

examiner made part of the record and viewed. Kluesner filed the final post-hearing memorandum from either party on April 14, 1999 and the case was submitted for decision.

II. Issues

The legal issues in this case are whether the school unlawfully discriminated or retaliated against Kluesner when it denied her reinstatement and whether the Commission has jurisdiction over the retaliation claim. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. St. Matthew's School is a Roman Catholic elementary school in Kalispell, Montana. The school operates as an ecclesiastical "juridic person" according to the Code of Canon Law of the Roman Catholic Church with a local board under the Roman Catholic Bishop of Helena. Final Prehearing Order, IV. Facts and Other Matters Admitted.

2. In operating as an ecclesiastical "juridic person," the school entered into contracts and otherwise operated as an ostensible entity ("roughly a corporation") responsible at law for its acts and omissions. Teacher contracts typically contained the signatures of the teacher, the principal of the school, the school board president and a St. Matthew's Parish priest. Exhibits 7 and 13; testimony of Fr. John W. Robertson. Diocesan Chancellor and Judicial Vicar.

3. Kluesner worked at the school as a teacher. The 1993-94 school year was her twelfth year teaching at the school. She was a certified accredited elementary school teacher. Testimony of Kluesner.

4. During the 1993-94 school year, conflicts between Kluesner and other teachers resulted in Sister Peggy Murphy, the principal, calling in a mediator. This fueled an existing conflict between Kluesner and Sister Murphy, resulting in both parties filing grievances that Fr. Mike O'Neil (a St. Matthew's Parish priest and pastor) attempted to reconcile. During that process, Kluesner involved an attorney, who ultimately became her lawyer in this case (see Exhibit 19, page 1, 2nd paragraph, "Father Mike advised me in March 1994 that Eileen and Sister Peggy were in the first stage of the due process procedure of the Diocese.") Exhibits 2-6 and 19; testimony of Kluesner and Sister Murphy.

5. Before the 1993-94 school year conflicts between Kluesner and Sister Murphy, Sister Murphy gave Kluesner a positive evaluation in January 1994. After that school year, the school hired Kluesner for the 1994-95 school year. Exhibits 1 and 7; testimony of Kluesner and Sister Murphy.

6. The school generally issued teachers' contracts in the spring for the next school year. In June of 1994, Eileen Gates Kluesner entered into a written teacher's contract with the school which included language providing that "The term of the contract shall begin on August 29, 1994, to and including June 10, 1995, and shall include 190 days of service, of which 180 shall be teaching days, extending from 8:00 a.m. to 4 p.m." Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibit 7.

7. The terms of Kluesner's contract with the school further provided: "Disputes pertaining to the interpretation and application of the provisions of this contract between the school and the Teacher shall first be discussed and a solution sought at the school with the Principal and/or Pastor. If further recourse is needed, the matter may be referred by either party to the Diocesan Office of 'Due Process.'" The contract specifically included a provision that the school had the right to terminate Kluesner's employment if she became disabled. Exhibit 7.

8. The school contracted with its teachers on a yearly basis. There were no tenure provisions. Becoming a newly hired teacher at the school was difficult, due to tight budget constraints and good longevity for current employees. The school generally retained its current teachers, unless decreases in enrollment or performance deficiencies dictated other action. For example, the school included in its files, with the 1994 contract between Kluesner and the school, a note from Sister Murphy acknowledging Kluesner's request to teach first grade in the following 1995-96 school year, with the statement, "Your request . . . will be considered as we begin to finalize teaching assignments during second semester of the 1994-95 school year." Exhibit 8; testimony of Anita Hoye, Tom Trumbull and Sister Peggy Murphy (principal of the school).

9. During the summer of 1994, Kluesner contacted her attorney and advised Sister Murphy, as well as Fr. O'Neil and Fr. Robert Noonan (another St. Matthew's Parish priest and co-pastor) that she had retained him. Noonan and other Parish staff chastised her for retaining an attorney to deal with problems with the school. Testimony of Kluesner.

10. Later in the summer of 1994, Kluesner underwent two brain surgeries for spontaneous subdural hematomas, one in mid-July and another in

mid-August. Her condition resulting from these cerebrovascular incidents substantially limited some of her major life activities, including working. She requested medical leave until the end of December 1994. Final Prehearing Order, IV. Facts and Other Matters Admitted; testimony of Dr. Christopher H. Gill, treating physician of Kluesner.

11. In the fall of 1994, Sister Murphy was absent due to heart surgery. She left before the commencement of the school year, and returned in October. Testimony of Sister Murphy.

12. The school granted Kluesner's request. On September 12, 1994, Fr. O'Neil wrote to Kluesner:

This letter is to verify that you have requested to use your total amount of accumulated sick leave of 40 days, effective September 1, 1994. We also acknowledge that you have requested a medical leave, without pay, through December 1994. Both of these requests have been approved.

We further acknowledge, that if your doctor releases you for employment in January, 1995, and you are medically able to return to work, a teaching position will be held for you at St. Matthew's school, effective January, 1995.

If extended medical leave is necessary after January 1, 1995, written notification must be received by St. Matthew's, no later than December 1, 1995. Any request for an extension of medical leave will have to be approved by Fr. Robert Noonan, myself and/or St. Matthew's Principal.

Final Prehearing Order, IV. Facts and Other Matters Admitted

13. The school had granted sabbaticals for one school year to teachers. Wanda Domrose and Marlene Nardinger both secured yearlong sabbaticals and returned to work. The school had the opportunity to consider and approve these sabbaticals prior to the year involved. Testimony of Kluesner.

14. In the fall of 1994 while Kluesner remained on medical leave, Fr. O'Neil (who is now deceased) left St. Matthew's Parish due to health reasons of his own. His co-pastor, Fr. Noonan, replaced him. Final Prehearing Order, IV. Facts and Other Matters Admitted

15. Kluesner met with Fr. Noonan on December 2, 1994 and discussed returning to work. Fr. Noonan at that time told Kluesner that the school would not offer her teaching position to her for the balance of the year, but

only a teacher's assistant position. This was a unilateral decision of the school, without consultation with Kluesner or her doctors. The school made this decision without undertaking any independent inquiry into Kluesner's limitations or any need for accommodation on Kluesner's part. Testimony of Kluesner and Fr. Noonan.

16. That same day, Fr. Noonan wrote Kluesner a letter:

Thank you for our conversation today. I am overjoyed that you are feeling better. Our agreement as to your return to St. Matthew's at this time is as follows:

1) You will meet with Sister Peggy Murphy [then the school principal] before December 7, 1994 to review the job description and expectations. I ask you to review them before you meet with the doctor.

2) You will obtain a written doctor release to return to work full-time as Teacher Assistant per the job description provided by Sister Peggy.

3) You will notify Sister Peggy of your decision to return or not by December 12, 1994.

Final Prehearing Order, IV. Facts and Other Matters Admitted

17. In accord with Fr. Noonan's directions, Kluesner met with Sister Murphy on December 7, 1994. Sister Murphy confirmed what Fr. Noonan had already said--that the school would return Kluesner to work as a teacher's assistant, not a teacher, for the balance of the school year. Kluesner did not express her dissatisfaction with this proposal. Testimony of Kluesner and Sister Murphy.

18. On December 9, 1994, Dr. Gill saw Kluesner. He advised her against returning to work before spring or fall 1994, based on her continuing symptoms. She indicated to him that returning in mid-semester (spring 1994) would be difficult for the students, so since he did not advise returning to work in January as a teacher's assistant, her second choice would be to wait until the end of the school year. Testimony of Dr. Gill.

19. On December 9, 1994, Dr. Gill wrote a note stating:

This patient continues to have medical problems which preclude her from returning to work at this time. She has shown tremendous improvement over the past months and I would

anticipate that she would be medically able to return in the spring and certainly by fall.

Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibit 10.

20. On December 12, 1994, Kluesner met with Fr. Noonan and submitted Gill's note together with a letter she had written. Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibits 9 and 10; testimony of Kluesner and Fr. Noonan.

21. In her letter Kluesner requested "a written guarantee of a teaching job in the fall if I am able healthwise to return to teaching." She told Fr. Noonan in their conversation, as well as in her letter, that she could not return to work in January. Fr. Noonan again expressed displeasure that Kluesner had obtained an attorney. Fr. Noonan also said that he was not in a position at that time to guarantee a future contract of employment for the next school year, but that he would try to reply to her letter by the end of January. Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibit 9; testimony of Kluesner.

22. On December 21, 1994, Joyce Workman, a teaching assistant who was not a certified teacher, signed a contract with the school as a "teacher partner" to teach the rest of the school year. Workman replaced Kluesner. Workman taught first grade during the 1995-96 school year, still uncertified. Exhibit 13; testimony of Fr. Noonan.

23. On February 2, 1995, Fr. Noonan wrote Kluesner a letter apologizing for the time which had passed, explaining that "[t]here have been so many other elements in the decision making that have delayed me" and going on to state:

I will not give you a definite yes to employment [next fall] at this time. Several other positions in the parish are shifting and it is imperative that I try to picture how our employees fit into the entire parish picture.

Final Prehearing Order, IV. Facts and Other Matters Admitted

24. On February 2, 1995, Fr. Noonan also wrote to the Diocesan Chancellor, Fr. Robertson, to forward papers regarding Kluesner and to note that "If they do plan to sue, I'm sure I will hear of it soon. Please be ready to advise me." Exhibit 15.

25. Shortly thereafter, Kluesner submitted a new note from her physician, dated February 6, 1995, releasing her to return to work full time as of March 1, 1995. She wrote a letter to accompany the doctor's note, and gave both to Fr. Noonan in mid-February 1995. Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibits 16 and 17; testimony of Kluesner and Fr. Noonan.

26. In her conversation with Fr. Noonan while delivering the letter and doctor's release, Kluesner asked to return to work. Fr. Noonan told her the job had been filled for the remainder of the year. Testimony of Kluesner and Fr. Noonan.¹

27. On March 14, 1995, Kluesner's attorney, Richard DeJana of Kalispell, wrote Fr. Noonan a letter requesting Christian conciliation in accordance with Diocesan Due Process pursuant to her employment contract. In that letter, DeJana asserted that "there is no present lawsuit planned or even suggested." Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibit 19.

28. According to Diocesan Due Process, reconciliation, with the assistance of Fr. Robertson, the Judicial Vicar, involved first conciliation and then (upon the agreement of the parties) binding arbitration. Exhibit 24; testimony of Fr. Noonan and Fr. Robertson.

29. Fr. Robertson assumed decision-making authority for the school at the same time he began to act to assist in conciliation. On April 4, 1995, he met with Kluesner, her spouse, her attorney, Sister Murphy and Fr. Noonan. Fr. Robertson requested that Kluesner's attorney not speak during the meeting. At some point during that meeting, Kluesner's spouse mentioned the possibility of filing a Human Rights Act complaint. Final Prehearing Order, IV. Facts and Other Matters Admitted; Exhibit 20; testimony of Fr. Noonan.

30. Among the documents provided to Fr. Robertson on April 4, 1995, were copies of Kluesner's original Human Rights complaint (not yet signed). The April 4, 1995, meeting with Kluesner and her attorney was the only meeting attended by Fr. Robertson in course of assisting with "Diocesan Due Process." Testimony of Kluesner and Fr. Robertson.

¹ Kluesner denied seeing a letter (dated March 3, 1995) from Fr. Noonan reciting a number of assertions about the pertinent events, including the fact that the school hired a teacher for the rest of the year after Kluesner was unable to return to work in January 1995. Kluesner also testified that Fr. Noonan told her of this in their conversation in approximately mid-February. Whether Kluesner saw the letter (Exhibit 18) in March 1995 is moot.

31. On April 24, 1995, Kluesner filed her complaint claiming discrimination on the basis of disability with the Montana Human Rights Commission. On April 27, 1995, Ric Moser with the Montana Human Rights Commission sent a letter transmitting a copy of Kluesner's complaint to the school. Final Prehearing Order, IV. Facts and Other Matters Admitted

32. On May 4, 1995, Fr. Robertson sent a letter to Kluesner, by which he communicated the school's decisions: that the school would like to try "to reach some equitable accommodation with [Kluesner] regarding this school year" and that the school "does not have a position to offer [Kluesner] for the 1995-1996 school year." Exhibit 20.

33. Fr. Robertson made the decision that the school would not hire Kluesner for the next year. In his May 4, 1995, letter, he did not communicate the basis for his decision to Kluesner. Testimony of Fr. Robertson.

34. The school received notice of the filing of Kluesner's Human Rights complaint by May 1 or 2, 1995. Fr. Robertson first knew of the filing on May 5, 1995. Testimony of Fr. Robertson.

35. The school hired Workman to teach first grade during the 1995-96 school year. Workman was not a certified teacher. Kluesner was a certified accredited elementary school teacher. Testimony of Kluesner and Fr. Noonan.

36. Disability was the only basis for discrimination claimed in the original complaint filed by Kluesner with the Montana Human Rights Commission on April 24, 1995. Final Prehearing Order, IV. Facts and Other Matters Admitted

37. On October 5, 1996, Fr. Carl Deitchman, a St. Matthew's Parish priest and pastor and the Parish Administrator, told Kluesner's husband (in a casual conversation after Mass) that the Kluesners were not record members of the Parish and that the Kluesners "have a conflict with this parish." Testimony of Fred Kluesner and Fr. Deitchman.

38. Later that day, both Kluesner and her husband had a second conversation with Fr. Deitchman during which Fr. Deitchman recalls saying that the existence of the pending Human Rights complaint "could indicate an unwillingness [on the part of the Kluesners] to be at peace" and that they "might continue to worship somewhere else if that was more comfortable to them." Both Kluesners believed Fr. Deitchman was telling them they could not be members of St. Matthew's Parish until they dropped the Human Rights

complaint. That same evening, they communicated their understanding of what Fr. Deitchman had said to a friend, Tom Trumbull. Trumbull found their account sufficiently credible to go to Fr. Deitchman about the matter. Testimony of Trumbull, Fred Kluesner, Kluesner and Fr. Deitchman.

39. On October 17, 1996, Kluesner reported her understanding of the conversation with Fr. Deitchman to the Montana Human Rights Commission. On October 23, 1996, Fr. Deitchman wrote a letter to the Kluesners, acknowledging that Kluesners were still current members of the parish. Fr. Deitchman also raised additional reasons he had not previously discussed with the Kluesners for his “question” about their registration in the parish. Fr. Deitchman concluded his letter by stating “I welcome you home to St. Matthew’s Parish when you want to return and can be at peace and join with us in the unity of mind of heart so profoundly signified in the Eucharist which we share in Christ.” Fr. Robertson considered the letter consistent with Fr. Deitchman’s authority, as parish administrator, to check on the registration of parish members. Exhibit 23; testimony of Fred Kluesner, Kluesner, Fr. Deitchman and Fr. Robertson.

40. A pastor does not have the power to exclude worshippers from the parish. Testimony of Fr. Deitchman.

41. On June 30, 1997, Kluesner filed an amended complaint with the Montana Human Rights Commission, alleging retaliation as well as disability discrimination. Hearing Examiner’s Docket.

42. Had Kluesner continued in her position as an elementary school teacher in the school, returning in the fall of 1995, she would have earned wages starting at \$16,884.00 in 1995-96 (with raises of at least 1% per year thereafter), FICA contributions (with an unknown effect upon her Social Security retirement entitlement) and additional retirement benefits (to be paid over her entire retirement, at an uncertain present value) of \$675.36 starting in 1995-96. She would have sought to remain until the end of the 1998-99 school year before retiring. Since the school did not permit her to return, she sought but could not obtain a teaching position in the Kalispell area schools. She found substitute teacher positions, and based upon her income as a substitute in 1995-96, 1996-97 and 1997-98, she expects to earn, through the 1998-99 school year, a total for the four school years of \$6,366.00, for an annual average of \$1,591.50. Given her pre-existing and continuing health problems, as well as the fluctuation in enrollment at the school, Kluesner did not prove it was more likely than not that she would remain employed by the school beyond the 1996-97 school year. Testimony of Kluesner.

43. Kluesner lost wages of \$33,936.84, less \$3,183.00 of substitute teaching earnings. Interest on her lost wages (at 10% per annum) amounts to \$764.64 through September 30, 1995, for monthly accruing wages (after reduction for substitute teaching earnings of \$1,274.37, \$1,302.35 from September 30, 1995 through September 30, 1996, for monthly accruing wages of \$1,288.45 (after substitute teaching earnings reduction) plus past due wages of \$15,292.50 for the previous year. The total interest through September 30, 1996, is thus \$2,066.99. Interest thereafter on the entire net wage loss of \$30,753.84 accrued at \$8.425 per day, over 1,190 days through January 3, 2000, for a total of \$10,025.75. Total interest accrued as of January 3, 2000, is \$12,092.74.

44. Kluesner suffered severe emotional distress because of the school's decision not to employ her in 1995-96 or thereafter, and its efforts to end her quest for relief. She had sleep disturbances, frequent crying jags, inability to focus and carry on normal activities, loss of self-esteem and a profound sense of being deserted by her Church and faith. Even at hearing, the emotional distress she suffered interfered with her ability to respond to questions. Testimony of Fred Kluesner, Tom Trumbull and Kluesner.

45. The emotional distress Kluesner continues to suffer entitles her to recover \$10,000.00.

IV. Opinion

Montana law prohibits employers from discriminating against employees based on disability. §49-2-303(1)(a) MCA (1995). Discrimination because of disability includes firing an employee because of disability, without first making inquiry to determine whether a reasonable accommodation is appropriate for an employee who seeks to continue employment despite a disability. An accommodation is not reasonable if it involves either undue hardship to the employer or danger to the health or safety of any person, including the claimant. §49-2-101(19)(b) MCA (1995). An employer has a legal duty to make independent inquiry regarding accommodation before firing the worker. *Reeves v. Dairy Queen, Inc.*, 287 Mont. 196, 953 P.2d 703 (1998).

The School Failed to Prove a Legitimate Non-Discriminatory Reason for its Adverse Employment Actions against Kluesner Because of Her Disability

A physical disability means a physical impairment that substantially limits one or more major life activities, a record of such impairment, or a condition regarded by the employer as such impairment. §49-2-101(19) MCA.

The determination of whether impairment resulting from illness is a disability under the Montana Human Rights Act requires a factual determination, made on a case-by-case basis. *Reeves, supra* at 206, 953 P.2d at 709. In making that factual determination, the hearing examiner notes that the Montana Supreme Court held that work is a major life activity. *Walker v. Montana Power Company*, 278 Mont. 344, 924 P.2d 1339 (1999), *Martinell v. Montana Power Company*, 68 Mont. 292, 886 P.2d 421 (1994). For employment contexts, a substantial limit upon the performance of work means the individual is unable to perform a class of jobs or a broad range of jobs as compared to an "average" person with comparable training, skills and abilities. 29 C.F.R. 1630.2(j)(3). Thus, the inquiry is whether Kluesner, following her surgeries was unable to perform a class of jobs or a broad range of jobs, compared with her unimpaired "average" twin. Since Kluesner was unable to work at all (and lost her job as a result), she proved she was disabled.

Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979). Direct evidence of discrimination establishes a civil rights violation unless the defendant responds with substantial credible evidence either rebutting the proof of discrimination or proving a legal justification. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). In Human Rights employment cases, direct evidence can both establish the employer's adverse action and prove the discriminatory motive. *Foxman v. MIADS*, HRC #8901003997 (June 29, 1992) (race discrimination); *Edwards v. Western Enerergy*, HRC #AHpE86-2885 (August 8, 1990) (disability discrimination); *Elliot v. City of Helena*, HRC #8701003108 (June 14, 1989) (age discrimination).

Here, the direct evidence is overwhelming that the school took adverse action against Kluesner due to disability. In June 1994, Kluesner had a contract to teach at the school. Nothing changed except that, due to two brain surgeries, she was convalescing and could not perform her duties. After giving her a leave of absence, the school demoted her to teacher's assistance and required her to return to work in January or remain off the rest of the year. No reason appears of record for this adverse action except her disability, unless it was the presence in the wings of her attorney (the retaliation claim is discussed in the next section).

The school failed to rebut the evidence of disability discrimination. Its argument that it decided to replace Kluesner because it needed a teacher immediately is singularly unpersuasive. The school had managed without a contractual replacement for Kluesner during the first half of the 1994-95

school year. Even before it hired a contractual replacement, the school made a unilateral decision to reduce Kluesner from teacher to teacher's aide. In hiring her replacement, the school selected a less qualified individual, and retained that less qualified individual the following year, when Kluesner was available. Kluesner's disability clearly prompted the actions of the school.

It is telling, though not conclusive, that the school asserted the contractual right to fire a teacher because of disability. Of greater weight is the school's failure to identify any legitimate reason for its adverse actions, starting with the decision of Fr. Noonan not to honor the prior representation of Fr. O'Neil that the school would hold Kluesner's position for her.

Fr. Robertson's testimony that he decided not to hire Kluesner for the 1995-96 school year because of her conflict with other teachers and the principal flies in the face of the evidence. That conflict existed when the school decided to hire Kluesner for the 1994-95 school year, her twelfth year with the school. Nothing exacerbated that conflict during Kluesner's leave. Nothing made her less suitable as a teacher, or more likely to be a problem, while she recuperated from her surgeries. In short, when Fr. Robertson made the decision not to hire Kluesner for the 1995-96 year, instead retaining a less qualified teacher who was not certified, he had no information about Kluesner's suitability as a teacher different from that available to Sister Murphy and the co-pastors when they hired her for the 1994-95 school year. The only different information that he had when he rejected her for a job in 1995-96 was her disability, and her attempts to fight for her job by having recourse to the legal process. Kluesner proved her disability claim. The school failed to prove legitimate and non-pretextual reasons for its adverse actions.

*The Commission has Jurisdiction to Redress
the School's Retaliation against Kluesner as well as
the School's Disability Discrimination*

The school interposed two jurisdictional defenses to the claim of retaliation—statute of limitations and freedom of religion. The school failed to sustain these defenses.

The school asserted that Kluesner's amendment of the complaint was untimely. This assertion is without merit. The Human Rights Commission staff, acting within its administrative function, accepted the amendment. Having been accepted, the amendment relates back to the original filing date. *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990) (doctrine of relation back applies to amendment of human rights complaint adding

retaliation claim filed more than 180 days after alleged act of retaliation). In *Simmons*, the claimant added a retaliation claim based on acts subsequent to the original complaint. The Court both allowed the amendment and related it back to the original filing date, in order to find the amendment timely. *Simmons* controls.

The school also asserted a defense of freedom from state regulation of religion. Matters of worship are private, and outside of the state's power to regulate. But retaliatory treatment of a disabled lay employee, a teacher in a parochial school, triggered by her attempts to obtain relief for disability discrimination in that employment, have nothing to do with either worship or membership. The school, according to Fr. Robertson, operates as "roughly a corporation," not as a church. While the state has no power to address the religious component of the school's curriculum, the school has no power to discriminate against its employees due to physical disability or exercise of civil rights unrelated to religion. Even the Church itself has no power to violate public policy. Here, it was not the Church, but a separate entity that employed teachers, acting not in a matter of worship or discipline based on doctrine, but rather responding to a challenge to a very secular decision to end a teaching career. This case is distinguishable from the holdings in *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 852 P.2d 640 (1993).²

The school took its adverse actions against Kluesner either because of her disability or, starting with the decision to hire an uncertified teacher instead of Kluesner for the 1995-96 school year, because of her pursuit of her legal rights. Repeatedly, representatives of the school, while acting for the school, told Kluesner they did not like her resort to counsel. In the single Diocesan due process meeting, the ultimate decision-maker, Fr. Robertson, while apparently acting as both a mediator and an advocate for the school, received notice that a Human Rights Act complaint was ready. Before he

² The school also contended that Fr. Deitchman's comments about parish membership were protected by the First Amendment. The school itself admitted, through Fr. Deitchman's own testimony, that he as a pastor had no power within the Church to exclude Kluesner from parish membership. The fact-finder's only reasonable interpretation of Fr. Deitchman's comments to Kluesner and her husband is that Fr. Deitchman attempted to influence her to drop her Human Rights claim. However, Fr. Deitchman was not acting for the school when he talked to the Kluesners. As pastor, he was one of the persons empowered pursuant to the school's contracts to act for the school when disputes arose. His conduct was indicative of the attitude of the school toward Kluesner's efforts to obtain relief for the loss of her career. However, his actions regarding parish membership were not undertaken on behalf of the school, but rather in his role as parish administrator. For this reason, the hearing examiner will not impute his conduct to the school.

made the decision not to hire Kluesner for the 1995-96 school year, the school received notice that the complaint was filed. It cannot immunize itself by presenting Fr. Robertson as the ultimate decision-maker and arguing his ignorance of the actual complaint filing. The only new information the school had, apart from information used in deciding to *hire* Kluesner for the 1994-95 school year, pertained to her disability and her resort to legal process.

The school has not presented a valid factual connection between worship, doctrinal discipline or parish membership and its actions against Kluesner. The school leaves the fact-finder no choice but to find retaliation as well as disability discrimination as the motives for the school's adverse actions.

Kluesner Proved Her Entitlement to Damages

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to correct the discriminatory practice and to rectify any resulting harm to the complainant. §49-2-506(1)(b) MCA (1995). The wages Kluesner lost during the time she could have worked for the school are clearly part of the resulting harm she suffered. Because of the uncertainty of future employment, two years' lost wages are all that she proved with reasonable certainty. Pre-judgment interest is properly part of the award to compensate for her lost income during those years. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Foss v. J.B.Junk*, Case No.SE84-2345 (Montana Human Rights Comm., 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 (1993). Kluesner's testimony proved her distress. Her husband and Tom Trumbull witnessed her 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.³ The claimant's testimony alone can establish compensable emotional harm from a civil rights violation, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The trier of fact can infer that the emotional harm did result from the illegal discrimination.⁴ Here, the fact-finder need make no such inference. Kluesner's demeanor during the hearing provided ample

³ *Carey v. Piphus*, 435 U.S. 247, 264, at ftnt. 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. Bureau of Labor and 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).

⁴ *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).

evidence that she suffered and still suffers from the emotional harm resulting from the illegal discrimination of the school. Had she sought help from a mental health professional far greater harm might be documented. The school benefits from the fact that Kluesner continues to seek her comfort from her Church.

V. Conclusions of Law

1. The Commission has jurisdiction over this case. §49-2-509(7) MCA (1995).

2. Respondent St. Matthew's School, a Roman Catholic elementary school in Kalispell, Montana, unlawfully discriminated in employment by reason of physical disability when it terminated the teaching employment of charging party Eileen Gates Kluesner and offered her only teacher's assistant employment in January 1995, and subsequently decided not to hire her for the school years of 1995-96 and 1996-97. §49-2-303(a) MCA (1995).

3. Respondent St. Matthew's School unlawfully retaliated when it decided not to hire charging party Eileen Gates Kluesner for the school years of 1995-96 and 1996-97 by reason of her pursuit of her legal rights under the Montana Human Rights Act. §49-2-301 MCA (1995).

4. Pursuant to §49-2-506(1)(b) MCA (1995), Kluesner is entitled to and the school must pay the sum of \$30,753.84 for lost wages. Prejudgment interest is \$12,092.74. Kluesner is also entitled to the sum of \$10,000.00 for emotional distress.

5. Affirmative relief is necessary in this case. §49-2-506(1)(a) MCA. The school must refrain from engaging in any further unlawful discriminatory practices. Within 60 days of the entry of this order, the school must submit to the Human Rights Bureau a proposed procedure to evaluate whether, for an employee who requests return to work after a leave due to disability, reasonable accommodation of the disability is feasible. Within 60 days after the Human Rights Bureau approves (with or without suggested modifications) the proposed policy, the school must file written proof with the Human Rights Bureau that it has adopted and published the policy (with any suggested modifications). The school must also modify its contracts so that they no longer assert the right to fire an employee because the employee is disabled. The school must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as an employer, or at once cease doing business in Montana as an employer.

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

VI. Proposed Order

1. Judgment is found in favor of Eileen Gates Kluesner and against St. Matthew's school, a Roman Catholic elementary school in Kalispell, Montana, operating as an ecclesiastical "juridic person" according to the Code of Canon Law of the Roman Catholic Church with a local board under the Roman Catholic Bishop of Helena on the charges of illegal discrimination in employment because of disability and retaliation.

2. St. Matthew's School is ordered to pay Eileen Gates Kluesner \$52,846.58, plus pre-judgment interest on the lost wages portion of the award at \$8.425 per day from January 3, 2000, to the date of this judgment. Interest accrues on the lost wages portion of the judgment at \$8.425 per day from the date of this judgment until paid.

3. St. Matthew's School is enjoined from further discriminatory acts and ordered to comply with the provisions of Conclusion of Law No. 5.

Dated: January 3, 2000.

Terry Spear, Hearing Examiner for the
Montana Human Rights Commission,
Hearings Bureau, Montana Department of Labor and Industry

