

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

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CHERYL HYLAND,  
Charging Party/Appellant,

-v-

RDJ ENTERPRISES, INC. d/b/a DOC &  
EDDY'S,  
Respondent/Appellee.

HRB CASE NO. 0190358

FINAL AGENCY DECISION

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Charging Party, Cheryl Hyland, filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of gender and retaliation by her former employer, Respondent RDJ Enterprises, Inc., d/b/a/ Doc and Eddy's (RDJ). Following an informal investigation, the Department determined that reasonable cause supported Hyland's allegations. The case went before the Office of Administrative Hearings of the Department of Labor & Industry, which held a contested case hearing, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a Decision on January 29, 2021. The hearing officer entered judgment in favor of Respondent RDJ and determined that neither discrimination nor retaliation occurred.

Cheryl Hyland filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on May 21, 2021. Veronica A. Procter, attorney, appeared and presented oral argument on behalf of Hyland. Geoff Cunningham, attorney, appeared and presented oral argument on behalf of RDJ.

**STANDARDS OF REVIEW**

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but 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 conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. 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.

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).

## **BACKGROUND**

Rick Jensen (“Jensen”) operates RDJ Enterprises, Inc. d/b/a Doc & Eddy’s (“RDJ”), a casino located in Glendive, Montana. Charging Party Cheryl Denise Hyland (Hyland) worked there as a cashier and floor runner -- cleaning, serving alcoholic beverages, and opening and closing the casino.

In late summer 2018, Jensen borrowed a significant sum of money from Lyle Christensen (Christensen) and entered into an agreement whereby Christensen would become a partner in the casino upon approval from the Montana Gaming Commission. In return for partnership, Christensen would forgive the loan to Jensen. As of the date of the hearing before the Office of

Administrative Hearings, none of the assets, ownership, or management of the casino had been transferred, and ownership remained only with Jensen.

After Christensen loaned Jensen the money, Christiansen became involved in the daily operations of Doc & Eddy's, e.g., he changed the free beer policy and banned checks as a form of payment. He also started working shifts. Eventually, Christensen hired an employee, without consulting Jensen, to work shifts for him.

On December 28, 2018, Christensen was at the casino gambling on a machine. He won and called Hyland over to him. When she went over, he pulled her down on his lap and said that he wanted to give her a kiss. Hyland attempted to get up. Christensen pulled her back onto his lap. Hyland started crying and went to the back of the casino where she called Jensen to report Christensen's behavior. Jensen told her that she could call the police using a button under the bar. When Hyland returned to the casino, Christensen was leaving. There were no further incidents between Hyland and Christensen.

The next morning Hyland filed a complaint with the police. Christensen was arrested and charges were filed against him. He ultimately pleaded nolo contendere to a misdemeanor assault charge. Hyland never saw him at the casino during the 10 remaining days of her employment.

After the incident on December 18, 2018, and Christensen's subsequent arrest, Hyland became increasingly afraid of Christensen based on warnings and rumors about Christiansen's past. Jensen made a statement to her she interpreted as a threat even though Jensen claimed that was not what he intended. Hyland became hypervigilant regarding her safety. She was offended and upset when Jensen told her a joke about a woman leaving her boyfriend to date her rapist. Hyland quit her employment at the casino ten days after the incident with Christensen.

## DISCUSSION

Before the Commission, Hyland argued that the Hearing Officer's Decision (HOD) should be overturned under the clearly erroneous standard of review on the following grounds:

1. Christensen was an agent or "defacto" owner of RDJ when he sexually assaulted Hyland.
2. Hyland made a prima facie case of a hostile work environment. Jensen took no action against Christensen.
3. Hyland made a prima facie case for retaliation. She established constructive discharge. Jensen's threatening comments and jokes about rape after his business partner, Christensen, sexually assaulted her amounted to materially adverse employment action in the form of a constructive discharge.
4. The Hearing Officer's *Discovery Order* dated June 26, 2020 should be reversed. The Hearing Officer's decision to permit RDJ to withdraw its deemed admissions to discovery pursuant to Mont. R. Civ. P. 36(b) was an error. RDJ's admissions to Hyland's requests about the nature of Jensen and Christensen's business relationship should have been admitted under Mont. R. Civ. P. 37. It was error to allow RDJ to withdraw them. The Hearing Officer permitted RDJ to benefit from its willful obstruction.

In response, RDJ argued that, at the time that Christensen assaulted Hyland, Christensen was in the bar as a patron, gambling and drinking alcohol. Jensen is the sole operator of RDJ. In the ensuing days, Jensen assured Hyland that Christensen was not allowed to enter the casino and Christensen did not return while Hyland was employed there. Jensen did not know of

Christensen's violent history until it was discovered by Hyland. The business partnership with Christensen never happened. Nowhere in the record does Hyland suggest that Christensen had authority to affect her employment or supervise her work directly. The Hearing Officer determined that Christensen was an employee. RDJ argues that the Hearing Officer's Decision, that Hyland was not subjected to a hostile work environment, is supported by the following substantial evidence:

1. Christensen was not an owner, or de facto owner of RDJ. The single action of a third-party, whether he is a patron, employee or manager, is insufficient to establish a hostile work environment.

2. The Hearing Officer correctly determined that Hyland did not establish a prima facie case of hostile work environment. RDJ cannot be held liable for Christensen and promptly and reasonably took all steps to stop the harassment and to protect Hyland.

3. Even if Hyland had established a prima facie case of a hostile work environment, RDJ's response precludes liability – RDJ, the employer, exercised reasonable care to prevent and correct harassing behavior and Hyland unreasonably failed to take advantage of the preventive or corrective opportunities that employer provided.

4. Hyland failed to establish a prima facie case of retaliation. She failed to establish any adverse employment action that resulted from her report of Christensen's assault.

5. The Hearing Officer correctly applied the law in the *Discovery Order* dated June 26, 2020 and was within his discretion when he permitted RDJ to withdraw its deemed admissions to

discovery pursuant to Mont. R. Civ. P. 36(b) while also sanctioning RDJ by precluding it from presenting any witnesses, experts, or exhibits other than Jensen's testimony.

After careful consideration of the complete record and the argument presented by the parties, the Commission made the following determinations:

I. Discrimination

A. Hostile Work Environment

The Montana Human Rights Act (MHRA) prohibits discrimination in employment based on gender. Mont. Code Ann. § 29-2-303(1)(a). A hostile work environment caused by sexual harassment violates the MHRA. *See Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶¶ 17-19, 332 Mont. 293, 138 P.3d 419 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62 (1986)).

To establish a prima facie case, the charging party must demonstrate:

- (1) that the party is a member of a protected class
- (2) that the party was subjected to offensive conduct that amounted to actual discrimination because of sex;
- (3) that the conduct was unwelcome; and
- (4) that the sexual harassment was so severe or pervasive to alter the conditions of employment and create an abusive working environment.

*Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 18, 391 Mont. 120, 415 P.3d 986 (citing *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶¶ 15-19, 322 Mont. 434, 97 P.3d 546).

Hyland has the burden of proof. Mont. Code Ann. § 26-1-402.

The Hearing Officer concluded that Ms. Hyland proved the first three elements of a prima facie case of hostile work environment. *HOD*, p. 12. The fourth element was contested on appeal before the Commission. Citing *Beaver v. DNRC*, 2003 MT 287, ¶ 41, 318 Mont. 35, 78 P.3d 857, the Commission found that the single act committed by Christensen, coupled with

Jensen's conduct after the incident in the form of inappropriate statements and failure to take immediate and corrective action, constituted a hostile work environment for Hyland.

After reviewing the record and listening to argument, the Commission reversed the Hearing Officer's Decision on hostile work environment. Discrimination occurred because Hyland proved all four elements of a prima facie case of hostile work environment. Further, the Commission reversed the Hearing Officer and concluded that RDJ did not take prompt and immediate corrective action reasonably likely to prevent the harassment from re-occurring.

## II. Retaliation

Montana law bans retaliation in employment based on protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. See Admin. R. Mont. 24.9.603(2). In order to establish a prima facie case of retaliation, a charging party must prove:

- (1) the plaintiff engaged in a protected activity;
- (2) thereafter, the employer took an adverse employment action against the plaintiff; and
- (3) a causal link exists between the protected activity and the employer's action.

See *Rolison v. Bozeman Deaconess Health Servs.*, 2005 MT 95, ¶ 17, 326 Mont. 491, 111 P.3d 202; see also *Beaver*, ¶ 71, Admin. R. Mont. 24.9.610(2). To prevail, a charging party must show retaliation was the "but-for cause" of the adverse employment action. See generally, *Univ. of Tex. Sw. Med. Ctr. V. Nassar*, 570 U.S. 338 (2013). A retaliation claim is a separate action from the original discrimination suit. See *Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989).

The Hearing Officer concluded that Hyland engaged in protected activity when she complained to Jensen about Christensen's behavior. Only the second element was contested

before the Commission. After reviewing the record and listening to argument, the Commission found that Hyland did not establish a prima facie case of retaliation. There was substantial, credible evidence to support the findings of fact and the conclusions of law were correct. The Commission affirmed the Hearing Officer's finding of no retaliation.

### III. Hearing Officer's Decision on Discovery Issues

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).

The Commission found no abuse of discretion in the Hearing Officer's June 26, 2020 *Discovery Order*. The Order allowed RDJ to withdraw its answers to requests for admissions deemed admitted and sanctioned RDJ by, with the exception of calling Jensen, precluding it from presenting any witnesses, experts, or exhibits at the hearing due to its untimely disclosure. The Commission affirmed the Hearing Officer's June 26, 2020 *Discovery Order*.

### IV. Status of Christensen

The Commission concluded that it was without sufficient information to determine Christensen's position with regards to RDJ. The Commission voted to remand the matter to the Office of Administrative Hearings for a determination and clarification of Christensen's position.

## **ORDER**

IT IS HEREBY ORDERED that the Hearing Officer's Decision is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED to the Office of Administrative Hearings for further action consistent with this Order:



1. The Commission reversed the Hearing Officer's finding of no discrimination on the basis of a hostile work environment. The Commission found that Hyland established a prima facie case of hostile work environment which was not rebutted by Jensen.

2. The Commission remanded the case to the Office of Administrative Hearings for a determination and clarification of Christensen's position at the time of the alleged incident.

3. The Commission affirmed the Hearing Officer's finding of no retaliation.

4. The Commission affirmed the Hearing Officer's June 26, 2020 *Discovery Order* imposing sanctions on RDJ Enterprises Inc. while allowing it to withdraw requests for admission deemed admitted.

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).

DATED this 6<sup>th</sup> day of July, 2021.

/s/ Debra Broadbent  
Debra Broadbent, Acting 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 6<sup>th</sup> day of July, 2021.

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