BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO.656-2021:

| | | |
|---|---|---|
| JENNIFER JACKSON, | ) | HRB Case No. 0200210 |
| | ) | |
| Charging Party, | ) | |
| | ) | **HEARING OFFICER DECISION** |
| vs. | ) | **AND NOTICE OF ISSUANCE OF** |
| | ) | **ADMINISTRATIVE DECISION** |
| PENELOPE STRONG, | ) | |
| D/B/A STRONG LAW FIRM | ) | |
| | ) | |
| Respondent. | ) | |

* * * * * * * * * * *

## I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Jennifer Jackson filed a Charge of Discrimination with the Montana Human Rights Bureau (HRB) on March 10, 2020, alleging Respondent Penelope Strong, d/b/a Strong Law Firm (Law Firm) discriminated against her on the basis of sex by neglecting to reasonably address sexual harassment in the workplace.

On June 11, 2021, the Hearing Officer granted Jackson's motion to amend the Charge of Discrimination to change the name of the Respondent from Strong Law Firm to "Penelope Strong d/b/a Strong Law Firm"; denied Respondent's Demand for a Jury Trial; and denied Respondent's Motion to Dismiss and Motion for Summary Judgment.

Hearing Officer Caroline A. Holien conducted a contested case hearing in this matter in Billings, Montana on June 15, 2021. Jackson appeared personally and was represented by Elisabeth Carey-Davis, Attorney at Law. Strong Law Firm (Law Firm) appeared through its representative, Penelope Strong (Strong), Attorney at Law. Palmer Hoovestal, Attorney at Law, represented the Law Firm.

At or near the beginning of hearing, Jackson made an oral motion in limine seeking the exclusion of any evidence pertaining to Jackson's provision of marijuana to Paul Matt (Matt), Strong's longtime domestic partner. Jackson argued the evidence should be excluded given Respondent's position that Strong was not aware

Jackson was providing marijuana to Matt despite not having a medical marijuana provider license. The Hearing Officer denied the motion in limine on the grounds that the relationship between Matt and Jackson was relevant to the issue of whether his conduct created a hostile working environment for Jackson. The Hearing Officer noted for the record that any negative inference drawn from Jackson's conduct was equal to any adverse negative inference drawn from Matt's acceptance of the marijuana despite not having a medical marijuana card and Jackson not being a licensed provider.

Jackson, Julie Palmersheim (Palmersheim), Shannon Grant (Grant), Ami Kenczka (Kenczka), Matt, and Strong testified under oath. Charging Party Exhibits 1 through 8 were admitted. Law Firm Exhibits 101 through 108 were admitted.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings.

## II. ISSUES

1. Did Penelope Strong, d/b/a Strong Law Firm discriminate against Jennifer Jackson on the basis of gender in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Penelope Strong, d/b/a Strong Law Firm did illegally discriminate against Jennifer Jackson on the basis of gender as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Penelope Strong, d/b/a Strong Law Firm did illegally discriminate against Jennifer Jackson on the basis of gender as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

## III. EVIDENTIARY ISSUES RAISED AT HEARING

As noted above, Jackson moved at the outset of the hearing to exclude evidence pertaining to Jackson having provided Matt marijuana in the course of their friendship. The hearing officer denied the motion on the grounds that the nature of their relationship was relevant as to whether Matt created a hostile work environment for Jackson due to his behavior on January 30, and February 1, 2020.

Jackson now seeks to seal any information pertaining to her using, growing, or providing marijuana, arguing such information is constitutionally protected from

public disclosure. The "right of privacy" provision of the Montana Constitution states:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Art. II, Sec. 9, Mont. Const. (emphasis added); *see also Great Falls Trib. v. Mont. Public Ser. Com.*, 2003 MT 359, ¶¶ 20-21, 82 P.3d 876, 319 Mont. 38; *Montana Human Rights Div. v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982).

In *Billings*, the Montana Supreme Court adopted the standard adopted by the Supreme Court in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 576 when addressing how confidential information should be handled. The Montana Supreme Court held the standard "is whether the party involved subjectively expected the information to be and remain private, and whether society is willing to recognize that expectation as reasonable."

In this case, the evidence offered at hearing indicates Jackson did not have a subjective expectation that information pertaining to her using, growing, or providing marijuana was and would remain private. Jackson admittedly provided marijuana to Matt numerous times, gave marijuana laced brownies to Matt for his personal consumption, and attempted to barter for lawn care using marijuana she grew. Both Strong and Jackson testified Strong was aware Jackson grew marijuana, with Strong testifying she knew Jackson had four mature plants. Further, Matt testified he smoked marijuana with Jackson on at least one occasion at her home with other people present. There has been no showing that Jackson ever had a reasonable expectation that her using, growing, or providing marijuana was private. Rather, the evidence shows she was quite open and direct about her marijuana enterprise.

Finally, even if Jackson had a subjective expectation that her using, growing or providing marijuana was private, society is not willing to recognize that expectation as reasonable. In *Billings*, the information sought were employment records of non-parties, which included information that the court found would not be willingly disclosed publicly by many individuals. *Id.*, 199 Mont. at 442. *See also Krakauer v. State*, 2019 MT. 153, ¶25, 396 Mont. 247, 445 P.3d 2021(students have an actual or subjective expectation of privacy in their records even if the public has knowledge of certain information contained in the records). In this case, the information Jackson seeks to seal is information regarding conduct illegal under the laws at that time. Society is not willing to recognize a constitutionally-protected privacy interest in such information. Therefore, Jackson's motion to seal the audio files of the hearing and any documents filed in this matter referring to marijuana be sealed is DENIED.

## IV. FINDINGS OF FACT

*Jackson's Employment at the Law Firm*

1. Jennifer Jackson (Jackson), a female, worked for Penelope Strong, d/b/a Strong Law Firm (Law Firm) as a file clerk from October 2017 through March 2, 2020.

2. At all times relevant to this matter, Penelope Strong (Strong) owned and operated the Law Firm as a solo practitioner. Strong's practice is primarily focused on criminal defense. The Law Firm is located in Billings, Montana.

3. Strong came to know Jackson through Jackson's work at the Good Earth Co-Op. Strong contacted Jackson about working as a file clerk for the Law Firm. Strong previously represented Jackson on a separate legal matter.

4. Jackson typically worked approximately 12 to 15 hours per week for the Law Firm. Jackson's duties included answering phones, filing, and other clerical work. Jackson's hourly wage was $13.00.

5. At all times relevant to this matter, Palmersheim worked as a legal assistant for the Law Firm on a full-time basis. Palmersheim is the Law Firm's only full-time employee.

6. The Law Firm did not have an employee handbook or other formal policies and procedures in place at the time of Jackson's employment.

7. Strong admonished Jackson on one occasion for hugging a juvenile client who had mental health issues. At one point, Grant, a friend of Strong's who did lawn care and other maintenance duties, complained to Strong that Jackson would give him a full embrace and tell him that she loved him. Grant also took issue with Jackson's attempt to offer him marijuana in exchange for his performing lawn care for her at her home.

8. Strong admonished Jackson on another occasion after she had a verbal altercation with an employee with the Yellowstone County Justice Court in August 2018. The employee was relatively new at the time and did not know how to perform a certain task. Jackson told her that she would come behind the counter and teach her how to do it in a sarcastic manner. The employee's supervisor informed Strong of the incident, and Strong directed Jackson to apologize.

9. Strong also observed that Jackson had difficulty staying on task and working quietly.

10. Strong did not issue any formal warnings to Jackson regarding her performance at any time during Jackson's employment.

*Jackson's Relationship with Strong and Matt*

11. Strong has been in a domestic partnership with attorney Paul Matt for the past 25 years. Matt typically visited the Law Firm two to four times per week.

12. The Law Firm has never employed Matt; nor does he maintain an office there. Matt has had no professional relationship with the Law Firm other than assisting Strong on a case that settled in December 2019.

13. Jackson considered Strong and Matt personal friends, and the three often socialized outside of work. Jackson occasionally had dinner at Strong's house or cared for Strong's animals when she was out of town.

14. Jackson once gave Strong and Matt an antique box in which to bury their dog after he passed away, and a special piece of wood upon which she wrote the name of her dogs to put on the grave.

15. Jackson often hugged Strong and Matt and other people who visited Strong's office. Jackson occasionally told Matt that she loved him when hugging him.

16. Jackson provided Matt with marijuana approximately ten times to help with physical health issues. Jackson provided Matt with the marijuana as a friend and sold it to him at her home. Matt did not have a valid medical marijuana card at the time.

17. Jackson had a valid license to use and grow medical marijuana at the time she worked for the Law Firm. However, she did not have a medical provider card. Strong was aware Jackson had four mature plants at her home and her propensity to give marijuana to people based upon Strong having chided Jackson for giving a "dime bag" to a homeless man.

18. Strong was not aware Matt was receiving marijuana from Jackson until after Jackson quit her employment with the Law Firm.

*First Incident with Matt*

19. On January 30, 2020, Strong was working with Palmersheim and Jackson on a case. Palmersheim had brought her golden retriever puppy to the office. Matt arrived at the office with his puppy, who was from the same litter as Palmersheim's puppy. As the puppies were playing, one puppy started "humping" the other puppy. Matt commented, "Oh look, the puppies are gay."

20. Jackson, offended at the comment, asked, "And there is nothing wrong with being gay, right?" Matt responded, "Oh, yeah. No, no, no, no."

21. Matt approached Jackson who was still sitting at her desk. Matt made a "humping" motion in Jackson's direction. Matt thought he was being humorous and

did not intend his actions to be construed as a sexual advance or an attempt to gratify his own sexual desires.

22. Strong was in her office and did not observe or overhear what had happened. Matt went to Strong's office after the interaction at Jackson's desk and spent approximately 20 minutes in her office before leaving the Law Firm.

23. When Strong left her office to get a file, Jackson told her that Matt had "humped" her leg. Strong told Jackson that she would talk with him.

24. Jackson went to Strong's office a short time later and repeated that Matt had tried to "hump" her. Strong told Jackson again that she would talk to him. Jackson then told Strong he had made an offensive joke about the dogs "humping."

25. Strong did not observe any changes in Jackson's attitude or demeanor that suggested to her that Jackson was distressed by Matt's behavior.

26. Strong spoke with Matt later that day or evening. Matt denied touching Jackson but admitted he had made a joke about the dogs. Strong told Matt that Jackson was offended by what had happened and told him to apologize to her. Strong then warned Matt to be careful around Jackson.

*Second Incident with Matt*

27. On February 1, 2020, Jackson was cleaning the Law Firm's offices when Strong and Matt came in to pick up some files before heading out of town. Strong went to her office and Matt stayed in the area near Jackson's desk. Matt told Jackson that he heard that she had said something about him, and she responded, "You rubbed your penis on me." Matt screamed out, "My penis?" Matt then told her it was impossible for him to have rubbed his penis on her since he was wearing underwear at the time.

28. Jackson called out, "Penny, are you going to do something about this?" Strong announced from her office, "That's enough." Strong came out of her office and told Matt that not everyone found his humor funny and sent him out to the car.

29. Strong left the Law Firm a short time later, wishing Jackson a good weekend as she left.

*February 2020 Events*

30. On February 4, 2020, Jackson wrote a letter to Strong informing her that she did not feel comfortable being alone with Matt in the office. Jackson wrote on the back of the envelope, "P.S. I love you." Strong did not receive the letter until February 7, 2020. Resp. Ex. 103-A.

31. Strong put the envelope in her desk drawer where she puts other communications not identified as being work related. Strong forgot about the letter and did not read it immediately after receiving it from Jackson.

32. Strong had previously given Jackson permission to play her singing bowls at an Art Walk Event that was scheduled to be held at the Law Firm on February 7, 2020. Jackson had invited several friends to the event.

33. Strong subsequently told Jackson that she could not hold the event at the Law Firm, because Strong and Palmersheim were working on a Supreme Court brief that was due.

34. Strong's refusal to allow Jackson to hold the Art Walk event at her office upset Jackson.

35. In mid-February 2020, Jackson was left alone in the office with Matt. Jackson had requested not to be left alone with Matt in her February 4, 2020, letter. Jackson was not aware Strong had not yet read her letter and believed she was ignoring her concerns.

36. Beginning on or about February 14, 2020, Strong was out of the office for approximately one week for a client meeting in Seattle. Before she left, Jackson told Strong that she should not take Matt with her but to take her instead.

37. Toward the end of February 2020, Strong found the envelope and read Jackson's letter. Before Strong could act on the letter, Jackson submitted notice of her resignation via email and dropped off her office key. Jackson's email cited the interactions with Matt on January 30, and February 1, 2020, as reasons for her decision to quit the employment.

38. On March 2, 2020, Jackson quit her employment with the Law Firm due to concerns she had regarding Matt's behavior on January 30, and February 1, 2020, as well as Strong's apparent indifference to the situation.

39. Matt's behavior on January 30, and February 1, 2020, was not so severe or pervasive as to create a working environment that a reasonable person would consider intimidating, hostile or abusive.

40. Strong spoke to Matt about his behavior on January 30, 2020, and directed him to apologize and to be careful around Jackson. Strong subsequently stopped Matt from confronting Jackson on February 1, 2020, by directing him to leave the office.

41. The two incidents involving Matt were isolated and did not reoccur during the weeks leading up to Jackson's resignation on March 2, 2020.

## V. DISCUSSION[1]

Jackson argues the Law Firm discriminated against her on the basis of sex by subjecting her to a hostile work environment through the words and actions of the domestic partner of the Law Firm's owner and the Law Firm's failure to investigate and to respond to her complaint.

The Montana Human Rights Act (MHRA) prohibits discrimination in the terms and conditions of employment on the basis of sex. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-3-201. The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

### A. Hostile Work Environment

A hostile work environment due to sexual harassment is a violation of 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). Jackson, at all times, bears the "ultimate burden of persuasion." Mont. Code Ann. § 26-1-402; *see McGinest*, 306 F.3d at 1140, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 40 (1993).

Jackson must prove (1) she was subjected to verbal or physical conduct of a harassing nature based on her gender; (2) that it was unwelcome; and (3) the conduct

[1] Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80–81 [140 L. Ed. 2d 201, 118 S. Ct. 998 (1998). Jackson must show "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] … because of … sex.' " *Id.* at 81.

"[N]either proof of sexual desire nor proof of sexual stereotyping is required to establish discrimination based on sex." *Campbell v. Garden City Plumbing & Heating, Inc.,* 2004 MT 231, ¶ 21, 322 Mont. 434, 97 P.3d 546. The Montana Supreme court recognized in *Mont. State University-Northern v. Bachmeier* that:

> Title VII's and the MHRA's prohibitions on sexual harassment do not simply protect employees from overtly sexual verbal or physical harassment, but strike at the entire spectrum of disparate treatment of men and women in the workplace. The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

*Mont. State University-Northern v. Bachmeier*, 2021 MT 26, ¶ 43, 430 Mont. 136, 480 P.3d 233.

Jackson has shown she was subjected to conduct and behavior that was based on her gender that was unwelcome. Jackson did not encourage Matt's behavior on January 30, or February 1, 2020. She immediately reported her distress regarding each incident to Strong. Having shown the first three elements of a hostile work environment claim, Jackson is left with the burden of showing that the complained of conduct was so severe or pervasive to alter the conditions of employment and create an abusive working environment.

A work environment must be both subjectively and objectively hostile. *McGinest v. GTE Serv. Corp*., 360 F.3d 1103, 1113 (9th Cir. 2004). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)" are not sufficient to create an actionable claim under Title VII, but the harassment need not be so severe as to cause diagnosed psychological injury. *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) *see also Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). 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." *Steiner v. Showboat Operating Co*., 25 F.3d 1459, 1463 (9th Cir. 1994).

Subjective hostility has clearly been established based upon the Jackson's testimony regarding the conduct of Matt on January 30, and February 1, 2020.

Jackson's testimony was substantially consistent with the testimony of both Palmersheim and Matt himself as to the events of those two days. Jackson testified she was upset at Matt's behavior on January 30, and February 1, 2020, and she no longer felt safe in the office. As noted above, Jackson has shown Matt's conduct was unwelcome. *See Nichols v. Azteca Rest. Enters.*, 256 F.3d. 864, 873 (9th Cir. 2001)(an employee's complaint about harassing behavior demonstrates a subjective belief that the employer believes he is being harassed). Jackson has shown that the workplace was subjectively hostile as a result of Matt's conduct. However, proving subjective hostility is not enough. Jackson must also show that a reasonable person also would find the misconduct objectively hostile and abusive. *Campbell*, ¶ 19; *Beaver v. Mont. Dep't. of Natural Res. & Conservation*, 2003 MT 287, ¶ 31, 318 Mont. 35, 78 P.3d 857.

In evaluating the objective hostility of a work environment, the Ninth Circuit uses a "totality of the circumstances test to determine whether a plaintiff's allegations make out a colorable claim of hostile work environment," considering factors such as "frequency, severity and level of interference with work performance." *McGinest,* 306 F.3d at 1113; *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris*, 510 U.S. at 21(internal quotation marks and citations omitted). "It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment." *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

It is necessary to note the two categories of behavior Jackson complains of: Matt's conduct on January 30, and February 1, 2020, and Strong's response to that behavior as it happened and during the subsequent days and weeks prior to Jackson quitting the employment.

1. *Matt's Conduct*

Jackson testified that, on January 30, 2020, Matt put his hand on her stomach and another hand on her back and "humped" her leg during which she could feel Matt's penis on her leg. While Matt adamantly denied having made any physical contact with Jackson, he conceded it was possible some physical contact was made. It was estimated the incident lasted several seconds, and Matt may have made one to three thrusting motions in Jackson's direction.

Palmersheim was the only witness to the January 30, 2020, incident other than Matt and Jackson. Palmersheim confirmed Matt made a "humping" action toward

Jackson but denied she saw any physical contact because she "looked away." Palmersheim testified she thought Jackson stayed on the telephone during the incident and only put her hand up and backed away. Palmersheim testified Matt's behavior disgusted her, and she would have been offended if he had directed his behavior toward her.

Jackson testified that Matt put his hand on her shoulder and "got right up in her face" and "screamed" at her that she had blown things out of proportion when he confronted her on February 1, 2020. Jackson testified she found Matt's behavior scary and asked Strong if she was going to do something about it. Strong came out of her office and directed Matt to get the files and go to the car. The incident lasted a matter of minutes and did not reoccur.

Matt's conduct on either occasion was not physically violent; nor did he make any direct threats to Jackson. The isolated two days of inappropriate conduct by Matt does not rise to the level of an objectively pervasive and severe hostile work environment that occurred with such severity and such consistency so as to affect Jackson's ability to perform her job duties. *Laulau v. City and Cnty. Of Honolulu*, 938 F.Supp.2d 1000, 1016-17 (D. Haw. 2013) (explaining that isolated comments by the plaintiff's supervisor were too sparse to support a claim that the workplace was permeated with hostility), Cf, *Freitag v. Ayers Jr.,* 468 F.3d 528, 539-41 (9th Cir. 2006)(female prison guards established hostile work environment claim because they proved they were regularly confronted by pervasive practice of male inmates masturbating in front of them); *Nichols*, 256 F.3d at 870 (hostile work environment found where employee is subjected to "a relentless campaign of insults" of a sexually explicit and derogatory nature "at least once a week and often several times a day.").

Matt had no further contact with Jackson after February 1, 2020, beyond saying hello or goodbye to her. While Matt's conduct was boorish and lacking in professionalism, Matt's conduct did not rise to the level of the conduct complained of in *Freitag* or *Nichols*. Matt's offensive conduct stopped after February 1, 2020. Jackson has not shown his conduct occurred with such frequency or was so severe as to alter the conditions of her employment and create an abusive working environment. *See Harris*, 510 U.S. at 21(internal quotation marks and citations omitted).

Jackson argues Matt's actions on January 30, 2020, constituted a physical assault. However, the Montana Supreme Court has held that a physical assault alone is not per se enough for a single incident to create a hostile work environment. *Beaver*, ¶ 41.

In *Beaver v. DNRC*, *supra*, the Montana Supreme Court recognized that a single incident may be sufficient to create a hostile work environment. However, "the appropriate standard requires review of all of the facts and circumstances surrounding the incident of sexual assault. . . ." *Beaver*, ¶ 47. The circumstances must show the environment was sufficiently severe or pervasive to alter the conditions of a charging party's work environment. *Id*. ". . . [I]n order for a sexually objectionable environment to be actionable under Title VII, it must be both objectively and subjectively offensive." *Beaver*, ¶ 48 (citing *Harris*, 510 U.S. at 21-22). The Montana Supreme Court concluded that, where the employer had taken immediate action to protect the victim and to prevent further misconduct by harasser, and where the victim never saw the harasser at work again and there was no other evidence of sexual misconduct, the victim had failed to show a hostile working environment. *Beaver*, ¶ 49.

In this case, Matt was not a co-worker and he did not have a constant presence in the office. However, Matt was a frequent visitor. Jackson argues Strong did not do enough to protect her from Matt and points to an incident in mid-February 2020 where she was alone with Matt in the office. While Jackson may have had to see Matt when he visited the office, there is no evidence showing he ever engaged with her other than saying hello or goodbye after February 1, 2020. Further, there is no evidence showing Matt engaged in offensive conduct toward her after February 1, 2020. Therefore, while Jackson found Matt's behavior subjectively hostile, she has failed to show that Matt's behavior was so objectively hostile and pervasive so as to alter her working conditions.

2. *Strong's Response*

Jackson points to other incidents involving Strong and her apparent lack of response to Jackson's concerns as evidence in support of her claim of a hostile work environment. Those incidents included Strong's "curt response" when she complained of Matt's behavior on January 30, 2020, as well as Strong's alleged failure to intervene during the February 1, 2020, incident. Jackson also contends Strong's failure to investigate her complaint and failure to respond to her February 4, 2020, letter shows an unwilling to address her concerns regarding Matt's behavior. Jackson further contends that Strong's refusal to allow Jackson to use the office for the Art Walk event on February 7, 2020, and failure to timely pay her in late February 2020 are significant as evidence that her relationship with Strong had suffered.

Even viewing the incidents "in the context of [the] emotionally charged time period" following the January 30, and February 1, 2020, incidents, Jackson has not shown Strong's response or conduct in the weeks following the incidents involving

Matt constituted discriminatory behavior. *Charging Party's Brief in Support*, p. 9 (filed 07/03/2021).

Even if one was to assume Strong's conduct during that period was part of a hostile work environment, Jackson has failed to show Strong's conduct was sufficiently severe or pervasive so as to create or maintain an abusive working environment. Strong is a solo practitioner running a law office with one full-time employee and one part-time employee. Strong testified she had a Supreme Court brief due the day of the Art Walk, which was why she retracted her permission to allow Strong to use the office that evening. Strong testified she was in and out of the office throughout February and was busy working on other cases. While Strong perhaps should have taken the time to talk with Jackson or, at the very least, read her letter, the question that begs to be asked is why Jackson did not approach Strong personally. Jackson testified she loved her job and considered office staff her family. Jackson spent time with Strong in her home and did favors for Strong as a friend. Jackson was in a position to judge whether Strong was busy running a legal practice. Jackson offered no evidence suggesting she believed Strong was avoiding her or otherwise ignoring the situation. Rather, her argument seems to be that Strong simply did not show her the care and concern she thought was owed to her as a friend. That is not a component of a hostile work environment claim.

When considering the totality of the circumstances, Jackson has not shown Strong's conduct neglected to reasonably address the incidents outlined at hearing such that her conduct was sufficiently severe or pervasive as to alter the working conditions. As stated, the evidence shows Matt's conduct, while boorish and lacking in professionalism, was not sufficiently severe or occur with such frequency so as to unreasonably interfere with Jackson's work performance. In addition, Strong's response also did not create a hostile work environment. *See Little, e v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2001)(quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001). Therefore, Jackson has failed to show the Law Firm subjected her to a hostile work environment based on her sex.

**B. Law Firm Liability**

Even if Jackson had succeeded in showing the Law Firm had subjected her to a hostile work environment based on her sex, she has also failed to show the Law Firm failed to take adequate measures to stop the behavior. *See Nichols*, 256. F3d at 875.

A significant issue in this case is that the complained of conduct came from Matt, not Strong, the actual employer or an employee of the Law Firm. For purposes

of discrimination claims, an "employer" is defined as "an employer of one or more persons or an agent of the employer. . . ." Mont. Code Ann. § 49-2-101(11).

While Matt has been in a domestic partnership with Strong for approximately 25 years, there is no evidence showing he had any type of professional relationship with the Law Firm beyond assisting Strong in one case in December 2019. While a frequent visitor to the office, Matt had no supervisory authority of the Law Firm's employees and had no history of directing or controlling the performance of either Palmersheim or Jackson. In short, Matt is not the employer for purposes of the hostile work environment analysis.

An employer, however, may be held liable for the sexual harassment of its employee by third parties where the employer, its agents, or its supervisory employees know or should have known of the conduct and ratify or acquiesce in the conduct by failing to take immediate and appropriate corrective action. *Puskas v. Pine Hills Youth Corr. Facility*, 201 MT 223, ¶ 33, 371 Mont. 259, 307 P.3d 298 (citing *Freitag*, 468 F.3d at 538); *Little*, 301 F.3d at 968; 29 C.F.R. 1604.11 (applying the knows or should have known standard, and adopted in Montana pursuant to Admin R. Mont. 24.9.1407)). "In other words, once a plaintiff establishes the initial elements of a sexual harassment claim or a hostile work environment claim, the employer's liability attaches only after it negligently responds, or fails to respond, to the condition created by the third party. An employer's immediate and appropriate corrective actions prevent the employer from being liable for a third party's sexual conduct." *Puskas,* ¶ 34 (internal citations omitted).

An employer who acts promptly and reasonably will not be held liable for the actions of a third party, but the reasonableness of the remedy depends on the employer's ability of the employer to stop the harassment. *Id.*, ¶ 35 (citing *Ellison,* 924 F.2d at 882). The Montana Supreme Court has held that "'culpable acts of continuing discrimination in the workplace 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 in *Stringer-Altmaier*). An employer cannot avoid liability for its employees' harassment when "it utterly fails to take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." *Wyninger v. New Venture Gear, Inc.*, 361 F. 3d 965, 978 (7th Cir. 2004).

Remedial measures taken by the employer should be reasonably calculated to end the harassment. "The reasonableness of the remedy depends on its ability to: (1) stop harassment by the person who engaged in harassment; and (2) persuade

potential harassers to refrain from unlawful conduct. *Ellison,* 924 F.2d at 882. When the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment. *Nichols*, 256 F.3d at 875-76 (internal quotations and citations omitted).

Jackson argues Strong neither seriously or adequately investigated the incidents and did nothing to protect her from future harassment by Matt. Strong was not present; nor did she personally observe Matt's behavior on January 30, 2020. When Jackson told Strong about the incident, Strong told Jackson she would talk to Matt. Strong spoke to Matt later that day or evening and told him to apologize to Jackson and warned him to be careful. After Matt confronted Jackson on February 1, 2020, and their voices became raised, Strong yelled from another part of the office, "That's enough," and ordered Matt to get the files and leave the office. No further incidents occurred, and Matt had no further interactions with Jackson beyond greeting her when he entered or left the office.

While Strong may not have acted in the fashion desired by Jackson, the evidence shows Strong acted in an appropriate fashion and the harassment stopped. Matt had no further interaction with Jackson, and Jackson suffered no more abuse in the workplace. It is unclear what more Strong could have done given that the harassment stopped. While Jackson may have been hurt that Strong did not timely respond to her letter, there is no evidence showing that Strong's failure to do so caused any type of workplace harassment to continue. Further, regarding Jackson's contention that Strong's failure to pay her appropriately in February 2020 somehow equated to a discriminatory act, it needs to be noted that Jackson has not alleged retaliation. There is no evidence showing Strong's failure to pay her properly in February 2020 was in anyway related to Matt's conduct or a failure of Strong to address that conduct and stop it. Therefore, even if Jackson had succeeded in showing the Law Firm subjected her to a hostile work environment due to her sex, her claim fails because she has not shown the Law Firm failed to properly address her concerns and act to promptly end the alleged harassment.

## VI. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this matter. Mont. Code Ann. § 49- 2-509(7).

2. The MHRA prohibits discrimination in employment based upon sex. Mont. Code Ann. § 49-2-303(1)(a).

3. Jennifer Jackson failed to prove that Penelope Strong, d/b/a Strong Law Firm discriminated against her illegally because of sex. Mont. Code Ann. § 49-2-303.

5. For purposes of Mont. Code Ann. § 49-2-505(8), Penelope Strong, d/b/a Strong Law Firm, is the prevailing party.

## VII. ORDER

Judgment is granted in favor of Penelope Strong, d/b/a Strong Law Firm and against Jennifer Jackson. Jackson's complaint is dismissed with prejudice as lacking merit.

DATED: November 23, 2021.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

* * * * * * * * * * *

**NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

To: Jennifer Jackson, Charging Party, and her attorney, Lisa Carey-Davis; and Penelope Strong, d/b/a Strong Law Firm, Respondent, and her attorney, Palmer Hoovestal:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(c)

**TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL,** Mont. Code Ann. § 49-2-505 (4), **WITH ONE DIGITAL COPY, with:**

**Human Rights Commission**
**c/o Annah Howard**
**Human Rights Bureau**
**Department of Labor and Industry**
**P.O. Box 1728 Helena, Montana 59624-1728**

**You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.**

**ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.**

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

**IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.**