

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

\*\*\*\*\*  
SHALAINÉ LAWSON,  
Charging Party -v- HRB CASE NO. 0180070  
NORVAL ELECTRIC COOPERATIVE,  
Respondent. FINAL AGENCY DECISION  
\*\*\*\*\*

Charging Party Shalaine Lawson (Lawson) filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of sex and retaliation against her employer, Respondent NorVal Electric Cooperative, Inc. (NorVal). Following an informal investigation, the Department determined that reasonable cause did not support Lawson’s allegations and dismissed the matter. Lawson filed an objection to the dismissal with the Human Rights Commission (Commission). The Commission sustained the objection and remanded the matter to the Department’s Office of Administrative Hearings (OAH), which held a contested case hearing pursuant to Mont. Code Ann. § 49-2-505. The Hearing Officer issued a decision (HOD) on October 22, 2019, determining that discrimination occurred and entering judgment in favor of Lawson.

Charging Party Lawson and Respondent NorVal both filed appeals of the HOD with the Commission. The Commission considered the matter on January 24, 2020. Todd Shea, attorney, appeared and presented oral argument on behalf of Lawson. Maxon Davis, attorney, appeared and presented oral argument on behalf of NorVal.

**STANDARDS OF REVIEW**

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 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).

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. 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).

Regarding witness testimony, "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.

## **BACKGROUND**

Lawson started at NorVal as an accountant in 2010, and she was promoted to office manager in 2015. Lawson reported directly to Craig Herbert (Herbert), the general manager. Lawson alleges that between May and November 2017, Herbert sexually harassed her at work. Lawson argues that she was not allowed to report the alleged harassment to anyone other than Herbert, and she was subjected to retaliation after complaining about the harassment. Lawson went on medical leave due to the effects of the harassment on her mental health.

In November 2017, Lawson filed a complaint of discrimination with the Department. After an informal investigation and proceedings before OAH, the Hearing Officer held that Lawson was subject to discrimination based on her sex and retaliation.

## **DISCUSSION**

### **I. Sexual Harassment – Hostile Work Environment**

The Montana Human Rights Act (MHRA) prohibits discrimination based on sex in any term, condition, or privilege of employment. Mont. Code Ann. § 49-2-303(1). The MHRA is closely modeled after Title VII of the Federal Civil Rights Act of 1964, and “Montana courts have examined the rationale of federal case law” when interpreting the MHRA. *Crockett v. Billings*, 234 Mont. 87, 92, 761 P.2d 813, 816 (1988).

Sexual harassment is one form of sex discrimination, and sexual harassment can occur through the creation of a hostile work environment. *Beaver v. Mont. Dep’t of Nat. Res. & Conservation*, 2003 MT 287, ¶ 29, 318 Mont. 35, 78 P.3d 857. To prove a claim of a hostile work environment, a plaintiff must prove that “1. she was subjected to verbal or physical conduct of a sexual nature; 2. the conduct was unwelcome; and 3. her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.” *Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶ 22, 332 Mont. 293, 138 P.3d 419 (citing *Meritor Savings Bank, FSB v. Vinson* 477 U.S. 57, 65 (1986)).

A totality of the circumstances must be considered when analyzing a claim of hostile work environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). “While simple teasing, offhand comments, and isolated incidents (unless extremely serious) are not sufficient to create an actionable claim under Title VII . . . the harassment need not be so severe as to cause

diagnosed psychological injury.” *Fuller v. Idaho Dep’t of Corr.*, 865 F.3d 1154, 1161-62 (9th Cir. 2017) (citations and quotations marks omitted). “It is enough if such hostile conduct pollutes the victim’s workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position.” *Id.*

“[T]he misconduct must create a working environment which is both objectively and subjectively offensive. In other words, the environment must be one that a reasonable person would find hostile or abusive, and one that the victim in fact perceived as hostile and abusive.” *Beaver*, ¶ 31 (citing *Harris*, 510 U.S. at 21-22).

NorVal argues that the Hearing Officer erred by holding that the cited conduct was not actionable sexual harassment. NorVal asserts that the alleged conduct was not severe; there were no “assaults, physical contact, uninvited sexual solicitations, intimidating words or acts, obscene language or gestures, pornographic pictures,” citing *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808-09 (7th Cir. 2000). NorVal further argues that the alleged conduct was only a few instances over several months, and it was not pervasive enough to be actionable sexual harassment.

Lawson responds that the Hearing Officer correctly determined that Lawson was subject to a hostile work environment based on the record and the applicable law. Lawson notes that the Hearing Officer held that Lawson was more credible than Herbert, and those determinations are entitled to deference by the Commission. Lawson argues that NorVal had notice of Lawson’s complaint of sexual harassment based on the record, and NorVal had a duty to respond to investigate Lawson’s complaint of harassment adequately and promptly. Lawson argues that NorVal did not properly address or investigate Lawson’s complaint, and NorVal argues that this evidence of continual discrimination by NorVal, citing *Stringer-Altmaier*, ¶ 27.

The Commission concludes that the Hearing Officer correctly concluded that Lowery was subject to sexual harassment based on the creation of a hostile work environment. Lawson's complaint triggered a duty by NorVal to investigate the complaint, and the actions by Herbert to prevent Lawson from reporting her complaint of harassment to anyone other than Herbert himself were continuing actions of harassment. *Stringer-Altmaier*, ¶ 27 ("culpable acts of continuing discrimination in the work place primarily take the form of the employer's failure to seriously and adequately investigate and discipline the harasser following the assault and the employer's subsequent failure to protect the victim on the job." (emphasis, citation, brackets, and quotation marks omitted)). The Hearing Officer's findings of fact regarding sexual harassment are supported by substantial competition evidence, and the conclusions of law are correct.

## **II. Retaliation**

A plaintiff may prove a prima facie case of discrimination based on retaliation "by showing that she engaged in a protected activity, that she was thereafter subjected to adverse employment action by her employer, and that there was a causal link between the two." *Beaver*, ¶ 71 (citations omitted). To be actionable retaliation, the employer's adverse employment action "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). Evidence of a causal link to establish a prima facie case of retaliation can be established by very close "temporal proximity between an employer's knowledge of protected activity and an adverse employment action." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001); *See also* Admin. R. Mont. 24.9.603(3).

If a plaintiff proves a prima facie case of retaliation, the employer may present a legitimate, nondiscriminatory reason for its alleged action. If the employer presents such

evidence, “the plaintiff must produce evidence establishing his or her *prima facie* case, as well as evidence raising an inference that the employer’s proffered reason is pretextual.” *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶ 496, 326 Mont. 491, 111 P.3d 202 (citing *Heiat v. E. Mont. Coll.*, 275 Mont. 322, 331-32, 912 P.2d 787, 793 (1996)). “The plaintiff retains the burden of persuasion . . . and succeeds either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Heiat*, 912 P.2d at 791-92.

NorVal argues that the Hearing Officer’s conclusion that retaliation occurred is both factually and legally wrong. NorVal argues that Lawson’s conversations and communications with Herbert in early October 2017 did not constitute a report of sexual harassment that NorVal, as an employer, needed to investigate. NorVal argues that Lawson did not suffer any adverse employment actions, as defined by the applicable law, and therefore her claim for retaliation fails.

Lawson argues that the Hearing Officer correctly concluded that she was subject to retaliation for engaging in a protected activity. Lawson argues that she made clear complaints to Herbert about his sexual harassment, and she suffered adverse employment actions due to her complaints. Specifically, Lawson cites the Hearing Officers findings that Herbert questioned Lawson’s ability to ethically and effectively perform her job, Herbert treated Lawson differently from other employees on medical leave by requiring her to return all her NorVal property and not enter NorVal’s facility while she was on leave, and this occurred when Lawson had never had a negative performance evaluation or been denied a pay increase due to performance during her time at NorVal. Furthermore, Lawson argues that the Hearing Officer correctly concluded

that Lawson was prevented from any recourse under NorVal's policy because she was only allowed to bring her complaint about Herbert to Herbert.

The Commission concludes that the Hearing Officer correctly concluded that Lawson was subject to retaliation by engaging in the protected activity of complaining about sexual harassment and suffering adverse employment actions as a result. The Hearing Officer's findings of fact regarding retaliation are supported by substantial competition evidence, and the conclusions of law are correct.

### **III. Damages**

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

#### **A. Damages Calculations**

Lawson argues that the Hearing Officer did not properly calculate Lawson's back pay and front pay damages awards, citing mathematical and typographical errors, including errors in the value of Lawson's wages, retirement benefits, and insurance benefits. NorVal counters that Lawson is not entitled to any damages because she has not proven her claim of discrimination. However, NorVal does not dispute Lawson's arithmetic on the recalculations of the Hearing Officer's front pay and back pay damages awards. The Commission concludes that Lawson's damages award was not properly calculated, and Lawson's back pay and front pay damages awards are corrected below.

#### **B. Front Pay**

Lawson argues that the Hearing Officer improperly relied on Montana's Wrongful Discharge from Employment Act (WDEA) to cap Lawson's front-pay award to only four years. Lawson argues that the WDEA is not applicable to cases brought under the Human Rights Act.

NorVal counters that the Hearing Officer did not cite the WDEA as controlling precedent on the issue of front pay; it was cited as guidance and a reference point.

The WDEA is not controlling of damages awards under the MHRA; however, the Hearing Officer specifically stated that “OAH has historically followed the *guidance* of the Wrongful Discharge from Employment Act,” HOD, pp. 50-51 (emphasis added). The Commission concludes that neither the Hearing Officer’s use of the WDEA as guidance for calculation of Lawson’s front pay damages award nor the amount of the award were clearly erroneous.

### **C. Emotional Distress Damages**

Lawson argues that the \$50,000 in emotional distress damages were not sufficient to make Lawson whole. The Commission concludes that the Hearing Officer’s award of \$50,000 for emotional distress damages is not clearly erroneous.

## **CONCLUSION**

After careful consideration of the complete record and the argument presented by the parties, the Commission determines that the Hearing Officer’s conclusions of law are correct, and the Hearing Officer’s findings of fact are supported by competent substantial evidence, with the exceptions of the mathematical calculations of damages described below.

## **ORDER**

IT IS HEREBY ORDERED, that the Hearing Officer’s decision is AFFIRMED with the following corrections to the Hearing Officer’s back pay and front pay damages calculations:

### **Findings of Fact, HOD, p. 29:**

144. Lawson’s final annual salary was \$84,567.00. Lawson was paid ~~\$7,047.30~~ \$7,047.25 on a monthly basis. Lawson would have continued to earn at least that amount each week if she had been allowed to return to work for NorVal.



145. Lawson was eligible for benefits as a NorVal employee that had a monthly value of ~~\$1,184.91~~ \$1,466.80. See Ex. 57C. Lawson is entitled to a monthly total of ~~\$8,662.21~~ ~~(~~\$7,047.30~~~~ + ~~\$1,184.91~~) \$8,514.05 (\$7047.25 + \$1,466.80).

146. Lawson is entitled to a backpay award of ~~\$192,384.89~~ \$189,094.30. Lawson is entitled to ~~\$13,635.51~~ \$13,402.30 in interest on that amount for a total of ~~\$206,020.395~~ \$202,496.60. See Addendum A.

147. Lawson is entitled to an award of four years of front pay in the amount of ~~\$505,957.92~~ ~~\$415,786.08~~, which represents her monthly pay of ~~\$10,540.79~~ ~~\$8,662.21~~ for a period of 48 months. The present value of this award, if paid in a lump sum, is ~~\$378,215.59~~ \$460,129.27.

**Conclusions of Law, HOD, p. 54:**

4. Shalaine Lawson is entitled to recover ~~\$192,384.89~~ \$189,094.30 in back pay she suffered as the discriminatory conduct of Craig Herbert, as the General Manager of NorVal Electric Cooperative, along with ~~\$13,635.51~~ \$13,402.30 in interest, for a total of ~~\$206,020.395~~ \$202,496.60.

5. Shalaine Lawson is entitled to recover ~~\$415,786.08~~ \$505,957.92 in front pay, the present value of which is ~~\$378,215.59~~ \$460,129.27, to address the suffering she experienced as a result of the discriminatory conduct of Craig Herbert in his role as General Manager of NorVal Electric Cooperative.

**Order, HOD, p. 54:**

2. Within 90 days of the date of this decision, NorVal Electric Cooperative, shall pay to Shalaine Lawson the sum of ~~\$671,806.47~~ \$758,454.52, representing ~~\$206,020.39~~ \$202,496.60 in backpay; ~~\$415,786.08~~ \$505,957.92<sup>8</sup> in front pay, and \$50,000.00 in emotional distress damages.

<sup>8</sup>As noted above, the present value of the front pay award is ~~\$378,215.59~~ \$460,129.27.

DATED this 13th day of February 2020.



---

Timothy A. Tatarka, Chair  
Human Rights Commission

---

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. 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).

---

**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 13th day of February 2020.

Todd Shea  
Shea Law Firm, P.L.L.C.  
517 South 22nd Avenue, Suite 1  
Bozeman, MT 59718

Maxon Davis  
Davis, Hatley, Haffeman & Tighe, P.C.  
P.O. Box 2103  
Great Falls, MT 59403-2103



---

Annah Howard, Legal Secretary  
Montana Human Rights Bureau