

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

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DANIELLE JONES,  
Charging Party/Appellee,

-v-

ALL STAR PAINTING, INC.,  
Respondent/Appellant.

HRB CASE NO.0151017226

FINAL AGENCY DECISION

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In November 2014, Charging Party, Danielle Jones (Jones), filed a complaint with the Department of Labor & Industry (Department), against Respondent, All Star Painting, Inc. (All Star), alleging unlawful discrimination in employment on the basis of sex (female). Following an informal investigation, the Department determined that reasonable cause supported Jones's allegations. On November 19 and 20, 2015, the Office of Administrative Hearings (OAH) of the Department of Labor and Industry held a contested case hearing pursuant to Mont. Code Ann. § 49-2-505 (2015 Hearing). On March 21, 2016, OAH issued the 2016 Decision, and the Hearing Officer found that Jones failed to prove that she was discriminated against in employment on the basis of her sex. Jones appealed the 2016 Decision to the Montana Human Rights Commission (Commission), and the Commission upheld the 2016 Decision in favor of All Star. Jones filed a petition for judicial review, and the District Court also upheld the 2016 Decision.

Jones appealed to the Montana Supreme Court, and on April 3, 2018, the Montana Supreme Court remanded the 2016 Decision to OAH for further consideration. *Jones v. All Star Painting, Inc.*, 2018 MT 70, ¶ 27, 391 Mont. 120, 415 P.3d 986. On July 9, 2018, the Hearing Officer took oral argument from the parties on the matters raised by the Supreme Court. On November 27, 2018, OAH issued the Decision on Remand, finding that Jones experienced unlawful discrimination in her employment on the basis of sex, entering judgment in favor of Jones, and awarding damages. All Star filed an appeal of the Decision on Remand with the

Commission. The Commission considered the matter on March 22, 2019. James Murnion, attorney, appeared and presented oral argument on behalf of Jones. T. Thomas Singer, attorney, appeared via telephone and presented oral argument on behalf of All Star.

### **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**

Between approximately July 29 and September 12, 2014, Jones worked as a house painter for All Star in Billings, Montana. All Star is owned by Norman Hodges (Hodges), who hires and directs crew members. In the summer of 2014, Marvin Thomas (Thomas) worked as the paint crew supervisor, as he had done for the prior four years. That summer the crew consisted mainly of Jones, Thomas, and Thomas's girlfriend, Ellen Knier.

In her original November 2014 complaint, Jones alleged that Hodges subjected her to sexual harassment on nearly a daily basis, including touching her on her legs and buttocks without her consent. Jones asserted that she told Hodges to stop his conduct several times, and she eventually left her employment with All Star due to Hodges's alleged sexual harassment.

## DISCUSSION

### **I. Were the conclusions of law correct and were the findings of fact supported by substantial competent evidence?**

As a preliminary matter, the Hearing Officer noted that to prove a claim of a hostile work environment based on sexual harassment, Jones must prove that “(1) she was subjected to verbal or physical conduct of a harassing nature; (2) that it was unwelcome; and (3) that the harassment permeated the work environment to the point that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Stringer-Altmaier v. Haffner*, ¶ 22, 2006 MT 129, 138 P.3d 419.<sup>1</sup> Jones needed to prove that her workplace was “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Faragher v. City of Boca Raton*,

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<sup>1</sup> Citing *Laudert v. Richland Cnty. Sheriff's Dep't*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386, the Hearing Officer also stated that “[t]his is a direct evidence case.” Decision on Remand, p. 7. The Hearing Officer stated that if a charging party proved a prima facie case of sexual harassment, the burden then shifts to the respondent to prove, by a preponderance of the evidence, “that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and unworthy of belief.” Admin. R. Mont. 24.9.610(5). Decision on Remand, p. 8. However, a burden-shifting analysis is not applicable to a claim of a hostile work environment. A respondent is not entitled to provide a “lawful motive” for harassment. *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 213 n.11 (3d Cir. 2017) (“[T]he burden-shifting framework is inapplicable . . . there can be no legitimate justification for a hostile work environment.”) While a respondent may question the sufficiency of a charging party's evidence to prove a claim of harassment, this is not a burden-shifting analysis. However, the citation to this analysis is harmless error because the Hearing Officer ultimately applied the correct legal analysis to Jones's claim of a hostile work environment. See *Bollinger v. Billings Clinic*, 2019 MT 42, ¶ 37, 394 Mont. 338, 434 P.3d 885 (applying the harmless error rule under Mont. R. Civ. P. 61 to a Commission proceeding).

524 U.S. 775, 787 (1998). In addition, Jones was required to prove that any harassment took place “because of sex.” *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

In the Decision on Remand, the Hearing Officer concluded that “Jones’[s] testimony was deemed more credible than Hodges’ denials[.]” and Jones proved her claim of sexual harassment through her testimony and the corroboration of her testimony by other witnesses. Decision on Remand, pp. 8-9.

**A. Did the Hearing Officer consider witness testimony for its proper purpose?**

This case was remanded from the Montana Supreme Court with instructions for the Hearing Officer to consider the corroborating nature of Jones’s witnesses’ testimony, “enter findings of fact explaining its review of the evidence, and explain the effect, if any, this review has on its conclusions of law.” *Jones v. All Star*, ¶ 27. In the Decision on Remand, the Hearing Officer acknowledged that the 2016 Decision failed to adequately consider the testimony of Jones’s husband, Ryan Jones (Ryan), her former roommate, Dustin Ritts (Dustin), and her father-in-law, Jeffrey Jones (Jeffrey). Their testimony confirmed that Jones appeared angry, depressed, and generally upset during her employment, and Jones relayed specific allegations of harassment to them at the time. Decision on Remand, p. 5. In light of the corroborating testimony of Ryan, Dustin, and Jeffrey, the Hearing Officer found Jones’s testimony more credible than Hodges’s denials. Decision on Remand, p. 6.

All Star argues that the Hearing Officer erred by considering testimony that was deemed inadmissible hearsay by the Montana Supreme Court. Specifically, All Star argues that the Hearing Officer relied on testimony from Ryan, Dustin, and Jeffrey to prove the truth of the matter asserted, i.e., that Hodges’s alleged harassment actually occurred. Ryan, Dustin, and Jeffrey did not personally witness any of Hodges’s alleged behavior. The Supreme Court

explicitly stated that Jones's corroborating witnesses "could not offer eyewitness testimony to prove any alleged specific acts," *Jones v. All Star*, ¶ 25. Because the three men testified as to what Jones said about Hodges's behavior, rather than what they personally observed, All Star argues that the statements were inadmissible hearsay. Jones argues that the Hearing Officer properly followed the directive of the Montana Supreme Court. Jones testified in detail about the alleged harassment by Hodges. Jones argues that the Hearing Officer properly considered the testimony of Jones's witnesses as to her demeanor while she worked for All Star. Ryan, Dustin, and Jeffrey all testified that Jones was upset while she worked for All Star.

The Supreme Court held that the personal observations made by Ryan, Dustin, and Jeffrey, particularly regarding Jones's demeanor while she worked for All Star, were not hearsay. *Jones v. All Star*, ¶ 22. Hearsay is a statement made outside of a trial or hearing "offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c). "The term 'hearsay,' as used in the law of evidence, signifies all evidence which is not founded upon the personal knowledge of the witness from whom it is elicited." *Jones v. All Star*, ¶ 22 (citing *Goodover v. Lindsey's*, 255 Mont. 430, 442, 843 P.2d 765, 772 (1992)). Hearsay is generally inadmissible unless an exception applies. Mont. R. Evid. 802. The Supreme Court stated as follows regarding the testimony of Ryan, Dustin, and Jeffrey:

They each testified that she was upset, and each attributed Jones's demeanor to her workplace environment. Though they could not offer eyewitness testimony to prove any alleged specific acts, their testimony supported Jones's testimony that her work with All Star was causing her distress during this time. Their testimony does not go simply to Jones' character for truthfulness, but supports an inference that she was being harassed at work.

*Jones v. All Star*, ¶ 25.

The Commission concludes that the Hearing Officer properly followed the directive of the Montana Supreme Court and considered the corroborating nature of Jones's witnesses' testimony.

**B. Were the findings of fact supported by competent substantial evidence?**

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.

All Star argues the Hearing Officer erred by finding that Jones's testimony was more credible than Hodges's testimony. All Star argues that the Hearing Officer provided no justification for this determination, and Jones's testimony contained many contradictions. All Star argues that Jones claimed her testimony would be corroborated by at least two homeowners; however, the homeowners' testimony corroborated Hodges's testimony.

Jones argues that the Hearing Officer is granted deference for determinations of witness credibility, and Jones's testimony detailed numerous instances of harassment by Hodges. Jones further argues that the testimony of the homeowners does not prove harassment did not happen because seven of the nine homeowners hardly paid attention to the painting crew or were not home while the crew worked. Jones also argues that her testimony was corroborated by Ryan, Dustin, Jeffrey, and Stacy Hemming.

The Commission defers to the Hearing Officer for determinations of witness credibility, and in this case the Hearing Officer determined that Jones's testimony was more credible than

Hodges's denials. The Commission concludes that the Hearing Officer's findings of fact are supported by competent substantial evidence and the conclusions of law are correct.

**C. Were the damages based on competent substantial evidence?**

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).

All Star argues that Jones's award of damages was not supported by competent substantial evidence. All Star highlights that during the 2015 Hearing, the parties discussed records of counseling sessions Jones had with various providers, and the records never indicated anything about her experiences with All Star or Hodges. All Star notes that Jones testified that she did discuss Hodges's behaviors during these appointments, and she conceded that the notes were otherwise accurate. All Star also noted that Jones has a history of mental health issues, trauma, and memory problems. Furthermore, All Star argues that Jones worked for All Star for barely six weeks, and she made more money at subsequent employment.

Jones counters that the emotional distress damages are appropriate based on the evidence, and the damages are not based on the length of her employment with All Star. Jones argues that the Hearing Officer properly considered the emotional distress damages awarded in similar cases. Jones testified in the 2015 Hearing and stated in briefing that Hodges's conduct made her feel anxious, humiliated, and deeply upset. Furthermore, Jones had no control over what was documented in any providers' notes.

The Commission concludes that Jones's damage awards are supported by competent substantial evidence.

**ORDER**

IT IS HEREBY ORDERED, that the Hearing Officer's Decision on Remand is AFFIRMED. 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. § 2-4-702(2).

DATED this 13<sup>th</sup> day of May 2019.

//Timothy A. Tatarka//  
Timothy A. Tatarka, 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 13<sup>th</sup> day of May 2019.

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