BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0131016284

RANDY BACHMEIER, Charging Party, vs. MONTANA STATE UNIVERSITY-NORTHERN, Respondent.	)	Case No. 1323-2014 ON REMAND: HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

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Although the Montana Human Rights Commission made two changes to the original Hearing Officer Decision, only one change is relevant to this remand. The pertinent part of the order follows:

> On appeal, Bachmeier argued that the hearing officer incorrectly found that discrimination had not occurred, and found that the conduct Bachmeier suffered was not objectively severe enough to warrant a finding of discrimination. The Commission determines the findings of fact are not based on substantial evidence and that the conclusions of law are incorrect.
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> At page 27, paragraph 3, the HOD states: "Whatever the exact frequency of the touching of Bachmeier, similar touching was not perceived as unreasonably intimate and inappropriate by MSU-N employees subjected to it." Bachmeier cited to numerous portions of the record directly contradicting this finding, and argues that the finding is not supported in the record. The Commission agrees with Bachmeier based on its review of the record. Therefore, this finding of fact is rejected by the Commission because it is not based upon competent substantial evidence in the record. Indeed, the record supports the opposite conclusion: that other MSU-N employees found that touching to be inappropriate when directed at them. See e.g. Tr. 30:10-24; 90:6-13; 166:1-172-3; 223:20-225:1; 490:6-491-9.
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> At page 28, paragraph 1, the HOD states: "it was Bachmeier alone who found the touching unreasonably interfered with his work performance." Once again, the Commission

determines that this finding of fact is not based on substantial evidence. The record supports an alternative conclusion: that most all employees found Templeton's touching to be inappropriate. Id. The Commission finds that competent substantial evidence in the record does not support a finding that only Bachmeier found the touching offensive. As such, this finding of fact is rejected by the Commission.

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

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

The Commission concludes Bachmeier was discriminated against when he was subjected to unwanted touching. As outlined above, the Commission determines the findings of fact

> are clearly erroneous and the conclusion of law is incorrect which supported the opposition conclusion; those are therefore reversed or rejected. The matter must be remanded for determination as to what damages should be awarded based on a finding of discrimination.

Bachmeier v. MSU Northern, Montana Human Rights Commission, "Order on Remand," Case. No. 0131016284, pp. 3-5.

The Commission has found that Bachmeier was discriminated against when he was subjected to unwanted touching. Specifically, the Commission found that other MSU-N employees found Templeton's touching (presumably the same touching as Bachmeier objected to) to be inappropriate when directed at them, that the record reflected a history of such inappropriate touching, and that evidence in the record reflected that Templeton's touching of Bachmeier continued following his request that it stop.

The Commission further found that an objective person would find the touching suffered by Bachmeier objectively offensive and unreasonable. The Commission then concluded that Bachmeier was discriminated against when he was subjected to unwanted touching, and remanded the case, directing the hearing officer to determine the damages due to Bachmeier due to the discrimination.

Based upon the Commission's findings and conclusions, and the proposed decision submitted by Bachmeier, the Hearing Officer makes the following combined findings and conclusions and determines damages, issuing a revised Hearing Officer Decision on Remand, and incorporating by reference the entirety of the original decision, with the deletion of the Findings and Conclusions disapproved and replaced by the Commission, incorporating by reference those replacements, and providing a first paragraph to the Order therein, with the remainder of the original Order incorporated by reference.

R1. Bachmeier suffered emotional distress as a result of MSU-N's conduct, which can effectively be divided 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.

R2. The third period pertains to the retaliation claim of Bachmeier, which the Commission has modified, and which is not before this Hearing Officer. The second period as well as the first period are the time over which when the emotional distress that resulted from the inappropriate touching of Bachmeier continued – Templeton was still on campus and nothing effective had been done to address her prior

inappropriate touching. Thus, the emotional distress damages involved come out of the 3 years of inappropriate touching and the 5 months thereafter. During the last 5 months, the retaliatory conduct of MSU-N, through Templeton herself or otherwise, is not relevant to the emotional distress issue, but the emotional distress continuing as a result of no action being taken against Templeton, while she was still present, still stemmed from the discrimination. The Ninth Circuit noted that employer inaction cannot "fairly be said to qualify as a remedy reasonably calculated to end harassment. Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to a ratification of the prior harassment." Fuller v. City of Oakland, 47 F.3d 1522, 1529 (9th Cir. 1995).

R3. Bachmeier credibly testified that it wasn't only during times he was being physically touched that he suffered emotionally, but that it "was 24/7 from the day she first touched me until she was gone." That period would be from the first touching until Templeton's actual and final departure from MSU-N. Further, the evidence at trial, the Commission apparently found, established that Templeton's repeated touching of Bachmeier significantly and unreasonably interfered with his ability to do his job, since it found that there had been discriminatory harassment because of sex. The inappropriate touching became a constant source of anxiety and worry, even when Bachmeier was not at work, and he went out of his way to avoid Templeton.

R4. Bachmeier rearranged his office to face the door instead of the window. This allowed him to see her advancing and to use his desk as a physical barrier between them. Undeterred by the desk, Templeton simply came around the desk and rubbed his shoulders and back anyway. He readily embraced an opportunity in 2012 to relocate his office to a less desirable location because it was much further away from Templeton's office. He installed a chime on the door to the office suite to alert him to her possible presence, and he chose the office at the far end of the hall, the furthest away from the suite door. He arrived at meetings with Templeton late so that he could position his chair away from her. He leaned away from her when forced to sit near her. These extraordinary efforts by Bachmeier to protect himself from Templeton show the extreme degree to which the sexual harassment (which is what the touching was and how it created a hostile work environment) interfered with his ability to do his job and altered the conditions of his employment, creating significant pain and suffering from his constant vigilance and anticipatory fear.

R5. MSU-N prolonged this period of torment, both before and then after Bachmeier's complaint. Despite all the ways in which MSU-N knew about Templeton's behavior of inappropriate touching of males, and her unerring sense of which males would be most distressed by it, MSU-N ignored it as long as possible. When after Bachmeier's complaint it finally did take action, it was half-hearted and ineffective. Moreover, MSU-N's reliance on its internal investigation of Bachmeier's complaint is also misplaced – investigation alone is not a remedy to harassment.

> An employer whose sole action is to conclude that no harassment occurred cannot in any meaningful sense be said to have "remedied" what happened. Denial does not constitute a remedy. Nor does the fact of investigation alone suffice; an investigation is principally a way to determine whether any remedy is needed and cannot substitute for the remedy itself.

City of Oakland, op. cit.

R6. The discrimination caused Bachmeier emotional distress. The retaliation caused him financial losses as well. Within 24 hours of asking Templeton to stop touching him, she reprimanded him twice, which was retaliatory. Cremean gave direct testimony that Limbaugh refused to consider Bachmeier for the interim provost position because it "wouldn't look good" in light of Bachmeier's complaint, which was retaliatory. Bachmeier also asserted that MSU-N deprived him of the opportunity to attend meetings and otherwise take actions which would allow him to advance within MSU-N, which was retaliatory. In addition, Bachmeier contended that MSU-N – from the highest levels – singled out and rejected his application for the provost position because his complaint about Templeton, which also was retaliatory action. Emotional distress that resulted from the discriminatory unwanted touching (not emotional distress resulting from the retaliation) comprises the basis for damages due to Bachmeier because of the discrimination.

R7. Bachmeier gave compelling testimony of the emotional distress he suffered during the approximately three year period when Templeton was subjecting him to inappropriate touch in the workplace. He testified that his emotional distress manifested in the form of recurring nightmares, and adversely effected his relationship with his wife and children. Even after Bachmeier filed a formal complaint, MSU-N did not endeavor to remove Templeton from campus. This created a situation in which Bachmeier felt "terrorized" and which lasted almost another five months.

R8. The damages the department may award for the illegal discrimination by MSU-N include any reasonable measure to rectify any harm Dr. Bachmeier suffered because of the discrimination. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. P. W. Berry v. Freese, 239 Mont. 183, 779 P.2d 521, 523 (1989); Dolan v. School District No. 10, 195 Mont. 340, 636 P.2d 825, 830 (1981); accord, Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362 (1975).

R9. Since the law requires "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against," the power and duty of the department to award money for proven emotional distress is clear as a matter of law. Vainio v. Brookshire, 258 Mont. 273, 852 P.2d 596, 601 (1993). A broad

range of damages is available in discrimination cases precisely so that the awards rectify all harm suffered. P. W. Berry, Inc., op. cit.; Dolan, op. cit. Emotional distress recovery is proper upon proof that Bachmeier suffered emotional distress because of the illegal discrimination. Vortex Fishing Systems v. Foss, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836.

R10. Under federal civil rights law, "compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms." Johnson v. Hale, 13 F.3d 1351 (9th Cir. 1994)(increasing award of $125.00 to $3,500.00 for overt racial discrimination). Montana does not think it reasonable to expect any person to endure emotional distress resulting from violation of a fundamental human right. Vainio, op. cit.; Campbell v. Choteau Bar (1993), HR No. 8901003828. This is the heart of Vortex Fishing Systems, op. cit., holding that the limitations and enhanced burdens of proof applicable to recovery of emotional distress damages in common tort claims are inapplicable to emotional distress claims in discrimination cases. Thus, in Human Rights Act cases, emotional distress becomes a potential element of damages, and thereby recovery, without the high burden of proof present in other kinds of torts.

R11. For all of these reasons, 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.

VI. Order

R12. Judgment is found in favor of Randy Bachmeier and against MSU-N on the charge that MSU-N subjected him to illegal sexual harassment in his employment. For the emotional distress damages he suffered because of MSU-N's discriminatory conduct over three years and five months, Bachmeier is entitled to and MSU-N is required to pay the sum of $175,000.00, due and owing from MSU-N with post judgment interest accruing by law from the date of issuance of this order.

R13. Given the original decision in favor of MSU, no pre-judgment interest is proper.

Dated: April 22, 2016.

/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: Charging Party Randy Bachmeier and his attorneys, Colette Davies, Davies Law PLLC, and John Heenan, Bishop & Heenan, and Montana State University – Northern, and its attorneys, Jessica M. Brubaker and Vivian V. Hammill, Office of the Commissioner of Higher Education, and Elizabeth L. Griffing, Axilon Law Group PLLC.

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.

Bachmeier On Remand HOD.tsp