

**BEFORE THE HUMAN RIGHTS COMMISSION
of the State of Montana**

Michael Laudert,)	
)	
Charging party,)	
)	HRC No. 9301005424
versus)	
)	ORDER
Richland County Sheriff Department,)	
)	
Respondent.)	

FINAL ORDER

This matter came before the Human Rights Commission at its regularly scheduled meeting on November 17, 1997, for purposes of review of the decision of the hearing examiner entered March 3, 1997, and on the exceptions to that decision filed by the charging party. The Hearing Examiner's Decision in this case is attached hereto and incorporated herein by reference.

At the hearing on exceptions, the Commissioners acknowledged for the record that each had reviewed the contested case record as agreed by the parties. Attorneys Barbara Bell and June Lord appeared on behalf of the charging party and argued in support of the exceptions. Attorney Virginia Bryan appeared on behalf

of the respondent and argued in opposition to the exceptions. At the conclusion of the oral arguments, the record was closed and deliberations were held by the Commissioners.

SUMMARY OF THE HEARING EXAMINER'S DECISION

The hearing examiner determined that Michael Laudert (Laudert) established by direct evidence at the hearing that the Richland County Sheriff Department (RCSD or Richland County) considered Laudert's physical disability (liver disease) in the process of selecting and hiring for a deputy sheriff position for which Laudert had applied. The hearing examiner further determined that RCSD's consideration of Laudert's disability during the hiring process was in violation of Section 49-2-303, M.C.A. RCSD did not hire Laudert for the position.

Having found that charging party's disability was a significant consideration in the decision by respondent not to hire Laudert, the hearing examiner determined that, in order to avoid liability to Laudert for compensatory damages, Richland County had the burden of proving by a preponderance of the evidence that RCSD would have made the same decision not to hire Laudert even if the disability had not been given any consideration whatsoever. The hearing examiner concluded that Richland County met its burden in that regard and proved at the hearing that it would not have hired Laudert even if the disability had been given no consideration. Based on the conclusion that Laudert would not have been hired even in the absence

of any consideration of his disability, the hearing examiner further concluded that charging party was not entitled to back pay or other compensatory damages pursuant to Section 49-2-506(1)(b), M.C.A. In accordance with Section 49-2-506(1)(a), M.C.A., the hearing examiner did order Richland County to refrain from any further discriminatory considerations in its hiring practices and to adopt certain hiring procedures to minimize the likelihood of any further violations of the Human Rights Act.

RULINGS ON THE EXCEPTIONS FILED BY CHARGING PARTY

Respondent filed no exceptions to the decision of the hearing examiner.

Charging party filed two exceptions contending that:

(1) "the hearing examiner had erred in failing to impose the proper burden of proof on Richland County in its affirmative defense that in spite of discrimination, they would have not hired Laudert for other legitimate reasons;" and,

(2) "the hearing examiner had erred in determining that Montana law would not allow damages in this case."

Relying primarily on the case of Nanty v. Barrows, Co., 660 F.2d 1337 (9th Cir. 1981), charging party contended that once consideration of a discriminatory factor during the hiring process was proven, respondent was obliged to prove by "clear and convincing" evidence that it would have made the same hiring decision based on nondiscriminatory factors. Commissioner Stevenson noted that in the recent case of O'Day v. McDonnell Douglas Helicopters, Inc., 79 F.3d 756 (9th

Cir. 1996), the Ninth Circuit Court of Appeals expressly overruled its *Nanty* decision with respect to the burden of proof standard. The Court in the *O'Day* case held that:

Taken together, *Price Waterhouse [v. Hopkins]*, 109 S.Ct. 1775 (1989)] and the Civil Rights Act of 1991 stand squarely for the proposition that an employer may limit an employee's remedy if it shows by *a preponderance of the evidence* that it would have made the same decision apart from an illegal motive. On the standard of proof issue, *Nanty* has therefore been overruled.

O'Day, 79 F.3d at 760 [emphasis added].

On motion made and seconded, the Commission decided by unanimous vote to overrule the exception of the charging party contending that the hearing examiner had erred in requiring the respondent to prove by a preponderance of the evidence, rather than by clear and convincing evidence, that RCSD would have made the same decision not to hire Laudert as a deputy sheriff apart from any illegal motive.

In his second exception to the hearing examiner's decision, Laudert contended that the hearing examiner erred by failing to award charging party compensatory damages in the amount of \$196,000 pursuant to Section 49-4-102, M.C.A., which provides that

A person who practices discrimination in violation of 49-4-101 [denial of employment opportunity based on disability] commits a misdemeanor and is also liable in a district court action for civil damages and attorney's fees by the person discriminated against.

Charging party argued that entitlement to the requested award of damages was based on a theory that Section 49-4-102 imposed a "strict liability" upon Richland County entitling him to any damages he requested once a violation of the Human Rights Act was proven.

Based on the record of the contested case, the conclusion of the hearing examiner that respondent proved by a preponderance of the evidence that it would not have hired Laudert for the position even if no consideration had been given to his disability and the absence of any citation by charging party to any clear legal authority supporting his theory regarding the application of Section 49-4-102, the Commission determined that the second exception of the charging party to the hearing examiner's decision was without legal basis. On motion made and seconded, the Commission decided by unanimous vote to overrule the second exception of the charging party contending that the hearing examiner had erred in determining that charging party failed to establish entitlement to an award of compensatory damages in this case as a matter of Montana law.

CONCLUSION

The exceptions of the charging party to the hearing examiner's decision having been overruled by unanimous vote of the Commission and no other exceptions having been filed contesting any finding of fact or conclusion of law in the decision of the hearing examiner, the Commission decided, upon motion made

and seconded and by unanimous vote, to adopt the hearing examiner's decision as the final order in this case.

Pursuant to the foregoing, IT IS ORDERED that the hearing examiner's decision, attached hereto and incorporated herein, is hereby adopted as the final order in the above entitled case.

Done and dated this 20th day of November, 1997.



Gloria "Patt" Etchart, Chair, Montana Human Rights Commission

Certificate of Service

The undersigned member of the State of Montana, Department of Labor & Industry, Human Rights Bureau staff, certifies that a true and accurate copy of the foregoing Order dated November 20, 1997, and attachment were served upon the persons named below by means of first class mail, postage prepaid, on the 26th day of November, 1997.

Barbara Bell, Attorney for charging party, Liberty Center #303, 9 Third Street North, Great Falls, Montana 59401; E. June Lord, Attorney for charging party, 600 Central Plaza, Suite 424, Great Falls, Montana 59401; Virginia Bryan, Attorney for respondent, Post Office Box 1977, Billings, Montana 59103.

