

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

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KIONDRA BULLOCK,  
Charging Party/Appellant,

HRB CASE NO.0160575

-v-

REMAND ORDER

TELETECH CORPORATION,  
Respondent/Appellee.

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Charging Party, Kiondra Bullock (Bullock), filed a complaint with the Department of Labor & Industry (Department), against Respondent, Teletech Corporation (TTEC), which alleged unlawful discrimination in employment on the basis of race (African American) and retaliation. Following an informal investigation, the Department determined that reasonable cause supported Bullock's allegation of retaliation, and the Department stated that there was not sufficient time to investigate Bullock's hostile work environment allegation. The case went before the Office of Administrative Hearings (OAH) of the Department of Labor & Industry, which on April 19, 2018 held a contested case hearing pursuant to Mont. Code Ann. § 49-2-505. On November 29, 2018, the Hearing Officer issued a Decision entering judgment in favor of Respondent and determining that discrimination based on race and retaliation did not occur.

Bullock filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on March 22, 2019. Josh Van de Wetering, attorney, appeared and presented oral argument on behalf of Bullock. Michelle Gomez, attorney, appeared and presented oral argument on behalf of TTEC.

## STANDARD OF REVIEW

Discretionary rulings of the Hearing Officer, such as denying a motion to amend the pleadings or to amend a pretrial order, are reviewed for an abuse of discretion. *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 323, 815 P.2d 1153, 1154 (1991).

## BACKGROUND

On January 13, 2015, Bullock began working as a Team Lead at TTEC's call center in Kalispell, Montana. During the hearing, Bullock described several inappropriate or offensive situations while working at TTEC that she perceived to be based on her race, including overhearing other employees tell jokes about black people. Bullock also described fielding general questions from supervisors and others about whether or not black people swim and what it is like to be black living in Kalispell. On September 11, 2015, Bullock was placed on a Performance Improvement Plan (PIP) due to her communication with other employees and unprofessional demeanor. On April 4, 2016, Bullock was placed on a second PIP due to her team's rate of employee termination, and the PIP attributed the terminations to Bullock's behavior.

Bullock alleges that on April 11, 2016, Alex Goodnight (Goodnight), a TTEC employee who is subordinate to Bullock, made a joke about Bullock's grandchildren being slaves on a plantation. Bullock's reaction to the joke was reported to TTEC management, and the incident resulted in an investigation. On May 20, 2016, Bullock was issued a Final Written Warning (Warning) for her unprofessional conduct and reaction to Goodnight on April 11, 2016. The Warning also reiterated concerns raised in the two prior PIPs, including Bullock's lack of professionalism and the rate of her team's employee terminations. On June 6, 2016, Bullock gave notice of her resignation to TTEC.

## **DISCUSSION**

### **Did the Hearing Officer abuse her discretion by limiting the scope of the hearing and not considering Bullock's allegation of a hostile work environment?**

#### **1. Procedural Background**

On June 29, 2016, Bullock filed a complaint of discrimination with the Department alleging discrimination based on race and retaliation using the standard HRB form. The HRB form used by Bullock does not contain a specific box for "Hostile Work Environment" in the "BASIS OF DISCRIMINATION" section. She noted that the latest date of discrimination was May 17, 2016, and she checked the box marked "Continuing Action." On August 19, 2016, Bullock sent a letter to the Department outlining the details of her charge of discrimination. Bullock primarily described the April 11, 2016 situation with Goodnight, and she wrote that she worked in a "severely discriminatory and hostile working environment."

On October 10, 2016, Bullock's first attorney, Nate McConnell (McConnell), filed a rebuttal to TTEC's response with HRB. McConnell argued that Bullock was discriminated against on the basis of race, she was subjected to a hostile work environment, and she was retaliated against for engaging in protected activity.

On December 2, 2016, the Investigator with the Human Rights Bureau (HRB) contacted McConnell to state that new allegations, disparate treatment and hostile work environment, were raised by Bullock, and TTEC had not had the opportunity to respond to the new allegations. On December 28, 2016, McConnell filed an Amended Complaint, formally adding the allegation of a hostile work environment to Bullock's complaint. On January 6, 2017, Bullock signed a verification of the Amended Complaint. On January 23, 2017, the Investigator issued the Final Investigative Report (FIR). The FIR concluded that there was reasonable cause to believe

retaliation occurred and there was not time to sufficiently investigate Bullock's allegation of a hostile work environment claim.

On March 6, 2017, OAH issued a Notice of Hearing, stating that "[t]he enclosed complaint or amended complaint charges race discrimination and retaliation in the area of employment." TTEC then moved to exclude consideration of the hostile work environment allegation from the hearing. TTEC argued that Bullock's hostile work environment allegation was untimely, it was not investigated by HRB or certified for a hearing, and TTEC had not had the opportunity to properly defend against that allegation. Bullock responded to the motion, arguing that the claim was not untimely, and it was properly raised before the HRB.

On July 24, 2017, OAH granted TTEC's motion to limit the scope of the hearing. The Pretrial Order stated that there was "little explanation" for why the original charge of discrimination was not amended before December 2016, and "there was no explanation offered as to why there had been no effort to amend the complaint pursuant to Admin. R. Mont 24.8.752 once the matter was certified for hearing by OAH." The Pretrial Order stated that Bullock's hostile work environment allegation was not investigated, not certified for a hearing, nor was it included in the March 7, 2017 Notice of Hearing. Although the Pretrial Order acknowledges that TTEC was "arguably on notice" of the hostile work environment allegation, it concluded that consideration of the hostile work environment allegation would be "unfairly prejudicial" to TTEC.

On April 19, 2018, a contested case hearing was held, and on November 29, 2018, the Hearing Officer issued a decision in favor of Respondent TTEC. The Hearing Officer held that Bullock did not prove a prima facie case of race discrimination based on disparate treatment.

Hearing Officer Decision, p. 11, 13. The Hearing Officer further held that Bullock did not prove a prima facie case of retaliation. Hearing Officer Decision, p. 14, 17.

## **2. Argument and Analysis**

“A person claiming to be aggrieved by any discriminatory practice prohibited by [chapter 2 of the Montana Human Rights Act] may file a complaint with the department.” Mont. Code Ann. § 49-2-501(1). A charging party may amend a complaint of discrimination while the complaint is under investigation by the department. *See* Admin. R. Mont. 24.8.203(2), (3); Admin. R. Mont. 24.8.403(2); *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990) (applying Mont. R. Civ. P. 15 to a charging party’s amended complaint of discrimination).

If any or all of the allegations of discrimination contained in the complaint are supported by a preponderance of the evidence, the complaint will be certified for hearing. Admin. R. Mont. 24.8.220(a)(1); Mont. Code Ann. § 49-2-504(7)(c). “The department shall hold a contested case hearing on a complaint that is certified for hearing under 49-2-504[.]” Mont. Code Ann. § 49-2-505(1). “The hearing officer may order preliminary prehearing conferences, prehearing conferences, or other procedures as necessary to appropriately regulate the conduct of the contested case proceeding.” Admin. R. Mont. 24.8.755(2). With leave of the hearing officer or consent of the adverse party, a charging party may amend a complaint before OAH “to cure defects or omissions, including procedural defects or defects in verification, and to allege new facts and matters arising out of continuing violation of law,” and also “to provide a respondent with fair notice of the allegations of a party.” Admin. R. Mont. 24.8.752(1), (4). “A complaint may be amended by way of a prehearing order . . . which is substituted for pleadings in the contested case.” Admin. R. Mont 24.8.752(5). “To the extent the amendment of pleadings is not

otherwise addressed in this rule, such amendments shall be governed by the provisions of Rule 15 of the Montana Rules of Civil Procedure.” Admin. R. Mont. 24.8.752(6).

After service of a responsive pleading, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Mont. R. Civ. P. 15(a)(2). A hearing officer may deny a motion to amend for reasons including “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowance of the amendment, futility of the amendment, etc.” *Farmers Coop. Ass’n v. Amsden, LLC*, 2007 MT 286, ¶ 12, 339 Mont. 445, 171 P.3d 690. A hearing officer must balance any possible prejudice to the non-moving party “against the sufficiency of the moving party’s justification of the delay.” *Farmers Coop.*, ¶ 14. While Mont. R. Civ. P. 15(a) “generally contemplates liberal amendment of pleadings, [the Commission] will reverse a denial of a motion to amend a pleading only upon finding an abuse of discretion under the circumstances of a particular case.” *Peeler v. Rocky Mt. Log Homes Can., Inc.*, 2018 MT 297, ¶ 29, 393 Mont. 396, 431 P.3d 911.

Bullock argues that the Hearing Officer erred by limiting the scope of the hearing and not addressing the hostile work environment allegation, asserting that the allegation was properly raised before the HRB with sufficient time for the claim to be investigated and addressed. Counsel for Bullock conceded before the Commission that he could have amended the certification before OAH to include the allegation of a hostile work environment; however, counsel argued that he believed the claim was already in front of OAH based on the proceedings in front of HRB. Counsel further argued before the Commission that TTEC first raised the issue

of a hostile work environment before OAH in TTEC's motion to narrow the scope of the hearing.

TTEC argues that the Hearing Officer properly excluded the consideration of the hostile work environment allegation. TTEC argues that the claim was never sufficiently raised and considered by the HRB or OAH with time for TTEC to respond. TTEC argues that Bullock made no effort to properly raise the issue for certification and consideration before OAH under Mont. Code Ann. §§ 49-2-504(7)(c) and -505. TTEC further argues that Bullock did not try to amend the complaint before OAH under Admin. R. Mont. 24.8.752.

The Commission concludes that, in this case, Bullock's allegation of a hostile work environment should have been considered by OAH during the hearing. The Commission notes that the proper procedural method to ensure the allegation was heard before OAH was to file for an amendment to the March 6, 2017 Notice of Hearing under Admin. R. Mont 24.8.752. However, Bullock's hostile work environment allegation was already before OAH because Bullock filed the Amended Complaint in HRB. Although a finding of reasonable cause means a complaint of discrimination must be certified for a hearing under Mont. Code Ann. § 49-2-504(7)(c), only the complaint—and any amended complaint—travel to OAH for a de novo contested case proceeding. Mont. Code Ann. §§ 49-2-504(7)(c), 505(1). The claim was already before OAH in the Amended Complaint filed in HRB, and the Pretrial Order narrowing the scope of the hearing retroactively denied Bullock leave to amend her complaint.

The Commission further notes that a hostile work environment allegation is a form of racial discrimination, and not a separate legal claim of illegal discrimination. Bullock clearly alleged discrimination based on race on her original Complaint filed with the HRB. As noted above, the Hearing Officer analyzed a claim of race discrimination based on disparate treatment,

citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), rather than a claim of race discrimination based on a hostile work environment as analyzed in *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004). However, both disparate treatment and a hostile work environment are forms of race discrimination, *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993), and Bullock has maintained a claim of race discrimination from the beginning.

Furthermore, TTEC was on notice of the hostile work environment allegation well before the OAH hearing and had adequate time to defend against the claim. As described above, Bullock filed an Amended Complaint alleging hostile work environment on December 28, 2016, and it was verified on January 6, 2017. Although the March 6, 2017 Notice of Hearing only listed race discrimination and retaliation as issues certified for a hearing, TTEC nonetheless moved to exclude the consideration of Bullock's hostile work environment allegation at the hearing. TTEC's motion was granted on July 24, 2017. The contested case hearing before OAH did not occur until April 19, 2018. Because TTEC was on notice of the hostile work environment allegation, TTEC would not have been prejudiced if the allegation was allowed to proceed before OAH.

Bullock, however, is prejudiced by the Pretrial Order limiting the scope of the hearing. Bullock's hostile work environment allegation currently remains in this administrative process. The HRB FIR only investigated and reached a finding on Bullock's claim of retaliation. The FIR did not address a claim of race discrimination. The FIR stated that the hostile work environment allegation was not investigated or addressed due to time constraints. Because the HRB did not issue a finding of no cause on Bullock's hostile work environment allegation, she was not issued a Notice of Dismissal and Notice of Right to File Civil Action in District Court on that allegation. Bullock must exhaust the administrative process before pursuing an action in district



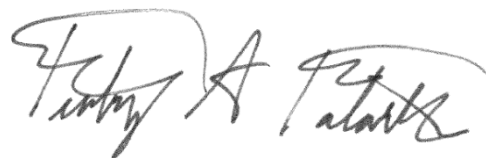
court. Mont. Code Ann. §§ 49-2-204(1); 2-4-702. The Montana Supreme Court has held that *each issue* must be “properly raised, argued, or adjudicated pursuant to the administrative process” before it is ripe for judicial review. *Marble v. State*, 2000 MT 240, ¶ 27, 301 Mont. 373, 9 P.3d 617. Bullock is prejudiced because the Pretrial Order limiting the scope of the hearing improperly prevented Bullock from having her allegation of a hostile work environment investigated and adjudicated on the merits within the administrative process, while also preventing Bullock from pursuing the allegation in district court.

After careful consideration of the complete record and the argument presented by the parties, the Commission concludes the Hearing Officer abused her discretion by granting TTEC’s motion to limit the scope of the hearing and not considering Bullock’s allegation of a hostile work environment. Because the Commission is remanding on the issue of the hostile work environment, the Commission will not address the other issues raised by Bullock in her appeal to the Commission.

### **ORDER**

IT IS HEREBY ORDERED the matter is REMANDED to the Office of Administrative Hearings of the Department of Labor & Industry for further proceedings consistent with this Order.

DATED this 17<sup>th</sup> day of June 2019.



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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 17<sup>th</sup> day of June 2019.

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