

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

<b>Christopher Ensey,</b>	)	
Charging Party,	)	Case No. 0021009938
vs.	)	<i>Final Agency Decision</i>
<b>Olympic Security Services, Inc.,</b>	)	
Respondent.	)	

**I. Procedure and Preliminary Matters**

Christopher Ensey, the charging party, filed a complaint with the Department of Labor and Industry on December 23, 2001. He alleged that Olympic Security Services, Inc., the respondent, discriminated against him on the basis of his sex (male) when it refused to accept his application for a Security Guard position on or about November 1, 2001. On July 23, 2001, the department gave notice Ensey's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties agreed to an extension of the department's jurisdiction beyond twelve months after complaint filing.

The hearing convened and concluded on January 7, 2003, in Great Falls, Cascade County, Montana. Ensey attended with his counsel, Todd A. Stubbs, Graybill, Ostrem, Crotty & Stubbs, P.C. The respondent attended through its designated representative, Russ Dowling, with counsel, James T. Harrison, Jr. Charging party Ensey, his father Hoss Ensey, Human Rights Bureau investigator Lynette Lee and corporate representative Dowling testified. The hearing examiner admitted Exhibits 2 and 101 into evidence without objections. Ensey filed the last post-hearing argument on February 14, 2003. A copy of the hearing examiner's docket accompanies this decision.

**II. Issues**

The issue in this case is whether the corporation is responsible for the rejection of Ensey as an applicant for a job, based on his sex, when he attempted to apply on November 1, 2001. A full statement of the issues appears in the final prehearing order.

**III. Findings of Fact**

1. In approximately October 2001, Olympic Security Services, Inc. ("OSS"), the respondent, obtained the contract to provide screening services at the Great Falls International Airport in Great Falls, Cascade County, Montana.

The provider under the previous contract, International Total Services (“ITS”), continued to provide the screening services through November 4, 2001.

2. OSS expected to hire the existing employees of ITS and some new employees. OSS placed a classified job advertisement in the *Great Falls Tribune*, which ran beginning in late October 2001, offering positions as check point screening agents. The ad specified that no experience was necessary and that free uniforms would be provided. The ad directed interested persons to pick up applications at the airport. The ad gave no further directions about how to apply. It identified neither the prospective employer nor the person or office to contact at the airport.

3. OSS had no employees of its own at the airport in late October 2001. It relied upon ITS personnel (whom it would hire and retain as some of its employees) to receive the applications. Russ Dowling was the ITS security screening manager at the airport, in charge of ITS operations at the site. Before the ad appeared, he had reason to believe that OSS would retain him in a supervisory position, but no formal confirmation of the fact. ITS employees at the airport began in late October to receive inquiries because of the OSS ad. Dowling initially had no OSS application forms, so he used an ITS existing form to create an application form for interested persons to complete. Because he reasonably expected OSS to retain him in his supervisory position (as it ultimately did), he undertook supervision of the receipt of applications even though he was not yet an OSS employee. He was aware that applicants were responding to an ad that directed them to come to the airport to secure the application forms.

4. Dowling made the application forms available to applicants by providing copies to his shift supervisors at the passenger access gates. He also made the applications available to applicants who requested them, either directly or through friends or relatives who came to the airport or worked at the airport.

5. OSS relied upon Dowling to distribute and receive the applications. He acted on behalf of his soon-to-be employer, at first with apparent authority and subsequently with actual authority. OSS, by November 1, 2001, had provided Dowling with some forms and other documents regarding their assumption of the contract on November 5, 2001. OSS authorized ITS, through Dowling, to undertake the distribution, collection and screening of applications solicited by OSS pursuant to its ads in the *Great Falls Tribune*.

6. Dowling reviewed the applications, whether he received them directly or through the ITS employees he supervised. He discarded applications which would have required him to contact the applicants to obtain information the

form sought but which the applicants had omitted. He cannot now recall how many applications he discarded, nor is he certain how many applications he retained.

7. ITS security personnel wore uniforms, consisting of dark gray trousers with black stripes on the outside seams and, white shirts with dark blue epaulets and a blue ITS emblem embroidered on the shirt pocket. Two other entities, the airport police and another security company, Burns Security, had uniformed employees working at the airport during late October and early November.

8. On November 1, 2001, Christopher Ensey, the charging party, was looking for work. Financial problems had interrupted his college studies. He had returned to his family's home in Great Falls to find employment that would permit him to pursue a college degree. Ensey was eighteen years old.

9. Ensey's father, Hoss Ensey, noticed OSS's *Tribune* ad. He pointed it out to his son. Ensey was interested, so he and his father went to the airport that same day so he could fill out an application.

10. Ensey and his father arrived at the airport and inquired about where to apply for the check point screening agent job. They were directed to the security area (a hallway in the upstairs portion of the building). They proceeded to that area, where they encountered a woman in a dark uniform who was sitting in front of a desk.

11. Ensey asked about getting an application for the check point screening agent job. The woman told him that they were only accepting applications from women. Ensey's father heard the conversation. Ensey and his father then left the airport.

12. Ensey reasonably relied upon the ad and the directions he received at the airport to inquire in the security area in directing his inquiry to the woman in the dark uniform. He reasonably attempted to apply for the position. He reasonably relied upon the apparent authority of the woman in the dark uniform to reject his application.

13. But for OSS' reliance upon Dowling and ITS to administer the application process, and the absence of any details in the ads about whom to contact at the airport to apply, the unidentified woman in the dark uniform would not have had apparent authority to reject Ensey's request for an application.

14. Ensey was upset about the rejection. He had a potential job available in Havre, which would require travel and lodging expenses. His vehicle was unreliable, his mother was ill, and he did not want to work out of Great Falls. He considered it unfair and humiliating to be refused a chance to apply for the job because he was male.

15. He called the Human Rights Bureau. At the directions of the investigator, Lynette Lee, he thereafter<sup>1</sup> called the airport and asked to talk to security. He spoke to an individual who identified himself to Ensey as an OSS employee and told Ensey that OSS was no longer hiring.

16. During the Human Rights Bureau's investigation of Ensey's complaint, OSS provided documentation that it ultimately hired eight new employees—three males and five females—when it first assumed the operations at the Great Falls Airport. It also provided documentation that it received and rejected applications from an additional forty persons, identified only by name and application dates. Of the forty names, twenty-seven were typically male names, eight were typically female names and five were not typically gender specific names. No applications from males bore application dates after the end of October 2001.

17. At least thirty males applied for OSS positions in October at the Great Falls Airport, after the ads commenced in late October. Dowling either received no applications from males in November or discarded all such applications, although he did receive and retain applications from females in November. It is more likely than not that other males as well as Ensey attempted in November to apply in accord with the ads. Therefore, it is more likely than not that persons who received inquiries from male applicants in November for OSS positions consistently rebuffed them, while continuing to accept applications from females.

18. Because his application was rejected, Ensey continued to seek work. He eventually found jobs, over time, which required travel and which paid him less than the advertised wage for the OSS positions. His actual income is \$2,300.00 less than he would have earned had he obtained an OSS position. His additional expenses due to work and work-seeking travel, which he would not have incurred had he obtained an OSS position, are \$850.00. His efforts

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<sup>1</sup> Ensey's sense of dates was shaky. He thought the phone call took place as early as November 2, but it could have been a few days later. OSS correctly pointed out that the conversation likely occurred after it assumed control of the security operations, but the exact date of the conversation is irrelevant.

to find and keep work since the rejection of his application have been reasonable and proper.

19. Had Ensey been able to submit an application for a position with OSS, his qualifications, on this record, were neither superior nor inferior to those of the other male applicants. He therefore had a one in ten chance of avoiding the economic losses of \$3,150.00, with a value of \$315.00.

20. Ensey suffered the embarrassment, in front of his father, of being denied an opportunity to apply for a job on the sole basis of his sex. This constitutes compensable emotional distress, for which Ensey is entitled to recover the sum of \$1,500.00.

#### IV. Opinion

##### I. Ensey's Proof of Illegal Discrimination Is Adequate

Montana law prohibits an employer from refusing employment to a person because of sex when the reasonable demands of the position do not require a sex distinction. Mont. Code Ann. § 49-2-303(1)(a). Montana applies the three-tiered standard of proof in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, for indirect evidence cases, and a simpler test for direct evidence cases, *Laudert v. Richland Cty. Sheriff's Dept.*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386; *see also Reeves v. Dairy Queen Inc.*, 1998 MT 13, 287 Mont. 196, 953 P.2d 703. Ensey's evidence satisfies either standard if OSS is responsible for the treatment Ensey received at the airport.

Under *McDonnell Douglas*, Ensey established a prima facie case that (i) he belonged to a protected class (males); (ii) he applied and was qualified for a job for which OSS was seeking applicants; (iii) OSS rejected him and (iv) after his rejection, the position remained open and OSS continued to seek applicants from others with his qualifications. Under *Laudert* and *Reeves*, he established that the reason for his rejection was that he was male, thus providing direct evidence of illegal discriminatory animus.

OSS did not defend by offering any justification for the conduct of the mysterious young woman in the dark uniform. It based its entire defense upon the absence of proof that it was responsible for her conduct.<sup>2</sup> Thus, Ensey's

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<sup>2</sup> OSS did argue that because the woman wore a dark uniform she could not have been an employee of ITS. It also argued that absent corroborative evidence identifying the woman or at least confirming her existence, Ensey's testimony lacked credibility. The former argument was not relevant to the ostensible agency issue. The latter argument failed to overcome the credible direct testimony of Ensey and his father.

case rests entirely upon the question of the authority of the uniformed woman to act for OSS.

### Ensey Has Proved Ostensible Authority

Montana defines an ostensible agent by statute, basing the relationship upon the principal's lack of ordinary care in allowing a third party reasonably to believe in the ostensible agent's authority. Mont. Code Ann. § 28-10-103:

An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him.

As OSS correctly pointed out, the critical question is whether it was responsible for Ensey's belief that the young woman in the dark uniform had the power to reject his request for an application. The woman was only an ostensible agent of OSS if OSS intentionally or negligently misled Ensey into reliance upon her authority. *E.g.*, *Sunset Point Partnership v. Stuc-O-Flex, Inc.*, 1998 MT 42, ¶ 22, 287 Mont. 388, 954 P.2d 1156:

Pursuant to this statutory definition of ostensible agency, [Mont. Code Ann. § 28-10-103] it must be the principal, not the agent, who "intentionally or by want of ordinary care causes a third person to believe another to be his agent." *See also*, *Miller v. Cascade Northern Co.* (1979), 181 Mont. 66, 69, 592 P.2d 156, 158 (recognizing liability under theory of ostensible agency may exist only where the alleged principal, "by reason of some act on his part," leads another to believe that an agency relationship existed.) (*Quoting Elkins v. Husky Oil* (1969), 153 Mont. 159, 168, 455 P.2d 329, 333). Furthermore, we have recognized that "the belief that another is an agent must be reasonable." *Larson v. Barry Smith Logging, Inc.* (1994), 267 Mont. 444, 447, 884 P.2d 786, 788.

OSS elected to place an ad for applications which only specified that the prospective applicants come to the airport. OSS elected not to direct the prospective applicants to contact ITS in particular or to go to any particular office or other locale at the airport. OSS gave no information about who was actually soliciting applications. OSS gave Ensey directions that he followed, to the letter. In providing such general directions, OSS failed to exercise ordinary care with regard to prospective applicants.

This alone is not enough. The inquiry that the law requires has two elements. First, Ensey had to prove that OSS caused him to rely upon the woman in uniform sitting at the desk in the security area. Second, Ensey had to prove that his belief in her authority was reasonable.

Had Ensey, for example, sought out a maintenance man sweeping up the parking lot and asked him about applying for the security position, relying upon that person's representation that the security service was only accepting female applicants, Ensey's reliance upon that statement would not have been reasonable. But Ensey did not behave in such a cavalier fashion.

When he arrived at the airport, Ensey sought out directions about where to apply. The directions he received ("go to the security area") seemed reasonable and proper. These directions were consistent with the ad itself, since he was at the airport and was trying to apply for a security position.

When he got to the security area, he found a uniformed woman seated at a desk. OSS had not identified a particular security service to which to apply. When Ensey asked for an application, the woman told him that only women could apply. He had no information upon which to conclude that the woman in the dark uniform was anything other than an employee and representative of the hiring entity. She did not tell him that some other entity was actually doing the hiring. She did not tell him that she understood that the new company taking over from ITS was only accepting applications from women. He had no reason to believe her rejection of his application request was outside of her authority. He had no basis to insist upon talking to someone in charge. He had no reason to seek further information about who was actually soliciting applications. He had every reason (based upon the OSS ad) to believe that she was the proper person to whom to present his request. Thus, as between OSS and Ensey, OSS failed to exercise ordinary care, while Ensey exercised ordinary care.

Further circumstantial evidence supports the conclusion that OSS failed, through Dowling as well as in the placement of the ad, to solicit applications without regard to sex of the prospective applicants. It is not credible that by coincidence no males except Ensey even attempted to apply for the security jobs after the end of October. Females continued to seek and submit applications. While the evidence does not permit a finding as to whether Dowling, ITS employees under his supervision or others thwarted other males from submitting applications, it is reasonable to believe that other males probably did try to apply, and could not do so. It does not matter, finally, where the rejection of Ensey's attempt to apply happened because ITS decided there were already enough male applicants or because one or more persons

working for some other security service decided to brush off male applicants, for some unknown reason. OSS made that possible either way, through failure to exercise ordinary care in its solicitation of applications and through failure to exercise ordinary care to assure that its agent, ITS, properly handled prospective applicants.

This is not an easy fact question to decide. The facts available are very limited.<sup>3</sup> OSS elected, throughout the investigative and contested case processes, to defend solely on its absence from the airport at the time Ensey tried to apply. Ensey, in turn, had only the information he received from the woman in the dark uniform. Between the two parties, OSS had the capacity to provide adequate information by its ads. Ensey, wanting the job, could only follow the directions in the ad. OSS placed ads that made it possible for a reasonable applicant to arrive in the security area making inquiry of any person there whose attire and comportment identified them as security personnel.

Based upon this record, OSS gave apparent authority to any person working in airport security to respond to a prospective applicant following the directions in their ad. With the information he had, Ensey reasonably relied upon the information he received from the young woman in the dark uniform. Dowling did provide applications through ITS personnel performing their normal security duties throughout the airport. Ensey had no information about who was accepting applications. He had no means of ascertaining that the woman was wearing the wrong uniform or sitting at the wrong desk, and therefore had no power to refuse him as she did. OSS created that situation. Therefore, OSS stands responsible for the rejection of Ensey's request for an application, under principles of ostensible authority.

### 3. Damages Due to Ensey

The department may order any reasonable measure to rectify any harm Ensey suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to make the victim whole. *E.g., P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *see also*

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<sup>3</sup> OSS attempted to impeach the adequacy of the Human Rights Bureau investigation. Since this was hearing *de novo*, the issue was moot. In addition, OSS chose not to provide additional information, either during investigation or hearing, that might have shed light upon the reasonableness of its reliance upon ITS for application intake or the reasonableness of ITS' conduct of that intake. The absence of such evidence at hearing required the hearing officer to weigh the adequacy of Ensey's inquiries against the vagueness of the ads.



*Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord*, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405 (1975)<sup>4</sup>.

Ensey sought damages based upon two theories. First, he claimed lost wages from the job he claimed he would have obtained had OSS allowed him to apply (in the amount of \$2,300.00) and out of pocket expenses incurred due to the necessity of finding other available work (in the amount of \$850.00). Second, he claimed emotional distress as a proximate result of OSS' rejection of his attempt to apply (in the amount of \$5,000.00).

In an employment discrimination case, a charging party who has proved discrimination has a presumptive entitlement to an award of back pay. *Dolan, supra*. Back pay awards should redress the full economic injury that the charging party suffered to date as a result of the unlawful discrimination. *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626. Calculation of the back pay award should include lost wages or salary, plus lost benefits (vacation pay, health insurance, pension contributions, etc.), less the value of any wages or benefits earned by the claimant in the interim. In addition, the charging party may recover for losses in future earnings if the evidence establishes that those losses are likely to occur as a result of the respondent's discriminatory acts. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 439.

The problem with economic damages in this case is the speculative nature of Ensey's claimed loss. His entitlement to economic damages only extends to lost income he would have earned but for the discriminatory act. *Beardsley v. Hays-Lodge Pole School District No. 50* (1996), HR No. 9401005996 (facts did not support a finding that the charging party would continue in his position more than another year, given the increasing hostility, for nondiscriminatory reasons, toward renewal of his contract). Ensey offered evidence of how much more he would have earned with an OSS job. He offered nothing but speculation regarding whether he would have obtained such a job. He did not present adequate evidence to prove he was more or less likely to obtain a job offer than the thirty or more males whose applications OSS considered, out of whom it hired three.

On this record, Ensey's economic loss is a lost opportunity to apply for a job. He proved that had he actually obtained a job, he would have earned \$2,300.00 more and saved \$850.00 in out of pocket expenses. However, what

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<sup>4</sup> The Montana Supreme Court uses analogous federal cases in interpreting application of Montana's Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

he lost was of the opportunity to apply rather than an assured position. The value of that lost opportunity is not equal to the worth of the job he sought.

Ensey must prove the amount of his economic loss, but not with unrealistic exactitude. *Horn v. Duke Homes* (7<sup>th</sup> Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Company*. (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas, op. cit.* (fact that back pay is difficult to calculate does not justify denying award). Since there is no evidence to consider Ensey more or less qualified than the other applicants, he lost a one in ten (three out of thirty) chance at a net gain of \$3,150.00, for a statistical value of \$315.00.

Prejudgement interest on lost income is ordinarily a proper part of the department's award of damages. *P. W. Berry, Inc., op. cit.*, 779 P.2d at 523; *Foss v. J.B. Junk* (1987), HR No. SE84-2345. However, because Ensey lost a chance at a job rather than a job, this kind of liquidated damage award is not reasonable for this case.

Ensey also sought emotional distress recovery. As already noted, the department has the power to require any reasonable measure to rectify "any harm, pecuniary or otherwise" that Ensey suffered because of OSS' discrimination. Mont. Code Ann. § 49-2-506(1)(b). Emotional distress damages fall within the scope of the statute. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601.

Eight years ago, Montana adopted a standard of proof for claims of emotional distress damages, applying that standard to all emotional distress recoveries. *Sacco v. High Country Independent Press, Inc.*, (1995) 271 Mont. 209, 896 P.2d 411. Two years ago, the Court expressly held that emotional distress recovery for illegal discrimination under the Montana Human Rights Act follows less restrictive federal case law, not *Sacco*. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

In *Vortex*, the Court affirmed an award of \$2,500.00 for emotional distress damages resulting from Ben Foss' loss of his job. Much of that emotional distress stemmed from financial problems due to loss of an existing income. Ensey did not lose an existing income. He lost a possibility of gaining a job. His emotional distress due to subsequent travel (incurring expenses and forcing him to leave a sick parent) and employment efforts was not solely the result of losing a chance to get a job with OSS.

Ensey's emotional distress is more akin to that of the plaintiffs in *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; *cited in Vortex at ¶33*. In *Johnson*, the plaintiffs suffered emotional distress resulting from the refusal of a landlord to

rent living quarters to them due to their race. The plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the court increased their awards from \$125.00 to \$3,500.00 each for the overt racial discrimination.

Ensey's emotional distress was not as great as that demonstrated in *Johnson*. Although his father did witness his rejection, he did not have prior personal experience with discrimination because he was male, nor did he belong to a protected class (men) with a history of being the object of societal hatred and discrimination. However, Montana law expressly recognizes the right to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a *per se* invasion of a legally protected interest. The Montana Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson, supra; Vainio, op. cit.; see also Campbell v. Chateau Bar and Steak House* (1993), HR No. 8901003828. Ensey suffered emotional distress as a result of the refusal, attributable to OSS, to permit him to apply for a job. His testimony regarding that immediate emotional distress was sufficient to merit an award of \$1,500.00.

#### 4. Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. §49-2-506(1)(a) MCA. Since there is only some limited circumstantial evidence that suggests OSS, even through Dowling, intentionally discriminated against males, injunctive relief alone is proper.

### **V. Conclusions of Law**

1. The Department has jurisdiction over the complaint and this case. Mont. Code Ann. § 49-2-509(7).

2. Olympic Security Services, Inc., illegally discriminated against Christopher Ensey by refusing, through an ostensible agent, to accept an

application for employment from him because of his sex (male), on or about November 1, 2001, at the Great Falls International Airport.

3. OSS is liable to Ensey for the value of his lost opportunity to obtain employment through submission of an application, in the sum of \$315.00 and for the value of the emotional distress Ensey suffered as a result of the illegal discrimination, in the sum of \$1,500.00. Mont. Code Ann. § 49-2-506(1)(b).

4. The law mandates affirmative relief against OSS. The department enjoins it from refusing to accept applications for employment from males when it has openings for which being male does not disqualify prospective applicants. Mont. Code Ann. § 49-2-506(1).

## **VI. Order**

1. The department grants judgment in favor of Christopher Ensey and against Olympic Security Services, Inc., on the charge that OSS illegally discriminated against Ensey by reason of his sex (male) when it refused to accept his application for a Security Guard position at the Great Falls International Airport, Great Falls, Cascade County, Montana, on or about November 1, 2001.

2. The department awards Ensey the sum of \$1,815.00 and orders OSS 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 OSS to comply with all of the provisions of Conclusion of Law No. 4.

Dated: March 6, 2003

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry