BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

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AMY LOWERY, Charging Party	HRB CASE NO. 0180086
-v-	FINAL AGENCY DECISION
SARENS USA, INC., Respondent	

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Charging Party Amy Lowery (Lowery), filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of sexual orientation,[1] and retaliation against her former employer, Respondent Sarens USA, Inc. (Sarens). Following an informal investigation, the Department determined that reasonable cause supported Lowery's allegations. The case went before the Office of Administrative Hearings of the Department of Labor & Industry (OAH), which held a contested case hearing pursuant to Mont. Code Ann. § 49-2-505. The Hearing Officer issued a decision (HOD) on September 20, 2019, entering judgment in favor of Lowery.

Charging Party Lowery and Respondent Sarens both filed appeals of the HOD with the Montana Human Rights Commission (Commission). The Commission considered the matter on January 24, 2020. Philip A. Hohenlohe, attorney, appeared and presented oral argument on behalf of Lowery. Micah D. Dawson, attorney, appeared and presented oral argument on behalf of Sarens.

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[1] Lowery identifies as a gay female, and her original complaint claimed discrimination based on her sexual orientation. The Hearing Officer held that Lowery's claim of discrimination was based on her sex (female), and the Hearing Officer did not rule on whether sexual orientation is included under the protected class of "sex" under the MHRA. Mont. Code Ann. § 49-1-102(1); Mont. Const. art II, § 4. HOD, p. 20.

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.

Certain discretionary rulings by the Hearing Officer, such as rulings on pretrial motions and witness testimony, are reviewed for an abuse of discretion. *State v. McOmber*, 2007 MT 340, ¶ 10, 340 Mont. 262, 173 P.3d 690; *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 323, 815 P.2d 1153, 1154 (1991).

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BACKGROUND

Lowery started working for Sarens in Missoula, Montana, in 2014. Lowery became a full-time employee and was promoted to Regional Marketing Manager in 2017. At the end of 2017, Lowery reported directly to Gus Stieger, the Sales and Marketing Manager. Stigter reported to Mark Watson (Watson), the Country Manager. Watson reported directly to Mike Hussey, Sarens's Regional Director for the U.S., Canada, and Mexico.

In October 2017, Lowery reported to her direct supervisor, Gus Stigter, that Watson engaged in inappropriate behavior and sexual harassment of Lowery when Lowery and Watson attended a conference in Houston. Lowery also told Stigter about prior instances of harassment by Watson. Lowery was later contacted by Sarens HR Manager to whom she also reported Watson's conduct. Lowery later asked HR about the status of her complaint, and she was told that it was being investigated, and later Lowery was told that a note was placed in Watson's file.

Lowery was laid off from Sarens on November 28, 2017, as part of a world-wide reduction in force that resulted from economic and market factors, as well as the effect of a hurricane on the Sarens office in Houston, Texas.

In December 2017, Lowery filed a complaint of discrimination with the Department. After an informal investigation and proceedings before OAH, the Hearing Officer held that Lowery was subject to discrimination based on her sex due to Watson's conduct. HOD, p. 41. The Hearing Officer held that Lowery's termination was not discriminatory, HOD, p. 30, and her termination was not in retaliation for filing a complaint against Watson, HOD, p. 35. The Hearing Officer held that Sarens is liable for Watson's conduct and awarded emotional distress damages to Lowery. HOD, p. 41.

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DISCUSSION

I. Testimony of Mike Hussey

Lowery argues that the Hearing Officer erred by allowing Skype testimony at the hearing from Mike Hussey, Sarens's Regional Director for the U.S., Canada, and Mexico. Sarens counters that Hussey's Skype testimony was not prejudicial to Lowery. The Commission concludes that the Skype testimony from Hussey allowed Lowery the opportunity for cross-examination and impeachment, and the Hearing Officer did not abuse her discretion by allowing Hussey to testify during the hearing via Skype. *State v. McOmber*, 2007 MT 340, ¶ 10, 340 Mont. 262, 173 P.3d 690 (rulings on evidence and witness testimony are reviewed for an abuse of discretion).

II. Sexual Harassment

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.[2] *Beaver v. Mont. Dep't of Nat. Res. & Conservation*, 2003 MT 287, ¶ 29, 318 Mont. 35, 78 P.3d 857.

[2] The Hearing Officer erroneously cites the definition for "direct evidence" in ARM 24.9.610(5), which defines the burdens of proof in a claim of discrimination based on disparate treatment. HOD, pp. 22, 24, 25. This definition of "direct evidence" does not apply to claims of discrimination based on a hostile work environment.

If an employee proves a prima facie case of a sexual harassment based on a hostile work environment, "[a]n employer may be held liable for creating a hostile work environment either vicariously (i.e., through the acts of a supervisor) or through negligence (i.e., failing to correct or prevent discriminatory conduct by an employee)." *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 688 (9th Cir. 2017) (citations omitted); *see also Stringer-Altmaier*, ¶ 25 (holding that an employee proved a prima facie claim of hostile work environment, and the employer was liable for the creation of the hostile work environment because the employer failed to address or correct the harassment).

A. Lowery was subjected to a hostile work environment.

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*, 477 U.S. at 65).

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) (internal 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).

On appeal to the Commission, Sarens argues that Lowery did not prove her claim of sexual harassment. Sarens argues that Lowery did not prove that Watson's conduct was unwelcome, that the conduct was severe or pervasive, or that the conduct altered the conditions of her employment. Lowery counters that the Hearing Officer correctly found that Watson's conduct created a hostile work environment that was severe or pervasive enough to alter the conditions of Lowery's employment.

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.

B. Sarens is responsible for creating a hostile work environment.

1. Sarens is liable for a hostile work environment created by a supervisor.

An employer is generally liable if a hostile work environment is created by a supervisor. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Stringer-Altmaier*, ¶ 26 (citations omitted).

Sarens argues that Watson was not a supervisor. Lowery argues that the finding that Watson is a supervisor is supported by substantial competent evidence because Watson could take tangible employment actions against Lowery. The Commission concludes that the finding

that Watson was a supervisor is supported by substantial competent evidence. Watson was "successively higher" than Lowery in the supervisory structure at Sarens. (*Stringer-Altmaier*.)

2. Sarens is not entitled to the *Faragher/Ellerth* affirmative defense.

If no tangible employment action has been taken, the employer may raise an affirmative defense to liability for harassment by a supervisor, known as the *Faragher/Ellerth* defense, "subject to proof by a preponderance of the evidence." *Stringer-Altmaier*, ¶ 26 (quoting *Faragher*, 524 U.S. at 807 (citing *Burlington Industries, Inc. v. Ellerth* 524 U.S. 742, 762-63 (1998))). "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807. "'[C]ulpable 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." *Stringer-Altmaier*, ¶ 27 (quoting *Benjamin v. Anderson*, 2005 MT 123, ¶ 54, 327 Mont. 173, 112 P.3d 1039 (emphasis added)).

Sarens argues that they are not liable for Watson's behavior. Sarens argues that they are entitled to the *Faragher/Ellerth* affirmative defense because Watson was not Lowery's supervisor, Sarens exercised reasonable care to prevent and correct harassment, and Lowery failed to take reasonable advantage of Sarens's procedures and policies to address harassment. Lowery counters that Sarens is liable for Watson's conduct and not entitled to the affirmative *Faragher/Ellerth* defense.

The Commission concludes that the Hearing Officer properly held that Sarens is not entitled to the *Faragher/Ellerth* defense. The Hearing Officer correctly found that, although Sarens has a policy for reporting harassment, Sarens failed to exercise reasonable care to correct and prevent sexual harassment by Watson.

III. 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.

Lowery argues that the Hearing Officer erred by not finding that Lowery was laid off in retaliation for complaining about Watson's harassment. Lowery argues that Watson knew about her complaint against him, Watson had discriminatory animus towards her, Watson helped decide who was laid off, and Lowery was a high performer who otherwise would not have been laid off.

Sarens argues that the Hearing Officer correctly found that there was no retaliation because Watson did not decide who was laid off; and Sarens articulated legitimate, non-discriminatory business reasons for their reduction in force based on many economic and market factors in 2017. Sarens argues that Lowery failed to prove that these reasons were a pretext for discrimination.

The Commission concludes that the Hearing Officer correctly found that Lowery was not laid off in retaliation for her complaints against Watson. The Hearing Officer's findings that Watson did not have a role in deciding to lay off Lowery is supported by competent substantial evidence. The Commission cannot reweigh the evidence or credibility determinations of the Hearing Officer under the Commission's standards of review.

IV. Emotional Distress 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). Lowery argues that the Hearing Officer erred in only awarding $50,000 to Lowery for emotional distress damages. Sarens argues that Lowery is not entitled to any damages because Lowery has not proven her case of

discrimination. The Commission concludes that the Hearing Officer's damages award for emotional distress was 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 findings of fact were supported by competent substantial evidence, the conclusions of law were correct, and discretionary rulings of the Hearing Officer were not an abuse of discretion.

ORDER

IT IS HEREBY ORDERED, that the hearing officer decision is AFFIRMED IN ITS ENTIRETY.

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 this 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 Final Agency Decision. 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.

Micah D. Dawson
Fisher & Phillips, LLP
1801 California Street, Suite 2700
Denver, CO 80202

Amanda Marvin
Marvin Law Office, PLLC
P.O. Box 10699
Kalispell, MT 59901

Philip A. Hohenlohe
Law Office of Philip Hohenlohe, PLLC
P.O. Box 1959
Helena, MT 59624

Annah Howard

Annah Howard, Legal Secretary
Montana Human Rights Bureau