agreements for improved or unimproved property submit them to HRB for approval, and within two weeks after that approval, incorporate said notices, in any and all such written rental agreements used for such transactions for Montana property. Said notices must

include statements that (a) He acknowledges and complies with the applicable state and federal prohibitions against sexual harassment; (b) The name, phone number and mailing address of the person or entity (in business with Bates) to whom any complaint of sexual harassment by Bates in any transaction regarding rentals of property in Montana may be submitted and (c) The names, phone numbers and mailing addresses of HRB and the appropriate federal agency office responsible for investigation of any sexual harassment allegations regarding transactions regarding rentals of property in Montana. These notices must be kept current and remain in any and all written rental agreements for commercial properties in Montana in which Bates has an interest and actively participates in the transactions for one year after the date of this decision. HRB may modify any provision within this Paragraph 4 for good cause shown.

5. Judgment is hereby entered against Bates subjecting him to and requiring his compliance with Paragraphs 2-4, above. Further, judgment is hereby entered that he must immediately pay to Neva the sum of \$93,529.60, being:

(a) \$30,851.82, hereby awarded for the value of the lost profits from her gallery resulting from Bates' sexual harassment of her during the time of her efforts to open and maintain her business in the premises Bates leased to her and his refusal to keep the promises he made to induce her to enter into that lease;

(b) \$2,677.78, hereby awarded for the itemized costs she proved she incurred in attempting to repair and maintain the premises and render them tenantable (which may not have covered all her costs incurred in those attempts);

(c) \$50,000.00, hereby awarded for the value of the prolonged and extreme emotional distress suffered by Neva as a result of Bates' sexual harassment of her and refusal to assist her as promised during the time of her efforts to open and maintain her business in the premises Bates leased to her;

(d) \$10,000.00 as a civil penalty assessed to Bates for this first adjudication of committing a discriminatory housing practice in violation of Mont. Code Ann. § 49-2-305.

6. Post judgment interest on the monetary award accrues according to law.

Dated: October 26, 2015.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer
Montana Department of Labor and Industry

* * * * *

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 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. There is an original transcript in the contested case file.

NEVA.HOD-RMD.TSP