BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Patrick D. Brosseau, Charging Party, versus **Montana Department of Public Health and Human Services,** Respondent.	)	*HRA Case No. 0001009084*
	)	*Final Agency Decision*

I. Procedure and Preliminary Matters

Patrick D. Brosseau filed a complaint with the Department of Labor and Industry on December 2, 1999. He alleged that the Montana Department of Public Health and Human Services (DPHHS) discriminated against him on the basis of disability (hearing impairment) when it required him to wear his hearing aids at all times during the workday and took adverse action against him for failure to follow the requirement.[1] On June 2, 2000, the department gave notice of a contested case hearing on Brosseau's complaint and appointed Terry Spear as hearing examiner. The parties stipulated to extend the department's jurisdiction beyond 12 months after complaint filing.

The hearing examiner heard the contested case on July 9-13, 2001, in Helena, Montana. Brosseau attended with his attorney, J. C. Weingartner. DPHHS's designated representative, Dr. Robert (Bob) Brown, attended with its attorney, Katherine J. Orr. The hearing examiner excluded witnesses on DPHHS's motion. Copies of the hearing examiner's exhibit and witness tables and the docket accompany this decision. Counsel filed the last post-hearing brief on October 15, 2001, and the hearing examiner deemed the case submitted for decision.

II. Issues

The issue in this case is whether DPHHS unlawfully discriminated against Brosseau because he had a record of disability or because DPHHS perceived him as having a disability.[2] A full statement of the issues appears in the final prehearing order.

---

[1] Brosseau moved to amend his complaint to add a retaliation count, arguing that his complaint already contained allegations of retaliation. The hearing examiner denied the motion as untimely.

[2] The hearing examiner granted DPHHS a partial summary judgment that Brosseau did not suffer from a disability, the third alternative under §49-2-101(19) MCA.

III. Findings of Fact

1. Patrick Brosseau graduated from high school in Conrad, Montana, in 1971. For approximately 15 years after high school graduation, Brosseau worked in the family construction business and in farm and gas station jobs. He received his bachelor's degree, with a major in business administration and minor in psychology, from Grand Canyon University in Arizona in 1985. He first worked in insurance and securities sales after graduation. Then he found a job as a trainer at an Easter Seal/Goodwill store in Great Falls, Montana, and discovered that he enjoyed working with persons with disabilities. In 1988, Brosseau returned to Montana State University Billings for a Master's degree. While pursuing his Master's, Brosseau worked for Vocational Resources, Inc., as an occupational consultant.

2. Brosseau suffers from a bilateral hearing loss that is partially correctable by hearing aids. While attending MSU Billings in 1988, Brosseau consulted with vocational rehabilitation services about his hearing loss. He did not qualify for services at that time. Vocational Resources, Inc., laid him off in 1989 and Brosseau received a referral to vocational rehabilitation, through the unemployment insurance process. He qualified for services due to his hearing loss. He received financial assistance in purchasing two hearing aids. He also received a certification of eligibility for handicapped preference in public employment in 1990. The Montana Department of Social and Rehabilitation Services issued the certification, verifying that Brosseau was "considered disabled under state law."

3. Brosseau applied for a position as a psychology specialist at the Montana Developmental Center (MDC), claiming entitlement to the handicapped preference, which he received. On July 18, 1990, the Montana Department of Institutions offered Brosseau a position at MDC.[3] Brosseau accepted the job. He later completed his work and received his Master of Science degree from MSU Billings in 1992. His Master's degree was in rehabilitation counseling with an endorsement in school psychology.

4. Brosseau used hearing aids, as he felt the need, to assist in his working and life activities. Hearing aids are devices that assist in enabling a person with a hearing loss to function in a normal fashion. Hearing aids do not restore completely normal hearing. Although his hearing was not fully restored by use of the hearing aids, Brosseau did not have a substantial

[3] Before the events directly involved in this claim, reorganization of state government made DPHHS the agency responsible for MDC, and thereby Brosseau's employer.

limitation in any major life activity with or without them. He was a satisfactory employee at MDC.

5. In October 1998, MDC hired Bob Brown as a counselor and supervisor. Brown, a licensed professional counselor, had a doctoral degree in educational psychology and career counseling. Brown initially supervised Brosseau and Donald Alsager, a training and program specialist.

6. At the beginning of 1999, MDC reorganized the counseling staff. Brown became head of the psychology department, and the duties of the psychology specialists changed. MDC implemented the changes by May 1999. The psychology department members generally were upset with the changes. Brosseau in particular resisted the changes. One of the methods he used to show his resistance was to remove his hearing aids during staff meetings. He sometimes made a point of turning to look out the window and away from the discussion after removing the hearing aids. Brosseau also used e-mail and conversation with other staff members to underscore his opposition to the changes. Brown received comments from other department members about Brosseau's use of his hearing aids as a means to show his anger or disagreement during staff meetings.

7. By July 5, 1999, when he went on a leave for a week, Brosseau had made his opposition to the changes clear to management and coworkers alike. He refused to cooperate or participate in work projects that he considered inappropriate or outside of his proper tasks. His passive aggressive responses to coworkers and management alike were a legitimate concern for Brown in the ongoing reorganization.

8. Brown met with Brosseau on July 13, 1999, to reiterate the changes to Brosseau's duties at MDC that resulted from the ongoing reorganization. In the course of the meeting, Brown expressed concern about Brosseau's removal of his hearing aids at work. He directed Brosseau to wear his hearing aids while working. Brosseau asked Brown to put his directive in writing. On July 14, Brown e-mailed to Brosseau a directive requiring him to wear his hearing aids at all times while working. In his e-mail Brown both expressed his concern about the impression Brosseau made on staff when he removed his hearing aids and shared his own impression that Brosseau missed "a fair amount of what is being said" in both individual and group meetings at MDC without his hearing aids.

9. Brown believed that Brosseau did need the hearing aids in order to hear well enough to do his job. Brown had no medical verification that Brosseau's hearing loss required constant use of hearing aids. Brosseau told Brown that he did not need to wear and never had worn his hearing aids at all

times while at work. Nevertheless, Brown decided that it was Brosseau's responsibility to have an evaluation performed by an audiologist to document that he did not need to wear his hearing aids at all times while working.

10. In directing Brosseau to wear his hearing aids at all times at work until he could provide medical evidence that he did not need to do so, Brown considered Brosseau severely limited by his hearing loss such that Brosseau could not participate in discussions and perform his job duties without hearing aids. Brown did not consider the limitation only applicable to Brosseau's specific job, but instead viewed the bilateral hearing limitation as so severe and so pervasive that it was applied to any situation involving communications with others. Brown imposed the requirement because of his perception of Brosseau's severe hearing loss as well as because of the impressions other employees formed that Brosseau used removal of the hearing aids as a way to withdraw from communication in protest against what was going on at the time.

11. Brosseau was humiliated and embarrassed by the directive. Sensitive about his hearing loss and his hearing aids, Brosseau felt singled out and persecuted. He railed against his employer to his family. His attitude, demeanor and temper worsened.

12. On July 16, 1999, Brosseau suffered an injury at work while helping to restrain an agitated client of MDC. Brosseau filed a report of work related injury on July 16, 1999, stating that the cause of the injury was an aggressive client. On July 21, 1999, Brosseau filed another report of injury or occupational disease on July 21, 1999, stating that he was suffering "stress due to hostile working conditions, changes." Brousseau did not identify the requirement that he always use his hearing aids at work as a source of his stress. The changes Brosseau referenced resulted from the reorganization of MDC. He knew about those changes before July 13, 1999. On both reports of injury or occupational disease, Brosseau stated that his disability began on July 16, 1999, the date of the injury from restraining the client.

13. From July 19, 1999, to September 14, 1999, Brosseau was out on sick leave, vacation leave and leave without pay. Brosseau's leave was related to the injuries involved in his worker's compensation claim. Dr. Kranaker eventually received payment for treatment of Brosseau from MDC's workers' compensation insurer.

14. While on leave, Brosseau pursued Brown's requirement that he obtain medical documentation of his lack of need to wear his hearing aids all the time. His physician, Dr. Kranaker, referred Brosseau to audiologist Pat Ingalls for testing. On July 23, 1999, Ingalls reported that Brosseau was the

best judge of when to use or not use his hearing devices. Brosseau had access to the report from the time of its issuance.

15. Brown met with Brosseau at his request on August 27, 1999, to discuss his readiness to return to work. Brown had not yet seen Ingall's report. Brosseau again challenged the directive that he wear his hearing aids at all times. Brown refused to compromise.

16. On September 1, 1999, Brown sent a letter to Brosseau confirming their conversation. In it, he reiterated that when Brosseau returned to work he had to wear his hearing aids at all times unless and until he provided medical documentation that constant use of the aids was unnecessary. Brown specifically asserted that Brosseau needed hearing aids to perform his job duties. Brown then went on to address changes in Brosseau's work duties that were unrelated to the question of hearing aid use.

17. On September 9, 1999, Brown received Ingall's report from Brosseau. On September 15, 1999, Brown met with Brosseau to discuss work responsibilities and the wearing of hearing aids or the removal of the aids in meetings. Brown focused on the perceptions of staff that removal of the hearing aids signalled Brosseau's withdrawal from the meeting. He proposed that Brosseau explain to attendees why he needed the hearing aids and why he was removing them if he did so during a meeting. Brown still did not agree that Brosseau could decide when and whether to use his hearing aids at work.

18. The direction that Brosseau wear his hearing aids at work and the strong suggestion that he explain non-use to other employees was the only employment action MDC took because of Brosseau's bilateral hearing loss. On January 26, 2000, Brown relented and agreed in writing that Brosseau was properly the best judge of when he needed to wear hearing aids. Until then Brown had not rescinded his direction and his suggestion regarding Brosseau's hearing loss.

19. Brosseau suffered emotional distress because of DPHHS's employment action because of his bilateral hearing loss. Brosseau reasonably believed that failure to follow Brown's direction could expose him to disciplinary action. When Brosseau began to disobey the edict and Brown suggested he explain his hearing loss and his reasons for removing his hearing aids to coworkers, Brosseau suffered additional emotional distress. The amount necessary to compensate him for that emotional distress is $3,500.00.

20. Brown's conduct regarding Brosseau's hearing loss did not result in adverse actions by the employer that reasonably necessitated Brosseau's resignation. Brosseau's refusal to follow the direction to wear his hearing aids

at all times did not result in adverse actions by the employer that reasonably necessitated Brosseau's resignation. Brosseau's conflicts with MDC management were not caused by or proximately related to his bilateral hearing loss or his use or failure to use his hearing aids, except as already found herein. Brosseau did not reasonably believe that his problems with MDC management resulted from disability bias regarding his hearing loss rather than management's reactions to his resistance and open opposition to the organizational changes MDC implemented in 1999 and 2000. Brosseau did not reasonably believe that the changes in his duties resulted from his resistance to wearing his hearing aids at all times rather than his resistance and opposition to the reorganization. Therefore, no harm resulted from Brown's discriminatory conduct other than Brosseau's emotional distress.

IV. Opinion

The Montana Human Rights Act prohibits discrimination against employees based on a physical or mental disability. §49-2-303(1)(a) MCA. A disability is a physical or mental impairment that substantially limits one or more of a person's major life activities. §49-2-101(19)(a) MCA. Brosseau is a person with a disability if he has a physical impairment that substantially limits one or more of a person's major life activities, a record of such an impairment; or a condition regarded as such an impairment. ***Id.*** Work is a major life activity. *Martinell v. Montana Power Co.*, 268 Mont. 292, 304, 886 P.2d 421, 428 (1994).

Although Brosseau claimed disability discrimination, he denied that he suffered from a physical impairment that substantially limited his ability to work. By his own deposition testimony and his work history, Brosseau established that his bilateral hearing loss did not substantially limit his ability to work. Since he did not present evidence raising a genuine question of material fact about whether his hearing loss substantially limited other major life activities, DPHHS properly obtained a summary ruling that Brosseau did not have a physical impairment that substantially limited one or more of his major life activities.

This case came to hearing because Brosseau's employer treated him as if he had an impairment that, without continual use of hearing aids, substantially limited his ability to work. Brown considered Brosseau to be a person with a condition that substantially limited his ability to work without hearing aids. Brown reached this conclusion without any medical evidence, and imposed a new and demeaning requirement upon a longtime employee with a satisfactory work record.

Relying on recent federal case law, DPHHS argued that even if Brown was wrong in imposing hearing aid requirements upon Brosseau, he only considered Brosseau unable to perform one job without prosthetics. Therefore, DPHHS argued, Brosseau had to prove (and did not) that Brown considered him substantially limited in the performance of a broad range of jobs to establish that Brown considered Brosseau disabled. Therefore, DPHHS also argued, since Brown considered Brosseau able to perform his job with prosthetics, he did not consider Brosseau disabled. The arguments are learned and logical, but wrong.

The question of whether Brown considered Brosseau substantially limited in the performance of a broad range of jobs is a fact question. ***E.g.***, *Reeves v. Dairy Queen*, 287 Mont. 196, 953 P.2d 703 (1998). Because Brown considered Brosseau unable adequately to engage in communication at work without his hearing aids, Brown necessarily considered Brosseau substantially limited in the performance of a broad range of jobs (and outside life activities, for that matter)–all jobs that required communication with others to perform the job duties. Thus, under the particular facts of this case, proof of Brown's presumption about Brosseau's need to wear hearing aids established that Brown considered Brosseau disabled–unable to carry on a conversation when meeting with a client or to participate in a group discussion without hearing aids. Communication, like memory and concentration, is itself a far broader category of human activity than manual tasks involved in a particular job, the narrower category of behavior involved in the seminal case requiring greater evidentiary support for a claim of disability under the Americans with Disabilities Act. *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); ***see***, *Moysis v. DTG Datanet*, 278 F.3d 819, 825 (8th Cir. 2002).

DPHHS's argument that Brown considered Brosseau able to perform his job with prosthetics and therefore did not consider Brosseau disabled raises a legal question. The United States Supreme Court has held that, for purposes of actual significant limitations upon job performance, the ADA addresses disabilities extant with the use of appropriate medical aids and prosthetics. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. U.P.S., Inc.*, 527 U.S. 516 (1999); *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999). DPHHS argued that requiring an employee to use prosthetic devices in order to work conclusively establishes that the employer did not consider the employee disabled. After all, considering the employee able to work with the prosthetic devices is considering the employee <u>not</u> disabled under *Sutton*, *Murphy* and *Albertson's*.

If the United States Supreme Court intended its ADA definition of required proof of actual limitation to apply also to perceived limitation, then

perhaps the Court did intend to bar all claims that employers were requiring unnecessary use of medical treatment and prosthetics at work. The cases themselves do not require such a reading. On the face of it, such a reading largely eviscerates the category of perceived disability. But if the Court intended such a reading, Montana is not bound to adopt the same reading for the Human Rights Act.

The 1993 Montana Legislature amended the Human Rights Act to conform the Act to the Americans with Disabilities Act. House Bill 496, Laws of Montana 1993, Chapter 407, ***see*** Preamble and Section 3. The legislature presumably adopted the existing federal interpretations and applications of the ADA provisions to which the amendments conformed the Human Rights Act. However, subsequent judicial interpretation of the ADA is not binding on Montana, and Montana will ignore it if public policy mandates a different result. *State ex rel. Kommers v. District Court*, 109 Mont. 287, 96 P.2d 271, 272 (1939) (rejecting judicial interpretation of a statute in the originating jurisdiction that occurred after Montana adopted the same law). One state has already rejected the Supreme Court's narrowing of the ADA as applicable to that state's disability law. *Dahill v. Police Department of Boston*, 434 Mass. 233, 748 N.E.2d 956 (2001) (refusing to apply *Sutton* to interpret Massachusetts anti-discrimination law because (1) Massachusetts did not have the same legislative history as the ADA regarding coverage and numbers of potential claimants and (2) the Massachusetts law expressly authorized the responsible state agency to adopt interpretative regulations, unlike the ADA, and the adopted regulations were broader than *Sutton*). The same two distinctions separate the ADA from the Montana Human Rights Act.

Montana's legislative history to the 1993 amendments did not include the massive statistics upon which Congress relied in adopting the ADA. Thus, the Montana legislature could not have engaged in the reasoning *Sutton* attributed to Congress (that broader interpretations of the scope of "disability" necessarily involved more disabilities than Congress identified as extant for ADA coverage).

Before *Sutton*, Montana adopted regulations requiring an employer to undertake an independent investigation before taking adverse action against an employee based upon disability. Rule 24.9.606(8), A.R.M. When the 1997 Legislature moved Human Rights enforcement into the Department of Labor and Industry, the department applied that Commission rule to cases filed after June 30, 1997. 24.9.107(1)(b) A.R.M. The Human Rights Act empowered the agency to adopt substantive and procedural rules. §49-2-204 MCA. Thus, Montana's public policy interpretation of disability departs from *Sutton*.

Under the rules, DPHHS engaged in prohibited conduct when it required Brosseau to wear his hearing aids without an independent investigation of the need for him to do so. Applying a *Sutton* defense would immunize employers from any liability for wrongfully insisting that employees wear glasses, hearing aids, braces, demonstrate use of medication, and so on, without any independent investigation. The rule as well as the underlying statutory prohibition would be rendered meaningless in such cases.

There is no valid reason to reject the existing regulation in favor of a new federal interpretation, even if the hearing examiner had that power. The existing regulation precludes DPHHS's interpretation, and forecloses any further analysis. ***See***, *Laudert v. Richland County Sheriff's Off.*, 301 Mont. 114, 125, 7 P.3d 386, 394 (2000) (although the statute authorized discretionary monetary recovery against the respondent, a properly adopted regulation exercised the agency's discretion by denying any such recovery upon adequate proof of "mixed motive," and the department properly followed its own regulation rather than the discretionary language of the statute and denied the recovery upon proof of mixed motive). In this contested case proceeding, the regulation, which defines Brown's conduct as illegal discrimination due to lack of an independent investigation, properly controls. Had Brown undertaken an independent investigation, instead of changing the terms and conditions of Brosseau's employment and putting the onus on Brosseau to prove the change was unwarranted, he would have verified that Brosseau was the best judge of when to use his hearing aids, MDC would never have demanded that Brosseau wear the aids at all times and this case would never have arisen.

Brown's efforts after the fact to deny that he regarded Brosseau as disabled were incredible in light of his own statements in writing to the contrary. The employer (through Brown) wrongly required Brosseau to use his hearing aids at all times at work, without medical verification of the presumption that he need the hearing aids to do his job. If Brosseau was removing his hearing aids in meetings as a dramatic announcement that he was no longer participating, Brown had the right to address such insubordinate behavior. However, addressing it by requiring Brosseau to use unnecessary prosthetics, in the face of years of adequate job performance and a complete lack of any medical evidence supporting the requirement, was regarding Brosseau as disabled. Forcing an employee to use unnecessary medical or prosthetic aids on the job without medical justification is disability discrimination.[4] Doing so out of a belief that the employee cannot adequately

[4] Because Brown considered Brosseau disabled, the hearing examiner need not and does not decide whether a certification of handicap for hiring preference in public employment constitutes a record of a disability under the Montana Human Rights Act.

communicate without the prosthetic aids constitutes considering the employee limited in the entire range of jobs that require communication, not just in the present position.

Brosseau tried to prove that Brown took other adverse employment action against him. He testified that he believed Brown reorganized his job, took disciplinary actions against him and denied him needed assistance (in the form of other employees he would supervise and use in his work) in performing his work. His testimony was not credible. The reorganization was far too general to be aimed at Brosseau, and began before his resistance to the hearing aid directive. The primary disciplinary action resulted from Brosseau directing his subordinate to write a letter in Brosseau's name opposing the reorganization, a clearly inappropriate use of a subordinate.[5] The elimination of Brosseau's supervisory duties was not a result of either his perceived disability or his resistance to wearing his hearing aids. The only adverse employment action that Brosseau proved by substantial and credible evidence was Brown's insistence that he wear his hearing aids and explain their non-use to his fellow employees.

Damages

The department may order any reasonable measure to rectify any harm Brosseau suffered, including monetary damages. §49-2-506(1)(b) MCA. The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); ***cf.***, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The only harm that resulted to Brosseau was that he suffered emotional distress, which is the only basis for an award.

Brosseau's emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). A claimant's testimony can, by itself, establish entitlement to damages for compensable emotional harm, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The illegal discrimination itself can establish an entitlement to damages for emotional distress, because it is self-evident that emotional distress does arise from enduring the particular illegal treatment. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C.Cir.1984) (42 U.S.C. §981 employment discrimination); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. §1982

[5] Brosseau's proof on these allegations did not lead to any findings. As noted here, the evidence did not demonstrate any illegal motive or action by DPHHS other than the illicit direction to use his hearing aids all the time.

housing discrimination based on race); *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass.App.Ct. 172 (1985) (finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.App. 253, 261-262, rev. denied, 287 Ore. 129 (1979) (mental anguish is direct and natural result of illegal discrimination); *Gray v. Serruto Builders, Inc.*, 110 N.J.Super. 314 (1970) (indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

Brosseau testified to his emotional distress, and the need to obtain treatment to relieve it. The more restrictive burden of proof imposed by *Sacco v. High Country Independent Press*[6] is not applicable under the Human Rights Act. *Vortex Fishing Systems, Inc. v. Foss*, 308 Mont. 3, 2001 MT 312 (12/31/01). Brosseau proved his right to recover for emotional distress. In this case, his distress is slightly greater than that of Ben Foss, who did not require counseling. However, much of Brosseau's emotional upset resulted from the reorganization of the department, his industrial injury and his continuing battle against the changes at MDC. None of those matters had any relation to the hearing aid dispute. Brosseau's distress related to the hearing aid dispute was substantially less than that of Nina Benjamin, for example, or of Paddy and Patricia Griffith. ***See***, *Benjamin v. Anderson*, "Final Agency Decision," Nos. 0001009023 & 0001009034 (Jan. 2, 2002) ($75,000.00 award for emotional distress); *Griffith v. Palacios*, "Final Agency Decision," Nos. 9802008368 and 9802008369 (Mar. 25, 1999) ($50,000.00 each to couple for emotional distress).[7] Therefore, $3,500.00 is a proper award to remedy Brosseau's emotional distress.

Affirmative Relief

When the department finds that illegal discrimination occurred, the law requires that it impose affirmative relief, enjoining further discriminatory acts of the kind found and, as appropriate, prescribing conditions on the discriminator's future conduct relevant to the type of discriminatory practice found. §49-2-506(1)(a) MCA. That obligation impels the imposition of affirmative relief upon DPHHS. The department must impose general and specific injunctive relief to prevent the recurrence of the discriminatory practice with other DPHHS employees who might be regarded as disabled, both by

[6] 271 Mont. 209, 896 P.2d 411 (1995).

[7] On appeal, the Commission reduced the emotional distress award by 50% and increased the affirmative relief. Later, a district court consent decree restored the original department award of $100,000.00 ($50,000.00 to each claimant) for emotional distress.

enjoining the practice and by requiring that Brown, if he still works for DPHHS, attends training on disability law.

V. Conclusions of Law

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

2. The Montana Department of Public Health and Human Services illegally discriminated against Patrick D. Brosseau by reason of disability (bilateral hearing loss) when it required him to wear his hearing aids at all times while working, and strongly suggested that he explain his hearing problems and reasons for removing his hearing aids should he remove them in the presence of coworkers.

3. As a proximate result of DPHHS's illegal discrimination, Brosseau suffered emotional distress. The amount reasonably necessary to rectify the compensable emotional distress suffered by Brosseau as a result of the illegal discrimination is the sum of $3,500.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against DPHHS. The department enjoins it from imposing requirements that employees its supervisors may consider to have disabilities use prosthetics or medical aids while working, without first obtaining verification through appropriate health care professionals that the need for use of prosthetics or medical aids exists.

5. If Dr. Robert Brown still works for DPHHS, then DPHHS must also within 60 days of this final order file with the Bureau a proposal of training for Bureau approval under which Brown will attend 4 hours of training in state and/or federal disability law and avoiding disability discrimination for employers. §49-2-506(1) MCA.

VI. Order

1. Judgment is found in favor of charging party Patrick D. Brosseau and against respondent Montana Department of Public Health and Human Services on the charge that respondent discriminated against him on the basis of disability when it required him to wear his hearing aids at all times while working, and strongly suggested that he explain his hearing problems and reasons for removing his hearing aids to coworkers.

2. The department awards Brosseau the sum of $3,500.00 and orders DPHHS to pay him that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

3. The department enjoins and orders DPHHS to comply with all of the provisions of Conclusions of Law Nos. 4 and 5.

Dated: March 21, 2002

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry