BEFORE THE MONTANA DEPARTMENT

OF LABOR AND INDUSTRY

	(	Human Rights Act Case No. 9801008296
Robert W. Butterfield,	(	
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Charging Party,	(	*Final Agency Decision*
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versus	(	
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Sidney Public Schools,	(	
	(	
Respondent.	(	

I. Procedure and Preliminary Matters

Robert W. Butterfield filed a complaint with the Department of Labor and Industry on September 3, 1997. He alleged the Sidney Public Schools)"the district"(discriminated against him because of his disability)back condition(when it would not let him return to his custodial position in the Middle School in July and August of 1997. The department appointed Terry Spear as hearing examiner.

The contested case hearing convened on August 20, 1998, in Sidney, Montana. Butterfield attended with counsel Marvin Howe)Schneider, Howe & Batterman, P.C.(. Douglas W. Sullivan, superintendent, attended as the district's designated representative, with counsel Kent K. Koolen)Moulton, Bellingham, Longo & Mather, P.C.(. The hearing examiner excluded witnesses on Butterfield's motion. Butterfield, Sullivan, William Nankivel and Kenneth Vanatta testified during hearing. The hearing examiner admitted Butterfield's Exhibits 1 through 13 and the district's exhibits 201-222 into evidence in accord with the stipulation of the parties.

Butterfield filed his proposed decision on September 22, 1998. The district filed its proposed decision on October 22, 1998. Butterfield filed his reply on November 4, 1998. The school filed a notice of additional authority on December 8, 1998. Butterfield filed his reply to the notice of additional authority on December 14, 1998.

II. Issues

The essential issue is whether the district discriminated against Butterfield by reason of his disability by failing to perform an independent assessment to determine whether actual undue hardship to the district would result from an accommodation. The final prehearing order contains a full statement of issues)August 18, 1998(.

III. Findings of Fact

1. The Sidney Public Schools hired Robert W. Butterfield as a school custodian on August 28, 1995. His job description required that he be able to lift and carry heavy objects and equipment. The district did not require Butterfield to take a physical examination during or after this hiring process. Testimony of Butterfield and Sullivan; Final Prehearing Order, Uncontested Fact No. 1; Exhibits 9 and 201.

2. In April 1996, Butterfield hurt his back in an auto accident. He was off work until June 1996. He returned to work when his doctor released him. He did not provide a written release to the district before returning. He continued to have problems with his back, but he was able to perform his job satisfactorily by reducing the amount of heavy lifting he did himself. Testimony of Butterfield; Exhibit 219.

3. On July 8, 1996, Butterfield submitted a worker's compensation form reporting that he had injured his low back at work on July 1, 1996, while cleaning under the bleachers. Butterfield's doctor, Donald A. Cooper, recommended that Butterfield remain off duty until his condition improved. Butterfield relayed this information to Douglas Sullivan, the district's superintendent. Sullivan told Butterfield he could return to his job when his doctor released him. Testimony of Butterfield and Sullivan; Final Prehearing Order, Uncontested Fact No. 2; Exhibit 202.

4. Butterfield began physical therapy, on a referral from Dr. Cooper. He abbreviated his physical therapy, stopping before he had completed the prescribed number of sessions. He still had complaints, but in August 1996 his therapist considered him ready to return to work with good pain management. However, Dr. Cooper referred Butterfield to a neurologist, Dr. Peterson. Dr. Peterson found no indications of any nerve root irritation and recommended stretching exercises. Butterfield remained off work. Testimony of Butterfield; Exhibits 5, 8 and 217.

5. The district's workers' compensation insurer referred Butterfield to Dr. Shaw for an evaluation in November 1996. Dr. Shaw found that Butterfield had suffered from chronic back problems for nearly 20 years, since an initial back injury in 1978. According to Dr. Shaw, any increased problems resulting from the July 1, 1996, injury at the school had stabilized and reached maximum healing.

According to Dr. Shaw, Butterfield reported that he did not believe he could do the work he had been doing for the district. However, Dr. Shaw did not think that Butterfield had any restrictions greater than those under which he had worked successfully for the district before the July 1, 1996 accident. Exhibits 3 and 219.

6. Butterfield continued to treat with Dr. Cooper, and with a local orthopedic surgeon, Dr. Ben-Youssef. Dr. Ben-Youssef concluded, in May 1996, that Butterfield probably would not be able to return to his job. Dr. Cooper did not release Butterfield to return to work until June of 1997. Testimony of Butterfield; Exhibits 1, 2, 220 and 221.

7. By letter dated February 28, 1997, Sullivan told Butterfield he was placing him on leave under the Family Medical Leave Act, for up to the maximum of 12 weeks required under the Act. The letter asked him to present verification from his treating physician upon returning to work, releasing him to resume the full responsibilities of his position. Butterfield's FMLA leave expired on May 20, 1997, but he remained off work. On June 23, 1997, Sullivan sent Butterfield a letter requesting written notification from the treating physician that Butterfield either could or could not now return to work, or a written resignation. The district gave Butterfield until July 8, 1997, to respond to the letter, or stated that it would proceed to fill his position. Testimony of Butterfield and Sullivan; Final Prehearing Order, Uncontested Fact No. 3; Exhibits 10, 205 and 206.

8. Butterfield believed he could return to work. He asked Dr. Cooper for a release. On June 24, 1997, Dr. Cooper gave Butterfield a work release that restricted Butterfield to no heavy lifting, limited back movement and limited use of his left shoulder. Butterfield provided this release to the district. Testimony of Butterfield; Exhibit 207.

9. Butterfield believed that the district wanted releases from both Dr. Cooper and Dr. Ben-Youssef. On July 1, 1997, he obtained a release from Dr. Ben-Youssef, also restricting him from heavy lifting, from lifting with his left shoulder and to light duty back movement. Butterfield also provided this release to the district. Testimony of Butterfield and Sullivan; Exhibit 208.

10. Sullivan reviewed the releases. He had no access to any other medical records in early August 1997. Sullivan believed he knew the custodian job well enough to ascertain whether Butterfield could perform the work within the physicians' restrictions. Sullivan did not consult with any rehabilitation specialist or with the other custodians in the district. He consulted legal counsel. Sullivan concluded Butterfield could not perform the essential functions of his job within the physicians' restrictions. He did not consider any accommodations for Butterfield. He believed the district could not hire all custodians unable to do heavy lifting, so he did not consider allowing Butterfield to return to work with no heavy lifting. Sullivan did not really consider whether Butterfield would be at risk of harm if he returned to work with the restrictions; he only considered whether Butterfield could perform every task on the job description with the restrictions. Testimony of Sullivan; Exhibits 9 and 201.

11. Butterfield met with Sullivan. Butterfield said he could do his job with the restrictions. Sullivan said Butterfield could not do the job with the restrictions. Sullivan drafted a letter stating the district's positions. He gave the letter to Butterfield, who signed it to acknowledge receipt. The letter said that the district believed Butterfield could not do his job with the restrictions. The letter further stated the district was not aware of any accommodation that would permit Butterfield to do his job with the restrictions. By that letter, the district considered Butterfield to be resigning effective July 18, 1997. Testimony of Butterfield and Sullivan; Exhibits 11 and 209.

12. Butterfield still believed he could do his job. He was not willing to resign. He went back to Dr. Ben-Yousseff's office and obtained a release)written by a nurse(limiting him to lifting 50 pounds or less. Sullivan refused to consider a release signed by a nurse. Sullivan asserted that because the nurse's release came after the July 18, 1997, deadline, the district still classified Butterfield as having resigned. Sullivan offered Butterfield until August 1, 1997, to provide verification that he could do his job. Butterfield went back to Dr. Ben-Yousseff and obtained a letter releasing him to his custodian's job with no restrictions. Butterfield went back to Dr. Cooper and got a modified release with the same restrictions as before, except that the "no heavy lifting" was specified as "over approximately 50 pounds." Butterfield obtained

both releases before August 1. Testimony of Butterfield; Exhibits 1, 2, 12, 210, 211, 212 and 213.

13. Butterfield delivered these final releases to the school. Sullivan told Butterfield the releases were insufficient, and that the district still believed he could not perform the essential functions of his job. Butterfield said he could perform his job within the restrictions. Sullivan then wrote another letter, informing Butterfield that the most recent releases still did not satisfy the district that Butterfield could perform his job. Sullivan went on to state that he would recommend that the board of trustees accept Butterfield's "resignation." Testimony of Butterfield and Sullivan; Exhibits 13 and 215.

14. Sullivan knew that the custodian job required the ability to lift and carry heavy objects and equipment. He correctly believed, based upon his experience as superintendent, that removal of garbage, unloading equipment and supplies and moving furniture would sometimes require lifting more than 50 pounds, and sometimes require more than limited use of the back and left shoulder. Sullivan did not determine whether one of the custodians could perform full-time work without lifting more than 50 pounds and without making more than limited use of the back and left shoulder. The district had never provided such an accommodation to a custodian on a full-time basis. Sullivan also did not consider whether the differences between Dr. Ben-Yousseff's full release and the continuing limitations in Dr. Cooper's release raised questions about how limited Butterfield's capacity truly was. Testimony of Sullivan, Nankivel and Vanatta.

15. Butterfield incurred no actual losses from losing the district's medical insurance coverage. Testimony of Butterfield.

16. Butterfield has limited his pursuit of work since the district ended his employment. He has failed and refused to seek work beyond the minimal requirements of Unemployment Insurance, and has ignored most minimum wage jobs. He has not limited his job search because of a greater family financial need than a minimum wage job provides. His spouse works. Butterfield lacks a high school diploma and has limited transferrable skills. His employment record before obtaining work with the district is spotty. Testimony of Butterfield.

17. Butterfield would have earned, from August 1997 through the present, $7.85 per hour for 40 hours per week, or $314.00 per week. To date)March 18, 1999(, Butterfield has lost wages for 85 weeks, for a total loss of $26,690.00. He has the ability to earn at least a minimum wage at least half of the time. Thus, his actual loss to date, offsetting for that earning capacity, is $17,340.00)$26,690.00 minus [$5.50 per hour times 40 hours times 42.5 weeks](.

18. Butterfield would have continued to work for the district until August 1, 1999. Beyond that date, his chronic back problems make prolonged employment with the district speculative, despite his avowed desire and intent to remain. Testimony of Butterfield.

19. Butterfield will continue to lose $314.00 per week, less $220.00 for every other week, for a period extending until August 1, 1999, for a total future loss of $3,834.34)$314 times 19.286 weeks minus $220.00 times 9.643 weeks(.

20. Through March 18, 1999, interest on Butterfield's lost wages, at 10% simple annual interest, accruing monthly, amounts to $1,413.13)$17,340.00 times 10%, divided by 2, divided by 365, times 595 days(.

21. Butterfield could not understand why the district refused to allow him to try to return to work. Therefore, he suffered frustration and emotional distress for which he is entitled to recover $5,000.00 from the district. Testimony of Butterfield.

IV. Opinion

Montana law prohibits employers from discriminating against employees based on disability. §49-2-303)1()a(MCA. Discrimination because of disability includes failure to make reasonable accommodation. An accommodation is not reasonable if it involves undue hardship to the employer. §49-2-101)19()b(MCA.

Physical disability can mean any of three things. It can mean a physical or mental impairment that substantially limits one or more of a person's major life activities. It can also mean a record of such impairment. Finally, it can also mean a condition regarded as such impairment. §49-2-101)19()a(MCA. Both parties argue

"disability" from *Hafner v. Conoco, Inc.*, 268 Mont. 396, 886 P.2d 947)1994(. A more recent decision defines the inquiry:

> A person is entitled to the protections of the Act not only if he or she suffers from a substantially limiting impairment, but also if he or she suffers from "a condition regarded as such an impairment." Section 49-2- 101)19()a()iii(, MCA. Congress added the "regarded as" provision to the ADA to recognize that individuals have historically suffered discrimination "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. s 12101)a()7(. High blood pressure is an example of such a perceived disability:
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> > [S]uppose that an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled. EEOC Interpretive Guidelines, 29 C.F.R. s 1630.2)l( )1995(.
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> *Reeves v. Dairy Queen*, 287 Mont. 196, 953 P.2d 703, 709)1998(.

The district removed Butterfield from work because of limitations his doctors imposed. On the facts of this case, Butterfield suffered from a condition regarded as a substantially limiting impairment by the district. Indeed, for a worker with a limited education and a spotty work history, the restrictions Butterfield brought to his employer in July 1996 could and did result in a substantial limitation of his employment. Butterfield was disabled.

The district disputed Butterfield's disability, but did not dispute that his limitations were the reason it removed him from employment. There was no real dispute about the reason why the district ended Butterfield's employment. The limits upon his activities resulting from his chronic back problems cost him his job. There is no genuine dispute about why the district took adverse action against Butterfield. When, as here, the employer believes an employee expressly willing to continue work is unable to work, the employer must support that belief through an independent investigation. *Reeves*, ***supra***, 953 P.2d at 711.

The federal regulations adopted pursuant to the Americans with Disabilities Act)ADA(provide suggested procedures for compliance with the reasonable accommodation requirement, following the statute itself. 42 U.S.C. §12111)9()b(.

A suggested procedure for engaging in reasonable accommodation instructs that the employer should:

1. analyze the particular job involved and determine its purpose and essential functions;

2. consult with the individual with a disability to ascertain the precise job-related limitations imposed by an individual's disability and how those limitations could be overcome with reasonable accommodation;

3. in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

4. consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employer and employee.

29 C.F.R. §1630.9

Similarly, the ADA Technical Assistance Manual provides the factors used to determine whether a particular job function)which an employee with a disability is unable to perform in the normal fashion(is an essential function. An employee precluded from performing essential functions by a disability is at much more risk of discharge, so this is a critical factor. According to 29 C.F.R. §1630.2)n(, factors to be used to resolve a controversy about whether a particular job function is "essential" are:

1. Whether the position exists to perform a specific function)for example, a position of proofreader cannot be modified to accommodate a blind person(;

2. The number of other employees available to perform the specific job function or among whom the job function can be distributed)the trier of fact can consider evidence of peak demand periods for the particular function(;

3. The degree of skill or expertise required to perform the specific task; and

4. The amount of time spent performing the specific task generally.

The district had almost all the information it needed. However, it did not undertake an inquiry into the differences between Dr. Ben-Yousseff's full release of Butterfield, and Dr. Cooper's limited release. The district likewise never undertook an inquiry of whether one member of its custodial staff could work full-time within the restrictions Dr. Cooper imposed. The district's witnesses disagreed about how much time was involved in heavy lifting. The district's witnesses were not entirely credible in their conclusions about what was required to perform the custodian's job. Butterfield's prior job performance established that he could perform the job with)according first to Dr. Shaw and then to Dr. Ben-Yousseff(the same restrictions he had in August 1997.

In failing to investigate the apparent conflict between Dr. Ben-Yousseff's release and Dr. Cooper's release, and in failing to investigate the possible accommodation of Butterfield within Dr. Cooper's limitations, the district failed to follow the law. As of August 1, 1997, the district's failures render it liable for the losses Butterfield suffered.

Butterfield argued for future lost wages)front pay(for "another year" after hearing. "Charging Party's Proposed Findings of Fact, Conclusions of Law and Order," p. 20, par. 8. Given his chronic back problems, this limitation is reasonable, interpreted as a request for damages for two years from the date liability commenced, including back pay and front pay, in order to rectify the pecuniary harm Butterfield suffered because of the district's failures. §49-2-506)1()b(MCA.

The victim of illegal discrimination at work must make reasonable efforts to mitigate damages by seeking another job. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231)1982(. The respondent must prove a mitigation defense by at least a preponderance of the evidence. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523)1989(; *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132)1987(. Butterfield need not seek all possible employment opportunities. He may exercise reasonable discretion in

pursuing offers of work, but he must pursue other work with reasonable diligence. Factors such as comparable wages and whether charging party can live on the wages for available positions are pertinent. *Ford Motor Co.*, ***supra***, 458 U.S. at 231; ***accord***, *Hullett v. Bozeman School Dist. #7*, ***supra***.

The district has proved that Butterfield has failed to seek other jobs with reasonable diligence. Butterfield does not need comparable wages to survive. His family has other means of financial support. Butterfield has disregarded areas of potential employment because they do not interest him, not because he is unsuited, overqualified or otherwise above the jobs involved. Mitigation appropriately reduces recovery here.

Mitigation still leaves Butterfield with a right to recover. Had he exercised due diligence in mitigating his damages, the evidence only shows that he might have found minimum wage jobs for some of the period of time he could have continued to work for the district. In order to rectify the harm actually resulting from the district's illegal discrimination, a reduced recovery is still appropriate. §49-2-506)1()b(MCA.

Pre-judgment interest is properly part of an award to compensate for lost income. *P. W. Berry Co.* at 183, 779 P.2d at 523; *Foss v. J.B. Junk*, Case No. SE84-2345)Montana Human Rights Commission, 1987(.

The power and duty to award money for emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596)Mont. 1993(. Butterfield's testimony proved his distress. Once a claimant proves violation of civil rights statutes, the claimant can recover for emotional harm that occurred as a result of the respondent's unlawful conduct.[1] The claimant's testimony alone can establish compensable emotional harm from a civil rights violation, *Johnson v. Hale*,

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[1] *Carey v. Piphus*, 435 U.S. 247, 264, at footnote 20)1978(; *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225)D.C. Cir. 1984(; *Seaton v. Sky Realty Company*, 491 F.2d 634)7th Cir. 1974(; *Brown v. Trustees of Boston Univ.*, 674 F.Supp. 393)D.C.Mass. 1987(; *Portland v. Bur. Labor & Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475)1984(; *Hy-Vee Food Stores v. Iowa Civ.Rights Comm.*, 453 N.W.2d 512, 525)Iowa, 1990(.

942 F.2d 1192)9th Cir. 1991(. The trier of fact can infer that the emotional harm did result from the illegal discrimination.[2]

V. Conclusions of Law

1 The Department has jurisdiction over this case. §49-2-509)7(MCA.

2 Respondent Sidney Public Schools unlawfully discriminated in employment by refusing charging party Robert W. Butterfield accommodation for his physical disability from August 1, 1997, refusing to return him to his job. §49-2-303)a(MCA.

3 Pursuant to §49-2-506)1()b(MCA, Butterfield is entitled to the sum of $21,174.34 for past and future lost wages. Prejudgment interest as of March 18, 1999 is $1,413.13. Butterfield is also entitled to the sum of $5,000.00 for emotional distress.

4 Affirmative relief is necessary in this case. §49-2-506)1()a(MCA. Sidney Public Schools must refrain from engaging in any further unlawful discriminatory practices. Within 60 days of this decision, Sidney Public Schools must submit to the Human Rights Bureau a proposed written policy by which it will hereafter engage in an independent assessment of the hardship an accommodation would involve, taking into account the circumstances and particular disability of the individual employee, all relevant information regarding the work and medical history of the individual employee, the possibility of modification of job duties, the cost of modification of job duties and the difficulty of modification of job duties, before taking adverse employment action regarding accommodation. Within 60 days after Human Rights Bureau approval of the proposed policy, Sidney Public Schools must adopt the policy)with any suggested modifications(and file written proof with the Human Rights Bureau that it has adopted and is implementing the policy. Sidney Public Schools must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as an employer.

5 For purposes of §49-2-505)4(, MCA, Butterfield is the prevailing party.

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[2] *Carter*, ***supra***; *Seaton*, ***supra***; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172)1985(; *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, ***rev. denied***, 287 Ore. 129)1979(; *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314)1970(.

VI. Order

1 Judgment is found in favor of Robert W. Butterfield and against Sidney Public Schools on the charge of illegal discrimination in employment because of disability.

2 Sidney Public Schools is ordered to pay Robert W. Butterfield the sum of $27,587.47.

3 Sidney Public Schools is enjoined from further discriminatory acts and ordered to comply with the provisions of Conclusion of Law No. 4.

Dated: March 18, 1999.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry