DA 19-0692

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 26

MONTANA STATE UNIVERSITY-NORTHERN,

Petitioner and Appellant,

v.

RANDY BACHMEIER,

Respondent, Appellee,
and Cross-Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2015-939
Honorable James P. Reynolds, Presiding Judge

COUNSEL OF RECORD:

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Submitted on Briefs: September 23, 2020

Decided: February 3, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Montana State University–Northern ("MSU-N"), appeals a decision of the First Judicial District Court, Lewis and Clark County, upholding a Hearing Officer's conclusion that MSU-N retaliated against its employee, Dr. Randy Bachmeier, for reporting and pursing a claim of sexual harassment against his supervisor. Should we uphold the retaliation claim, MSU-N argues that the Hearing Officer's $75,000 damages award is inappropriate. MSU-N also challenges the District Court's award of attorney fees in Bachmeier's favor. Bachmeier cross-appeals, arguing that the District Court erroneously reinstated the Hearing Officer's original findings of fact, conclusions of law, and order, which concluded that Bachmeier failed to demonstrate his supervisor sexually harassed him. Bachmeier also argues, should this Court reverse the District Court, the Montana Human Rights Commission ("HRC") erred by reducing the sexual harassment award from $175,000 to $80,000.

¶2 We reverse the District Court's decision to remand and reinstate the Hearing Officer's first decision and affirm the HRC's final order on Bachmeier's sexual harassment claim. We affirm the District Court's ruling upholding the conclusion that MSU-N retaliated against Bachmeier. We affirm the HRC's reduction of both the $175,000 damages award for sexual harassment to $80,000 and the $75,000 award for retaliation to $20,000. Finally, we affirm the District Court's award of attorney fees and costs.

¶3 We restate the issues as follows:

1. Did the District Court properly reverse the HRC's Remand Decision on the ground that it applied an incorrect standard in reviewing the Hearing Officer's first set of findings?

2. Did the District Court err by upholding the Hearing Officer's and HRC's conclusion that MSU-N retaliated against Bachmeier?

3. Did the HRC exceed its statutory authority when it reduced Bachmeier's damages for MSU-N's discriminatory and retaliatory acts?

4. Did the District Court abuse its discretion in calculating and awarding attorney fees and costs in Bachmeier's favor?

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Bachmeier brought this action against MSU-N, alleging sexual harassment and retaliation by his supervisor, Dr. Roslyn Templeton. In May 2013, Bachmeier notified MSU-N that Templeton had been inappropriately touching him on the arm and back for the past several years. Bachmeier filed a complaint with the HRC shortly thereafter. In November 2013, Bachmeier filed an amended complaint with the HRC alleging sexual harassment and retaliation. Following a contested case hearing, the Hearing Officer issued sixty-nine findings of fact. Most of those findings are not disputed.

¶5 MSU-N hired Bachmeier in 2002 as a project coordinator. By 2011, Bachmeier had earned his Ph.D. and been promoted several times, reaching the position of Interim Dean of Extended University. The Hearing Officer found that, by all accounts, Bachmeier was a diligent and hard-working employee, with only a minor reprimand in his personnel file. In early 2012, Bachmeier was appointed Dean of Extended University, a position he still holds.

¶6 MSU-N hired Templeton as Provost and temporary Dean of the College of Education in June 2010. She was MSU-N's fourth provost in ten years, joining at a time when the university was undergoing accreditation review and facing financial and organizational difficulties. Bachmeier's promotion to Interim Dean of Extended University in 2011 resulted in Templeton becoming his sole direct supervisor.

¶7 In late 2011, Montana State University ("MSU") appointed Dr. James Limbaugh to be the new chancellor of MSU-N. As provost, Templeton reported directly to Limbaugh. Even before arriving on campus, Limbaugh began receiving messages from faculty members expressing concerns and frustrations regarding Templeton. Most of these complaints concerned her difficult task in administering an "academic program prioritization" review of all MSU-N programs, as well as her direct communication style.

¶8 Bachmeier testified at the hearing that on or around October 14, 2010, Templeton first began touching him, placing her hand on his knee for several seconds during a meeting in her office. Templeton continued to touch Bachmeier intermittently after that, usually by stroking his arm with her fingertips or by rubbing his shoulders and down his back. Bachmeier stated he found this touching uncomfortable, but he initially did not expressly tell Templeton to stop; he instead adopted "closed" body language around her, moved his office desk into a position where it would be more difficult for her to touch him, avoided attending meetings with her alone, and eventually moved to a smaller office in a different building and installed a door chime to help alert him to when she might be coming. Despite these measures, Templeton would continue to touch Bachmeier in the same manner, both publicly at meetings or gatherings and by walking behind Bachmeier's desk to reach him.

¶9 Templeton did not limit her touching to Bachmeier. Numerous witnesses testified that, although Templeton would touch both male and female coworkers, she touched men in a manner objectively different from how she touched women. As she did with Bachmeier, Templeton would "stroke" male coworkers on their arms, massage their shoulders, and massage or rub up and down their backs. Both male and female coworkers described Templeton's touching as "borderline fondling," "inappropriate for a boss or a supervisor," and "inappropriate, kind of creepy." Limbaugh testified that Templeton once touched him from behind in a manner that caused him to confuse her for his wife, though he stopped short of describing it as a sexual touch. Not a single witness testified to Templeton touching women in this manner.

¶10 On April 30, 2013, Bachmeier met with Templeton to discuss the minimum number of enrolled students necessary to justify holding a course in the summer. Bachmeier advocated that eight enrolled students, rather than nine, should justify putting the course on the summer schedule. Bachmeier testified that while he was explaining his position, Templeton began stroking the hair on his forearms with her fingertips. At this point, Bachmeier, for the first time, told Templeton to "please stop." Templeton took her hand away, told Bachmeier that the number of enrolled students needed would remain at nine, and ended the meeting.

¶11 The next day, Templeton went to Bachmeier's office and reprimanded him. Bachmeier had submitted a contract for a professor to teach the course Templeton had stated did not meet the enrollment requirements. Templeton inadvertently had approved the contract the previous day, discovering her error that morning. Her reprimand was

followed by an e-mail later that afternoon informing Bachmeier that he should "[c]onsider our conversation this morning" to be an official "verbal warning." Templeton forwarded her e-mail to MSU-N's human resources department.

¶12 About a week later, Bachmeier instructed his attorney to send a letter to MSU-N's human resources department alleging that Templeton sexually harassed him. MSU-N Human Resources Director Kathy Jaynes forwarded the letter to Limbaugh, who met with Templeton that day. Limbaugh instructed her to not touch Bachmeier at all anymore and informed her that he would directly supervise Bachmeier while the complaint was processed. Limbaugh informed Bachmeier of the same that day. Bachmeier filed a discrimination and retaliation complaint with the Montana Department of Labor and Industry on May 30, 2013.

¶13 MSU-N completed its internal investigation into Bachmeier's allegations on July 9, 2013, finding Bachmeier's sexual harassment and retaliation claims unsupported. In August Templeton voluntarily resigned from the university, effective January 3, 2014. She ceased working on campus in mid-October. Templeton's departure created a job opening for provost, a position for which Bachmeier previously applied in 2007.

¶14 A job description for the provost position was posted, requiring a candidate to be or have been an associate or full professor, effectively disqualifying Bachmeier because he had no such experience. This job description was substantively the same as the description for the same position in 2007, for which Bachmeier also did not qualify. Bachmeier nonetheless e-mailed Limbaugh of his intent to apply for the position; he asked if the requirements could be changed so he would qualify. Limbaugh responded that Bachmeier

did not meet the qualifications and that they would not be modified, effectively denying him the position. Limbaugh then e-mailed MSU president Waded Cruzado and MSU provost Martha Potvin informing them that a "controversy" was about to surface, involving an "issue with an employee who has had an ongoing issue with the current incumbent provost." Cruzado copied this e-mail to MSU-N legal counsel.

¶15 On October 1, 2013, Bachmeier applied for the provost position. Jaynes forwarded Bachmeier's application to Limbaugh. Out of fifty applications, Bachmeier's application was the only one she sent Limbaugh, whose role in the selection process was only to write the job description and to interview the final candidates. The next day, Limbaugh e-mailed Greg Kegel, the chair of the provost search committee, informing him that Bachmeier's application did not meet the minimum qualifications for the position. Kegel e-mailed Limbaugh several days later on behalf of the search committee, inquiring if the requirement that a candidate be a full or associate professor—the specific requirement excluding Bachmeier—could be lowered as it was eliminating candidates the search committee thought were otherwise qualified. Limbaugh replied that the requirements would remain the same. Bachmeier thus was filtered out of the selection process as unqualified for the position.

First Decision

¶16 Based on the facts above, the Hearing Officer issued his Findings of Fact, Conclusions of Law, and Order ("First Decision"). He determined that Bachmeier had not produced enough evidence to support a claim of sexual harassment. The Hearing Officer based this conclusion on findings that other male employees' responses to Templeton's

touching "ran the gamut from amused indifference through mild annoyance to embarrassed discomfort and on to shame and humiliation"; that it was "Bachmeier alone who found the touching unreasonably interfered with his work performance"; and that once Bachmeier asked Templeton to stop touching him, she stopped. The Hearing Officer did find, however, that MSU-N retaliated against Bachmeier when Templeton gave him a verbal reprimand the day after Bachmeier told her to stop touching him. MSU-N also retaliated when, primarily through Limbaugh, it took "special care" to make sure Bachmeier knew he was not getting the provost position and to make sure everyone else in the provost search process, including many of Bachmeier's colleagues, knew that he was not qualified. The Hearing Officer awarded Bachmeier $75,000 in damages for retaliation and ordered MSU-N to train its officers in the laws and regulations regarding workplace retaliation.

¶17 Both parties appealed the Hearing Officer's First Decision to the HRC. The HRC agreed with the majority of the Hearing Officer's findings of fact but found that three of the findings were incorrect. First, the HRC found that the Hearing Officer's finding that "similar touching [by Templeton] was not perceived as unreasonably intimate and inappropriate by MSU-N employees subjected to it" was not based on competent substantial evidence in the record. Citing specific portions of the hearing transcript, the HRC found that the record supported the opposite conclusion. Second, based on the same testimony, the HRC rejected the Hearing Officer's finding that "it was Bachmeier alone who found the touching unreasonably interfered with his work performance."

¶18 Finally, regarding whether Templeton knew her touching was unwelcome, the HRC rejected the Hearing Officer's finding that the touching "was not so obviously outrageous

that she should reasonably have known it was unwelcome. Once he asked her to stop, she stopped." Pointing to testimony from multiple witnesses that the Hearing Officer ignored, the HRC found that Templeton rubbed Bachmeier's back at a barbeque picnic event at Limbaugh's house in May 2013—after Bachmeier had requested and Limbaugh had told her to stop touching him. It was soon after this incident that Bachmeier filed his formal complaint under the Montana Human Rights Act ("MHRA").

¶19 The HRC issued a Remand Order on November 5, 2015. It determined that an objective person would find the touching Bachmeier experienced to be offensive and unreasonable. The HRC therefore rejected the Hearing Officer's second conclusion of law, that Bachmeier failed to present sufficient evidence to support his discrimination charge, concluding instead that Bachmeier was discriminated against by Templeton's touching. The HRC upheld the retaliation conclusion but found the damages award erroneous and not based on substantial evidence, reducing it from $75,000 to $20,000. It remanded the matter to the Hearing Officer, ordering him to modify his decision to reflect the HRC's findings and conclusions and to determine the damages due Bachmeier on his discrimination claim.

Second Decision

¶20 The Hearing Officer issued a second decision in April 2016 ("Second Decision"). The Second Decision incorporated by reference the entirety of the First Decision, except for those findings and conclusions that the HRC rejected. The Hearing Officer issued several new findings, concluded that Templeton sexually harassed Bachmeier, and awarded him $175,000 in damages.

¶21 MSU-N appealed the Second Decision to the HRC, arguing that the damages award for sexual harassment was unsupported. In August 2016, the HRC issued its Final Agency Decision. The HRC agreed with MSU-N that the $175,000 in damages was unsupported and reduced the award to $80,000. It left untouched the previously modified $20,000 award for retaliation.

Judicial Review

¶22 Both parties appealed the Final Agency Decision to the District Court. The District Court determined that the HRC erred as a matter of law by finding the three factual findings in the First Decision unsupported by substantial credible evidence. The District Court held that the Hearing Officer's original conclusion that Bachmeier was not sexually harassed was supported because there was no testimony establishing that "Templeton's touching was accompanied by any sexual content whatsoever." It therefore concluded that the HRC had no basis for its Remand Order and voided the Hearing Officer's Second Decision. On the retaliation claim, however, the District Court agreed that MSU-N retaliated against Bachmeier when Templeton gave him a verbal reprimand and when MSU-N took "special care" to single him out in the provost search process, upholding the Hearing Officer's conclusion on retaliation. The District Court then remanded the matter to the HRC with instructions to reinstate the Hearing Officer's First Decision as the final agency decision.

¶23 The District Court held a hearing on attorney fees and costs in May 2019. Bachmeier initially requested $912,227.29 in combined fees and costs. MSU-N first argued that Bachmeier's request should be denied outright. Alternatively, MSU-N sought

substantial reduction in the award, arguing primarily that only fees and costs for the successful retaliation claim should be awarded. The District Court concluded that although it had denied Bachmeier's discrimination claim, the claim was factually and legally interrelated to the retaliation claim. It therefore awarded Bachmeier attorney fees for time spent on both claims. The District Court did, however, substantially reduce the amount Bachmeier requested, awarding $360,072.65 in combined fees and costs.

STANDARDS OF REVIEW

¶24 A court's review of an HRC's decision is governed by the Montana Administrative Procedure Act (MAPA). *Blaine County v. Stricker*, 2017 MT 80, ¶ 16, 387 Mont. 202, 394 P.3d 159. We review agency decisions under MAPA pursuant to § 2-4-704(2), MCA, which provides in pertinent part:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
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> (a) the administrative findings, inferences, conclusions, or decisions are:
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> (i) in violation of constitutional or statutory provisions;
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> (ii) in excess of the statutory authority of the agency;
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> (iii) made upon unlawful procedure;
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> (iv) affected by other error of law;
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> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; [or]

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Blaine County, ¶ 16; *see also Schmidt v. Cook*, 2005 MT 53, ¶ 20, 326 Mont. 202, 108 P.3d 511. We apply this standard of review to "both the District Court's review of the agency's decision and this Court's subsequent review of the District Court's decision." *Blaine County*, ¶ 16 (citing *In re Transfer of Ownership & Location of Mont. All-Alcoholic Bevs. License No. 02-401-1287-001*, 2007 MT 192, ¶ 6, 338 Mont. 363, 168 P.3d 68).

¶25 We do not substitute our judgment for that of the administrative agency; we instead review the entire record to determine whether the agency's findings of fact are clearly erroneous and whether its determinations of law are correct. *Jones v. All Star Painting, Inc.*, 2018 MT 70, ¶ 14, 391 Mont. 120, 415 P.3d 986 (citing *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, ¶ 10, 378 Mont. 324, 343 P.3d 1222; *Total Mech. Heating & Air Conditioning v. Emp't. Relations Div.*, 2002 MT 55, ¶ 23, 309 Mont. 84, 50 P.3d 108). "A hearing [officer], when one is used, is in the unique position of hearing and observing all testimony entered in the case. . . . The findings of the hearing [officer], especially as to witness credibility, are therefore entitled to great deference." *KB Enters., LLC v. Mont. Human Rights Comm'n.*, 2019 MT 131, ¶ 9, 396 Mont. 134, 443 P.3d 498 (quoting *Benjamin v. Anderson*, 2005 MT 123, ¶ 37, 327 Mont. 173, 112 P.3d 1039).

¶26 This Court reviews a district court's award of attorney fees under § 49-2-505(8), MCA, of the MHRA for abuse of discretion. *Laudert v. Richland Cty. Sheriff's Dep't.*, 2001 MT 287, ¶ 12, 307 Mont. 403, 38 P.3d 790. A district court abuses its discretion

when it "acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice." *Gendron v. Mont. Univ. Sys.*, 2020 MT 82, ¶ 8, 399 Mont. 470, 461 P.3d 115.

DISCUSSION

¶27 The MHRA prohibits employment discrimination through § 49-2-303(1)(a), MCA. It provides:

> (1) It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction.

See also Vortex Fishing Sys. v. Foss, 2001 MT 312, ¶ 14, 308 Mont. 8, 38 P.3d 836. Put another way, the statute "prohibits discrimination in employment practices based on a person's sex when the demands of the position do not warrant a sex distinction." *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶ 13, 322 Mont. 434, 97 P.3d 546.

¶28 Two forms of sexual harassment violate the MHRA's prohibition against workplace discrimination—quid pro quo harassment and hostile work environment harassment. *See Beaver v. Mont. Dep't. of Natural Res. & Conservation*, 2003 MT 287, ¶ 29, 318 Mont. 35, 78 P.3d 857 (citations omitted). Sexual harassment constitutes a hostile work environment when the harassment "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." *Beaver*, ¶ 30. To establish a claim, a claimant first must

establish membership in a protected class, either male or female. *Campbell*, ¶ 16. The claimant next must demonstrate the alleged discrimination was based on sex and that the conduct was unwelcome. *Campbell*, ¶¶ 17-18. Finally, based on a totality of the circumstances, the claimant must prove that he or she found the misconduct subjectively hostile and abusive and that a reasonable person also would find the misconduct objectively hostile and abusive. *Campbell*, ¶ 19; *Beaver*, ¶ 31. Importantly, "neither proof of sexual desire nor proof of sexual stereotyping is required to establish discrimination based on sex." *Campbell*, ¶ 21. Instead, the "normal definition" of discrimination is "differential treatment." *Babb v. Wilkie*, ___U.S. ___, 140 S. Ct. 1168, 1173 (2020) (quoting *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 174, 125 S. Ct. 1497, 1504 (2005)).

¶29 Human rights complaints brought before the HRC are governed by MAPA. *Schmidt*, ¶ 20. The HRC may appoint a hearing examiner (hearing officer) to oversee a hearing in a contested case, who then submits a proposed decision. Sections 2-4-611(1), 2-4-621(1), MCA. "The agency may adopt the proposal for decision as the agency's final order," but it may not reject or modify the hearing officer's findings of fact unless it first reviews the complete record and states with particularity how the findings were not based upon competent substantial evidence. Section 2-4-621(3), MCA. The agency then enters a final decision, which may be appealed to the district court for judicial review. Sections 2-4-623, 2-4-702, MCA.

¶30 "Under MAPA, an agency may reject a hearing officer's findings of fact only if, upon review of the complete record, the agency first determines that the findings were not

based upon competent substantial evidence." *Blaine County*, ¶ 25 (internal quotations omitted, quoting *Moran v. Shotgun Willies*, 270 Mont. 47, 889 P.2d 1185 (1995)). When an agency modifies the findings of a hearing officer without first determining his findings are not supported by competent substantial evidence, it abuses its discretion. *Blaine County*, ¶ 25 (citing *State Pers. Div. v. Dep't. of Pub. Health & Human Servs., Child Support Div.*, 2002 MT 46, ¶ 26, 308 Mont. 365, 43 P.3d 305; *Ulrich v. State ex rel. Bd. of Funeral Serv.*, 1998 MT 196, ¶ 14, 289 Mont. 407, 961 P.2d 126; *Moran*, 270 Mont. at 50, 889 P.2d at 1187). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *Blaine County*, ¶ 26 (citation omitted).

¶31 *1. Did the District Court properly reverse the HRC's Remand Decision on the ground that it applied an incorrect standard in reviewing the Hearing Officer's first set of findings?*

¶32 Relying on *Blaine County*, the District Court determined the HRC applied an incorrect standard in its review of the Hearing Officer's First Decision. The District Court determined that the Hearing Officer heard no testimony describing Templeton's touching as being sexual in nature, and some employees testified that it was not unduly burdensome. The District Court concluded that the HRC's conclusion of law on the sexual harassment claim was incorrect, noting the HRC did not reject any of the Hearing Officer's conclusions of law, only three of his findings.[1] Citing *Blaine County*, the District Court stated it

[1] This appears to be a misreading of the HRC's Remand Order, which specifically states: "the [HRC] rejects conclusion of law 2 on page 34 of the [First Decision]. That conclusion

therefore could not conclude as a matter of law that the findings in the First Decision were not supported by substantial evidence, and the HRC had no basis for remanding the matter to the Hearing Officer.

¶33 On cross-appeal, Bachmeier argues that rather than "generically" concluding that the Hearing Officer "misapprehended the effect of the evidence," as it did in *Blaine County*, the HRC pointed to specific evidence in the record to conclude that the Hearing Officer's three findings in his First Decision were not based upon substantial evidence. The HRC accordingly did not substitute its own view of the evidence for that of the Hearing Officer but concluded that the Hearing Officer's findings of fact were unsupported. Bachmeier argues that this is exactly what *Blaine County* instructs—reviewing the entire record and discussing erroneous findings with particularity.

¶34 MSU-N responds that Bachmeier attempts to turn the Court's attention to testimony the Hearing Officer considered to be not credible or otherwise did not accept. Had the HRC looked at the evidence supporting the Hearing Officer's findings, MSU-N argues, it would have found them supported by sufficient evidence. MSU-N thus claims that by relying upon *other* evidence that could support a contrary finding, Bachmeier and the HRC are doing what this Court said in *Blaine County* was impermissible.

¶35 In *Blaine County*, we concluded that the HRC did not have the authority to modify a hearing officer's findings when it held the findings clearly erroneous because the hearing

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states that Bachmeier failed to present sufficient evidence to support his discrimination charge. The [HRC] concludes that the [H]earing [O]fficer misapplied the facts of the case to the law of discrimination."

officer "misapprehended the effect of the evidence" of discrimination. *Blaine County*, ¶ 27. The hearing officer had determined that county jail personnel's failure to fill and administer prescribed medication to an inmate, which led to that inmate's death, was not based in discriminatory animus. *Blaine County*, ¶ 30. The inmate's estate appealed to the HRC. It concluded that the hearing officer "misapprehended the effect of the evidence" and that the failure to fill the prescriptions "manifested a discriminatory indifference" to the inmate based on his disability. Based on that determination, the HRC found two of the hearing officer's findings of fact clearly erroneous and modified those findings. *Blaine County*, ¶ 12. On appeal, the district court reinstated the hearing officer's findings; we affirmed on the basis that the HRC failed to point to record evidence of discrimination, instead relying on evidence that showed only negligence by the counties. *Blaine County*, ¶ 29. We thus concluded that "a reasonable mind" could accept the hearing officer's original findings of no discrimination from the evidence presented. The HRC lacked the authority under MAPA to modify the hearing officer's findings because they were supported by competent substantial evidence. *Blaine County*, ¶¶ 30–31.

¶36 Here, however, the HRC neither modified the Hearing Officer's findings nor determined that the Hearing Officer "misapprehended the effect of the evidence." Rather, the HRC found that three of the findings the Hearing Officer used to find no discrimination were not based on credible substantial evidence. The HRC supported this determination with multiple citations to the record.

¶37 The HRC first found unsupported the Hearing Officer's finding that "[w]hatever the exact frequency of the touching of Bachmeier, similar touching was not perceived as

unreasonably intimate and inappropriate by MSU-N employees subjected to it." Instead, the HRC concluded that the record supported only a contrary finding. MSU-N employees' characterizations of the touching included: "inappropriate, kind of creepy," "borderline fondling . . . inappropriate for a boss or supervisor," "she touches me like my wife," and "creepy." In fact, the Hearing Officer's finding is directly contradicted by his finding No. 45: "At a donor event on campus, Templeton rubbed the small of Limbaugh's back . . . Limbaugh thought the touching was by his wife. . . . When he discovered it was Templeton touching him, he thought that her touching was inappropriate and it made him feel 'very uncomfortable.'"

¶38 The HRC next determined, relying on the same record testimony, that the Hearing Officer's finding that "it was Bachmeier alone who found the touching unreasonably interfered with his work performance" was not based on substantial evidence. Norton Pease, an MSU-N employee, testified that due to Templeton's fondness of touching him, coworkers often pressured him into acting as a point-man to calm her down or to bring employee concerns to her. This situation "inhibited [his] job in a lot of ways" and resulted in derisive ridicule and a loss of respect from others.[2] Despite the fact that some other

[2] Colleagues referred to Pease as "Rosalyn's bitch," "the puppet boy," and "the scratching post." Pease said the situation hindered his ability to do his job as department chair. In his discussion, the Hearing Officer noted that "[b]eyond any doubt, Pease would not have found Templeton's touching as difficult as he did find it had his colleagues refrained from adding injury to insult with malevolent and juvenile teasing." This statement fails to recognize the purpose of sexual harassment and workplace discrimination laws to prevent not only the discriminatory conduct itself but also the humiliation and loss of respect that flow from the discriminatory conduct. *See Beaver*, ¶ 31 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283 (1998)) (instructing that courts look to, among other things, whether the allegedly discriminatory conduct is humiliating); *Benjamin*, ¶ 70 (allowing compensatory damages for emotional distress and humiliation caused by discrimination). Further, the statement is clear that

employees may have testified Templeton's touching did not interfere with their work, Pease's testimony is sufficient to support the HRC's rejection of the unqualified finding, "*Bachmeier alone* found the touching unreasonably interfered with his work performance" (emphasis added), as not based on competent substantial evidence.

¶39 Finally, the HRC found no competent substantial evidence for the Hearing Officer's finding of fact that Templeton's touching "was not so obviously outrageous that she should reasonably have known it was unwelcome. Once he asked her to stop, she stopped." The HRC found from its review of the complete record that Templeton continued to touch Bachmeier after he told her to stop, specifically at the employee picnic held at Limbaugh's house just a week after Bachmeier asked Templeton to stop. Indeed, three people witnessed this occurrence: Norton Pease, Dr. Christine Shearer-Cremean, and Dr. Lawrence Strizich. The Hearing Officer ignored this lengthy and consistent testimony without explanation. The HRC thus rejected the Hearing Officer's second conclusion of law, that Bachmeier failed to present sufficient evidence to support a discrimination claim.[3]

¶40 Citing *Benjamin v. Anderson*, MSU-N argues that on appeal, should the reviewing body (here, the HRC and now this Court) find contradictory evidence in the record, it must

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Pease found Templeton's touching "difficult," and the ridicule that followed made it even more so.

[3] The Dissent's reference to the finding that MSU-N did not have sufficient notice before Bachmeier's formal complaint "to require sooner action" (Dissent, ¶ 104) does not speak to the relevant information. This finding was not rejected by the HRC and is not in dispute; it simply has no bearing on the fact that Bachmeier told Templeton to stop touching him on April 30, 2013—which the Hearing Officer found was "his first notice to her that he considered her touching unwelcome and inappropriate"—but she nonetheless continued her unwelcome touching at the employee picnic.

recite the "facts as found by the Hearing [Officer]," and it cannot employ an analysis relying on other evidence that might support a different finding. *Benjamin*, ¶ 12; *Schmidt*, ¶ 31 (The question on appeal "is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings."). Rather, according to MSU-N, the reviewing body must look only at whether substantial credible evidence—evidence that a reasonable mind might accept to support a conclusion, more than a mere scintilla of evidence but less than a preponderance—supports the trier's findings. *Blaine County*, ¶ 26.

¶41 We do not agree with MSU-N's assertion that a reviewing agency cannot look to evidence contrary to a hearing officer's findings. Both statute and case law make clear that a reviewing body *must* review the *complete record*; that necessitates review of evidence that may be contrary to a finding made by the trier of fact. *See Blaine County*, ¶ 25; *Total Mech. Heating*, ¶ 22; §§ 2-4-621(3), 2-4-704, MCA. Indeed, in *Blaine County*, on which MSU-N heavily relies, we noted that the HRC specifically *failed* to point to record evidence supporting its modification of the hearing officer's findings. *Blaine County*, ¶ 29 ("The [HRC] did not point to any such evidence [supporting the discrimination claim].").

¶42 The HRC rejected the findings at issue after it reviewed the complete record. It explained with particularity why the findings "were not based upon competent substantial evidence[.]" Section 2-4-621(3), MCA. The findings the HRC rejected did not depend on the weight of evidence or the credibility of one witness over another; they were findings declaring in absolute terms that *no* other employees perceived Templeton's touching as unreasonably intimate and inappropriate, that *only* Bachmeier's work performance was

affected, and that Templeton *never* touched Bachmeier after he told her to stop. And despite MSU-N's claims to the contrary, the Hearing Officer did not find any witness to lack credibility regarding testimony relative to these three findings. The Hearing Officer's only discussion of credibility was in his finding that Limbaugh's testimony on one aspect of Bachmeier's retaliation claim was more credible than that of Shearer-Cremean. The Hearing Officer also commented that Shearer-Cremean was an "unrelenting" critic of Templeton, but he made no finding that rejected her testimony; on the contrary, the Hearing Officer accepted her descriptions of Templeton's touching in his findings of fact.

¶43 Finally, we reject the District Court's comment that testimony revealed "Templeton's touching was accompanied by [no] sexual content whatsoever." "Reference to federal case law is appropriate in employment discrimination cases filed under the [MHRA]" because of the MHRA's similarity to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq ("Title VII"). *Campbell*, ¶ 12. 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." *Harris v. Forklift Sys.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993) (citation omitted). "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." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80, 118 S. Ct. 998, 1002 (1998) (quoting *Harris*, 510 U.S. at 17, 114 S. Ct. at 372 (Ginsburg, J., concurring)). Simply put, an employer that intentionally treats a person worse in a term or condition of employment because of the employee's sex

discriminates based on sex. *See* § 49-2-303(1)(a), MCA; *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59, 126 S. Ct. 2405, 2410 (2006) ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."). Proof of sexual desire is not an element of sexual harassment. *Campbell*, ¶ 21.

¶44 The record is replete with testimony that Templeton touched men in a manner categorically different from the way she touched women. Templeton's touching of women was limited to pats on the back, brief touching for emphasis or to get someone's attention—in general, the kind of touches one could reasonably expect (if not always particularly enjoy)[4] from a colleague. In sharp contrast, it was undisputed that her touching of men consisted of "lingering" touches up to ten seconds long, rubbing or "massaging" men up and down their backs, and, in Bachmeier's case at least, the caressing of arm hair. Male witnesses for both parties equated this touching to how their spouses touched them. Bachmeier testified to how this touching negatively affected the conditions of his employment; he moved his office and desk to keep Templeton from touching him, installed a door chime to help alert him to her presence, and took active measures to avoid being alone with her.

¶45 The Dissent emphasizes Bachmeier's increased sensitivity to Templeton's touching due to his history of sexual abuse. Dissent, ¶¶ 96, 102. Again, however, the HRC did not

[4] "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview." *Harris*, 510 U.S. at 21, 114 S. Ct. at 370. *Accord Beaver*, ¶ 31.

reject any findings that Bachmeier's subjective response to Templeton's touching was heightened because of his prior abuse. The Hearing Officer's finding that "[t]he touching was of substantial subjective severity for Bachmeier" establishes that Bachmeier subjectively found Templeton's actions hostile and abusive, a required element to prove his claim. *Campbell*, ¶ 19; *Harris*, 510 U.S. at 21-22, 114 S. Ct. at 370 ("if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment"). Bachmeier's subjective experience has no bearing on the finding the HRC rejected—that "[w]hatever the exact frequency of the touching of Bachmeier, similar touching was not perceived as unreasonably intimate and inappropriate by MSU-N employee[s] subjected to it." The rejected finding relates instead to the objectively hostile and abusive nature of Templeton's conduct.

¶46 The testimony of other employees, both men and women, demonstrates this objective severity. *See Oncale*, 523 U.S. at 81, 118 S. Ct. at 1003 ("the objective severity of sexual harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances'"). The Dissent references *Oncale*'s comment that Title VII is not a "civility code" and does not reach "innocuous differences in the way men and women routinely interact" with each other. Dissent ¶ 91; *Oncale*, 523 U.S. at 81, 118 S. Ct. at 1003. As the *Oncale* Court explained, "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or physical acts performed." *Oncale*, 523 U.S. at 81-82, 118 S. Ct. at 1003. Here, the "constellation of surrounding circumstances, expectations,

and relationships" found at MSU-N—a professional academic and office setting—helps establish the objective severity of Templeton's actions.

¶47 To establish his case, Bachmeier needed to demonstrate that, in this setting, a reasonable person would find a supervisor's unsolicited and lingering rubbing, stroking, and massaging offensive. Bachmeier did not need to demonstrate that other employees experienced similar psychological reactions to his. *See Harris v. Forklift Sys.*, 510 U.S. at 22, 114 S. Ct. at 371 ("Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious.") (internal citation omitted). Pease's testimony poignantly captured the objective severity of Templeton's behavior when he noted that had the situation been reversed, and he had touched a female subordinate in a manner similar to Templeton's touching, "this would be a completely different conversation altogether." Templeton's conduct was neither "innocuous" nor "routine." And but for Bachmeier being male, Templeton would not have touched him in the objectively offensive manner she did, and the terms and conditions of his employment would not have been altered. This is enough to trigger the MHRA's protections. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1081, 103 S. Ct. 3492, 3497 (1983) (under Title VII, discrimination occurs "because of . . . sex" when it treats a person "in a manner which but for [her] sex would [have been] different") (internal quotations omitted).

¶48 We conclude that the HRC did not misapply the MAPA standards of review when it rejected three of the Hearing Officer's findings as not based on competent substantial evidence. MSU-N's arguments against a conclusion of sexual harassment are premised specifically upon these rejected findings. Without these findings, as the HRC concluded in its Remand Order, "the record shows that an objective person would find the touching suffered by Bachmeier objectively offensive and unreasonable." *See Beaver*, ¶ 31 ("To be sufficiently severe or pervasive to . . . establish a claim, the misconduct must create a working environment which is both objectively and subjectively offensive."). The HRC therefore properly rejected the Hearing Officer's second conclusion of law—that MSU-N did not discriminate against Bachmeier.

¶49 A court reviews an agency's findings that the elements of § 49-2-303(1)(a), MCA, are met by examining: (1) whether the findings are supported by substantial evidence in the record; (2) if so, whether the agency misapprehended the effect of the evidence; and (3) whether a review of the record nevertheless leaves the court with a definite and firm conviction that the agency made a mistake. *Total Mech. Heating*, ¶ 22. The Second Decision's findings of fact on the sexual harassment claim that the HRC adopted in its Final Agency Decision are supported by substantial evidence in the record; the HRC did not misapprehend the effect of this evidence. The District Court erred by concluding the HRC misapplied the standard of review in its Remand Order when it rejected several of the First Decision's findings of fact. The District Court thus abused its discretion by concluding the HRC did not have the authority to modify the Hearing Officer's First Decision. *See Blaine County*, ¶ 27; § 2-4-704(2)(a)(vi), MCA. We therefore reverse its

August 2018 order remanding the matter to the HRC for reinstatement of the Hearing Officer's First Decision as the final agency decision in this matter.

¶50 *2. Did the District Court err by upholding the Hearing Officer's conclusion that MSU-N retaliated against Bachmeier?*

¶51 The Hearing Officer concluded that MSU-N retaliated against Bachmeier in two ways: first when Templeton gave him an official verbal warning because Bachmeier opposed her touching and again when Limbaugh went out of his way to make sure Bachmeier was not considered eligible for the provost position. The HRC affirmed these findings, as did the District Court on appeal. MSU-N contends that the District Court misapplied the rules regarding retaliation claims, listing several conclusions it claims the District Court "would have reached" had it properly considered the legal basis for the retaliation claims. [5]

¶52 Administrative Rule of Montana 24.9.603 prohibits workplace retaliation. It reads in pertinent part:

> (1) It is unlawful to retaliate against or otherwise discriminate against a person because the person engages in protected activity. A significant adverse act against a person because the person has engaged in protected activity . . . is illegal retaliation. "Protected activity" means . . . (b) opposing any act or practice made unlawful by the act or code; [or] (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the [] act or code. . . . (2) Significant adverse acts are those that would dissuade a reasonable person from engaging in a protected activity. This may include the following: (b) discharge, demotion, denial of promotion, denial of benefits or other material adverse employment action.

[5] Several of MSU-N's arguments against retaliation rely in whole or in part on the District Court's ruling that Bachmeier did not suffer discriminatory sexual harassment in the first place; having upheld the HRC's conclusion that Bachmeier was subjected to discriminatory sexual harassment, we do not address those arguments in this section.

¶53 To establish a prima facie case of retaliation, an employee must demonstrate "1) she engaged in protected activity; 2) she suffered an adverse employment action; and 3) there is a causal connection between the protected activity and the adverse action." *Bollinger v. Billings Clinic*, 2019 MT 42, ¶ 29, 394 Mont. 338, 434 P.3d 885 (citation omitted). Once the employee meets that initial burden, the employer must articulate non-discriminatory reasons for the adverse action; the burden then "shifts back to the employee to demonstrate the articulated reasons are a pretext for retaliation." *Bollinger*, ¶ 29 (citation omitted). Pretext is established when the employee shows that a retaliatory reason motivated the adverse action or that the employer's proffered non-discriminatory reasons are completely "unworthy of credence." *Bollinger*, ¶ 29 (citation omitted).

¶54 The Hearing Officer first found that Bachmeier engaged in protected activity when he told Templeton to "please stop" touching him. The Hearing Officer found this action put Templeton and MSU-N on notice that the touching was unwelcome. The Hearing Officer further found it "more likely than not" that if Bachmeier had not asked Templeton to stop touching him, she would have not officially reprimanded him the next day. The HRC concluded that the Hearing Officer's findings were "based on competent substantial evidence and that, but for Bachmeier's protected activity, he would not have suffered the adverse actions of discipline and singling out even though there were legitimate business reasons on which the actions could have been based." It thus affirmed the conclusion that MSU-N retaliated against Bachmeier.

¶55 MSU-N argues that the District Court erred in upholding both the verbal reprimand and the "special care" retaliation conclusions. Regarding the former, MSU-N argues it did not have notice that Bachmeier was engaging in protected activity before it provided him with a verbal warning; the verbal warning was not "adverse action" as contemplated under the law; and there is no causal link between the verbal warning and Bachmeier's engagement in protected activity. Regarding the retaliation related to the search for a new provost, MSU-N argues that Bachmeier did not establish he was denied the provost position "but for" Limbaugh's alleged animus towards him.

¶56 MSU-N argues that it did not receive notice that Bachmeier found Templeton's touching offensive when he told Templeton to "please stop" because, "[i]n the context of this case, it is more reasonable to conclude that Bachmeier was expressing that he wanted the argument with Templeton to stop." To find a lack of notice under this argument, we would have to reject the Hearing Officer's finding No. 31, that "Templeton began to stroke the hair on his forearm with her fingertips. Bachmeier asked her to 'please stop.' . . . This was his first notice to her that he considered her touching of him unwelcome and inappropriate." We would further have to reject finding No. 42, that Templeton's verbal reprimand was motivated at least in part by retaliatory animus stemming from Bachmeier's request for her to stop touching him, which request constituted "his first notice to her that he considered her touching unwelcome and inappropriate."

¶57 Unlike the findings the HRC rejected, which did not have record support, the findings MSU-N requests us to strike or modify involve the weight and credibility of evidence and testimony. It is not a reviewing court's place to substitute its judgment for

that of the Hearing Officer on what interpretation of the evidence is "more reasonable" than another when the Hearing Officer's interpretation is based upon substantial credible evidence. *See KB Enters., LLC*, ¶ 9; *Blaine County*, ¶ 25. A review of the record reveals substantial credible evidence to support the finding that Bachmeier's statement, "please stop," was intended to inform Templeton to stop touching him, and that Templeton understood the statement as such. In view of the reliable, probative, and substantial evidence in the whole record, the District Court thus properly affirmed the Hearing Officer's finding that Templeton, and MSU-N through her, first received notice during their April 30, 2013, meeting that Bachmeier opposed her touching.

¶58 MSU-N next argues that a verbal warning is not a "significant adverse act" for the purposes of retaliation but rather a "trivial" employment action because it did not dissuade Bachmeier from exercising his rights under the MHRA. As the Hearing Officer found, MSU-N retained Bachmeier through a yearly contract, which could be terminated either for cause or upon five months' notice for essentially any reason. Human Resources Director Jaynes testified that verbal warnings are considered in a decision to terminate an employee for cause. It is hard to characterize an official warning that can be used as evidence to support a potential termination as anything but "material adverse employment action" under Admin. R. M. 24.9.603(2)(b). More, the fact that Bachmeier was not totally dissuaded from engaging in protected activity—reporting Templeton's touching of him to both MSU-N and the HRC—is not fatal to his claim. Admin. R. M. 24.9.603(2) ("Significant adverse acts are those that would dissuade a reasonable person from engaging in a protected activity."). Bachmeier never personally reported Templeton's touching, only

engaging in his protected activity through counsel, who sent the May 8, 2013 letter to MSU-N. This suggests that Bachmeier felt he needed legal protection to safely exercise his right to report sexual harassment.

¶59 MSU-N's argument also misapplies the reasonable person standard. Whether a "reasonable person" would be dissuaded from engaging in protected activity is not measured against any actions Bachmeier took in response to Templeton's reprimand. The question, rather, is would a reasonable person in Bachmeier's place be dissuaded from reporting Templeton's touching after she reprimanded him? We have determined that Templeton's reprimand was "material adverse employment action." As "material adverse employment action" is included in the list of possible "significant adverse acts" under Admin. R. M. 24.9.603(2), the District Court did not err when it upheld the Hearing Officer's conclusion that a reasonable person would be dissuaded from engaging in protected activity due to such a warning.

¶60 Finally, MSU-N argues that the Hearing Officer did not follow the legal standard when he concluded, nor the HRC and District Court when they affirmed, that Templeton's verbal warning was retaliation for protected activity. MSU-N points to Admin. R. M. 24.9.611(1), which states that if a respondent "proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case," and compensation to the claimant is barred. MSU-N cites to the Supreme Court's ruling in *University of Texas Southwestern Medical Center v. Nassar* to argue Bachmeier must prove that the "unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer," effectively a "but-for"

standard. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360, 133 S. Ct. 2517, 2553 (2013). MSU-N then argues the Hearing Officer did not use the "but-for" standard, but rather in his finding of fact No. 43 found it was "*more likely than not*, if Bachmeier had not asked her to stop touching him on April 30, 2013, Templeton would not have reprimanded him." (Emphasis added). MSU-N claims this error wrongfully shifted the burden to MSU-N to demonstrate it would have taken the same action without any discriminatory motive, and wrongfully prevented a conclusion that this is a "mixed motive" case pursuant to Admin R. M. 24.9.611(1).

¶61 Bachmeier responds that the *Nassar* court did not abrogate, or even mention, a "more likely than not" standard for retaliation, but rather replaced a "motivating factor" analysis with a "but-for" one. *Nassar*, 570 U.S. at 360, 133 S. Ct. 2553. "More likely than not" is simply another way of saying "by a preponderance of the evidence." *See Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628 ("A preponderance requires that the applicant meet the relatively modest standard that the statutory criteria are 'more probable than not' to have been met."). Once MSU-N articulated a legitimate, non-retaliatory reason for Templeton's warning, Bachmeier had to show, by a preponderance of the evidence, that but for his objection to Templeton's touching, she would not have reprimanded him the following day. Reading findings No. 42 and 43 with the foregoing in mind demonstrates this is exactly what the Hearing Officer found. The clause, "if Bachmeier had not asked her to stop touching him on April 30, 2013, Templeton would not have reprimanded him," is a "but-for" finding, which the Hearing Officer determined was "more likely than not" supported by the evidence, i.e., it was

supported by a preponderance of the evidence. The HRC agreed, ruling that "but for Bachmeier's protected activity, he would not have suffered the adverse actions[.]" The findings on which this conclusion rests involve the weight and credibility of the evidence, which we will not disturb if supported by substantial, credible evidence in the record. The Hearing Officer discussed at length the evidence supporting his findings in findings Nos. 31-41. Our review of the record confirms that findings No. 42 and 43 were not clearly erroneous. Based on those findings, the HRC did not err in upholding the Hearing Officer's decision that Templeton's reprimand constituted retaliation.

¶62 We therefore conclude that the District Court was correct in upholding the Hearing Officer's conclusions that MSU-N retaliated against Bachmeier when Templeton gave him a verbal warning. Because the verbal reprimand alone is sufficient to support a retaliation claim, we find it unnecessary to further consider the "singling-out" argument.

¶63 *3. Did the HRC exceed its statutory authority when it reduced Bachmeier's damages for MSU-N's discriminatory and retaliatory acts?*

¶64 Both parties take issue with the damage award. Bachmeier argues that, should this Court reverse the District Court on the sexual harassment claim, it also should reinstate the $175,000 award found in the Hearing Officer's Second Decision. MSU-N argues that, should this Court affirm the District Court's upholding of the retaliation claim and reinstatement of the Hearing Officer's original $75,000 damages award, it should reduce the $75,000 award as inappropriate in light of the evidence presented at the hearing and strike the affirmative relief of training.

¶65 The HRC may award damages for discrimination pursuant to § 49-2-506(1), MCA. *Vortex Fishing Sys.*, ¶ 30. Damages may include an award for humiliation and emotional distress. *Benjamin*, ¶ 70 (citing *Vortex Fishing Sys.*, ¶ 33). Additionally, the HRC may require the employer to implement any reasonable measures necessary to correct the discriminatory practice. *See* § 49-2-506(1)(b), MCA. Under MAPA, the HRC "may accept or reduce the recommended penalty in a proposal for decision." Section 2-4-621(3), MCA.

¶66 Because we have reversed the District Court's order reinstating the Hearing Officer's First Decision as the final agency decision in the matter, the HRC's August 29, 2016, Final Agency Decision reducing the damages award for discrimination from $175,000 to $80,000 remains in effect. Despite initially not finding discrimination, the Hearing Officer in his First Decision noted the effect Templeton's actions had on Bachmeier, not only through the adverse work environment he experienced but also the "substantial subjective severity" of reliving childhood trauma because of the touching and concerns about losing his contract. The Hearing Officer reinforced these findings in the Second Decision. The HRC reduced Bachmeier's discrimination damages for three reasons: 1) Bachmeier originally requested only $100,000 in damages; 2) Bachmeier did not report Templeton's touching until three years after it started; and 3) the nature of the touching did not support such a large award. The Hearing Officer's findings in his Second Decision support the HRC's reduction of the damages award. Templeton's offensive touching was discriminatory because she subjected only men to it, not because it demonstrated overt sexual desire. And Bachmeier did not claim he suffered damages worth $175,000. These are non-arbitrary reasons, supported by the record, for the HRC to reduce

the Hearing Officer's damages award, and the HRC was within its authority to do so. *See contra, Benjamin*, ¶ 70 (affirming a District Court's reimposition of a hearing officer's award when his findings were supported by the record but the HRC acted arbitrarily in reducing the award.).

¶67 Similarly, because we have reversed the District Court's order reinstating the Hearing Officer's First Decision, the HRC's Remand Order reducing the damages for retaliation to $20,000 remains in effect. This effectively grants MSU-N the relief it seeks, and we do not modify the $20,000 award found in the HRC's Remand Order and left untouched in its Final Agency Decision. The reduced $20,000 award reflects the minor nature of the discipline and evidence suggesting it was partially justified, while acknowledging that a retaliatory motive was nonetheless its but-for cause.[6] Finally, we also leave untouched the Hearing Officer's original order in his First Decision requiring that MSU-N arrange and provide its chancellor and provost appropriate training in the laws against retaliation. Contrary to MSU-N's assertion, the training ordered does not involve Bachmeier or the complaint process but is focused instead on training MSU-N administration in what constitutes workplace retaliation. The Hearing Officer was within his authority to order it, and the HRC did not err by affirming that order.

[6] The second act of alleged retaliation for "singling out" Bachmeier in the provost search process—which we have declined to address—has no bearing on our decision to uphold the reduced damages award. Bachmeier acknowledges that he would not have been eligible for provost, and the HRC's damage award finds support whether or not the selection process included retaliatory conduct.

¶68 *4. Did the District Court abuse its discretion in calculating and awarding attorney fees and costs in Bachmeier's favor?*

¶69 MSU-N argues that the District Court abused its discretion in awarding $360,072.65[7] in attorney fees and costs on a $100,000 total damages award.[8] MSU-N claims that the District Court erred by failing to separate Bachmeier's unsuccessful sexual harassment claim from his retaliation claim when it calculated the fees and that the District Court erred by failing to appropriately analyze the factors justifying attorney fees. We have now upheld the HRC's ruling in Bachmeier's favor on both claims. We thus need not address MSU-N's argument regarding separating the fees on the harassment claim from fees on the retaliation claim. Upon review of the record, we affirm the District Court's analysis and award of $360,072.65 under the standard we set forth in *Plath v. Shonrock*, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984.

¶70 Under the MHRA, the prevailing party in a contested case may request attorney fees and costs in the district court. Section 49-2-505(8), MCA. We have long used the following guidelines to determine the reasonableness of attorney fees:

> (1) the amount and character of the services rendered;
>
> (2) the labor, time and trouble involved;
>
> (3) the character and importance of the litigation in which the services were rendered;

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[7] In its briefing, MSU-N uses a figure of $358,662.23 in fees and costs. Based on the District Court's order awarding fees, this Court calculated the total as $360,072.65.

[8] MSU-N uses the $75,000 damages award figure in its briefing. Having reversed the District Court's remand order, however, the total damages award now stands at $100,000; the $25,000 discrepancy is irrelevant to our analysis.

(4) the amount of money or the value of the property to be affected;

(5) the professional skill and experience called for;

(6) the attorneys' character and standing in their profession; and

(7) the results secured by the services of the attorneys.

Plath, ¶ 36. This is a fact-intensive analysis. *See Plath*, ¶ 36. The *Plath* factors are not exclusive, and a district court is within its discretion to rely on other considerations in determining reasonableness. *Gendron*, ¶ 13 (citing *James Talcott Constr., Inc. v. P&D Land Enters.*, 2006 MT 188, ¶ 63, 333 Mont. 107, 141 P.3d 1200).

¶71 Bachmeier moved the District Court for attorney fees and costs, initially requesting a combined total of $912,227.29. The District Court held a hearing on the motion, at which both parties presented testimony from attorneys and experts. The District Court issued a detailed order, analyzed each of the *Plath* factors against the facts of the case, and awarded $360,072.65 in combined fees and costs. MSU-N argues the District Court abused its discretion when it found the "character and importance" of the litigation significant because "[t]his case did have some unique and important components in that it involved allegations of sexual harassment and retaliation by a female supervisor of a male employee."

¶72 MSU-N is correct that the law is well-settled in protecting both women and men from sexual harassment. *See Campbell*, ¶ 20 (finding the plaintiff "obviously" falls into the protected class of "males" under the MHRA); *Oncale*, 523 U.S. at 78, 118 S. Ct. at 1001 ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women."). The District Court also discussed, however, the importance of litigation under

the MHRA in furthering the ability of plaintiffs to vindicate their civil and constitutional rights and how the fee-shifting provisions of the act facilitate that vindication. This analysis suffices to meet the "character and importance" factor. MSU-N advances no other challenge to the District Court's application of the *Plath* factors. Finding adequate support in the record for the District Court's remaining analysis, we conclude that the District Court did not abuse its discretion in determining an appropriate fee award. We therefore affirm the court's October 10, 2019, order awarding fees and costs to Bachmeier.

CONCLUSION

¶73 We reverse the District Court's order reinstating the Hearing Officer's First Decision as the final agency decision in this matter. We therefore affirm the HRC's August 29, 2016, Final Agency Decision and its award of $80,000 and $20,000 in damages to Bachmeier on the discrimination and retaliation claims, respectively. We further affirm the District Court's October 10, 2019, Order on Motion for Attorney Fees and Costs.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, concurring and dissenting.

¶74 I disagree with the Court's resolution of Bachmeier's sexual harassment claim, and thus dissent as to that issue. I concur with the Court's resolution of Bachmeier's retaliation claim and would affirm damages of $20,000.

¶75 Over a period of four days, the Hearing Officer received testimony from nineteen witnesses, considered 168 exhibits, and issued a comprehensive, detailed 37-page, single-spaced order setting forth 69 findings of fact, a discussion, and conclusions of law. The HRC and this Court do not agree with certain findings reached by the Hearing Officer set forth in his "Discussion," and refer to them as findings of fact not supported by "substantial evidence." The disputed findings made by the Hearing Officer are that: (1) similar touching of other MSU-N employees was not perceived as "unreasonable"; (2) Bachmeier's response to the touching was heightened because of his childhood sexual trauma; and (3) neither Templeton nor MSU-N had any reason to know Bachmeier was severely suffering from Templeton's touches and that Templeton stopped when asked.

¶76 In affirming the HRC's alternative findings that other MSU-N employees found Templeton's touching unreasonable, the Court misconstrues the standard of review set forth in §§ 2-4-621(3) and 2-4-704, MCA, and our decision in *Blaine County*. The Court also ignores that the Hearing Officer was addressing a necessary element of a hostile work environment claim by finding that while other MSU-N employees found the touching inappropriate and intimate, a *reasonable* person would not find that an offensive and hostile work environment was created. *See Oncale*, 523 U.S. at 81 (The conduct was "not severe or persuasive enough to create an objectively hostile or abusive work environment—an

environment that a *reasonable* person would find hostile or abusive . . . ."). Equally disturbing, especially for sexual discrimination claims pursued in the future, is the Court's confusion and blending of case law construing proof of quid pro quo sexual discrimination claims and a hostile or offensive work environment claim. Opinion, ¶ 47. Quid pro quo claims involve harassment that conditions concrete employment benefits on the basis of sex, such as classifying employees on the basis of sex for purposes of paying lower retirement benefits for women than men, despite both making equal contributions to the plan. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1081, 103 S. Ct. 3492, 3497 (1983). However, in a hostile or offensive work environment claim, the conduct may occur solely because of sex, but it is not actionable until a hostile work environment has been created from both an objective and subjective standard. The Court fails to embrace these distinctions, which have been recognized in federal law and our own precedent, and concludes all that is required to trigger the MHRA's protections is different treatment—"but for Bachmeier being male" no sexual discrimination would have occurred. Opinion, ¶ 17. This is not the correct standard to apply for a claim of sexual discrimination based on creation of a hostile or offensive work environment.

The Undisputed Facts

¶77 To begin, I think it is important to set out the facts determined by the Hearing Officer which are not contested, and which are, therefore, deemed supported by substantial evidence. This is important because it establishes context and demonstrates that there was substantial evidence to support the Hearing Officer's conclusions and that this Court has

chosen to selectively cite facts it maintains support its conclusion.[1] The following facts are taken directly from the Hearing Officer's Decision and are not disputed.

¶78 Bachmeier is an administrator at MSU-N and has his doctorate in Education Psychology. He and his wife, who has stayed home to raise their six children, have lived in Havre their entire lives. Bachmeier's wife does not want to leave Havre and he does not want to uproot his children from Havre. Both his parents and his wife's parents live in Havre. Bachmeier is his family's sole provider and has never been covered by a Collective Bargaining Agreement. He serves under annually renewable contracts at the discretion of MSU-N.

¶79 Templeton arrived at MSU-N in June 2010 as the new provost. When she arrived, she became the fourth provost in ten years at MSU-N. She came at a point when the school was facing several difficulties, including financial problems, a lack of organizational structure, a particular group of faculty members who were "disengaged" (indicating their discontent and hostility toward the administration and parts of the university community),

[1] For example, the Court appears fixated on describing Templeton's touching as "lingering rubbing, stroking, and massaging . . .," which was the testimony of only one witness that had actually been the receiver of Templeton's touching. That witness still described the touching as "inappropriate" and did not attribute any sexual connotations to the touching, as the Court does. Moreover, other witnesses described Templeton's touching, while inappropriate, was more of the "touchy, feely type." It is crucial, given the standard of review for these types of cases, that the Court does not succumb to substituting its opinion as to findings of fact for those of the Hearing Officer, unless substantial evidence did not support the Hearing Officer's findings. The Court fails to abide by its own standards and improvidently notes that had the "shoe been on the other foot and a male had touched a female, it would be quite a different conversation." Opinion, ¶ 47. This statement is neither relevant to the present inquiry nor helpful to future litigants and the trial courts in these types of cases. A standard of review based on whether the shoe was on the other foot is both wrong and inappropriate. It is well-established that each case depends on the surrounding circumstances, expectations, and relationships within the workplace. *Oncale*, 523 U.S. at 81-82, 118 S. Ct. at 1003.

a nursing program in disarray, and in accreditation review. She was not welcome by many of the university community and some faculty members circulated articles about union grievances at Marshal University where she had previously been employed and which linked her to the grievances.

¶80 Less than a year after Templeton's hiring, MSU President Waded Cruzado announced the selection of Dr. James Limbaugh (Limbaugh) as new chancellor of MSU-N, starting January 1, 2012. Even before Limbaugh arrived on campus, some faculty members at MSU-N contacted him and expressed their dislike for Templeton. The school was undertaking an "academic program prioritization," and Templeton had to review all programs on campus and classify each as "viable" or "non-viable," with those non-viable programs being terminated. This was a difficult and sensitive process for faculty, many of whom felt a strong connection to their programs and feared diminished roles and perhaps the need to seek other positions and leave Havre.

¶81 Templeton made many of these difficult decisions and was also charged with budget and course approval. For example, one of Templeton's budget decisions involved new hire Christine Shearer-Cremean, who testified against Templeton and was found not to be credible by the Hearing Officer. Following administrative decisions Templeton made, Shearer-Cremean was left with no job security as a full-time administrator and subject to annual renewal of her employment contracts at the discretion of MSU-N. The Hearing Officer found that "Templeton alienated this new hire, who was under her direct supervision [and] Shearer-Cremean became a harsh and persistent critic of Templeton's

leadership." Templeton had a very direct communication style, which also upset other faculty members and administrators, including Bachmeier.

¶82 Bachmeier testified that the first time Templeton touched him was around October 14, 2010, when she placed her hand on his knee and allowed her hand to linger for several seconds, making him "uncomfortable." Thereafter, though the number of times is not established in the record, Templeton touched Bachmeier intermittently, stroking his arm and rubbing him on his back from his shoulders to his waist. Bachmeier found Templeton's touching to be unduly personal and intimate, but did not tell Templeton this until April 30, 2013. Templeton testified that she did not remember more than one or two times where she touched Bachmeier, and that it was never intimate. On August 30, 2013, Bachmeier met with Templeton in her office to discuss summer class enrollment. Bachmeier was concerned and upset that Templeton was going to eliminate certain summer classes. Templeton reached over to Bachmeier to comfort him by stroking his forearm. Bachmeier asked her to "please stop." Templeton then concluded the meeting. This was the first notice to Templeton that her touching was not welcome. The Hearing Officer found Templeton's statement credible that she did not know she was offending anyone by her touching.

¶83 Templeton also touched other MSU-N employees, but Shearer-Cremean, a woman, was the only witness who testified that Templeton touched men differently from women. Norton Pease characterized Templeton's touching of him as a lingering, fingertip massage and that "she touches me like my wife." Lawrence Strizich testified about an instance when Templeton put one hand on his neck and the other on his bicep, and rubbed his back

and his arm. Strizich testified that when this occurred, he was having a disagreement with Templeton and he believed her touching was to "make everything alright," as "her way of calming the waters and making me settle down." The Hearing Officer found the context of Templeton's touching Bachmeier was the same.

¶84 Shearer-Cremean also testified she saw Templeton touch Daniel Ulmen, the facilities services director. However, Ulmen described Templeton as a "very touchy-feely person" who touched "all the time." Although Shearer-Cremean found Templeton's touches "unsettling and inappropriate to watch," Ulmen was unfazed by being the recipient of some of these touches, remarking off-handedly that Templeton "did like to, you know, rub and stroke and pat."

¶85 Limbaugh had also seen Templeton touch other employees and experienced Templeton's touching himself. At a donor event when Limbaugh was talking to someone else, he thought his wife was touching him on the back, but discovered it was Templeton. He thought the touching was inappropriate and made him feel "very uncomfortable." Significantly, none of the witnesses testified that Templeton's touching had sexual connotations or that it created a work environment that was hostile or offensive—except for Bachmeier.

¶86 Bachmeier was molested as a child and had treatment on and off for years because of the molestation. To the present day, he is not fond of being touched and he felt that Templeton touched him in ways that were personal. He testified he had blackouts as a result of Templeton's touching. Although Bachmeier testified that he attempted to communicate his discomfort to Templeton with nonverbal cues, the Hearing Officer found

that there was no credible evidence that Templeton could have known that Bachmeier was distressed by her touches. Indeed, Templeton testified that her touches were meant to be reassuring and, on one occasion, comforted Bachmeier by patting him on his forearm when he was visibly disturbed with tears in his eyes following a reprimand from Limbaugh. Asked specifically why she touched him that day, she responded "[b]ecause I saw that he was visibly upset, and I wanted to reassure him that it was going to be okay, that it wasn't the end of the world."

¶87 One week after Templeton verbally reprimanded Bachmeier respecting summer course offerings, Bachmeier sent a letter to MSU-N on May 8, 2013, alleging sexual harassment by Templeton. An investigation was conducted by Mary Kay Bonilla, MSU Great Falls Human Resources Director, and Janelle Barber, MSU Equity Specialist. Bonilla and Barber interviewed 16 people over approximately a seven-week period. They issued their report on July 9, 2013, finding that none of Bachmeier's allegations of sexual harassment were supported by their investigation. By the time the report was issued, Bachmeier had filed his complaint with the Department of Labor and Industry on May 30, 2013.

Legal Requirements for Establishing Hostile Environment Sexual Harassment Claim

¶88 Sexual harassment is sexual discrimination under the MHRA. "When sexual harassment is directed at an employee solely because of gender, the employee is faced with a working environment fundamentally different from that faced by an employee of the opposite gender. That difference constitutes sexual discrimination in employment."

Stringer-Altmaier v. Haffner, 2006 MT 129, ¶ 18, 332 Mont. 293, 138 P.3d 419 (citing *Harrison v. Chance*, 244 Mont. 215, 221, 797 P.2d 200, 204 (1990)); *see* § 49-2-303(1), MCA. Because the MHRA was closely modeled after Title VII, we have determined that reference to federal case law is both appropriate and helpful in construing the MHRA. *Stringer-Altmaier*, ¶ 17. "The provisions of Title 49 parallel the provisions of Title VII" and reference to federal case law is appropriate in employment discrimination cases filed under the MHRA. *Campbell*, ¶ 12.

¶89 There are two forms of sexual harassment that violate Title VII's prohibition against workplace discrimination: (1) harassment that conditions concrete employment benefits on sexual favors (quid pro quo); and (2) harassment that creates a hostile or offensive work environment. *Campbell*, ¶ 15; *Meritor*, 477 U.S. at 62. The phrase "terms, conditions or privileges of employment" in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with discriminatory sexual discrimination. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or persuasive 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.

¶90 Most importantly, "[n]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. "Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Meritor*, 477 U.S. at

67. For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Title VII does not prohibit all verbal and physical harassment in the workplace; it is directed at "discrimination . . . because of . . . sex." "The critical issue, Title VII's text indicates, 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." *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring); *see Bostock*, 140 S. Ct. at 1742 ("To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.").

¶91 The requirement that the discriminatory conduct create a hostile or offensive work environment before it is actionable prevents Title VII from "expanding into a general civility code." *Oncale*, 523 U.S. at 81. As emphasized in *Meritor* and *Harris*, "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Oncale*, 523 U.S. at 81. The Court explained in *Oncale*, "the prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81. The Court further explained that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or physical acts performed." *Oncale*, 523 U.S. at 81-82, 118 S. Ct. at 1003. Accordingly, "[c]onduct that

is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile and abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21. The Supreme Court has "always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" *Oncale*, 523 U.S. at 81.

¶92 Here, the Court has not considered the "constellation of surrounding circumstances, expectations, and relationships" found at MSU-N and appears again to be fixated on its own opinion that Templeton's conduct was sexually motivated, despite the Hearing Officer's findings to the contrary. From the Hearing Officer's undisputed findings of fact and assessment of witness credibility, we learn that Templeton, a newcomer to Montana and to the small town of Havre and MSU-N, was in charge of weeding out programs of study with low student attendance and which were financially unsupportable. This is not an enviable position as an outsider to be in, which is perhaps why they hired Templeton. MSU-N had been struggling for several years and had hired several provosts over a ten-year period. To say the least, Templeton's taking the proverbial axe to nonproductive programs, and terminating faculty members on yearly contracts with no tenure threatened the livelihoods and careers of many faculty members, including Bachmeier. This is true, particularly, given the small Havre community and the inability to find alternative suitable employment. Being terminated, as Bachmeier testified to, would mean being uprooted and having to relocate his family of seven. These were

circumstances that the Hearing Officer observed firsthand and of which the Court makes absolutely no mention. Indeed, the Hearing Officer found the testimony of many of the witnesses the Court relies upon to lack credibility for the very reason that they disliked Templeton for what she was doing as an administrator. The Hearing Officer noted the toxic environment that originated, not from Templeton's inappropriate touching, but because of major and unpopular changes being initiated by the MSU-N administration and Templeton, as one of its administrators. The Hearing Officer's findings of fact are replete with observations about the expectations, relationships, and circumstances taking place at MSU-N and, indeed, referred to the environment among faculty members as toxic. The Court, however, has not considered *any* of these undisputed findings which are necessary considerations for a hostile work environment claim. Instead, the Court has considered the "shoe on the other foot" standard, Opinion ¶ 47, without consideration of these circumstances, relationships, and expectations. Conveniently, the Court has chosen to fixate on Templeton's touching *alone* and *finds* sexual connotations, even though no witness identified the touching as sexual and the Hearing Officer made findings to the contrary. The surrounding circumstances, relationships, and expectations of other employees, which the Court has not considered, are also relevant to findings related to Pease, who testified that as a result of teasing by his co-workers, he did not feel that he could perform his job as expected. However, the chastising and teasing was perpetrated by MSU-N employees other than Templeton; it was for the Hearing Officer to decide what weight and responsibility to attribute to those behaving inappropriately and those to attribute to Templeton. The Hearing Officer was in the best position to make these findings

and judge the credibility of the witnesses, not the Court. The Court's contrary findings of fact and credibility determinations are inappropriate under the standard of review. *See generally Blaine County.*

¶93 Montana has specifically adopted the definition of actionable sexual harassment set forth in 29 CFR § 1604.11:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Campbell, ¶ 14. The relevant language, here, is the presence of "physical conduct of a sexual nature" which has the "effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The harassing conduct "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale*, 523 U.S. at 80. However, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue *was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of . . . sex*." *Oncale*, 523 U.S. at 80 (emphasis added).

¶94 In *Campbell*, this Court held that to establish a case of hostile environment sexual harassment, four requirements must be met. First, the plaintiff must be a member of a protected class. Second, the plaintiff must show that the offensive conduct amounted to

actual discrimination because of sex; that is, members of one sex are exposed to disadvantageous terms or conditions of employment which members of the other sex are not exposed. Third, the plaintiff must show that the harassment was unwelcome. Finally, the plaintiff must show that the claimed harassment was so severe or pervasive that it altered the conditions of his employment and created an abusive environment. *Campbell*, ¶ 19. "To be sufficiently severe, the working environment must be one that a *reasonable person* would find hostile and abusive, and one that the plaintiff in fact perceived as hostile and abusive." *Beaver*, ¶ 19 (emphasis added). To determine whether the environment is hostile and abusive, the courts are to look at all the circumstances, "including the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Beaver*, ¶ 19.

¶95 In this case, Bachmeier satisfies elements one and three in that he falls into the category of the protected class of "males" and he established that Templeton's touches were unwelcome. However, Bachmeier has not established elements two and four, which, under the facts here, are mixed together. Bachmeier has not established *discrimination*—that he received disadvantageous conditions of employment or that his claim of a hostile work environment (a condition of employment) is objectively reasonable. While Bachmeier, himself, testified that he was fearful of Templeton's touching and unable to work, there was not even a suggestion from other male MSU-N employees who Templeton touched that Templeton's touching created a workplace "heavily charged with [sexual] discrimination." *Meritor*, 477 U.S. at 66. No witness testified to a hostile or offensive

work environment as a result of Templeton's touching—and no witness testified that the touching was of a "sexual nature." *See* 29 CFR § 1604.11. Furthermore, it was undisputed that Templeton touched both males and females. The Court balances its argument on the basis that the touching, although indiscriminate as to male and female, was a "different" touch when done to male MSU-N employees. However, the only witness testifying that Templeton touched males differently from females was Shearer-Cremean, who held ill will towards Templeton and whose testimony the Hearing Officer found, in many ways, not to be credible. Non-discriminatory touching which has no sexual connotations may be highly "inappropriate," as the witnesses here testified to, but it falls outside the reach of Title VII and the MHRA.

¶96 Considering other relevant factors for determining whether the environment was hostile, the record does not establish more than a few instances of touching Bachmeier over a three-year period. Templeton's touching was neither severe nor physically threatening. While all the witnesses testified to the inappropriateness of Templeton's touching, it was only Bachmeier, because of his childhood sexual trauma, who internalized Templeton's touching differently from other male and female MSU-N employees and found it to be severe and unbearable. This is exactly what the Hearing Officer determined when he found (1) that similar touching of other MSU-N employees was not perceived as "unreasonable"; and (2) that Bachmeier's response to the touching was heightened because of his childhood sexual trauma. The HRC found that there was not substantial evidence supporting these findings. However, the Hearing Officer had no evidence to support a finding that a reasonable person would conclude Templeton's touching created a hostile or offensive

work environment, as none of the other MSU-N employees testified to this. Thus, there was substantial evidence supporting the Hearing Officer's conclusion that the touching was not reasonably perceived as creating a hostile work environment. The Hearing Officer did not determine that other MSU-N employees were not touched by Templeton; he only concluded a reasonable person would not perceive the conduct as creating a hostile or offensive work environment.

Standard of Review

¶97 The Court concludes the Hearing Officer's findings of fact in his first decision were not based on substantial evidence and that the District Court erred when it determined the HRC misapplied the standard of review. The Court explains the HRC was correct in rejecting three of the Hearing Officer's findings because the findings were not based on competent substantial evidence. Although § 2-4-704(2), MCA, and our precedent is referred to frequently throughout the Court's Opinion, the Court nonetheless has misapplied the standard of review set forth in § 2-4-704(2), MCA, and rendered a decision contrary to *Blaine County*.

¶98 For purposes of clarity, § 2-4-704(2), MCA, in its entirety, states:

> *The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact*. The court may affirm the decision of the agency or remand for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because: (a) the administrative findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) *clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record*; (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion . . . .

(Emphasis added.) The plain language of the statute allows a "court" to "reverse or modify the decision" of an *agency* if "the administrative findings, inferences, conclusions, or decisions" are, as relevant here, "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ."

¶99 In contrast, § 2-4-621(3), MCA, provides that an agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules made by a hearing officer; however, it may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity that the findings of fact were not based upon competent substantial evidence. Accordingly, the HRC may reject a hearing officer's *findings of fact* only if, upon review of the complete record, the agency determines the findings were not based upon substantial evidence. *Blaine County*, ¶ 25; *see also Schmidt*, ¶ 31 ("Consequently, an agency's rejection or modification of a hearing officer's findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence."). Importantly here, the question on appeal "is not whether there is evidence to support findings *different from those made* by the trier of fact, but whether substantial credible evidence supports the trier's findings." *Schmidt*, ¶ 31 (emphasis added). Substantial evidence "is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *Blaine County*, ¶ 26.

¶100 This distinction and the clarification we provided to the standard of review for agency-related findings was the primary value to our precedent of *Blaine County*. We held

that, under MAPA, an agency may reject a hearing officer's findings of fact "*only if*," upon review of the complete record, the agency first determines that the findings were not based on "*substantial evidence*." *Blaine County*, ¶ 25 (emphasis added). We explained, relying on § 2-4-621(3), MCA, that "an agency in its final order may not reject or modify the hearing officer's findings of fact unless it first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence." If the agency rejects the hearing officer's findings in violation of this substantial evidence standard, it abuses its discretion pursuant to § 2-4-702(2)(a)(vi), MCA. Accordingly, and important to the analysis here, the standard is "*not whether there is evidence to support findings different from those made by the trier of fact*, but whether substantial credible evidence supports the trier's findings." *Schmidt*, ¶ 25 (emphasis added).

¶101 Here, this Court does exactly what *Blaine County* held was wrong when it affirms the HRC's reversal order after the HRC determined there was evidence to support a *different* finding from that made by the Hearing Officer. In *Blaine County*, we held the record contained substantial evidence to support the hearing officer's findings of fact and that the HRC applied the wrong standard of review by concluding the Hearing Officer misapprehended the effect of the evidence. Here, the Court attempts to distinguish *Blaine County* by stating the HRC neither modified the Hearing Officer's findings nor determined that the Hearing Officer "misapprehended the effects of the evidence," and that the HRC supported its determination with multiple citations to the record. Opinion, ¶ 36. Although specific reasons for the rejections are necessary to reverse a finding of fact, the

standard remains the same, despite the Court's gloss, rhetoric, and misconstruction: there must be a lack of substantial evidence to reverse a Hearing Officer's finding of fact. Nonetheless, and in spite of *Blaine County*, this Court concludes the HRC found the "record supported only a contrary finding" and not that the Hearing Officer's findings lacked substantial evidence. Opinion, ¶ 36. Moreover, the HRC, in its Remand Order, specifically reasons that the Hearing Officer's findings are rejected because "the record supports the opposite conclusion" and "the record supports an alternative conclusion."

¶102 Reviewing the rejected findings in detail and in the context of the entire record, I struggle to see how they are not supported by substantial evidence, although other findings leading to different conclusions could be drawn from the same evidence. In my opinion, the District Court correctly understood and remained constrained by the standard of review. Addressing the first disputed finding, the HRC rejected the following: "Whatever the exact frequency of the touching of Bachmeier, similar touching was not perceived as unreasonably intimate and inappropriate by MSU-N employees subjected to it." In support of its rejection of this finding, the HRC cites to portions of the record and holds "the record supports the opposite conclusion." However, in its entirety, the Hearing Officer found that due to Bachmeier's childhood trauma, he may have inadvertently overstated Templeton's touching—specifically, stating that "the touching was of substantial subjective severity for Bachmeier." Thus, Bachmeier perceived the touching in a different manner than the others who testified. The mere fact that other witnesses testified they found the touching to be inappropriate, does not mean that the Hearing Officer's finding that Bachmeier perceived the touching in a different manner was not based on substantial evidence; it only

demonstrates that there could have been a different finding or conclusion, which is not the standard to reverse a Hearing Officer's finding. Based on the evidence before the Hearing Officer, Bachmeier perceived the touching in a different manner than others.

¶103 The HRC rejected a second finding, which stated: "it was Bachmeier alone who found the touching unreasonably interfered with his work performance." The HRC stated the record supports an alternative finding and referenced that most employees found the touching inappropriate. Again, there is no dispute that the touching was inappropriate—the Hearing Officer confirmed that. However, the specific finding attests to Bachmeier's testimony, which illustrates the alterations he made to his work performance, including, using "closed" body language around her, moving his desk into a position where it would be more difficult for her to touch him, avoiding meetings with only her, and moving into a different building and installing a door chime. No other employee testified that Templeton's touching caused such a change in their work performance. The Hearing Officer noted and concluded that because of Bachmeier's childhood trauma the touching may have resulted in those severe adjustments to his work performance. Although other employees testified that they found the touching inappropriate,[2] no other employee testified that the touching caused a severely hostile or offensive work environment as Bachmeier claims. Again, although the finding could have resulted in a different conclusion, this is

[2] The Hearing Officer wrote that other male employees' responses to Templeton's touches ran the gamut from amused indifference through mild annoyance to embarrassed discomfort and on to shame and humiliation. The Hearing Officer also found instances where female employees alluded to inappropriate behavior; specifically, that of Shearer-Cremean's testimony in which she discussed incidents where Templeton used inappropriate and unprofessional language.

not the standard to reverse a Hearing Officer's finding. Based on the evidence before the Hearing Officer, Bachmeier was the only one who found the touching unreasonably interfered with his work performance.

¶104 The HRC rejected a third finding, which stated: "It was not so obviously outrageous that she should reasonably have known it was unwelcome. Once he asked her to stop, she stopped." The HRC stated the finding was rejected because it was not based on competent substantial evidence and the record reflected a history of inappropriate touching. The HRC again, however, noted that the hearing officer's finding was "contrary." However, the Hearing Officer wrote this particular finding in the context of evaluating *Beaver*. He stated the reasoning in *Beaver* applied to Bachmeier. The Hearing Officer found that neither Templeton nor MSU-N knew that Bachmeier was suffering so severely from the touching and once Bachmeier filed the complaint, MSU-N removed Templeton as Bachmeier's supervisor. This Court, as did the HRC, concludes the record reflects that Templeton's touching of Bachmeier continued following his request that it stop. *See* Opinion, ¶ 39. However, the Hearing Officer, in the context of *Beaver*, addressed this and clarified that "an anonymous request to direct the provost to stop her inappropriate touching, with no formal complaint of inappropriate touching submitted through the established channels for complaints of sexual harassment, simply was not sufficient notice to require sooner action by MSU-N." Regardless, as I would conclude there was no objective evidence establishing an offensive or hostile work environment, it is of no consequence that Templeton or MSU-N took immediate corrective action once they received notice of Bachmeier's claim.

¶105 I concur with the Court's resolution of Bachmeier's retaliation claims, but would conclude that Bachmeier has not proven his claim of sexual harassment.

/S/ LAURIE McKINNON