BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Magdalene Collins, Charging Party, vs. **Lewis and Clark County**, Respondent.	)	HRC Case No. 0001009322
	)	*Final Agency Decision*

I. Procedure and Preliminary Matters

Magdalene Collins filed a complaint with the Department of Labor and Industry on July 19, 2000. She alleged that the county discriminated against her on the basis of race (black) and national origin (West African) when it denied her numerous positions for which she both applied and was qualified. On April 5, 2001, the Human Rights Commission sustained Collins' objection to dismissal of her administrative complaint by the Human Rights Bureau. On April 11, 2001, the department gave notice Collins' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on January 7, 2002, in Helena, Lewis and Clark County, Montana. Collins attended with her counsel, Bruce M. Spencer, Smith Law Firm, P.C. Sheila Cozzie attended as designated representative for the county, with the county's counsel, K. Paul Stahl. Magdalene Collins, Michael Henderson, Kay Robertson and Sheila Cozzie testified. Copies of the exhibit docket and the file docket accompany this decision. The parties argued the case at the close of the presentation of evidence.

II. Issues

The issue in this case is whether the county discriminated against Collins because of her national origin when it hired Sarah Boutilier as a family advocate in January 2000 rather than Collins. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Magdalene Muna Collins, a married mother of two children, has been a citizen of the United States since August 24, 2001. She and her family immigrated from Liberia, West Africa. She is a registered nurse. In 1996, 1997 and 1999, she applied for public health nurse positions with Lewis and

Clark County. The county hired other applicants for all three positions. Collins did not consider any of those hiring decisions discriminatory.

2. In January 2000, Collins had a college degree in biology, a 1995 registered nurse degree, and four and a half year's professional nursing experience at St. Peter's Hospital in the transitional care unit and with the Big Sky Care Center (both in Helena). She also had public health care experience before her R.N. certification, assisting a pediatric nurse with children and record keeping and a refugee stipend job in a village clinic working with patients ranging in age from infants to 18 year olds (both jobs in Africa). In January 2000, Kay Robertson, a supervisor within the county's health department (a "team leader"), contacted Collins and encouraged her to apply for a county health position denominated "family advocate," which involved both insurance work with clients and public health nursing. The county had originally posted the position as one for an insurance clerk, but then obtained additional funding and revised the job description to require a nursing degree, for higher pay. The actual final posting identified a nursing degree as "preferred" (with other health related degrees acceptable), with one year of public nursing experience or two years of professional nursing experience.

3. Robertson had been on the interviewing teams for some of the jobs Collins had previously sought. She knew Collins wanted to work in public health nursing and considered Collins a good candidate. Collins was less interested in the insurance work involved in the position, but Robertson assured her that clinical work would be an important part of the job. Michael Henderson, another county health supervisor ("team leader" for the team on which the new hire would work), also called Collins and encouraged her to apply. She did apply.

4. The county interviewed three applicants for the family advocate position, the only three who had nursing degrees. Henderson, Robertson and Sandy Hale, who would train the new hire, conducted the interviews for the county. They used a structured interview technique. They asked all three applicants the same questions, and scored the answers on the same form. The final scores for the three candidates involved a total score for 17 interview questions, and a rating of up to 10 points by each interviewer based on a subjective evaluation of how well the candidate would perform in the job.

5. All three interviewers scored Collins highest of the three candidates on the 17 interview questions and on total points, with Sarah Boutilier, a Caucasian woman, second. Henderson awarded Boutilier 10 evaluation points and Collins 6 evaluation points, but since he had rated Collins 13 points above Boutilier in the interview questions, Collin still had a higher overall score.

Robertson rated Collins above Boutilier in evaluation points (7 to 6), and Hale gave Collins and Boutilier equal evaluation points.

6. At the end of each interview, the interviewers asked the candidate if she had any questions. Collins asked if there would be initial training, and by whom (Henderson told her Hale would do the initial training). Collins then asked if she would receive an increased salary because she had more experience than the job description sought. Henderson told her she would not. Collins then asked if she could perform the job with four 10-hour work days, because she wanted to keep her nursing job at St. Peter's Hospital (three days a week) in order to avoid taking a substantial cut in pay. Henderson told her that would not be possible. He then asked her if she believed she could do the job. Collins said she could, with proper training. Henderson asked if she could do the job with the schedule and pay specified. She said she could. She did not tell the interviewers that she required four 10-hour work days, nor did she withdraw from candidacy after Henderson rejected her request.

7. Collins had no way of knowing it, but the county had experimented with four 10-hour working days within the public health teams. The experiment had proved disastrous, with scheduling tumbling from difficult to impossible within a short time. Unaware of the department's past problems with scheduling, Collins sought to explore how she might be able to supplement her income by retaining her job at St. Peter's.

8. While Henderson did consider Collins' desire to work four 10-hour shifts a problem, he also took offense at Collins' questions about salary and hours. He took offense because he considered her insufficiently deferential to the interviewers. He would not have expected such deference from Collins but for her national origin.

9. Henderson led the discussion after the interviews. He stressed his concerns about whether Collins would be willing to keep the flexible hours he envisioned for the position. He did not directly share with Robertson and Hale his outrage at what he considered to be Collins' lack of due deference. Although Boutilier was fresh from nursing school with no professional or public health nursing experience, he decided she would be a better "fit" with the job requirements. Because the successful candidate would be a member of his team, Henderson was able to persuade Hale and Robertson that Boutilier would be the best candidate.

10. Having persuaded his two colleagues to select Boutilier, Henderson next consulted with Sheila Cozzie, the county's Human Resources Director, regarding the propriety of hiring Boutilier rather than Collins. Henderson called Cozzie because the county required a department hiring someone other

than the high scorer during interviews to consult Human Resources before the actual hiring. Henderson told Cozzie that Collins needed four 10-hour shifts in order to take the job, which was not true. Cozzie told Henderson that if Collins needed four 10-hour shifts, and that would not work for the county, to hire the next highest scoring candidate.

11. Henderson hired Boutilier. In accord with the county's policies, Human Resources sent a form letter to Collins notifying her that another candidate had been hired. The form letter indicated that the county had hired the candidate that most closely fit its needs at the time.

12. Collins cried when she received the letter. She did not suffer any financial loss as a result of the rejection, but she had felt confident that she was the best candidate for this job, and would finally be able to work in the public health nursing field. She now questioned her own competence, and tried to figure out what failings the interviewers had seen which led to her rejection. She was devastated.

13. Collins tried to contact Henderson, to find out why she had not been the county's choice. He did not take her call. She came to his office on Thursday or Friday of the week in which she got the letter. She happened to meet Henderson in the parking lot as he was leaving work, and he told her he would get back to her after talking with Robertson (suggesting that the hiring decision had not been primarily his). He promised to get back to her. He did not get back to her, because after he talked to Robertson, he hoped that she would call Collins. Henderson did not want to explain the decision to Collins.

14. Collins awaited a return contact for the rest of that week and the following Monday. She received none. She called Henderson on the following Tuesday, and left a message on his voice mail. She received no return call. She tried again on Wednesday, but Henderson was not in his office. She called him again on Thursday, and he asked if Robertson had contacted her, since Robertson had told him she would. Then Henderson told Collins the county made the hiring decision "because of experience." That statement was not true.

15. Collins learned the county had hired a newly graduated nurse. She realized that Henderson's stated reason for hiring Boutilier was a falsehood. She filed her Human Rights complaint against the county.

16. Collins suffered emotional distress as a result of her rejection for a job for which she was the most qualified applicant. She is entitled to recover $5,000.00 for that emotional distress.

17. Since January 2000, the county has hired Collins for a nursing position. Her employment history since the rejection demonstrates that she has not suffered any financial loss, nor does she require injunctive relief requiring the county to take positive employment action on her behalf.

18. Injunctive and other affirmative relief are proper. The county properly required consultation with Human Resources for a hiring decision that rejects the highest scoring applicant. However, the limited consultation in this case resulted in Human Resources approving a decision that was not based upon a legitimate business reason. Cozzie never had sufficient information to evaluate the subtle connection between Collins' national origin and Henderson's decision. Had the county required documentation of the reasons for hiring someone other than the high scoring candidate, Cozzie would have had an opportunity to discern the underlying discriminatory animus.

IV. Opinion

Montana law prohibits discrimination in employment based upon national origin. §49-2-303(1)(a) MCA. The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas.*[1] ***See, e.g.***, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welf. Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981).

The first tier of *McDonnell Douglas* required Collins to prove her prima facie case by establishing four elements:

> (i) that [s]he belongs to a [protected class] . . .; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, ***supra***, 411 U.S. at 802.

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Court noted in *McDonnell Douglas* that this standard of proof is flexible.[2] Collins satisfied her burden by proving that she was Liberian while Boutilier was not, that she was more qualified for the job than Boutilier, and that despite her qualifications, the county hired Boutilier.

Collins's prima facie case under *McDonnell Douglas* raised an inference of discrimination at law. The burden then shifted to the county to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. The county only had the burden to show, through competent evidence, that it had a legitimate nondiscriminatory reason. *Crockett* ***supra***, 761 P.2d at 817. The county must satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981). The county raised a genuine issue of fact by clearly and specifically articulating a legitimate reason for rejecting Collins, its concern over her flexibility and Boutilier's contrasting "enthusiasm" for whatever conditions the job might require. *Johnson*, ***op. cit.***, 734 P.2d ***at*** 212.

Once the county produced facially legitimate reasons for its adverse employment action, Collins had the burden to prove that the county's reasons were pretextual. *McDonnell Douglas* ***at*** 802; *Martinez*, ***op. cit.***, 626 P.2d ***at*** 246. To meet her burden, Collins could present either direct or indirect proof of the pretextual nature of the county's proffered reasons:

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine ***at*** 256. Ultimately, Collins met her burden to persuade the hearing examiner that the county did illegally discriminate against her. *Crockett*, ***op. cit.***, 761 P.2d ***at*** 818; *Johnson*, ***supra***, 734 P.2d ***at*** 213. She proved that Henderson's account to Cozzie of the "red flag" (the four 10-hour shifts) was inaccurate and incomplete. She also proved that Henderson gave her a false

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[2] ***Cf.***, *Martinez*, ***op. cit.*** 626 P.2d ***at*** 246 ***citing*** *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

reason for hiring Boutilier. Considering the proof of Henderson's false statements about the reasons for the hiring decision, coupled with Collin's prima facie case[3] and observation of the witnesses' demeanor, the hearing examiner found that the real reason Henderson chose Boutilier was that Collins was insufficiently deferential, a quality he found unacceptable because she was a black woman.

Henderson persuaded his colleagues on the interview panel that his concerns were based on Boutilier's enthusiasm and flexibility. He reported to Cozzie that Collins "needed" four 10-hour shifts to take the job. He testified at hearing that the county's collective bargaining agreement barred four ten-hour shifts, an explanation he never offered to Cozzie or his colleagues. Henderson may believe his own explanations. But given his skewed reporting to Cozzie of the basis for the hiring decision (in order to obtain approval for Boutilier's hiring) and his false statement to Collins, his reasons for rejecting Collins and persuading his colleagues to do the same were incredible.

At hearing, the county's counsel argued very capably that Henderson was embarrassed by his alleged true motive–his umbrage at any applicant asking for more money and different hours. However, Henderson's reaction to Collins' conduct during the interview, and his reticence about explaining that reaction to Collins or to Cozzie, is only understandable if his real motivation was a reaction to who she was. Having observed the witnesses' demeanor and testimony, the hearing examiner is convinced that if Boutilier, the white applicant, had been the applicant with experience and had asked the same questions as Collins asked, for the same stated reasons, Henderson would not have rejected Boutilier. Consciously or otherwise, Henderson reacted strongly against Collins in a way that could only have resulted from her national origin.

The department may order any reasonable measure to rectify any harm Collins 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). Collins admitted she suffered no financial loss as a result of the

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[3] Proof establishing a prima facie case, together with evidence that the respondent's claimed reason for taking the adverse action is false, is sufficient evidence to establish liability for illegal discrimination. *Reeves v. Anderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000); *Blow v. City of San Antonio*, 236 F.3d 293, 297, ***reh. den. en banc***, 250 F.3d 745 (5th Cir. 2001); *McInnis v. Alamo Community College District*, 207 F.3d 276, 283 (5th Cir. 2000).

county's rejection of her. She did suffer emotional distress, to which she testified convincingly.

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (Mont. 1993). Emotional distress recovery under the Act does not require threshold proof that the emotional distress Collins suffered was serious and severe, following *Sacco v. High Country Independent. Press*, 271 Mont. 209, 896 P.2d 411 (1995). *Vortex Fishing Systems, Inc. v. Foss*, 308 Mont. 8, 38 P.3d 836 (2001).

A claimant's testimony alone can establish entitlement to damages for compensable emotional harm, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). In some cases, the illegal discrimination itself establishes an entitlement to damages for emotional distress, because it is self-evident that emotional distress does arise from enduring the particular illegal treatment. ***See, e.g.***, *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (42 U.S.C. §1981 employment discrimination); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. §1982 housing discrimination based on race); *Buckley Nursing Home, Inc. v. M.C.A.D.*, 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. Bur. 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).

This is such a case. Collins saw, correctly, that she was the best qualified candidate for the job, and saw that the county had instead hired a less qualified white woman. On the face of it, such illegal treatment generates emotional distress. Two black college students suffered emotional distress entitling them to $3,500.00 each from being told that a private landlord would not rent to them because of their race. *Johnson v. Hale*, ***op. cit.*** Collins suffered greater emotional distress from the county's rejection of her despite her qualifications and from learning that the county's representative had lied to her about the reasons for her rejection.

Upon a finding of illegal discrimination, the law requires affirmative relief, enjoining any further discriminatory acts and prescribing appropriate conditions on the county's future conduct relevant to the type of discrimination found. §49-2-506(1)(a) MCA.

V. Conclusions of Law

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

2. Lewis and Clark County illegally discriminated against Magdalene Collins by rejecting her by reason of her national origin (Liberian) in favor of a less qualified applicant for a public nursing position in January 2000.

3. Lewis and Clark County is liable to Magdalene Collins for her resulting emotional distress, in the sum of $5,000.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against Lewis and Clark County. The department enjoins the county from discrimination against candidates for hire on the basis of their national origin. The department also requires the county to revise its policy regarding consultation with Human Resources before hiring a candidate who did not receive the high score on interviews, so that before the hiring Human Resources receives, reviews and approves a written statement of the reasons for the selection, signed by all of the persons who scored the interviews and made the decision as either approved or contested. The county must submit its revised policy to the department's Human Rights Bureau within 60 days of this decision and then adopt and implement the policy as approved by the Bureau. Finally, the county must provide Michael Henderson (if he is still in the county's employ) with a four hour training course on racial prejudice, and the course provided must be approved in advance of the training by the Human Rights Bureau. The county must submit the proposed training for Bureau approval within 60 days of this decision. §49-2-506(1) MCA.

VI. Order

1. The department grants judgment in favor of Magdalene Collins and against Lewis and Clark County on the charge it discriminated against her because of national origin when it rejected her in favor of a less qualified applicant for a public nursing position in January 2000. The department awards Collins $5,000.00 and orders the county to pay her that amount immediately. Interest accrues as a matter of law.

2. The department enjoins and orders Lewis and Clark County to comply with all of the provisions of Conclusion of Law No. 4.

Dated: May 17, 2002.

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