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No. DA 19-0692

IN THE

Supreme Court of the State of Montana

MONTANA STATE UNIVERSITY – NORTHERN,

Appellant/Cross-Appellee,

V.

RANDY BACHMEIER

Appellee/Cross-Appellant.

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY, HON. JAMES P. REYNOLDS
CASE NO. DDV-2015-939

APPELLEE/CROSS-APPELLANT'S CROSS-APPEAL REPLY BRIEF

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I. MSU-N Refuses to Properly Apply the Standard of Review to the Two Specific Findings Rejected by the Montana Human Rights Commission.

MSU-N does not deny that the hearing officer's initial rejection of Bachmeier's sexual harassment claim was fundamentally premised on two factual findings: (1) that Bachmeier "alone" perceived Templeton's touching as unreasonably intimate and inappropriate such that it unreasonably interfered with his work performance; and (2) Templeton stopped touching him once he asked her to on May 8, 2013. *See* Hr'g Off. Dec., 27-29. Nor does MSU-N dispute that Montana law permits the Commission to reject a hearing officer's findings of fact "if, upon review of the complete record, the agency first determines that the findings were not based upon competent substantial evidence." *See Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 25, 387 Mont. 202, 394 P.3d 159. Likewise, it does not contend that the Commission failed to review the entire record or neglected to state with particularity the findings not based on substantial evidence. *See id.*

Rather, in attempt to pigeonhole this case into *Blaine County*—where the Commission improperly applied the standard of review by broadly concluding that the hearing officer misapprehended the

evidence—MSU-N merely recounts the hearing officer's findings as if they are infallible. In essence, MSU-N contends that the hearing officer's findings must be upheld simply because the hearing officer made them. For instance, MSU-N urges that "[t]he Commission may not look at contrary evidence and evaluate it." *See* Answer/Reply Br., 6. That is flatly wrong. While it is certainly true that the Commission may not simply substitute its own view of the evidence for the hearing officer's, *Blaine County* expressly states that the Commission must evaluate the entire record, which logically includes *all* the evidence, contrary or not. *Blaine County*, ¶¶ 25, 26.

When it comes to applying the correct substantial evidence standard of review, MSU-N's lone argument is that the hearing officer's findings are supported by substantial evidence because some witnesses testified that they did not find Templeton's touching offensive. *See* Answer/Reply Br., 6. That argument, however, entirely ignores the nature of the findings the Commission rejected.

If the hearing officer had found that *some* employees did not find Templeton's touching offensive, MSU-N might be correct. But, as detailed in the Commission's order, the hearing officer concluded that "similar touching was not perceived as unreasonably intimate and

inappropriate by MSU-N employees subjected to it," and that "it was Bachmeier *alone* who found the touching unreasonably interfered with his work performance." *See* Remand Order, 3 (emphasis added). If five witnesses testify that a light was green and five testify that it was red, a factual finding that the plaintiff *alone* perceived the light to be red would plainly not be supported by substantial evidence.

The same is true here. As the Commission acknowledged "[a]fter careful consideration of the complete record," there was a plethora of testimony indicating that MSU-N employees other than Bachmeier found Templeton's touching inappropriate and sexual in nature. *Id*. at 2-3. MSU-N cannot escape that conclusion by wrongly insisting that the Commission could not consider any contrary evidence. That position misstates the law no matter how loudly MSU-N characterizes Templeton's touching as innocuous.

Notably, MSU-N does not address Bachmeier's argument that the district court should have affirmed the Commission's rejection of the hearing officer's finding that Templeton stopped touching Bachmeier once he asked her to do so. *See* Answer/Reply Br., 1-8. Accordingly, MSU-N has waived any argument with respect to that finding. *See, e.g.*, *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98,

¶ 9, 315 Mont. 231, 69 P.3d 652 ("[I]f a party fails to raise an issue or argue it in his or her brief, we will deem the issue waived and will not address it."); *accord Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (failure to raise an argument in an answering brief waives it).

In sum, the Commission properly reviewed the record and concluded that several of the hearing officer's findings were not supported by substantial evidence. The Commission also discussed its findings with particularity and did not repeat its error from *Blaine County* by simply concluding that the hearing officer misapprehended the evidence. As such, the district court erred by concluding that the Commission applied an incorrect standard of review and merely substituted its own view of the evidence for the hearing officer's.

II. *Faragher* Does Not Provide MSU-N a Defense.

Under *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), an employer is vicariously liable for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Stringer-Altmaier v. Haffner*, 2006 MT 129, ¶ 26, 332 Mont. 293, 138 P.3d 419 (quoting *Faragher*). Although *Faragher* allows employers to raise an affirmative defense to vicarious liability under narrow circumstances, the defense is not available when

the supervisor's harassment culminates in a "tangible employment action." *Id.*

MSU-N suggests that a "tangible adverse employment action" is a high standard that "requires an employer to actually discharge, demote or reassign the employee to an undesirable position." *See* Answer/Reply Br., 7. But MSU-N reads *Faragher* too narrowly. To start, MSU-N misquotes *Faragher*, which uses the phrase "tangible employment action," not "tangible adverse employment action." *See Faragher*, 524 U.S. at 807-08. Additionally, courts do not strictly limit a "tangible employment action" to discharge, demotion or reassignment to a different position. In *Stringer-Altmaier*, for example, this Court held that an undesirable schedule change was a tangible employment action sufficient to foreclose the employer's attempt to invoke the *Faragher* affirmative defense. *See Stringer-Altmaier*, ¶¶ 26-28.

Here, Templeton's harassment culminated in a verbal warning to Bachmeier. As discussed in more detail in Bachmeier's Answer and Cross-Appeal Brief, the verbal warning constituted an adverse employment action for purposes of Title VII retaliation. *See* Answer/Cross-Appeal Br., 31-35. In short, Bachmier's employment contract can be terminated for cause following progressive discipline

and MSU-N's Human Resources Director testified that verbal discipline is a type of progressive discipline that may lead an employee closer to termination. *Id.*; *see also, e.g.*, *Williams v. Baltimore Cnty.*, 2016 WL 3745980, at *17 (D. Md. Mar. 11, 2016) ("[A] reprimand is a "tangible employment action when "evidence shows that a reprimand not only bruises an employee's ego or reputation, but also works a real, rather than speculative, employment injury." (internal quotation marks omitted)). For all the same reasons, Templeton's verbal warning is a tangible employment action under the *Faragher* analysis—it "thrust [him] further along the discipline tract and closer to termination." *Nye v. Roberts*, 145 F. App'x 1, 4-5 (4th Cir. 2005). As such, the *Faragher* affirmative defense is unavailable to MSU-N.

III. MSU-N Has Waived Any Argument Regarding the Commission's Inappropriate Reduction of the Hearing Officer's $175,000 Award.

As part of his cross-appeal, Bachmeier argued that if this Court reverses the district court's rejection of the Commission's harassment finding, it should also reinstate the hearing officer's $175,000 award. *See* Answer/Cross-Appeal Br., 51-52. MSU-N failed to address that issue in its response brief and has thus waived it. *See Mountain West Farm Bureau,* 2003 MT 98, ¶ 9.

CONCLUSION

For the foregoing reasons, Bachmeier respectfully requests that the Court reverse the district court's order with respect to harassment and reinstate the hearing officer's $175,000 award.

Dated: August 12, 2020.

Respectfully submitted,

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I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,219 words, as determined by the undersigned's word processing program.

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