

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

SARAH MACIAG,
Charging Party/Appellee,

HRB CASE NO.015107728

-v-

FINAL AGENCY DECISION

REC ADVANCED SILICON MATERIALS,
LLC,
Respondent/Appellant.

Charging Party, Sarah Maciag, filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of retaliation. Following an informal investigation, the Department determined that reasonable cause supported Maciag's allegations. The case went before the Office of Administrative Hearings of the Department of Labor & Industry, which held a contested case hearing, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a Decision on May 25, 2018. The hearing officer entered judgment in favor of Maciag and determined that retaliation did occur.

Respondent filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on September 14, 2018. Scott Peterson, attorney, appeared and presented oral argument on behalf of Maciag. Patrick T. Fleming, attorney, appeared and presented oral argument on behalf of REC Advanced Silicon Materials, LLC.

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. Mont. Code Ann. § 2-4-621(3). The commission reviews conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. The commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. “Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance.” *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305. An 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(3).

FACTUAL BACKGROUND

Charging party Sarah Maciag ("Maciag") worked for 17 years for the Respondent REC without any apparent significant performance issues. In 2013, REC restructured its operations and transferred Maciag from one position as a Non-Destructive Evaluations Technician to another position as a Silane Operator, a position she had previously held. Maciag filed a complaint with the Human Rights Bureau of the Department of Labor and Industry in December, 2013, alleging disparate treatment based on sex. In February 2014, Maciag spoke up in a safety meeting in a manner that REC deemed highly inappropriate. In April 2014 REC placed Maciag on a short Decision Making Leave ("DML") before requiring her to agree to a written Action Plan ("the Plan") regarding her future conduct as an REC employee. On June 23, 2014, the Human Rights Bureau issued a "no reasonable cause" determination regarding the 2013 transfer and Maciag's later contention that REC instituted the Plan in retaliation for her filing the HRB complaint.

In March 2015 Maciag was involved in a verbal confrontation in the workplace with a co-worker, in which she implied that he had reported an incident the previous month during which she inadvertently overfilled a lime silo. Maciag was discharged by REC on March 24,

2015 on the grounds the verbal workplace confrontation violated the terms of her Action Plan. Maciag then filed a second complaint with the Human Rights Bureau, alleging that REC's adverse employment actions, including terminating her employment, were in retaliation for her prior human rights complaint. Following a contested case hearing, the Hearing Officer Decision found that REC had retaliated against Maciag, and awarded back pay, front pay, and emotional distress damages.

DISCUSSION

As a preliminary matter, Maciag moved to strike REC's reply brief on the grounds that it contained newly presented arguments for the first time, which the Commission should not consider. The Commission concludes that REC did not raise new issues in its reply brief, and that Maciag would have the opportunity to speak to all of the issues during oral argument to the Commission. The Commission therefore denies Maciag's Motion to Strike REC's reply brief.

Issue 1. Did the Hearing Officer have jurisdiction to consider REC's March 2014 employment actions taken against Maciag in evaluating whether REC ultimately retaliated against Maciag?

REC argues that because Maciag did not appeal the Human Rights Bureau "no cause" determination regarding her amended December 2013 complaint (which include allegations that REC retaliated against her in March 2014), the Hearing Officer lacked jurisdiction to hear any evidence as to whether REC's March 2014 actions constituted "retaliation" against Maciag.

Maciag argues that while her previous claim may be barred from being re-litigated, she is not precluded from offering evidence of those occurrences as a means of showing REC's retaliatory intent when it took adverse actions against her in 2015.

The Commission agrees with Maciag, and determines that the Hearing Officer did not commit legal error in considering the March 2014 actions as evidence of the later alleged retaliation by REC.

Issue 2. Did the Hearing Officer correctly evaluate the evidence presented at the hearing in determining that REC is liable?

REC raises two arguments concerning the Hearing Officer's treatment of the evidence presented. The first argument is the Hearing Officer failed to cite the "preponderance of the evidence" standard and place the burden of proof on Maciag. REC further argues that not only should the Hearing Officer have concluded that REC did not retaliate against Maciag, the Hearing Officer should have concluded that REC had legitimate business reasons to terminate Maciag in April 2015.

The Commission first notes the Hearing Officer, at page 18 of the Hearing Officer Decision, expressly states "At all times, Maciag retains the burden of persuading the trier of fact that she has been the victim of retaliation." and cites to *St. Mary's Honor Ctr. v. Hicks*, 509 U.S.502, 506, 113 S. Ct. 2742, 2747 (1993). The Hearing Officer correctly applied the standard. With respect to REC's second argument, it appears that REC overlooks the discussion at pp. 16-17 where the Hearing Officer determines that REC did articulate a legitimate, nondiscriminatory reason for its actions. At that point, the Hearing Officer then went on to analyze whether Maciag demonstrated that REC's reasons were a pretext. The Hearing Officer distinguished between direct and indirect evidence of pretext. The Hearing Officer correctly applied the shifting burden of proof as required under the law. The Commission concludes there is substantial evidence to support the Hearing Officer's findings that REC retaliated against Maciag.

Issue 3. Did the Hearing Officer correctly award front pay?

REC argues the Hearing Officer erred in concluding that REC was hostile towards Maciag and that reinstatement was not an appropriate remedy. Maciag argues that REC never offered reinstatement to Maciag, and that there is evidence in the record of hostility towards her by REC and its employees. The Commission concludes that there is substantial credible evidence in the record to support the Hearing Officer's finding that reinstatement was not appropriate and that front pay should be awarded.

Issue 4. Did the Hearing Officer correctly award damages for emotional distress?

REC argues that the award of \$30,000 is clearly excessive. REC argues that the Montana Supreme Court has not established an evidentiary standard for emotional distress, and therefore the reasonableness of an award for emotional distress should be evaluated in comparison to the awards in other cases. REC cites to the evidence presented in *Vortex Fishing Systems v. Foss*, 308 Mont. 8, 38 P.3d 836 (2001) articulating the severity of Foss's emotional distress, but in which the Court affirmed an emotional damage award of \$2,500. REC compares that to the testimony of Maciag, where she stated that she did not lose work at her two subsequent jobs due to emotional distress, and that she did not seek treatment for emotional distress following her termination from REC. The Hearing Officer, in the decision, analogized the distress suffered by Maciag to the distress suffered in *Johnson v. Hale*, (9th Cir., 1994) 13 F.3d 1351. The Commission agrees that while Maciag did suffer some emotional distress from REC's retaliatory actions, that distress was not nearly as severe as that suffered in *Johnson* (denial of housing based upon race).

The Commission concludes that Finding of Fact 48, finding the amount of damages for Maciag's emotional distress to be \$30,000, is not supported by substantial credible evidence. Based on the Commission's review of the entire record, and in light of the emotional distress

damage awarded in other cases heard by the Commission, the Commission finds that an award of \$5,000 for emotional distress damages is appropriate.

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ORDER

IT IS HEREBY ORDERED, that the hearing officer decision is AFFIRMED IN PART; hearing officer decision Finding of Fact number 48 is AMENDED to reduce the amount of emotional distress damages to \$5,000; and hearing officer Conclusion of Law number 3 is AMENDED accordingly to reduce the amount of emotional distress damages to \$5,000. Therefore, entry of the FINAL AGENCY DECISION AND ORDER, reflecting the above modifications, shall be made this date.

Either party may petition the district court for judicial review of the Final Agency Decision. *Sections Mont. Code Ann. §§ 2-4-702 and 49-2-505.* This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. Mont. Code Ann. § *Section 2-4-702(2).*

DATED this 20th day of November, 2018.



Sheri Sprigg, Chair
Human Rights Commission

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 20th day of November, 2018.

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