

IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 18-0564

KB ENTERPRISES, LLC, d/b/a SNAPPITZ,

Appellant,

-VS-

MONTANA HUMAN RIGHTS COMMISSION and JERRY
JAMES BRIGHT,

Appellees.

OPENING BRIEF OF APPELLANT KB ENTERPRISES, LLC

ON APPEAL FROM THE MONTANA THIRD
JUDICIAL DISTRICT COURT, DEER LODGE COUNTY
HON. RAY J. DAYTON, PRESIDING

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant KB Enterprises, LLC, d/b/a Snappitz (“KB Enterprises”) presents the following issue for review:

Whether the district court erred in denying KB Enterprises’ Petition for Judicial Review.

STATEMENT OF THE CASE

This case involves the denial of KB Enterprises’ petition for judicial review of a Final Agency Decision issued by the Montana Human Rights Commission dated February 1, 2018. The Final Agency Decision affirmed the hearing officer’s decision. Following a contested case hearing, the hearing officer determined that unlawful racial discrimination had occurred and awarded compensatory and emotional distress damages to Jerry James Bright.

KB Enterprises appealed the hearing officer’s decision to the Human Rights Commission on the grounds that: 1) the findings of fact are not supported by substantial evidence in the record; 2) the hearing officer misapplied fact to law or incorrectly interpreted or misapplied the law; and 3) the damage award is not supported by substantial evidence and is clearly erroneous. The Human Rights Commission affirmed the hearing officer’s decision in its entirety, and issued a Final Agency Decision.

KB Enterprises petitioned the district court for judicial review of the Final Agency Decision on the grounds that:

1. The hearing officer's findings of fact are not supported by substantial evidence and are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
2. The hearing officer's conclusions are affected by error of law due to his misapplication of fact to law and incorrect interpretation and application of the law; and
3. The hearing officer's award of damages is not supported by substantial evidence and is clearly erroneous.

Despite the existence of grounds for reversal or modification of the Final Agency Decision under Mont. Code Ann. § 2-4-704(2)(a), the district court erred in affirming the Final Agency Decision in its entirety. The grounds that existed included the fact the substantial rights of KB Enterprises had been prejudiced because the administrative findings, inference, conclusions, and decisions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and were affected by error of law. Accordingly, KB Enterprises has appealed the district court's decision.

STATEMENT OF FACTS

KB Enterprises owns and operates a small fabrication business in Anaconda. Hearing Officer Decision, p. 2 FOF ¶ 3 (Oct. 10, 2017). Jerry James Bright worked as a fabricator at KB Enterprises for approximately a year and three months, from January 28, 2015, until the time he quit on April 29, 2016. *Id.*, p. 2 FOF ¶¶ 1, 5. During Bright's employment, Dave Gustafson (referred to as "Gus") was responsible for overseeing fabrication. *Id.*, ¶ 8. Shortly after Bright was hired, he was made second in command of fabrication. *Id.*

Bright alleged that on four occasions in March, June, and November 2015 and April 2016, Gus called or referred to him as the N-word. *Id.*, ¶¶ 10-17. According to Bright, no one else witnessed Gus's alleged use of the N-word. Tr. 67:5-7, 68:6-11, 69:19-70:2, and 158:6-24.

Gus had a condescending and demeaning attitude toward the other fabricators. *Id.*, ¶ 8. Bright had a temper and a short-fuse and used the N-word at work. *Id.*, ¶¶ 21-22. In December 2015 and January 2016, Bright got angry and lost his temper with his co-workers, and called Travis Scholler, who is Caucasian, the N-word. *Id.*, ¶ 22.

After Gus allegedly used the N-Word on April 29, 2016, Bright quit his job at KB Enterprises and did not report Gus's alleged use of the N-word to anyone at KB. *Id.*, ¶ 17. After Bright quit, the owner of KB Enterprises, Kevin Beck, made

two unconditional offers to reinstate Bright to his former position. *Id.*, ¶ 26. Bright refused the first offer because Gus was still employed at KB Enterprises, and he refused the second offer because he had taken a job with his previous employer, BSW. *Id.* Bright filed a claim of race discrimination with the Montana Human Rights Bureau in May 2016, and subsequently moved back to Colorado to be reunited with his wife and obtained employment at Walmart, making \$11.70 per hour. *Id.*, ¶ 28; Tr. 51:4-8.

STATEMENT OF THE STANDARD OF REVIEW AS TO EACH ISSUE

In rendering its decision, the district court erroneously applied incorrect standards of review cited to by Jerry James Bright. The district court erroneously applied the definition of substantial and credible evidence from cases involving review of the denial of Rule 59 motions for new trial. See Order Affirming Final Agency Decision, p. 2 (citing *Barile v. Butte High School*, 2013 MT 263, ¶ 30; *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 18). However, that is not the correct standard of review for a hearing officer's findings of fact.

A three-part test is used to determine whether a finding of fact is clearly erroneous: (1) if the finding is not supported by substantial evidence in the record; (2) if the fact finder misapprehended the effect of the evidence; or (3) if a review of the record leaves the Court with a definite and firm conviction that a mistake has been made. *Owens v. Montana Dept. of Revenue*, 2007 MT 298, ¶ 13, 340 Mont.

48, 172 P.3d 1227; *Benjamin v. Anderson*, 2005 MT 123, ¶ 31, 327 Mont. 173, 112 P.3d 1039.

The district court also erroneously applied a harmless error review standard to the conclusions of law at issue in this proceeding. See Order Affirming Final Agency Decision, p. 3 (citing *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 60). The *Kluver* case involved review of the district court's admission of evidence protected by the mediation confidentiality statute, which is an abuse of discretion standard not applicable to the conclusions of law at issue in this case. In reviewing conclusions of law, the Court must determine whether the agency's interpretation and application of the law are correct. *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595.

The district court erred in failing to review the whole record to determine whether the hearing officer's findings of fact are clearly erroneous and whether the hearing officer correctly interpreted and applied the law. *McDonald v. DEQ*, 2009 MT 209, ¶ 38, 351 Mont. 243, 214 P.3d 749. A review of the record as a whole will leave this Court with a definite and firm conviction that a mistake has been made. Accordingly, KB Enterprises' respectfully requests this Court to reverse the district court's denial of the petition for judicial review and remand this matter for entry of an order reversing or modifying the hearing officer's decision, which was adopted by the Human Rights Commission as its Final Agency Decision.

SUMMARY OF ARGUMENTS

KB Enterprises is not asking the Court to substitute its judgment for that of the hearing officer as to the weight of the evidence, it is asking the Court to apply the correct legal standards, review the record as a whole, and reverse or modify the Final Agency Decision pursuant to Mont. Code Ann. § 2-4-704 based on the following grounds:

1. KB Enterprises' substantial rights have been prejudiced because the administrative findings, inferences, conclusions, and decisions are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and
2. KB Enterprises' substantial rights have been prejudiced because the administrative findings, inferences, conclusions, and decisions are affected by other error of law.

ARGUMENT

- I. **The district court erred when it failed to reverse the Final Agency Decision on the grounds that KB Enterprises' substantial rights have been prejudiced as a result of clearly erroneous administrative findings, inferences, conclusions, or decisions in view of the reliable, probative, and substantial evidence on the whole record.**

The district court erred in failing to reverse the Final Agency Decision based on the following clearly erroneous findings of fact in view of the reliable, probative, and substantial evidence on the whole record:

Finding of Fact No. 11: Bright's testimony regarding the alleged use of the N-word by Dave Gustafson ("Gus") in March 2015 was that as Bright was coming out of the bathroom while employees were on break in the warehouse by the

garage door that was open, he overheard Gus say, “I don’t know why Kevin hires niggers and spics anyway.” Tr. at 15:11-22. Bright did not identify to whom Gus allegedly made this statement and no other employee who was present heard Gus make that statement.

Bright testified that after overhearing this alleged comment, he just stood there and smoked a cigarette, waited until break was over, and then asked Gus to come to the spin saw because he was having some problems since he was fairly new at operating it. Bright stated that after Gus looked at what he was doing, he repeated what he had said outside, which was, “I don’t know why Kevin hired niggers and spics anyway.” *Id.*, 19:11-20:1. Bright claims he told Gus that he would appreciate it if he didn’t talk to him that way because he doesn’t disrespect Gus. *Id.*, 20:2-5. When asked what happened next, Bright stated that the day was almost at an end (even though the employees had just returned to work from a break), so he completed the task and after he cleaned up and got ready to leave he stopped by Office Manager Misty Franklin’s office and she told him that she had heard what Gus had said outside and told Bright it was really messed up that Gus felt that way. *Id.*, 20:6-13. Bright went on to testify that the bookkeeper Diane came in while he was talking to Misty and when Misty repeated what had been said about “niggers and spics,” Diane informed him that was a bunch of crap, which was objected to and sustained by the hearing officer. *Id.*, 20:14-18.

On cross examination, Bright admitted that he did not know whether Misty Franklin had heard the alleged use of the N-word by Gus in March 2015, and that he was only speculating that other employees overheard it. *Id.*, 66:18-67:12. Misty Franklin testified that she did not remember any incident in March 2015 where Gus used the N-word while speaking with Bright. *Id.*, 155:16-156:4. Contrary to the hearing officer's finding and footnote, Misty testified that she did not hear the N-word come from Gus in March 2015, and that she had only learned about this alleged incident shortly before Bright quit in April 2016. *Id.*, 156:5-17.

Kevin Beck testified that no one reported Gus's alleged use of the N-word in March 2015 to him. *Id.*, 112:9-22; 113:15-114:7. Kevin testified that Bright called him about Gus's condescending attitude toward him, but did not mention that Gus had used the N-word toward him. *Id.*, 112:23-114:7. Gus testified that he met with Kevin Beck and Bright to discuss Bright's allegation that he had called Bright a "nigger" in March of 2015. Gus testified that during a meeting with Kevin Beck regarding Bright's allegation that Gus had used the N-word, Kevin told him that he was not treating his employees right and that Kevin had told him this before. *Id.*, 208:11-23. Gus testified that he admitted using the N-word in 2012 in the presence of an African American employee, William "Spanky" Sanders,¹ approximately 3 years prior to Bright being employed at KB Enterprises, and that Kevin and Dave

¹ Bright's attorney served a subpoena on William Sanders to testify at the hearing, but Mr. Sanders ignored the subpoena and failed to appear at the hearing to testify. Tr. 99:11-101:7.

Beck met with Gus at that time and told him that he needed to watch how he treats employees. *Id.*, 206:11-207:22; 226:22-227:5.

When asked by Bright's counsel to confirm that he had not been punished for his alleged use of the N-word in March 2015, Gus responded that he was not going to be punished because he denied saying that, so why would he ever be punished for it. *Id.*, 209:25-210:5. Then, Bright's counsel asked, "You were simply warned, 'You know I've told you this before,' is that correct?," and Gus responded "correct." There is no description or explanation of what Gus had been told before or when. The only logical reference to what he had been told before was to Gus's previous testimony about being told that he was not treating employees right in 2012.

On cross examination by KB's attorney, Gus testified that he did not use the N-word in the presence of or directed at Bright. *Id.*, 214:20-25. Gus testified that each of Bright's allegations concerning his alleged use of the N-word in March, June, and November 2015 and April 2016 were not true. *Id.*, 215:1-217:15.

Finding of Fact No. 12: Bright's testimony regarding the alleged use of the N-word by Gus approximately three months later in June 2015 was that he was operating the spin saw and was having trouble hitting a certain measurement and went over to talk to Gus who was operating the block saw to ask him to take a look at what he was producing. *Id.*, 23:10-24:1. Then, Bright testified he guesses that

Gus was still a little perturbed about the fact that he got called in based upon the alleged “nigger” statement in March 2015 and just said to him, “You know, I don’t know why Kevin hired you fucking niggers anyway because I’ve showed you this a thousand times.” *Id.*, 24:2-7. Bright said he went back to the spin saw with Gus’s instructions and tried to spin it, but that he was a little angry about the statement Gus had made to him and decided to stop and clock out. *Id.*, 24:8-12. Bright stated that he called Kevin Beck on his way home and told him that, “You know, Mr. Gustafson is starting to use that ‘nigger’ crap again.” *Id.*, 24:16-25:5.

Bright testified that he returned to work the next day, and that he met with Kevin Beck and Gus maybe two or three days later around the 10:00 a.m. break in a corridor that separates the office and the rear entrance. *Id.*, 25:9-20. Bright testified that Kevin asked them what was going on between the two of them. *Id.*, 26:3-5. Bright claims that he explained to Kevin, “You know, the ‘nigger’ statements is getting on my nerves, that he don’t respect me, Mr. Gustafson,” and that Gus replied to Kevin that he gets tired of Bright continuously asking questions over and over. *Id.*, 26:6-11. Bright claims that it was basically just a meeting to say I have tried to deal with it and that Gus calling him a “nigger” was never really addressed, except for Kevin telling Gus that he’s told him about his language. *Id.*, 26:15-23. After the meeting, Bright and Gus went back to work. *Id.*, 26:24-27:1.

Kevin Beck testified that Bright did not call him in June 2015 to report the alleged use of the N-word by Gus, and that at no time did Bright come to him and report that he was being called the N-word. *Id.*, 114:8-115:12. Kevin testified that he does not recall meeting with Gus and Bright in June 2015, but that he had two or three meetings with them to discuss Gus's condescending and demeaning attitude toward Bright. *Id.*, 115:13-24.

Finding of Fact No. 13: Bright's testimony regarding the alleged use of the N-word by Gus in November 2015 was that despite having worked at KB for over 10 months, he did not know what material was trash and what could be used again, so he left it in the shop after working on the weekend. *Id.*, 27:17-28:13. Bright testified that when Gus's wife, Debbie Fortner, who worked near the block saw, came in to work on Monday morning, she antagonized Gus to come in and ridicule Bright about the mess that was made. *Id.*, 29:3-17. Initially, Bright testified that he and Josh Blaz had worked the weekend and then he testified that he could be the only one who was the subject of ridicule because he was the only one who had worked on the weekend. *Id.*, 28:4-9; 29:13-17.

A meeting of the employees was held in the assembly room during which Debbie Fortner turned off the radio and informed them she was not happy about the trash that was left in her area. *Id.*, 29:23-30:18. Bright asked what she was talking about and Gus said come with me and let me show you. *Id.*, 30:18-21.

Bright stated that only he and Gus walked from the assembly room to the block saw area. When they were near the block saw, Bright claims that when he told Gus he didn't know that it was trash he left in there, Gus said, "what, you niggers stupid, or what?" *Id.*, 30:22-31:7. Bright stated that he and Gus walked back into the assembly room and began exchanging words and Debbie Fortner ended up calling the police. *Id.*, 31:19-32:6. When the police arrived, they told Bright he needed to leave the property, and he got his coat and left. *Id.*, 32:7-18.

Finding of Fact No. 14: Office Manager Misty Franklin heard yelling in the assembly room, looked out her office door and saw Bright and Gus yelling at each other, and heard Bright tell Gus that he was going to break his fucking neck. *Id.*, 157:5-16. Misty did not hear Gus use the N-word. *Id.*, 157:17-18. Misty conducted an investigation of the incident, talked to each of the employees present regarding the incident, including Bright, and obtained written statements from them. *Id.*, 157:25-158:6. In the statement Bright had his girlfriend write for him near the time of the incident in November 2015, nowhere does it state that Gus made the statement to him, "what, you niggers stupid, or what?" Bright's statement says that Gus kicked a box and got loud with him and Bright told him if he can't respect him as a co-worker they will have problems. *Id.* Bright's statement says, "Gus has pushed me over the top with using the (N) word. Each day its something with him." *Id.* Bright's statement says he told Gus that if he

didn't stop disrespecting him that he will break his neck. *Id.* Bright's statement concludes by saying that all of this came about over some trash. *Id.* Notably, it does not say that all of this came about because of Gus's use of the N-word. In addition, Bright did not tell the police that he had threatened Gus with physical violence because he was angry with him for using the N-word.

None of the other employees Misty spoke with and obtained statements from as part of her investigation witnessed or heard the N-word being used by Gus. Tr. 158:6-20. In addition, no employee ever complained to her that Gus used the N-word in the workplace. *Id.*, 158:21-24. The only complaint that was made about Gus using the N-word was the reference in the written statement submitted by Bright regarding the November 2015 incident, which was not corroborated by any of the other employees who were present. *Id.*, 157:25-158:24.

Finding of Fact No. 15: No evidence in the record exists to support this finding of fact. During direct examination of Gus, Bright's counsel asked him if he observed Kevin Beck scream in his wife Debbie's face, "Your husband is going to get me sued!" after the November 2015 incident. *Id.*, 211:19-212:12. Gus responded, "No, I did not observe that. He took her either out the side of the building or the back or something like that. It was not in front of me." *Id.*, 212:8-15. There was no examination of the source of this alleged hearsay statement,

there was no further testimony on this subject, and Debbie Fortner did not testify at the hearing. *Id.*, 221:21-225:19.

Finding of Fact No. 16: Bright testified that after the alleged use of the N-word by Gus in November 2015, he called Kevin Beck and told him that Gus was actually using the N-word against him again and that had pushed him over the top, and he told Gus if you don't get out of my face, I'll break your neck. *Id.*, 32:19-33:6. Bright claims that Kevin's only response to hearing this was, "Well, I'll deal with it when I get back." *Id.*, 33:7-8. Neither Kevin Beck nor Gus testified to any specific recollection of a meeting after the November 2015 incident. The only testimony regarding a meeting where Gus was warned that he was not treating employees right occurred after the alleged use of the N-word in March 2015, as set forth in detail above in the discussion concerning Finding of Fact No. 11.

Finding of Fact No. 17: Bright's testimony regarding the alleged use of the N-word by Gus in April 2016 was that he was at the spin saw talking about a special order and Gus came over and checked the measurements. *Id.*, 38:16-39:3. Bright testified that he told Gus he had never checked measurements before and claims Gus said, "You know, I've talked to you a thousand times. I don't know why Kevin hired you niggers anyway." *Id.*, 39:4-6. Bright said he walked away from Gus and went into the assembly room where Dave Ritchie and Travis Scholler were, and Gus came around the corner and asked Bright if he was going

back to fucking work. *Id.*, 39:8-12. Bright said he told Gus to give him a minute and let him catch his breath, and then claimed Gus grabbed a piece of foam off of a table, threw it, and said, “This is bullshit,” at which time Bright chose to clock out and leave *Id.*, 39:16-21. Gus denied using the N-word to Bright in April 2016 and testified that Bright’s allegation concerning Gus’s use of the N-word in April 2016 is untrue. *Id.*, 217:10-15.

Finding of Fact No. 18: Gus testified that after the November 2015 incident, Dave Beck, who is Kevin Beck’s father, accused Gus of being a racist. *Id.*, 210:19-22; 212:16-21. At the time of the alleged accusation, Dave Beck was not an owner of KB, did not have any role in the business, and did not direct employees on employment or any other matters. *Id.*, 212:22-213:13.

Finding of Fact No. 19: The hearing officer’s attempt to distinguish Bright’s use of the N-word as a term of endearment, regardless of how it is pronounced, is nonsensical, especially in light of the fact the hearing officer found that Bright himself used the N-word while employed at KB. *See* Hearing Officer Decision, p. 14.

Bright admitted using the N-word while he was employed at KB. Tr., 47:3-5. Bright stated that, “Most of the time, it was with another black guy who was considered to be a friend, so that’s how we’d kind of greet each and communicate, you know, ‘What’s up, my nigga?’” you know, stuff like that. So, yes, I have used

it.” *Id.*, 47:7-11. Bright claimed that when he used the term “nigga” with his African American co-worker or other African Americans, it was a term of endearment as opposed to when the N-word is used by a white person, which is offensive and degrading. *Id.*, 47:24-49:4.

However, KB employee Travis Scholler testified that he heard Bright use the N-word at KB day after day after day. *Id.*, 172:6-12. In addition, during an incident on December 31, 2015, after Bright had gotten in Dave Ritchie’s face about the temperature in the assembly room, Bright followed Travis over to the other side of the shop calling him a little N-word the whole way. *Id.*, 182:10-184:10. Based on the credible testimony of Travis Scholler, the hearing officer found that Bright had called Travis the N-word. FOF 22. Misty Franklin also testified that Bright used the N-word at work. *Id.*, 153:2-3. It is axiomatic that one cannot claim offense to a racial slur that he himself uses.

Finding of Fact No. 23: As discussed in relation to Finding of Fact No. 11 above, Misty Franklin testified that she did not remember any incident in March 2015 where Gus used the N-word while speaking with Bright. *Id.*, 155:16-156:4. Misty specifically testified that she did not hear the N-word come from Gus in March 2015, and that she had only learned about this alleged incident shortly before Bright quit in April 2016. *Id.*, 156:5-17. With respect to Bright’s allegation that Gus used the N-word toward him in June 2015, Misty testified that she did not

witness that alleged incident, no one witnessed that alleged incident to her knowledge, and she does not recall learning about that alleged incident after June 2015. *Id.*, 156:18-157:4.

Finding of Fact No. 26: Approximately two weeks after Bright's discussion with Kevin Beck after Kevin had received the complaint of discrimination that was filed on May 3, 2016, Kevin went to Bright's home and asked him if he wanted to come back to work. *Id.*, 41:5-43:11. Bright explained to Kevin that he wasn't interested in coming back because Gus was still there, and Kevin told Bright that if he wanted to work on the weekends when Gus was not there, he would be willing to give Bright some work. *Id.*, 45:9-21. Bright testified that Kevin Beck came to his house again to inform him that Gus no longer worked at KB and that he had talked to Travis Scholler and Travis did not have any problems with Bright returning. *Id.*, 45:25-46:8. Bright explained to Kevin that he was not interested in coming back because he had a new job at BSW, where he had been employed prior to working at KB. *Id.*, 46:9-11.

The district court erred in failing to reverse or modify the hearing officer's findings and conclusions with respect to the awards of back pay and front pay based on Bright's failure to mitigate his alleged damages. Under Montana law, a terminated employee has a duty to mitigate his alleged damages by obtaining other comparable employment. *Martinell v. Montana Power Co.*, 268 Mont. 292, 321,

886 P.2d 421, 439 (1994). “[T]he general rule is that an employer charged with discrimination under Title VII can toll the continuing accrual of damages by offering the claimant a job without conditions attached. If the claimant then rejects the offer of employment, damages cease to accrue.” *Id.*, 268 Mont. at 322-23, 886 P.2d at 440 (citing *Ford Motor Co. v. EEOC* (1982), 458 U.S. 219, 241, 102 S.Ct. 3057, 3070, 73 L.Ed.2d 721, 739).

Here, KB offered Bright re-employment on two occasions without conditions attached, both of which he refused. Bright testified that Kevin Beck offered to allow him to work on weekends when Gus was not there to give Bright some work, but Bright refused. Bright testified that he turned down KB’s second offer of reinstatement after Gus no longer worked there because he was re-employed at BSW. Tr. 45:25-46:11.

Bright testified that he left his employment with BSW and moved back to Colorado because he was going through a multitude of changes with the woman with whom he was living in Montana regarding financial stability, relationship issues, and he decided to go back to Colorado to be reunited with his wife. Tr. 51:4-8. After returning to Colorado, Bright failed to mitigate his damages by obtaining comparable employment in a manufacturing facility or assisting developmentally disabled individuals, and chose to work at Walmart making almost \$3 per hour less than he had at KB.

Despite the fact that Bright turned down both of KB's unconditional offers of reinstatement, and only worked at KB for a year and 3 months, the hearing officer awarded him back pay for a year and a half and a year of front pay equal to the difference in hourly rates between KB and Walmart, totaling \$18,357.70.

As a result of Bright's failure to mitigate his alleged damages by accepting KB's offers of re-employment, his back and front pay awards should be reduced accordingly or eliminated entirely.

Finding of Fact No. 32: In response to leading questions from his attorney, Bright's testimony regarding his alleged emotional distress was that it was hurtful to be called a "nigger" by Gus and that he became very angry. *Id.*, 59:1-9. Bright testified that, "it was a pretty dark situation for him to have KB fail to stop the alleged racial comments by Gus because he was always open and honest with Kevin on everything and he worked very hard for KB, and he did not receive any protection from the way Gus was treating him, so he felt that Kevin had failed him. *Id.*, 59:10-19. When asked by his counsel if his experience was humiliating, Bright testified it was humiliating because he grew up with that and he has worked hard to try to be able to rise above it and to treat everyone with respect. *Id.*, 60:15-20. Bright testified that no one else witnessed Gus's alleged use of the N-word, and he did not offer any testimony regarding how he was allegedly humiliated by Gus's alleged statements.

In response to his attorney's leading question, "Was it degrading?," Bright testified that Gus made it a point to do that by calling him a "nigger," and Gus made it a point to tell Kevin Beck that Bright was too slow, that he wasn't getting it, and that was totally false. *Id.*, 61:3-10. Bright went on to talk about Gus not taking responsibility for his own actions and everything that occurred at KB in regards to orders getting out, Gus chopping up material so Kevin Beck wouldn't have it so he would have to rush an order to get material because Gus had used it on bigger sizes, and he couldn't convince Kevin because he had so much faith in Gus and Bright was a newcomer. *Id.*, 61:11-24.

Bright testified that he was very angry having to deal with Gus's racial statements against him, and belittling and undermining him about not being able to grasp what they did at KB. *Id.*, 63:3-10. Bright claimed that it made him mean and that he lost his relationship with a woman that he came out to Montana with because of it. Yet, Bright's previous testimony was that he left his employment with BSW and moved back to Colorado because he was going through a multitude of changes with the woman he was living with in Montana as far as financial stability, relationship issues, and he decided to go back to Colorado to be reunited with his wife. *Id.*, 51:4-8.

Bright also claimed that it affected his relationship with his co-workers because he didn't talk to them, he would go on break and sit in the back of his

truck and smoke, and he quit interacting with them. *Id.*, 63:13-18. When asked if it affected his relationship with his friends, he said that he hadn't accumulated any friends in Montana, and that he's always been a loner-type guy, standoffish. *Id.*, 64:6-13.

Finding of Fact No. 33: Contrary to the hearing officer's finding, KB Office Manager Misty Franklin investigated the allegation in Bright's statement that Gus has pushed him over the top with using the N-word following the November 2015 incident, and it was not substantiated or corroborated by any of the other employees. *Id.*, 157:25-158:24. Other than the reference to Gus using the N-word in Bright's written statement, no employee ever reported to Kevin Beck that Gus had used the N-word toward Bright. *Id.*, 114:5-7; 114:17-18; 118:4-7.

Finding of Fact No. 35: This finding of fact is not supported by substantial evidence in the record. Bright testified that he rejected the first offer to return to work at KB because Gus was still employed at KB and nothing had been done about the alleged racial slurs Gus had been making against him. *Id.*, 44:24-45:13. Bright testified that Kevin Beck offered to allow him to work on weekends when Gus was not there to give Bright some work, but Bright refused. *Id.*, 45:14-24. Bright testified that he turned down KB's second offer of reinstatement because he was re-employed at BSW. *Id.*, 45:25-46:11.

II. The district court erred in failing to reverse the Final Agency Decision because KB Enterprises' substantial rights have been prejudiced as a result of the clearly erroneous administrative findings, inferences, conclusions, or decisions affected by other error of law.

The following Findings of Fact are clearly erroneous because they are affected by other error of law:

Finding of Fact No. 20: Josh Blaz's testimony regarding allegedly witnessing Gus use the N-word toward Bright is not credible. Pursuant to Mont. Code Ann. § 26-1-303(3), a witness false in one part of his testimony is to be distrusted in other parts of his testimony. The hearing officer stated that he had disregarded most of Blaz's testimony because he lied about who was in several pictures taken at a gas station where he and his girlfriend had taken a KB vehicle without permission and not returned it. Yet, he went on to conclude that Blaz's initial testimony about Gus was more credible than his testimony about Kevin Beck. See Hearing Officer Decision, pp. 8-9.

In addition, on cross examination Blaz denied speaking with Bright's counsel concerning this matter and Bright's counsel had to ask clarifying questions of Blaz on re-direct to correct Blaz's false testimony. *Id.*, 94:11-12; 97:4-98:7. Accordingly, the hearing officer erred in finding Blaz credible in some parts of his testimony after finding he had provided false testimony.

Not only should the hearing officer have distrusted Blaz's testimony in its entirety based on his false testimony about he and his girlfriend's involvement in

taking a truck owned by KB and forgery of checks belonging to KB, according to Bright, none of the incidents involving Gus's alleged use of the N-word toward him were witnessed by Blaz. *Id.*, 67:5-7; 68:6-11; 69:19-70:2. Moreover, in the first full paragraph of page 8 of his decision, the hearing officer acknowledged the fact that no one other than Bright heard Gus utter racial slurs. He went on to state that most of the other employees were not in a position to hear what Gus might have said because they were working in other parts of the facility where, given the loud nature of the work and the wearing of ear protection, it is unlikely anyone but two people talking directly with one another in the same space could hear each other.

Finding of Fact No. 34: This purported finding of fact is a legal conclusion that is not supported by substantial evidence in the record. There is no testimony or evidence in the record that Gus's alleged use of the N-word on four occasions between March 2015 and April 2016 created an intimidating, hostile, and offensive working environment sufficiently severe so as to alter the conditions of Bright's employment.

Neither the Montana Human Rights Act nor Title VII is a general civility code. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81. Conduct must rise to the level of severe or pervasive before it is considered unlawful. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Harassment must be analyzed

on a case-by-case basis, by looking at the totality of the circumstances and the context. See EEOC Compliance Manual Section 15: Race and Color Discrimination, VII Equal Opportunity for Job Success.

In order for alleged race-based conduct to trigger potential liability for unlawful harassment: 1) the conduct must be unwelcome; 2) the conduct must be subjectively and objectively sufficiently severe or pervasive to alter the terms and conditions of employment. A single incident or isolated incidents of offensive racial conduct or remarks generally do not create an abusive work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

As the U.S. Supreme Court stated in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), it is only when the workplace is permeated with discriminatory intimidation, ridicule, and insult that it is sufficiently severe or pervasive to alter the conditions of the claimant's employment and create an abusive work environment. Mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently alter the conditions of employment. A plaintiff must show that the work environment was so severe or pervaded by discrimination that the terms and conditions of employment were altered. *Vance v. Ball State University*, 570 U.S. 421, 427 (2013).

A review of the totality of the circumstances demonstrates that the terms and conditions of Bright's employment were not altered by Gus's alleged utterance of the N-word on four occasions. The factors for evaluating whether conduct is sufficiently severe or pervasive to alter the terms and conditions of employment include: 1) the frequency of the discriminatory conduct; 2) the severity of the conduct; 3) whether the conduct was physically threatening or humiliating; 4) whether it unreasonably interfered with the employee's work performance; and 5) the context in which the harassment occurred, as well as any other relevant factor. *Harris*, 510 U.S. at 23. The objective severity or pervasiveness of alleged harassment must be judged from the perspective of a reasonable person in the claimant's position, considering all of the circumstances. *Oncale*, 523 U.S. at 81.

In *Manatt v. Bank of America*, 339 F.3d 792 (9th Cir. 2003), the Court concluded that an Asian employee's work environment was not so objectively abusive as to alter the conditions of her employment where over a two and a half year period, harassment consisted of two offensive and inappropriate incidents--one in which two co-workers cruelly ridiculed her for mispronouncing a word and another instance in which co-workers pulled their eyes back with their fingers to imitate or mock the appearance of Asians, as well as other offhand remarks by her co-workers and supervisors where she overheard jokes using the phrase "China man" and a reference to China and communism.

The same is true in this case. The alleged racial remarks made by Gus to Bright on four occasions in March, June, and November 2015, and April 2016, do not rise to the level of objectively abusive so as to alter the conditions of Bright's employment. With respect to the alleged comment in March 2015, Bright testified that during an employee smoke break outside, he briefly overheard Gus say, "I don't know why Kevin hires niggers and spics anyway." Bright did not say to whom such alleged comment was made and the other employees who were outside did not hear the alleged comment by Gus. Bright then claims that after returning to work following the smoke break, Gus repeated this same comment to him near the spin saw. No other employee heard Gus make this comment to Bright. Although Bright testified that he told Misty Franklin about Gus's comments at the end of the day, Misty Franklin testified that she had no knowledge of any such comments by Gus in March 2015.

Bright claimed that Gus again made a similar comment to him in June 2015. Kevin Beck denied that Bright reported Gus's alleged comments to him, but acknowledged that he held meetings with Gus and Bright to address their working relationship and Gus's condescending and demeaning attitude toward employees. During these meetings, Bright made no mention of Gus using the N-word.

On November 30, 2015, Bright was upset because he felt Gus was singling him out for leaving the shop a mess. The exchange between Gus and Bright became heated and Bright threatened to break Gus's fucking neck. The police were called and Bright was asked to leave the premises. Misty Franklin investigated the incident on behalf of KB and none of the employees who were present during the incident reported hearing Gus use the N-word. In addition, when the police arrived, Bright did not inform them that Gus had used the N-word.

The final comment alleged by Bright occurred approximately five months later on April 29, 2016. Bright claimed Gus approached him while he was spinning material and said, "I've talked to you a thousand times. I don't know why Kevin hired you niggers anyway." Again, no one else witnessed this alleged comment by Gus, and Bright did not report it to anyone at KB.

Taking into account the relevant factors in evaluating the alleged comments by Gus, such comments, even if taken as true, are not sufficiently severe or pervasive to constitute unlawful harassment, as they did not alter the conditions of Bright's employment from the perspective of a reasonable person in Bright's circumstances. Accordingly, the district court erred in failing to reverse the hearing officer's conclusions regarding the existence of conduct sufficiently severe or pervasive to alter the terms and conditions of Bright's employment.

Findings of Fact Nos. 36 and 41: As discussed in detail regarding the specific findings of fact set forth herein, Bright's alleged lost and future wages were caused by his own actions in resigning his employment at KB and relocating back to Colorado to be reunited with his wife. In addition, no substantial evidence exists in the record to support the hearing officer's finding that Bright suffered humiliation or emotional distress.

Bright's subjective, self-serving testimony regarding alleged emotional distress suffered by him is discussed in detail in relation to Finding of Fact No. 32. According to Bright, as acknowledged by the hearing officer, none of the alleged racial remarks made by Gus was heard by anyone other than Bright. Bright did not offer any testimony regarding how he was allegedly humiliated by Gus's remarks. More importantly, Bright did not offer any objective evidence, at the hearing or anywhere in the record, regarding his alleged emotional distress. Namely, Bright did not offer any evidence that he sought treatment of any kind for his alleged emotional distress, such as counseling, medical, or psychiatric treatment, or that he suffered any physical symptoms of any kind (i.e., loss of sleep, loss of appetite, nausea, etc.). Additionally, Bright, by his own admission, did not miss any work due to alleged distress. Bright testified that "he felt better" as soon as he was no longer employed at KB. *Id.*, 73:7-74:10.

The amount of the hearing officer's emotional distress award in this case is not substantiated by the evidence in the record, is higher than the back and front pay awards combined, and is far in excess of other emotional distress awards issued by the Montana Human Rights Bureau for the type of remarks alleged in this case. The value of Bright's alleged emotional distress should be determined by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836. In *Johnson v. Hale* 13 F.3d 1351 (9th Cir. 1994), the Court set aside the district court order and awarded \$3,500.00 to each plaintiff, noting that "sum would appear to be the minimum that finds support in recent cases . . ." *Johnson*, 13 F.3d at 1354. The *Johnson* plaintiffs were alone when the discriminatory conduct occurred, just like Bright alleged in this case. Cf. *Wazoua, v. Ames Construction, Inc.*, Administrative Decision, Human Rights Bureau Case No. 240-2010, awarding plaintiff \$30,000 in damages for emotional distress, where numerous racial epithets were broadcast over the radio to the entire work crew. Accordingly, any damages awarded for emotional distress should be minimal, directly in line with *Johnson*.

The Office of Administrative Hearings case of *High Pine v. 3G's Convenience Stores*, Case No. 413-2017, is instructive and similar to the instant case. In *High Pine*, the hearing officer determined that although the claimant did suffer emotional distress, there was no evidence that this distress required

counseling or medical treatment. *See High Pine*, at Finding of Fact 23. Similar to the claimant in *High Pine*, Bright did not provide any evidence that his alleged distress required counseling or medical treatment, arguably reducing any award for damages related to emotional distress. As the hearing officer in *High Pine* stated, “[N]o larger award can be reasonably supported on the limited evidence of the depth of his emotional distress.” *Id.* Also, in contrast to *High Pine*, Bright did not suffer mental disability like the claimant in *High Pine*, and any award of emotional distress damages to Bright should be less than the \$7,000 awarded to the claimant in *High Pine*.

In *Emol v. Anmol, Inc.*, Human Rights Bureau Case No. 0141017055, decided by hearing officer David Scrimm who was the hearing officer in this case, held that “other than saying he felt humiliated and belittled, [the claimant] can point to no specific evidence of how he was damaged from the encounter at Days Inn.” *Id.* at p. 13. In the *Emol* case, Hearing Officer Scrimm awarded only \$2,500 in damages to the claimant for emotional distress. Accordingly, KB Enterprises requests that the Court reverse or modify the erroneous award of \$20,000 in emotional distress damages to Bright.

CONCLUSION

Review of the record as a whole establishes that the hearing officer’s findings of fact are not supported by substantial evidence and the hearing officer’s

conclusions of law are clearly erroneous. Accordingly, KB Enterprises respectfully requests that the Court reverse the district court's denial of its petition for judicial review and remand this matter for issuance of an order reversing or modifying the hearing officer's findings of fact and conclusions of law.

RESPECTFULLY SUBMITTED this 3rd day of January, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 7,541 words, not averaging more than 280 words per page, excluding the Certificate of Service and Certificate of Compliance.

DATED this 3rd day of January, 2019.

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CERTIFICATE OF SERVICE

I, Cynthia L. Walker, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-03-2019:

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