

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

ROBERT HEALY IV,
Charging Party/Appellee,

HRB CASE NO.0160562

-v-

FINAL AGENCY DECISION

PIERCE COMPANIES GRP, INC.,
Respondent/Appellant.

Charging Party, Robert Healy IV (Healy), filed an amended complaint with the Department of Labor & Industry (Department) against Respondent, Pierce Companies Grp. Inc. (Pierce), which alleged unlawful discrimination in employment on the basis of religion, creed, race, national origin, color, and retaliation. Following an informal investigation, the Department determined that there was no reasonable cause to believe that discrimination had occurred, and a dismissal of the case was issued in January 2017.

Healy filed an objection to the dismissal with the Human Rights Commission (Commission) in February 2017. The Commission considered the matter at the March 2017 hearing. The Commission sustained Healy's objection and remanded the matter to the Office of Administrative Hearings for further consideration. The Office of Administrative Hearings held a contested case hearing pursuant to Mont. Code Ann. § 49-2-505. The Hearing Officer issued a decision on July 27, 2018. The Hearing Officer entered judgment in favor of Healy, determining that discrimination and retaliation occurred.

Pierce appealed the Hearing Officer's decision to the Commission. The Commission considered the matter on November 16, 2018. Bryan L. Spoon, attorney, appeared and presented oral argument on behalf of Healy. Cody Atkins, attorney, appeared and presented oral argument on behalf of Pierce Companies Grp, Inc. The Commission affirmed the Hearing Officer's decision in its entirety and thereby affirmed all the issues presented.

STANDARDS OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the Hearing Officer's decision. Mont. Code Ann. § 2-4-621(3) (2017). Conclusions of law and interpretations of statutes and administrative rules are reviewed for correctness. Admin. R. Mont. 24.9.123(4)(a).

The Commission 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 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.

BACKGROUND

Healy is a Native American male who is an enrolled member of the Fort Belknap, Assiniboine, and Gros Ventre tribes. From June 6, 2016, until October 7, 2016, Healy worked as a carpenter on Pierce's Homes Division set-up crew. Healy's employment at Pierce included working under the supervision of set-up crew supervisor Seth Ebel (Ebel).

DISCUSSION

- 1. Does substantial credible evidence support the Hearing Officer's findings of fact that Healy was credible, which formed the basis of the Hearing Officer's conclusions that discrimination and retaliation occurred?**

Pierce argues the Hearing Officer erred because there is not substantial credible evidence to support the findings of fact. 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*, ¶ 31. Under the substantial credible evidence standard, “it is not appropriate for a board to substitute its judgment for that of the hearing officer as to the credibility of witnesses and the weight to be given their testimony.” *Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶ 29, 374 Mont. 364, 321 P.3d 819.

On appeal, Pierce argues several findings of fact (FOFs) made by the Hearing Officer are not supported by substantial credible evidence, including FOFs 18, 19-22, 24, 29, 32, 37, 38, and 39. Pierce argues FOFs 19-22, 24, 29, 32, and 37 describe numerous instances of Ebel using racial slurs to and about Healy, and Pierce argues that Healy’s testimony alone in support of these findings is not substantial credible evidence. Pierce also argues that FOF 18, which finds that Healy worked primarily with Ebel, is not supported because Healy also worked with other supervisors. Pierce asserts that FOF 38, finding Pierce never took Healy’s witness statement, is not supported because Ann Eyler (Eyler), a Pierce Human Resources Specialist, interviewed Healy on September 6, 2016. Pierce argues that FOF 39 is not supported because Healy’s probationary period was extended before, not after, Healy complained of Ebel’s language, and therefore the extension was not retaliation for Healy’s complaint.

Pierce argues the Hearing Officer should have included several facts in her findings that undermine Healy’s credibility. Pierce argues the Hearing Officer should have found that Healy was frequently late to work, he recorded his initial employment interviews because he feels Billings employers are bigoted, Healy said his experience with Pierce made him lose track of right and wrong, he did not remember Pierce’s remedial measures taken after his complaint, he did not report other instances of discrimination to Pierce, and Healy used his cell phone in violation of Pierce’s policy.

In response, Healy argues that the Hearing Officer’s findings are supported by substantial credible evidence. The Hearing Officer determined that Healy’s testimony was credible, which is

sufficient to establish findings of fact. Healy's testimony was also corroborated by other witnesses, including Russ Mahan, an employee who worked with Healy and Ebel. The Hearing Officer determined that the testimony of Eyler was less credible than Healy, noting several factual inconsistencies with Eyler's testimony.

The Commission does not substitute its judgment for that of the Hearing Officer as to witness credibility. After review of the complete record, the Commission concludes that the Hearing Officer's findings of fact are based on substantial credible evidence, including determinations of witness credibility.

a. Did the Hearing Officer abuse her discretion when she excluded the testimony of Andrew Moulaison on the basis of hearsay?

A ruling on the admissibility of testimony under a hearsay exception is reviewed for an abuse of discretion. *State v. Hamby*, 1999 MT 319, ¶ 13, 297 Mont. 274, 992 P.2d 1266. Andrew Moulaison (Moulaison) worked with Healy under the supervision of Ebel, one of two set-up crew chiefs. Moulaison testified about Healy's work ethic. He also testified to hearing Ebel use racial slurs to and about Healy on a job site, including the term "lazy prairie nigger." The Hearing Officer excluded Moulaison's testimony on the basis of hearsay.

In his Response Brief, Healy argues the Hearing Officer should have admitted the testimony of Moulaison because it was not offered to prove the truth of the matter asserted. Rather, his testimony was simply offered to prove that the racist comments by Ebel occurred, and therefore the testimony is not hearsay. *Jim's Excavating Serv. v. HKM Assocs.*, 265 Mont. 494, 507, 878 P.2d 248, 255-256 (1994) (citing Commissioner's Comments to Mont. R. Evid. 801(c)). Furthermore, Moulaison's testimony corroborates Healy's allegations that Ebel used several racial slurs and comments to and about Healy while at work. Moulaison's testimony also refutes Pierce's assertion that Healy was a poor employee. Pierce argues that Moulaison's testimony was not credible, and it was properly excluded by the Hearing Officer as hearsay.

“[A] party must cross-appeal if the party seeks to change any part of the judgment below.” *City of Missoula v. Robertson*, 2000 MT 52, ¶ 19, 298 Mont. 419, 998 P.2d 144 (citations omitted). Healy raised this issue in his response brief, rather than filing a cross appeal; therefore, this issue was not properly raised before the Commission. The Commission concludes that Moulaison’s testimony was not hearsay; however, in this case the exclusion of that testimony by the Hearing Officer was harmless error. Because the issue was not properly raised before the Commission, and the admission of the testimony would not change the outcome of the case, the Commission will not modify the order of the Hearing Officer on this issue.

2. Does substantial credible evidence support the Hearing Officer’s finding that the conduct of Healy’s supervisor was sufficiently severe or pervasive to create a hostile work environment?

Pierce maintains that there is only one instance of racial discrimination supported by the record: on August 30, 2016, while at a job site, Ebel used the terms “prairie nigger” and “Pocahontas” in reference to Healy. Pierce argues that this one instance of discrimination was not sufficiently severe and pervasive to create a hostile work environment for Healy, citing several cases in support of this assertion. *See e.g., Vasquez v. Cnty. of L.A.*, 349 F.3d 634 (9th Cir. 2003); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1037 (9th Cir. 1990); *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104 (9th Cir. 2000).¹ Pierce argues for the application of a burden-shifting analysis to Healy’s claims of discrimination, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); however, “the McDonnell Douglas test is inapplicable when plaintiffs present direct evidence of discrimination.” *Laudert v. Richland Cnty. Sheriff’s Dep’t*, 2000 MT 218, ¶ 22, 301 Mont. 114, 7 P.3d 386.

Healy argues that Pierce repeatedly misstates the appropriate legal standard: a hostile work environment is created by severe *or* pervasive conduct, not severe *and* pervasive conduct.

¹Because the Montana Human Rights Act closely models the Federal Civil Rights Act of 1964, Montana courts look to federal case law for guidance when interpreting the Montana Human Rights Act. *Crockett v. Billings*, 234 Mont. 87, 92, 761 P.2d 813, 816 (1988).

McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1113 (9th Cir. 2004). Courts have held that the single use of the term “nigger” by a supervisor is sufficient to alter the conditions of employment for an African-American employee. *McGinest*, 360 F.3d at 1116 (citing *Rodgers v. W.-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)). Healy argues that the Hearing Officer properly determined that Healy credibly testified to his supervisor’s frequent use of several racial slurs, which was sufficient to support the finding of a hostile work environment.

The Commission concludes that substantial credible evidence supports the Hearing Officer’s findings that Ebel’s behavior was sufficiently severe or pervasive to create a hostile work environment for Healy.

3. Does Hearing Officer correctly conclude there was retaliation by Pierce?

Pierce argues it did not retaliate against Healy. Citing the *McGinest* case, Pierce argues “[t]o establish a prima facie case of retaliation under Title VII, [a charging party] must show 1) that he acted to protect his Title VII rights; 2) that an adverse employment action was thereafter taken against him; and 3) that a causal link existed between the two events.” *McGinest*, 360 F.3d at 1124. Pierce argues that Healy cannot prove a causal connection between Healy’s complaint and the adverse employment actions taken against Healy. Pierce argues that Healy was a below-average employee who was frequently late, and legitimate business reasons existed for the extension of the probationary period, the employee warnings, and the termination.

In later briefing, Pierce argues for the application of a mixed-motive analysis to Healy’s claim of retaliation. Pierce did not argue for a mixed-motive analysis in its initial brief to the Commission. The Commission will not address the merits of an issue presented for the first time in a reply brief. *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 16, 379 Mont. 265, 350 P.3d 39. Furthermore, the Hearing Officer applied the correct legal analysis to this case.

Healy argues that the Hearing Officer correctly found that he was subjected to retaliation by Pierce. Healy asserts that he was never marked “below average” on any Probationary

Employee Progress Report. The Hearing Officer concluded that after Healy complained about Ebel's comments to Pierce on September 1, 2016, he was immediately reassigned to work on the Pierce lot (rather than travel with the Homes set-up crew). On September 6, 2016, he was given his first Employee Warning Notice for being late to work, and he was informed that his employment probationary period was extended. On September 12, 2016, he was given a second Employee Warning Notice. Healy was never given the customary "final" warning notice, and on October 7, 2016, he was terminated. Healy argues that the Hearing Officer correctly concluded that these actions by Pierce were retaliatory.

The timing of Pierce's adverse employment actions against Healy create a disputable presumption that those actions were retaliatory because the actions occurred while Healy's complaint of discrimination was being investigated. Admin. R. Mont. 24.9.603. Pierce failed to overcome that presumption. The Commission concludes that the Hearing Officer applied the appropriate legal analysis and correctly found there was retaliation.

4. Does substantial credible evidence support the Hearing Officer's damage awards?

The Commission reviews a Hearing Officer's damage awards to determine if they are supported by substantial credible evidence:

The commission reviews damage awards to determine if they are clearly erroneous. A party asserting that a damage award is clearly erroneous shall specifically cite the portions of the record supporting that claim. A party asserting an alternative monetary award shall cite the portions of the record which support such alternative calculation. The commission may deny an appeal on the issue of damages if it fails to comply with this subsection.

Admin. R. Mont. 24.9.123(4)(c).

Pierce argues that the damage awards of front pay and back pay are not supported by substantial credible evidence because Healy did not use reasonable diligence to attain or maintain work after his termination from Pierce. Healy only testified to using an Internet search engine to apply for jobs. Pierce argues that this limited activity was insufficient to mitigate his

damages, and he is not entitled to front pay or back pay. *EEOC v. Serv. News Co.*, 898 F.2d 958, 963 (4th Cir. 1990) (“Looking through want ads for an unskilled position, without more, is insufficient to show mitigation, and the back pay award should accordingly be reduced.”). Pierce further argues that the emotional distress award is clearly erroneous because Healy presented no evidence of health concerns or other indications of emotional distress. Without more evidence of emotional distress, Healy is not entitled to such damages. *Benjamin v. Anderson*, 2005 MT 123, ¶ 69, 327 Mont. 173, 112 P.3d 1039 (holding that an employee who suffered PTSD and clinical depression resulting from discrimination was entitled to emotional distress damages).

Healy counters that his damage awards are supported by substantial credible evidence, and he mitigated his damages after his termination from Pierce. He applied for 130 jobs through the website *Indeed*, and he worked at Pizza Hut and later Burger King. Healy argues that the front pay and back pay are supported by substantial credible evidence. Healy further asserts that he is entitled to emotional distress damages because he suffered illegal discrimination. *Vainio v. Brookshire*, 258 Mont. 273, 281, 852 P.2d 596, 601 (1993). The Hearing Officer properly determined that Healy’s emotional distress award is supported by substantial credible evidence because he felt devastated both economically and emotionally after being subject to offensive racial slurs used by his supervisor.

The Commission concludes that Healy’s damage awards are supported by substantial credible evidence.

ORDER


After the hearing on this matter, it came to the Commission’s attention a clerical error is present in the Hearing Officer’s Decision. Because this is a clerical error and not a substantive

issue affecting the rights of any party, IT IS HEREBY ORDERED that § VII. Order, ¶ 6, of the Hearing Officer's Decision is CORRECTED AS FOLLOWS:

6. Pierce Companies Grp., Inc., must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for its employees to prevent and timely remedy ~~disability~~ discrimination. . . .

IT IS HEREBY ORDERED, that the hearing officer decision is AFFIRMED IN ITS ENTIRETY. Either party may petition the district court for judicial review of the Final Agency Decision. Mont. Code Ann. §§ 2-4-702 and 49-2-505(9). 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. § 2-4-702(2).

DATED this 11th day of February 2019.



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 11th day of February 2019.

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