

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

RANDY BACHMEIER,
Charging Party,

-v-

MONTANA STATE UNIVERSITY
NORTHERN,
Respondent.

HRB CASE NO.0131016284

FINAL AGENCY DECISION

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. Following an informal investigation, the Department determined that a preponderance of the evidence supported Bachmeier's allegations. 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 its Hearing Officer Decision and Notice of Issuance of Administrative Decision on May 13 2015 (2015 Decision). The 2015 Decision was appealed to this Commission, which heard oral argument on September 18, 2015.

Following consideration of arguments, briefing, and the complete record, this Commission issued a Remand Order. The Remand Order reflected this Commission's determination that the damages awarded on the matter of retaliation, \$75,000, was clearly erroneous and not based on substantial evidence in light of the retaliatory acts which had occurred. As such, the Remand Order reduced damages for retaliation to \$20,000. The Remand Order further reversed the 2015 Decision, which had found no discrimination had occurred. This Commission held that certain findings of fact were not based on competent substantial evidence in the record, and rejected a conclusion of law as incorrect. As such, the matter was remanded to

the Office of Administrative Hearings “for determination as to what damages should be awarded based on a finding of discrimination.” Remand Order.

The hearing officer issued a decision on remand on May 13, 2016. (2016 Decision). In it, the Hearing Officer issued various findings of fact, and determined that, based on them, “Bachmeier is entitled to recover the sum of \$175,000.00 which reflects value in dollars of the emotional distress he suffered because of MSU-N’s conduct over three years and five months.” 2016 Decision at 6.

Respondent, Montana State University filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on July 22, 2016. Elizabeth Griffing, attorney, appeared and presented oral argument on behalf of Bachmeier. John Heenan, attorney, 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)*. A factual finding is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the Commission with a definite and firm conviction that a mistake has been made. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3rd 284, ¶ 39. The Commission reviews conclusions of law to determine whether the hearing officer’s interpretation and application of the law is correct. *See, Denke*, 39. Further, “[t]he 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.” Mont. Code Ann. § 2-4-621, Admin. R. Mont. 24.9.123(4)(b).

DISCUSSION

After careful consideration of the complete record and the argument presented by the parties, the Commission agrees with the Respondent that the hearing officer’s damage award is unsupported. Opening Brief at 15. The Commission determines that the hearing officer’s determination awarding \$175,000 in damages for discrimination was clearly erroneous. This determination is made for three reasons. First, Bachmeier requested \$100,000 in damages when asked what he believed to be an appropriate damage award. Transcript, Vol I at 319:23-320:1. The record does not support doubling the requested damage award.

Second, the Commission notes that a considerable period of time passed between the harassment beginning, and Bachmeier’s complaining about the actions. As described by the hearing officer, who separated the discriminatory actions into three time periods: “First came the approximately 3 year period where Bachmeier was subjected to Templeton’s inappropriate and unsolicited touching. Second came the approximately 5 month period after Bachmeier had complained yet MSU-N allowed Templeton to remain on campus during which he was quasi-banished and prevented from doing his job. Third came the period since Templeton left.” 2016 Decision at ¶ R1. Bachmeier’s failure to report a problem for so long a period limits the liability of MSU-N.

Finally, the Commission finds that the nature of the inappropriate touching does not give rise to so great a damage award. For example, the Hearing Officer described Bachmeier’s supervisor as having “placed her hand on his knee and allowed it to linger for several seconds.” 2015 Decision at ¶ 15. While sufficient to support his claim of sexual harassment, this conduct is insufficient to justify a damage award of \$175,000.

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 29th day of August, 2016.

COLETTE DAVIES
DAVIES LAW PLLC
1631 ZIMMERMAN TRAIL
BILLINGS, MT 59102

JOHN HEENAN
BISHOP & HEENAN
1631 ZIMMERMAN TRAIL
BILLINGS, MT 59102

VIVIAN HAMMILL & JESSICA BRUBAKER
OFFICE OF THE COMMISSIONER OF HIGHER EDUCATION
MONTANA UNIVERSITY SYSTEM
2500 BROADWAY
HELENA, MT 59601

ELIZABETH GRIFFING
AXILON LAW GROUP, PLLC
POWER BLOCK, SUITE 4P
7 WEST 6TH AVE.
HELENA, MT 59601



Annah Howard, Legal Secretary
Montana Human Rights Bureau