

1 (1992), *accord Kovarik v. Kovarik*, 1998 MT 33, ¶ 20, 287 Mont. 350, ¶ 20, 954 P.2d 1147, ¶
2 20.

3 Conclusions of Law nos. 2-5 are incorrect and not supported by the evidence in the
4 record. Findings of Fact nos. 37, 40 and 43 must be rejected because they are not supported by
5 substantial credible evidence in the record. Finding of Fact no. 36 must be rejected as it not
6 only states an incorrect Conclusions of Law but also is not supported by substantial credible
7 evidence in the record and is clearly erroneous.

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9 Specifically, the Commission concludes, based on a review of the complete record and
10 upon hearing the arguments of both parties, as follows:

11 1. Respondent did not discriminate against Charging Party on the basis of sex. The record
12 is devoid of evidence of legally significant discrimination based on Charging Party's status as a
13 woman. Although some of the Findings of Fact, such as 8, 9, 17, and 23, suggest that Charging
14 Party encountered tension, rudeness, lack of cooperation and other difficulties in her
15 employment, these Findings indicate difficulties of an individualized, personal nature and do
16 not rise to the level of pervasive and discriminatory behavior targeted at gender, particularly
17 when the experience of another woman in the shop was generally positive. In fact, Findings of
18 Fact nos. 4 and 22 show that Lee Bridges, also female, qualified for admission into the sheet
19 metal workers' apprenticeship training program in Montana, worked for Respondent, and did
20 not experience any discrimination. Further, Bridges' testimony at pages 246-259 of the hearing
21 transcript clearly stated that she had no problems with her employment at Respondent's
22 workplace.

23 Evidence in the record suggests that Charging Party was treated fairly and evaluated
24 accurately based on her job performance. Findings of Fact nos. 15 and 19 show Charging Party
25 received both negative and positive evaluations from Respondent, and Finding of Fact no. 34
26 shows she also received mixed evaluations from other employers. Exhibits 1-4, 6 and 7

1 accurately describe that Charging Party had both strengths and weaknesses as an apprentice
2 sheet metal worker.

3 Respondent appropriately addressed Charging Party's complaints of a hostile workplace
4 environment and investigated her allegations of sexual harassment. Each time Charging Party
5 had an issue with the behavior of other employees, Respondent took appropriate action.
6 Findings of Fact nos. 10, 11, 24 and 25, plus the testimony in the record of Jeffrey Gordon,
7 provide substantial credible evidence that Respondent took steps to investigate and respond to
8 Charging Party's complaints, including those outlined in Findings of Fact nos. 10, 11 and 23.
9 Finding of Fact no. 20 shows that Respondent also developed, circulated and implemented an
10 anti-discrimination policy for the corporation, clearly taking steps to remediate any current or
11 potential difficulties.

12 Therefore, substantial credible evidence in the record supports a conclusion that
13 Respondent did not treat female sheet metal apprentices as a group in a discriminatory fashion.
14 The hearing examiner's finding of discrimination based on sex is clearly erroneous because the
15 hearing examiner misapprehended the effect of the evidence and, even when the evidence has
16 not been misapprehended, a review of the complete record leaves the Commission with the
17 definite and firm conviction that a mistake has been committed.

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19 2. Respondent did not discriminate on the basis of disability. There is no discrimination
20 when the nature or extent of a disability reasonably precludes the performance of a particular
21 employment. MCA 49-4-101. The record is devoid of evidence of discrimination based on
22 Charging Party's dyslexia, and in fact shows that Respondent went out of the way to
23 accommodate her. Charging Party was still not able to perform essential job functions even
24 with reasonable accommodation, and her job performance could endanger the health or safety
25 of herself or others. *See* MCA 49-2-101 (19)(b).

1 Finding of Fact no. 8 shows that Charging Party did not initially tell her employer about
2 her dyslexia. Findings of Fact nos. 9 and 21 show that after Charging Party revealed her
3 dyslexia, Respondent made all of the accommodations she requested. Findings of Fact nos. 13,
4 22, 31, and 34 show that Charging Party was given generous extensions of training time, extra
5 help and other assistance which was beyond “reasonable.” Findings of Fact nos. 15, 19, 30, 31,
6 and 34 indicate that Charging Party, even with all requested accommodations, had trouble
7 grasping essential concepts and performing the work involved. Finding of Fact no. 19 indicates
8 that Charging Party could not perform essential job functions such as heavy lifting and that she
9 lacked motivation. Findings of Fact nos. 15, 19 and 30 reveal that she received some positive
10 but also many consistently negative job evaluations from Respondent. Finding of Fact no. 34
11 indicates that other employers gave Charging Party both positive and negative performance
12 reviews, but that her poor performance required an extension of her apprenticeship, even
13 though she was working for other sheet metal contractors. Further, exhibits 1-4, 6, and 7, as
14 well as the testimony in the record clearly indicates that Charging Party had difficulty
15 performing essential job functions.

16 Therefore, the hearing examiner’s finding of discrimination based on disability is
17 clearly erroneous because the hearing examiner misapprehended the effect of the evidence and,
18 even when the evidence has not been misapprehended, the Commission has a definite and firm
19 conviction that a mistake has been committed.

20 3. The Commission rejects Finding of Fact no. 36 on the grounds that such finding, stating
21 that Respondent discriminated against Charging Party, is clearly erroneous because it is not
22 supported by substantial credible evidence in the record. In addition, Finding of Fact no. 36
23 actually states a Conclusion of Law, and under that standard is also incorrect and contrary to
24 the evidence in the record.

25 4. The Commission rejects Finding of Fact no. 37 because the hearing examiner
26 misapprehended the effect of the evidence when concluding that Respondent’s negative reports

1 and her negative performance evaluations were “unfair” and that her treatment by Respondent
2 was “disparate.” There is ample evidence in the record that Charging Party was given multiple
3 opportunities to improve her job performance and that the only disparity in her treatment was
4 the additional assistance, time and consideration given her to gain the skills required in her
5 apprenticeship program.

6 5. The Commission accepts the reasonable earning capacity calculations in Finding of Fact
7 no. 40, but otherwise rejects this Finding because there is not substantial credible evidence in
8 the record to support the statement that the Respondent’s acts were discriminatory or that
9 Charging Party’s failure to earn these wages was because of discrimination by Respondent.

10 6. The Commission rejects Finding of Fact no. 43 in its entirety. After a review of the
11 complete record, the Commission finds that there is no substantial credible evidence in the
12 record to support the existence of either discriminatory conduct; and, because Respondent
13 already took numerous steps to address Charging Party’s complaints, including the creation,
14 circulation and enforcement of an anti-discrimination policy, there is no risk of recurrence.

15 7. The Commission rejects Conclusions of Law nos. 2 through 5 in the Final Agency
16 Decision as incorrect and contrary to the evidence in the record.

17 The Commission rejects Conclusion of Law no. 2 because the Commission finds, based
18 on a review of the complete record, that Respondent did not illegally discriminate against
19 Charging Party. The Commission rejects Conclusion of Law because the Commission finds
20 no illegal discrimination and thus Respondent was not the proximate cause of Charging Party’s
21 delay in obtaining journeyman sheet metal worker certification, nor was Respondent liable for
22 wages theoretically available if Charging Party had completed such certification. The
23 Commission rejects Conclusions of Law nos. 4 and 5 because no injunctive or affirmative
24 relief is mandated in absence of illegal discrimination.

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1 THEREFORE, the Human Rights Commission REVERSES AND VACATES the Final
2 Agency Decision and ORDERS dismissal of the complaint in accordance with the provisions
3 of MCA 49-2-507. The Commission specifically finds that Respondent DID NOT illegally
4 discriminate against Charging Party on the basis of sex (female) or disability (dyslexia);
5 specifically rejects Findings of Fact 36, 37, 40, and 43 on the grounds noted *supra*; and
6 specifically rejects Conclusions of Law 2-5 as incorrect and not supported by the evidence in
7 the record.

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9 The parties are advised that Charging Party has 90 days after receipt of this order to file
10 a civil action in district court to seek appropriate relief. MCA 49-2-509(5). If Charging Party
11 fails to file a civil action in the district court within that 90-day period, claims under the
12 Montana Human Rights Act as stated in the above-captioned complaint will be barred.

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14 IT IS HEREBY ORDERED that Charging Party's complaint is DISMISSED, that the
15 Final Agency Decision is REVERSED and VACATED, and Charging Party's Cross-Appeal is
16 DISMISSED as moot due to the Commission's Reversal of the Final Agency Decision.

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18 Dated this _____ day of August, 2002.

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Gary Hindoien, Chair,
Montana Human Rights Commission

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the foregoing was served to the following persons via US Mail, postage prepaid, on the _____ day of August, 2002.

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