

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

Susan Vincent,)	
Charging Party,)	Human Rights Act Case No. 9909008838
vs.)	<i>Final Agency Decision</i>
Metalworks of Montana, Inc.,)	
Respondent.)	

I. Procedure and Preliminary Matters

Susan Vincent filed a complaint with the Department of Labor and Industry on March 9, 1999. She alleged that the respondent, Metalworks of Montana, Inc., discriminated against her in employment because of her sex (female) and disability (dyslexia) and retaliated against her, beginning January 15, 1995 and continuing through January 1999. Following an investigation, the Human Rights Bureau dismissed the complaint. On December 7, 1999, after a hearing on Vincent's objection to dismissal, the Montana Human Rights Commission remanded the complaint for contested case hearing.

The corporation sought judicial review. On May 1, 2000, the district court stayed the contested case proceedings and granted the petition for judicial review. On February 1, 2001, the district court affirmed the Commission decision and remanded for a department contested case hearing.

The department gave notice that Vincent's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on June 28-29, 2001, in Missoula, Montana. Vincent attended with her counsel, Edward A. Murphy, Datsopoulos, MacDonald & Lind, P.C. The corporation attended through a designated representation, Jeff Gordon, with its counsel, J. Tiffin Hall, Milodragovich, Dale, Steinbrenner & Binney, P.C. Bill Lefter, Sr., Jeff W. Gordon, Susan Vincent, Linda Carriere, Lee Bridges, Wally Dunlap, Walter Sandvig, Tim Kester, Pat Ward, Lee Vandenburg, Paul Markiss and Dick Teman testified. The hearing examiner admitted exhibits 1-10 and 101-106 (including 102A and 103A). Respondent filed the last post-hearing argument on August 17, 2001.

II. Issues

The issue in this case is whether Vincent proved that the corporation engaged in a continuing violation of the Montana Human Rights Act by discriminating against her because of sex and disability from 1995 through January 1999, and if so, whether the corporation is liable for the harm that resulted to her because the JATC extended her apprenticeship beyond January 1999. A full statement of issues appears in the final prehearing order.

III. Findings of Fact

1. Charging party Susan Vincent is a woman. She had a high school diploma and obtained a B.A. degree in Fine Arts from the University of Montana in 1981, after which she left Montana. She returned to Montana in 1992, at age 37. In an effort to find work and get off of welfare, she enrolled in the non-traditional jobs for women program in Missoula, Montana. She had not worked outside of her home since shortly after her graduation from college.

2. Vincent suffered from dyslexia, a learning disorder. Her dyslexia prevented her from regularly recognizing letters when she attempted to read. The disorder made it difficult for her to recognize words she knew, interfering with her ability to read as well as to spell. With assistance reading, she had been able to obtain her college degree during her five years in attendance at the University of Montana.

3. In 1994 a representative of the Sheet Metal Workers Union in Missoula, Pat Ward, indicated to the head of Vincent's program, Linda Carriere, that the union would like to see qualified women apply to the apprenticeship training program in the sheet metal industry. Ward was at that time a member of the coordinating committee for the union apprenticeship training program. Carter told Vincent about the possibility of employment and on-the-job training through the program.

4. Vincent applied for the apprentice program, and interviewed for a position in the program on May 5, 1994. One other woman, Lee Bridges, also interviewed at that time. Vincent and Bridges were the first two women who qualified for admission into the sheet metal workers apprenticeship training program in Montana. Vincent placed fourth among the 25 interviewees.

5. The Missoula Joint Apprenticeship Training Committee (JATC) operated the union apprenticeship training program in Missoula. Committee members were area sheet metal contractors who employed union workers and members of the sheet metal workers union. The Montana Department of

Labor and Industry also regulated the program. Jeff Gordon, principal shareholder and operator of Metalworks of Montana, Inc., was a member of the JATC in 1995. He participated in Vincent's interview. One of the corporation's employees, James Whitcomb, a journeyman sheet metal worker, was also on the committee and also participated in Vincent's interview.

6. The apprentice training program involved working for a sheet metal contractor during the day while attending school several nights a week in order to learn the craft. Union sheet metal workers qualified as journeymen or above taught the classes. The employer's role was to expose the apprentice to a variety of tasks and work experiences in the sheet metal industry.

7. The JATC selected the apprentice candidates, arranged for their schooling and training, evaluated their progress and administered their qualification test for journeyman certification. The customary period within which to complete the program was 4 years. Each apprentice had to complete 8000 hours of work (2000 hours per year), obtain satisfactory job evaluations from the employer, complete the school work satisfactorily and pass the certification testing. The JATC decided when the apprentices were ready to complete training and receive journeyman certification.

8. Vincent waited for almost 7 months for a position. Ward told her that she was "on the list," awaiting placement with a union employer. On January 12, 1995, Jeff Gordon contacted her to commence work for his corporation. He warned Vincent during their initial meeting that many of his employees were hostile to having a female sheet metal worker. The corporation did business in Missoula and western Montana as a sheet metal contractor, employing union workers. Vincent began work for the corporation on January 16, 1995. Concerned about acceptance in the workplace, Vincent did not tell her employer about her dyslexia.

9. When Vincent came to work the first day, no one introduced her to the other employees, gave her a tour of the shop or provided her with any orientation. Whitcomb was doing welding work in the corporation's shop on January 16, 1995. He approached Vincent and assigned her some work. The corporation did not assign Vincent to any particular journeyman on a consistent basis in 1995. She worked primarily with Whitcomb. After he became aware that she had problems reading work orders and other work-related documents, she told him about her dyslexia. She suggested to Whitcomb that there were times when she needed someone to read documents to her in order for her accurately to understand them. Whitcomb did so as needed while Vincent worked under his supervision. Through this

arrangement, other employees of the corporation, including Gordon, became aware of her dyslexia over the course of 1995.

10. In January 1995, the corporation had no policy prohibiting discrimination in the workplace on the basis of sex. When Vincent commenced work for the corporation, there were a number of pictures of nude women on walls within the shop. Vincent did not initially complain about the pictures. One male employee of the corporation told jokes at work that Vincent considered offensive to females. After a number of such jokes, Vincent responded by posting a picture of a seminude man in the shop. The male employee took down the picture. Vincent did not inform Gordon of these occurrences.

11. After her first six months working for the corporation, Vincent complained about the pictures of nude women. The corporation required employees to remove the pictures after her complaint. Some of the pictures remained on display. Vincent did not report that to the corporation.

12. Vincent did not receive any evaluations from the corporation until she attended the JATC meeting on December 13, 1995, to discuss her progress. The committee was considering whether to extend the probationary period of her apprenticeship into the first 6 months of 1996, because of reportedly unsatisfactory progress on her part.

13. Whitcomb and Gordon attended the December 1995 JATC meeting. Whitcomb suggested the extension of Vincent's probationary period from 12 to 18 months. Roy Symons, Apprenticeship and Training Field Representative for the Montana Department of Labor and Industry, advised the committee that the applicable regulations did not allow them to extend Vincent's probationary period, but only to extend the term of the apprenticeship beyond the normal 4 years. Symons queried Whitcomb about Vincent's 6 month evaluation and ascertained that Whitcomb was unaware of any requirement for such an evaluation and had not performed one. Symons instructed the committee (including Gordon) that problems with the performance of an apprentice should trigger notification to the apprentice of the deficiency with a corrective action plan, with the employer giving the apprentice the opportunity to correct the deficiency and assistance in doing so.

14. The corporation next complained that Vincent had not worked adequate hours. She responded that she had worked enough hours, providing the committee with records of her work that verified the adequacy of her hours. The committee then verified that Vincent's school attendance and scores were acceptable.

15. Gordon then reported to the committee that Vincent's job performance was inadequate, because she could not grasp the necessary concepts to perform the work and was too slow. Vincent responded by citing her dyslexia, and the committee discussed the need for a reasonable accommodation. Vincent also complained that she was the only apprentice without a journeyman regularly working with her. Whitcomb reported that Vincent's work was good 95% of the time.

16. Gordon then complained that Vincent could not drive the forklift. Vincent argued that she could drive the forklift, and had driven a forklift previously, but that the gear positions were not labeled on the corporation's forklift. She reported that when she asked to be shown the gear positions that Gordon instead ordered her not to drive it. Gordon indicated he would "work on that," effectively withdrawing this complaint.

17. Gordon next complained to the committee that there was tension in the shop because Vincent was a woman. Symons and another committee member immediately told Gordon that could not be an issue.

18. Gordon also complained that he could not make a sufficient profit from Vincent's apprenticeship and was upset at having to make accommodations for her.¹ Symons told Gordon that when an employer accepted an apprentice he accepted the obligation to train and that training did not always equal profit.

19. At the December 1995 JATC meeting, the corporation submitted negative evaluations of Vincent authored by some of its journeymen. Vincent had never received those evaluations, and was not previously aware of the criticisms contained in them. The majority of the evaluations reported that Vincent was lazy and did not want to do her work. Some evaluations reported that she was trying to do her work. One evaluation indicated that she was a very slow reader. Another evaluation contained a general comment section that Vincent "will not lift heavy objects + has a girls attitude about it."² Vincent responded that she had requested assistance (reading work orders to her as needed), and had informed the corporation about her dyslexia. Despite the negative evaluations, the JATC decided that Vincent's performance was acceptable. Despite the clear and convincing evidence that Vincent was struggling for acceptance within the corporation, and was at odds with Gordon, the committee took no action beyond deciding that Vincent was "doing a good

¹ The only accommodation Vincent ever requested and received was to have work orders read to her when she needed help understanding them.

² The corporation did not disclose this evaluation to Vincent until the contested case hearing itself.

job at this time” and obtaining her agreement to ask for additional assignments instead of waiting to receive them.

20. Within a week after the December 1995 JATC meeting, Gordon circulated and obtained acknowledgments of the corporation’s newly adopted policy against discrimination in the workplace based on sex.

21. After the December 1995 JATC meeting, the corporation did not change its treatment of Vincent, except that employees who worked with Vincent were told to make sure that Vincent understood her tasks and to take extra time to read the work orders to her. Whitcomb left employment with the corporation and Vincent received her supervision from Paul Markiss, another apprentice who was six months ahead of Vincent in the training program. The corporation did not provide either six month or annual evaluations to Vincent of her progress.

22. Bridges also began work for the corporation. She did not experience any discrimination because of her sex. Bridges and others in the apprenticeship program went to Vincent’s home and helped her with her class work, on their own time.

23. Dick Teman was one of the most experienced sheet metal workers at the corporation. In the summer of 1996, Vincent told him that she was still having problems getting along with other workers and getting enough work to progress in her program. Teman asked her if she would like to meet someday after work for dinner to discuss her problems. She agreed and they had the meeting in August 1996. After dinner, Teman offered to use her on a corporation job he would be doing in Butte. He added a comment about sleeping with her.³ Vincent took the comment to be a proposition, which she refused. Teman tried to make the comment into a joke.

24. Vincent chose not to work with Teman in the field. Vincent told the corporation that she did not want to work on any of Teman’s field jobs. She worked on some of his jobs in the shop.

25. Gordon heard a rumor about the Teman incident. He asked Vincent about it. She told him that Teman had conditioned taking her on the Butte job with obtaining sexual favors from her. Gordon did not believe her, and took no action to investigate.

³ During the summer of 1995, Vincent had worked on an out of town job with another male sheet metal worker. They had shared sleeping quarters (separate beds), with no incidents or improprieties. The arrangement had prompted some gossip and speculation among other male employees.

26. In late August or early September, the corporation laid off Vincent and others due to lack of work. Had Vincent placed her name back on the JATC list when she received the lay off, other sheet metal contractors could have called her if they had work. She did not do so. She did not work regularly again until the spring of 1997, when the corporation brought her back as business increased.

27. On Sunday, April 27, 1997, after Vincent returned to work with the corporation, the *Missoulian* ran a newspaper article on women contractors and women working in the construction crafts. The article included a statement attributed to Linda Carriere that many women in the constructions crafts had met with blatant discrimination and had been told that they were not wanted in the shops because they were women. Carriere also reportedly said that the discrimination was more prevalent in the heavy equipment and sheet metal fields and that shop situations were bad.

28. Gordon confronted Vincent with the article, demanding whether she had made any statements to the *Missoulian* or to Carriere to support the assertions made in the article. Vincent refused to talk about the matter.

29. Vincent continued with her apprentice work for the corporation, from 1997 though late 1998. During that time, her work assignments remained very basic, her opportunities to work regularly with journeymen were few, and her opportunities to develop her sheet metal work skills were limited.

30. In mid-January 1999, the JATC met again with Vincent, after giving her notice by registered letter of the meeting, for the stated purpose of deciding whether to require her to spend additional apprentice time. The JATC had adopted a uniform "turn out" test, involving a written test, a field test of installing a fitting and a drafting test. The committee doubted that Vincent was ready to pass the test. Even if she did, she had received (without notice to her) consistently negative evaluations from the corporation. Vincent asserted that those evaluations were unfair and biased, but the JATC viewed her job prospects if she were awarded journeyman status as very poor.

31. The JATC decided that Vincent might have difficulty retaining the classroom and study information after she successfully completed each unit of instruction, resulting in poor work performance. Since Vincent denied that difficulty and blamed employer bias, JATC decided to assign Vincent to another sheet metal contractor, Western Sheet Metal, requiring her also to continue her classroom instruction with additional one-to-one tutoring. The JATC would evaluate her progress and status on June 4, 1999, 5 months after her original projected turn out date. Vincent agreed to the extended apprenticeship, instead of insisting upon immediate testing and turn out.

32. After mid-January 1999, the corporation had no involvement in Vincent's apprenticeship training program.

33. On March 9, 1999, Vincent filed a Human Rights Act complaint against the corporation.

34. In 1999, Vincent worked as an apprentice for two other sheet metal contractors in the Missoula area. She received both positive and negative performance evaluations from both employers. In May 1999, the JATC extended Vincent's apprenticeship again, citing new poor performance reviews. She last worked as a sheet metal apprentice in September 1999.

35. Vincent continued to pursue her class work. She successfully completed the turn out tests. In February 2001, the supervisor of the apprenticeship training program for the Department of Labor and Industry notified her in writing that she had worked the requisite number of hours and completed the journeyman's turn out exam and that all she needed was a positive on the job work performance evaluation. Vincent found regular employment in the Kalispell area commencing in February 2001. She ceased suffering any wage loss at that time. By the end of July 2001, Vincent obtained her certification as a journeyman sheet metal worker.

36. The delay in Vincent's certification resulted in part from the failure of the corporation to accord to her the same assignments, training, experience and evaluation as it accorded to other apprentices who differed from Vincent only in being male and in not being dyslexic. The corporation discriminated against her because she was female and because it regarded her dyslexia as an impairment that substantially limited one or more of her major life activities (reading, working, understanding). This discrimination began in 1995 and continued unabated in a course of conduct that lasted through January 1999. The corporation submitted unfair evaluations and reports of Vincent's performance to the JATC in 1995 and in January 1999. In those reports, it penalized her for being female and dyslexic.

37. The delay in Vincent's certification also resulted from her lack of confidence in her ability to complete the test successfully in January 1999, which led her to agree to the further extension of her apprenticeship. Her lack of confidence itself resulted from her treatment by the corporation, and her treatment by the JATC in reliance both upon the unfair negative evaluations she received from the corporation and upon the corporation's unfair reports, orally as well as in writing, that her performance was inadequate. But for the disparate treatment she received from the corporation, Vincent would have attained the position she finally achieved at the end of July 2001 by January 1999.

38. Vincent worked full-time when she worked as an apprentice. Her income as a second-half fourth year apprentice, in January through September 1999, would have been \$15.92 an hour times 40 hours a week times 37 weeks, or \$23,561.60. However, she left the definite impression with the JATC that she would only work with one specific employer, the third contractor with whom she had worked as an apprentice. As a result, she did not actually have those earnings. That was her responsibility, not harm suffered due to the conduct of the corporation.

39. Vincent was unemployed from October 1999 through January 2001, remaining on the union lists for hire. She was able to work and could have found lower paying work during that time period. It was not reasonable for her to remain unemployed for that length of time while waiting for union sheet metal work. From the beginning of October 1999 until the end of January 2001, she reasonably could have earned the equivalent of full-time minimum wage pay, or \$5.15 an hour times 40 hours times 70 weeks, or \$14,420.00.

40. Vincent's reasonable earning capacity as a journeyman sheet metal worker during mid-January 1999 through the end of January 2001 was \$21.23 an hour times 40 hours times 107 weeks, or \$90,864.40. But for the corporation's discriminatory acts, she would have earned those wages. Her earnings loss over that period of time, resulting from the delay in her certification as a journeyman, was \$52,882.80.

41. Interest on the lost earnings, at 10% simple per annum, through the date of judgment, is \$7,183.79.

42. Vincent suffered emotional distress as a result of the unfair treatment she received from the corporation and the delay in completing the apprenticeship training program. She sought counseling for this emotional distress. An appropriate award for the emotional distress is \$12,500.00.

43. There is a risk of recurrence of the discriminatory conduct of the corporation.

IV. Opinion

Liability

Montana law prohibits employment discrimination based on sex and based on a physical or mental disability. §49-2-303(1)(a) MCA. A disability is an 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. §49-2-101(19)(a), MCA. Vincent proved by substantial direct

evidence that the corporation considered her to suffer from an impairment that limited her from reading, understanding and from working in the whole range of jobs represented by the sheet metal worker status she sought.

The corporation considered that Vincent suffered from a disability.⁴ It therefore had a duty to provide a reasonable accommodation if with such an accommodation Vincent could perform the essential job functions of position. §49-2-101(19)(b), MCA; 24.9.606(2) A.R.M. Instead, the corporation judged Vincent by different standards, savaged her in performance reviews and gave her more limited job opportunities during her apprenticeship, because she was female and because she requested the accommodation of having work orders read to her when necessary.

Gordon presented a whole series of invalid complaints, some factually untrue and others legally impermissible, to the JATC. His own conduct provided ample manifest gender and disability bias against Vincent. In addition to his complaints to the JATC, when Vincent made a direct complaint to him about Teman's conduct, Gordon did nothing. Despite prior adoption of a policy against sex discrimination, despite Vincent's complaint of a *quid pro quo* demand upon her by Teman, Gordon did nothing. Again, his own conduct provided ample direct evidence of his illegal bias against Vincent.

Statute of Limitations

The corporation argued that any discriminatory acts against Vincent occurred more than 180 days before complaint filing, and that in determining whether there were adverse acts within the 180 days, conduct outside of that time period was irrelevant.

Failure to file the discrimination complaint within 180 days of the unlawful acts by the employer bars the claim. §49-2-501(4) MCA; *e.g.*, *Skites v. Blue Cross/Blue Shield of Montana*, 297 Mont. 156, 161, 991 P.2d 955, 958 (1999) (when the administrative complaint on its face indicated that the last act of alleged discrimination occurred more than 180 days before complaint filing, summary judgment in favor of the employer was proper). The statute of limitations issues arising in this case are (1) whether timely allegations of unlawful acts within 180 days before complaint filing also confer

⁴ Because of the clear and convincing evidence that the corporation considered Vincent as having a disability, the department does not reach in this case a new issue of interpretation. The United States Supreme Court has recently revisited the definition of disability under the Americans with Disabilities Act, substantially increasing the burden of proof upon a plaintiff.

jurisdiction upon the department to decide whether the employer engaged in a violation of the Act that began before the pertinent statute of limitation and continued into the 180 days and (2) if acts outside of the 180 days can serve to illuminate the respondents' motives even if they cannot be a basis for relief. The first issue involves so-called "continuing violations" or "serial violations." The second issue involves proof of motive.

Neither *Skites* nor *Hash v. U.S. West Communications Serv.*, 268 Mont. 326, 886 P.2d 442 (1994) the earlier Montana Supreme Court decisions regarding the statute of limitations for Human Rights Act claims, directly address the issue of continuing violations. In both instances, discovery or occurrence of the last act of alleged discrimination took place more than 180 days before complaint filing. Although the Montana Supreme Court has not addressed the issue, the Montana Human Rights Commission has. *Kundert v. City of Helena*, HRC No. 9301005512 (Mar. 31, 1995) (adopting findings regarding conduct of employer for 17 months prior to the complaint filing date); **followed**, *Dernovich v. City of Great Falls*, HRC No. 9401006004 (Nov. 28, 1995) (citing *Kundert* for adoption of continuing violation theory and overruling objection to consideration of discriminatory acts occurring more than 180 days before complaint filing); *Ashmore v. Hilands Golf Club*, HRC No. 9103004707 (Jun. 10, 1994) (respondent's earlier treatment of women relevant and probative to issue of intent for later discrimination).

The rationale of the decisions of the U.S. Court of Appeals for the Ninth Circuit is consistent with the three Commission decisions cited above. *Morgan v. N.R.P.C.*, 232 F.3d 1008 (9th Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000); **see also** *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir.1999); **and** *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9th Cir.1998); *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990). California takes the same approach to continuing violations as the Ninth Circuit. *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 29 P.3d 175 (2001).

Vincent proved a series of related acts, several of which were within the limitations period (a "serial violation"). She proved that the corporation engaged in the continuing course of conduct because of her status as a female apprentice with dyslexia. The acts of discrimination occurring outside of the limitations period were substantially related to those occurring within the limitations period, **see**, *Fielder*, **supra at** 988, rather than isolated, sporadic, or discrete acts, **see**, *Draper*, **supra at** 1107-10; *Sosa*, **supra at** 1456.

Both within 180 days before complaint filing and earlier, the corporation submitted negative evaluations of Vincent's performance and treated her less favorably than male apprentices (and perhaps less favorably

than one female apprentice who was not dyslexic). In both 1999 and 1995, the corporation provided false and prejudicial information to the JATC that threatened Vincent's progress in the apprenticeship program. The 1999 information, coupled with the denial for more than 4 years of an equal opportunity to learn her trade on the job, led to a substantial delay in Vincent's certification.

The conduct of the corporation prior to the 180 days before her complaint filing is relevant to the question of motive for its actions within the 180 days. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (evidence of prior discriminatory acts relevant to motive), a case the Montana Court has expressly applied to Human Rights Act litigation regarding burdens of proof. *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). Thus, the failure and refusal of Gordon to investigate her complaint about Teman are pertinent to establish his gender bias. His unfounded complaints and his direct admission that gender bias in his corporation made it difficult to have Vincent as an apprentice are pertinent to sustain Vincent's claims.

Retaliation

Vincent did not prove retaliation against her by the corporation for either opposition to illegal discrimination or participation in protected activity.

Damages

The department may order any reasonable measure to rectify any harm Vincent 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).

Vincent proved discrimination that resulted in a diminished earning capacity for a period of 107 weeks. She proved the wages she lost, and she was not required to do so with unrealistic exactitude. *Horn v. Duke Homes*, 755 F.2d 599, 607 (7th Cir. 1985); *Goss v. Exxon Office Systems Company*, 747 F.2d 885, 889 (3rd Cir. 1984); *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award).

Vincent had an obligation to make reasonable efforts to mitigate harm from discrimination by seeking other employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The evidence did establish that she failed to exercise reasonable diligence in mitigating damages from lost wages and benefits. *P. W. Berry, Inc. 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). Vincent was not required to exhaustively seek out all possible employment opportunities. But she did not establish reasonable efforts to seek work. Holding out for work in her chosen field before she was certified was not reasonable. Having no income instead of some income was not an economically feasible and appropriate mitigation effort. The unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position. *Ford Motor Co.*, *supra* at 231; *accord*, *Hullett v. Bozeman School Dist. #7*, *supra*. But here, Vincent failed to do anything to mitigate her damages for a prolonged period, with no justification. An offset for minimum wage work is proper, for the period after she ceased working as an apprentice in October 1999 through January 2001.⁵

An award of prejudgment interest is also proper on lost past wages due to illegal discrimination. *P. W. Berry Co.*, *supra*; *see also Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987).

Vincent's emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (Mont. 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 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

⁵ In her proposed decision, Vincent conceded that she had no earning loss after the end of January 2001. She did not specify a dollar figure for her losses after September 1999. Thus, the hearing examiner has applied the mitigation offset during that period.

foreseeable result" of unlawful discrimination). This may be such a case, but Vincent also testified to her emotional distress, and the need to obtain counseling 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). Vincent proved her right to recover for emotional distress. In this case, her distress is significantly greater than that of Foss, who did not require counseling, but considerably less than that of Nina Benjamin or the Griffiths. *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, \$12,500.00 is a proper award to remedy her 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 the corporation. The department must impose general and specific injunctive relief to prevent the recurrence of the discriminatory practice with other female employees of the corporation.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. The corporation illegally discriminated against Vincent by subjecting her to unfair and adverse working conditions and false negative evaluations of her performance from the commencement of her employment up to and including January 1999, in a continuing course of conduct, because of her gender and her dyslexia, which the corporation regarded as an impairment that substantially limited one or more of her major life activities.

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.

3. As a proximate result of the corporation's illegal discrimination, Vincent was unable to obtain her journeyman sheet metal worker certification in January 1999, and did not obtain it until the end of July 2001, losing wages otherwise available to her in the sum of \$52,882.80. Prejudgment interest upon those wages is \$7,183.79. The value of the emotional distress suffered by Vincent as a result of the illegal discrimination is the sum of \$12,500.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against the corporation. The department enjoins it from:

- a) discrimination against female employees by unsupported and false negative evaluations and denial of equal opportunities to work on the jobs and assignments available to comparable male employees;
- b) failing and refusing promptly to investigate, verify and address sexual harassment when it receives complaints of such from female employees.

5. The corporation must also within 60 days of this final order:

- a) file with the Montana Human Rights Bureau written proposed rules ready for adoption and publication upon approval by the Bureau or ready for amendment, adoption and publication should the Bureau recommend any amendments, implementing the above injunctive requirements and providing for ongoing training of its supervisory employees and
- b) file with the Bureau a proposal of training for Bureau approval under which Gordon will attend 4 hours of training in sexual harassment identification and prevention techniques for employers and 4 hours of training in recognizing and avoiding disability discrimination for employers. §49-2-506(1) MCA.

VI. Order

1. The department grants judgment in favor of Susan Vincent and against Metalworks of Montana, Inc., on the charge that it discriminated against her because of her sex (female) and disability (dyslexia) against her, beginning January 15, 1995 and continuing through January 1999.

2. The department awards Vincent the sum of 72,556.59 and orders the corporation to pay her 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 the corporation to comply with all of the provisions of Conclusions of Law Nos. 4 and 5.

Dated: January 18, 2002.

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