

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

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KATHY JARRELL,	)	
	)	
Charging Party	)	Cause No. 0031010070
	)	
vs.	)	<b>ORDER AFFIRMING IN PART</b>
	)	<b>AND MODIFYING IN PART</b>
	)	<b>FINAL AGENCY DECISION</b>
DEACONESS BILLINGS CLINIC and	)	
SCOTT ROSS, M.D.	)	
	)	
Respondent.	)	

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INTRODUCTION

The above-captioned matter came before the Montana Human Rights Commission (Commission) on September 18, 2003. The Commission considered Respondent's appeal to the proposed Final Agency Decision issued by the Department of Labor and Industry's Hearings Bureau on June 18, 2003. Oral argument was presented. John Crist appeared on behalf of Respondents, Deaconess Billings Clinic (DBC) and Scott Ross, M.D. Thomas Lynaugh appeared on behalf of Charging Party, Kathy Jarrell.

At the hearing before the Commission, Respondent argued that the Final Agency Decision (proposed) runs contrary to the law and makes it impossible for an employer to rely on uncontroverted medical testimony when determining whether an applicant can meet the established physical requirements for a position. Additionally, Respondent objected to the affirmative relief ordered as wholly inappropriate. Charging Party responded by arguing that the Respondents relied solely on the medical opinion of its physician and did not make an individualized assessment or independent inquiry into Charging Party's ability to perform in the position.

STANDARD OF REVIEW

When reviewing an appeal of a Final Agency Decision (proposed), the Commission may reject or modify the conclusions of law and interpretations of administrative rules, but the Commission may not reject or modify findings of fact unless it first reviews the complete record and states with particularity the findings that were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of the law. *Admin. R. Mont. 24.9.1717* The Commission may accept or

reduce any award or penalty, but it may not increase such an award of penalty without reviewing the complete record. *Id.*

The Commission has reviewed the complete record and has listened to the arguments presented at hearing.

**I. Are the findings of the Hearings Officer supported by competent substantial evidence and did the proceedings comply with the essential requirements of the law?**

In reviewing the findings of the Final Agency Decision (proposed) the Commission concludes these findings are based on "competent substantial evidence." *Admin. R. Mont. 24.9.1717* The Commission notes, and Montana's Supreme Court has stated, that in those instances where the alleged risk of harm is directed to the employee's initial qualifications an employer must take into account all relevant information concerning the risk of harm, including the medical history. *See Hafner v. Conoco, ¶ 41, 1999 MT 68, ¶41, 293 Mont. 542, ¶ 41, 977 P.2d 330* On review, the Commission finds the record offers the requisite support for the hearing officer's finding that Respondent failed to adequately take into account all of the relevant information, and therefore, Respondent illegally discriminated against Charging Party on the basis of her disability.

In reviewing the corresponding Conclusions of Law and Order of the proposed Final Agency Decision, the Commission makes the following modification:

The proposed order provides for an award of "front pay." *See Hearings Officer's Decision, pg. 23* The officer concludes front pay is necessary to make the victim "whole when reinstatement is not feasible." *Id.* The officer notes the pay should be "temporary" while Charging Party reestablishes her rightful place in the job market. *Id.* In the corresponding conclusion of law and order, the officer awards Charging Party the difference between whatever her actual gross wages are for a week and the sum of \$700.00 for each calendar week or fraction thereof within a month until she takes a full time job as a tech or refuses an offer of full time permanent job as a tech. *See Hearings Officer's Decision, pg. 26 and pg. 27*

The Board notes that an award of front pay may be necessary in those cases where it would not be appropriate for the Charging Party to obtain reinstatement, or as in this case, accept the position. *Hearing Aid Institute v. Rasmussen, 258 Mont. 367, 378, 852 P.2d 628 (1993)* In cases where front pay is appropriate, the Montana Supreme Court has held that a finding that "excessive hostility" existed between the parties may not be necessary. Instead, an award of front pay may be reasonable when the "antagonism between the parties is so great that reinstatement is not appropriate." *Id. at 378 (citing Thorne v. City of El Segundo (9th Cir. 1986), 802 F.2d 1131, 1137)* Having considered the record, and the argument provided at the hearing, the Commission is not left with a clear picture of "hostility" between the parties nor do the findings reflect what if any hostility exists.<sup>1</sup>

Taking this into consideration, the Commission notes that an award of "front pay" would appear to be for an unreasonable amount of time. While duly noted that the proposed order limits

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<sup>1</sup> The findings of the Final Agency Decision do address "emotional distress" at Nos. 42 and 49.

Respondent's obligation with a condition subsequent (if she takes a full-time job or if she refuses an offer of a full time permanent job), the Commission, nonetheless, finds that the order insufficiently limits the continuing liability of the Respondent. By statute, upon a finding of discrimination, an order may "require any *reasonable* measure" to correct the discriminatory practice and rectify the harm. *Mont. Code Ann. § 49-2-506(1)(b)(emphasis added)*

Having considered the complete record, the Commission finds the indefinite award of front pay to be unreasonable and therefore, modifies Paragraph 2 of the Order as follows:

2. The department awards Jarrell the sum of \$21,299.95 (including \$1,029.71 in prejudgment interest) and orders DBC to pay her that amount immediately, with future losses accruing and due and owing from DBC to Jarrell, for each calendar month, at the difference between Jarrell's actual gross wages and the sum of \$700.00 for each calendar week or fraction thereof within the month for either a period of 1 (one) year from the date of this order, or, until she takes a full-time job as a tech or refuses an offer of a full time permanent job as a tech, including an offer by DBC, whichever period is shorter. This sum is due to Jarrell from the DBC within the next calendar month after she submits to DBC's counsel pay stubs or other reasonably acceptable verification of her entire income from employment for the immediately proceeding calendar month, together with her sworn statement that she has not accepted or refused a job offer as a full time tech and continues to seek such jobs.

*Admin. R. Mont. 24.9.1717*

THEREFORE, IT IS HEREBY ORDERED, that Respondent's objection to the Final Agency Decision is overruled and the Final Agency Decision issued by the Hearings Bureau is AFFIRMED in part and MODIFIED in part as discussed above, the decision is adopted and incorporated for the purpose of reference.

The parties will have 90 days after the receipt of this order to petition a district court in the district where the alleged violation occurred for the appropriate relief. *Mont. Code Ann. § 49-2-509(5) and Admin. R. Mont. 24.9.1714(5)* If a party fails to commence a civil action within 90 days, the claim is time barred. *Id.*

Dated this \_\_\_\_\_ day of September 2003

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Mr. Gary Hindoien, Chair  
Montana Human Rights Commission

CERTIFICATE OF SERVICE

The undersign employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on October\_\_\_\_, 2003.

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