

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0041011036

ERIC BILLINGS,)	Case No. 1173-2005
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
THE BENEVOLENT AND PROTECTIVE)	
ORDER OF THE ELKS, NO. 456,)	
OWNER OF THE CLUB HOUSE-)	
PINE MEADOWS,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Eric Billings filed a complaint with the Department of Labor and Industry on April 27, 2004, and an amended complaint on May 10, 2004, alleging that the Benevolent and Protective Order of Elks, No. 456 (the Elks), discriminated against him on the basis of perceived disability when it failed to promote him, failed to consider him for another position for which he was qualified, and subjected him to different and more onerous terms and conditions of employment because of his disabilities beginning in January 2004 and continuing.

The contested case hearing proceeded on April 13-15 and 28-29, 2005, in Lewistown, Montana. Billings attended with his counsel, Mary K. Gallagher and Timothy C. Kelly, Kelly Law Office. The BPOE attended through Jerry Johnson, Chairman of the Board of Trustees, designated representative, with its counsel, William Berger, Wilkins and Berger.

Milo Aasved, Eric Billings, Walter Scotson, Rilla Presser, Bonnie Kallam, Omar L. Taylor, Lawrence McCrary, Carol Woolsey, Bill Larson, Randy Orley, Robert Bjelland, Lonny Bergstrom, Guy Woodburn, Kim Ferrell and Jerry Johnson testified in person. Russ Spika testified by telephone. The hearing examiner admitted exhibits 1-25, 30-32, 34-37, 101-112 (including subparts) into evidence.

The parties submitted their proposed decisions, briefs and designations of portions of deposition testimony for inclusion in the record, and submitted the matter for final agency decision.

II. ISSUES

A complete statement of issues appears in the final prehearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. FINDINGS OF FACT

1. At all relevant times, charging party Eric Billings resided in Lewistown, Montana. Infected by the human immunodeficiency virus (HIV), Billings suffered from acquired immunodeficiency syndrome (AIDS), which substantially limited one or more of his major life activities.¹ He lived with Larry McCrary, his life and business partner, who also had HIV that had progressed to AIDS.

2. Respondent Benevolent and Protective Order of Elks, No. 456 (the Elks), is a nonprofit organization and association, a “lodge” affiliated with and recognized by the Benevolent and Protective Order of Elks of the United States of America (the Elks USA) pursuant to its “Annotated Statutes” (its operating rules for recognized lodges). The primary places of business of the Elks were the premises known as the “Club House–Pine Meadows” (the club house) and its adjoining golf course, located in Lewistown, Montana. The club house, including its bar, restaurant and casino, as well as the golf course and its pro shop, were available for use by members of the Elks and the public, when open for business. The Elks’ facilities were public accommodations. At all times relevant to this case, more than half the persons using the facilities at any time were typically members of the general public and not members or officers of the Elks.

3. Before moving to Lewistown, Billings had substantial janitorial experience. In the 1990s in California, Billings and McCrary owned a franchise for Jani-King, a national chain of janitorial service companies. Their company employed up to 40 employees, providing services to a number of large facilities. Billings was responsible for contract sales, personnel administration, purchasing, quality control and customer relations. During much of the same time, Billings and McCrary also owned a coffee house that provided food, nonalcoholic beverages, and entertainment.

¹ The evidence regarding Billings’ medical status was sparse. His HIV had progressed to AIDS. The decision will therefore refer to his condition as AIDS.

As the adverse effects of Billings' AIDS increased, he could not sustain his work activities with the janitorial service company and the coffeehouse. He and McCrary closed their businesses and relocated to Lewistown where McCrary's family lived. Billings believed he was "going there to die." Instead, Billings' medication helped him to regain better strength and health, and he then began to look for work.

4. In May 2001, Kim Ferrell, bar manager for the Elks for 6 years, hired Billings to perform maintenance and janitorial services at the club house. Ferrell was the first woman to become a member of the Elks (as opposed to its auxiliary) after it ceased excluding women from membership in approximately 1995. She knew at the time she hired Billings that he had AIDS. She was satisfied with Billings' work as the janitor at the Elks during 2001.

5. Billings worked part time. He wanted to work, but he also wanted to make sure that his earnings stayed below the disqualifying amount for his social security benefits, with which he qualified for federal medical benefits. The cost of his medications without those medical benefits was prohibitive.

6. At the end of September 2001, Ferrell resigned as bar manager. The bar, gaming and restaurant business at the club house historically had not done well and was in danger of closing due to its financial condition when Ferrell resigned.

7. After Ferrell resigned, the Elks leased its restaurant operation to Omar Taylor, a member of the Elks. The Elks retained control and management of the bar, gaming operation, and golf services, and hired Bonnie Kallam as its new bar manager in late fall of 2001. She held that position until December 2003 and was Billings' direct supervisor. The Elks had a "house committee" appointed by the "Exalted Ruler," the lodge's chief executive officer. The committee had the power to hire or fire the Elks' employees at the clubhouse and golf course. In practice, Kallam exercised hiring and firing authority over the Elks' employees at the clubhouse, with the committee ratifying her decisions. During her tenure she hired a number of bartenders and other bar staff.

8. In December 2001, the local Lewistown newspaper printed a front page article on Billings and his battle with AIDS, titled *Local Man Shares Personal Experience to Increase Awareness of Deadly Disease*. As a result, some of the officers, trustees and members of the Elks, as well as others in the Lewistown community, knew that Billings had AIDS.

9. In April 2003, Milo Aasved assumed the position of exalted ruler. In that position he served as an ex-officio member of the board of trustees and presided over all membership and committee meetings. The exalted ruler had authority to sign contracts, including employment agreements, and to sign and submit licensing documents, including applications to maintain and renew liquor and gaming licenses.

10. The financial condition of the Elks' operations at the club house and the golf course continued to deteriorate. In spring 2003, Taylor and Walt Scotson, also a member of the Elks, began pursuit of purchase of the Elks' facilities, including the club house and the golf course. Taylor and Scotson thought the purchase might be a valuable investment for them and provide a resolution of the Elks' financial difficulties. Taylor was still operating the restaurant on a lease with the Elks and Scotson was the golf pro. Both were officers of the Elks.

11. In March 2003, the Elks gave a special gratuity to Billings, providing him with \$300.00 to help him in a time of need.

12. While Kallam was bar manager, Billings occasionally worked behind the bar, without authorization. In spring and summer 2003, he asked Kallam whether he could work as a bartender. Kallam had other experienced bartenders available and did not use Billings to bartend.

13. At a lodge meeting in summer 2003, there was a discussion about getting volunteers to bartend for a scheduled event. Kallam mentioned that Billings had offered to bartend for tips or as a volunteer. The trustees already had in place a policy to control cash flow and inventory (more honored in the breach than in the observance) that only the bar manager and the bartenders on duty should be behind the bar. That policy was raised during the lodge meeting, and there were also comments that Billings should not bartend or to serve in any food or drink capacity because he had AIDS. Kallam told Billings about the comments made at the lodge meeting. She did not use Billings as an authorized volunteer bartender. Billings and other persons who were not bartenders continued, in isolated instances, to go behind the bar to get drinks for customers.

14. In 2003 and 2004, both Scotson and Kallam heard what they considered to be derogatory comments about Billings in the club house bar, made by patrons. At least some of the comments were expressly related to Billings having AIDS.

15. Activities concerning the possible sale of the Elks facilities continued throughout 2003 and culminated in a membership vote in favor of the sale in November 2003. Former exalted ruler Lonny Bergstrom, long an inactive member, became active again in the fall of 2003 to oppose the sale. Bergstrom owned and operated another casino/restaurant (the Four Aces) in Lewistown. He objected to the vote favoring the Taylor-Scotson purchase proposal. Bergstrom sent a letter to the national headquarters of the Elks USA, asserting that the procedure and vote favoring the sale violated bylaws and rules. He coordinated his opposition with other officers, trustees or former exalted rulers of the Elks, including Jerry Johnson and Bill Berger, as well as the Montana Elks' representative from Bozeman, Montana.

16. On December 8, 2003, the Grand Exalted Ruler of the Elks USA issued a proclamation and executive order, placing the Elks on probation because the procedure leading to the vote to approve the sale and the terms of that sale were not proper. The Grand Exalted Ruler appointed three special trustees to oversee and to administer the Elks during probation. All three special trustees were local members and former exalted rulers – Lonny Bergstrom, Bill Berger and Russell Spika.

17. The special trustees exercised oversight of the Elks management structure, to return the organization to normal operations. The normal decision process for the Elks (membership meetings, local trustee meetings, officer and committee meetings) remained intact, subject to review and approval by the special trustees. Although objections to the facility sales triggered the executive order, its terms were not limited to the sale alone.

18. Shortly after receiving the executive order from the Elks USA, the Elks posted it for all members. By then members had already frequently discussed how to deal with the critical financial problem. The posting of the executive order intensified the discussions. At subsequent trustee and lodge meetings, there was widespread agreement on the need for a general manager to run the entire operation. Jerry Johnson, current chairperson of the local trustees, identified Carol Woolsey as a good candidate for the general manager position. Woolsey had worked as a bartender at the clubhouse from July 2002 until she left in September 2003. After she quit that job, she became a member of the Elks. By December 2003, she was an officer.

19. The midwinter convention for Elks' lodges throughout Montana was scheduled for January 15-17, 2004, in Lewistown, hosted by the Elks. The executive order heightened concerns that the Elks could not meet its responsibility to host the statewide convention. To cut costs, the Elks had already laid off all its staff for the winter except for Billings (for upkeep of the premises) and the bookkeeper. Woolsey

and some of the other members were confident that with member and volunteer help, they could still host the convention. The Elks agreed to go forward. Woolsey helped coordinate efforts.

20. Billings volunteered to work in addition to performing his regular duties. He was aware of the Elks' interest in hiring a general manager and wanted the job. He believed that doing volunteer work as well as his usual duties might impress members and prompt his consideration as a candidate for the general manager position. Billings wanted to advance beyond his janitorial job—that was why he had inquired about bartending. He wanted to work his way up to a management position, and thus was trying to demonstrate that he could do the unadvertised and undescribed job.² Although he did do some extra work, Woolsey, who was very active in coordinating preparations for the convention, did not use him much.

21. From December 2003 through January 2004, Billings asked if the Elks would be hiring a general manager. He talked to a number of the Elks' officers or trustees, including Bergstrom, Larson and Aasved. In a late night conversation at Four Aces, Bergstrom's business, Bergstrom told Billings to be more visible more often at work. Bergstrom told Billings that he had to impress the members with his work getting the clubhouse in shape to be considered seriously for the general manager job. None of the officers or trustees with whom Billings spoke either suggested that he apply, in some fashion, for the general manager position, or offered to assist him in his efforts to place his name in consideration for the position.

22. The Elks successfully hosted the Montana 2004 midwinter convention. Woolsey was a visible force in leading the efforts that made that success possible.

23. On January 26, 2004, the Elks' membership met to discuss a business plan for the year. Aasved chaired the meeting. The members discussed various options. Woolsey presented a series of ideas and was encouraged to write up a proposal to present the trustees at their meeting the next evening. Billings was absent because he was not a member.

24. On January 27, 2004, the Elks held a local trustees' meeting to make decisions about the coming year. Members could attend and had been invited to

² It is unclear how Billings intended to advance beyond his part time janitorial job and still preserve his entitlement to social security and federal medical benefits that he absolutely needed to afford his necessary medications. He could only increase his earnings by \$99.00 per month (see finding 41) and remain qualified for those benefits.

attend during the lodge meeting the previous night. Billings was not invited and could not attend because he was not a member. All three special trustees (Berger, Spika and Bergstrom) were present, as well a single local trustee (Randy Orley), exalted ruler Aasved, the next exalted ruler (Robert Bjelland) and lodge secretary Bill Larson. As invited, Woolsey attended and presented a written proposal to the trustees. After her presentation, the Elks hired her as its general manager.

25. The Elks had not advertised or published any notice of the general manager position opening. It required no written or formal application. Notice of the position was by word of mouth. No position description was created prior to hiring. In order to seek consideration for the position, any interested person had to (a) be a lodge member, (b) attend the January 26 lodge meeting, and then (c) attend the January 27 trustee meeting. Woolsey had not expressed interest in the position before those meetings. Trustees, officers and members considered her a suitable candidate, encouraged her to accept and then hired her as general manager.

26. At no time during either the lodge meeting of January 26 or the trustees' meeting of January 27 was Billings' name mentioned as a possible candidate for general manager.

27. The Elks hired members as employees if qualified members were available and interested. Individual members, including officers and trustees, often encouraged nonmember employees they liked to become members.

28. To join the Elks, a prospective member had to find a current member willing to "sponsor" the applicant for membership. Over his years of employment, Billings had asked various members about becoming a member. He had never asked any member to sponsor his application. He had never asked for an application form. Although he had expressed interest in the rumored general manager position, Billings had neither submitted an application for the position nor asked directly to be considered for it. In his exploration of becoming a member of the Elks and of landing a better job with the Elks, Billings expressed his interest indirectly, apparently hoping for or awaiting further encouragement from the members.

29. Billings and Woolsey both had experience with food and beverage sales. Woolsey had experience in golf course and tournament operation. Billings did not. Had the Elks considered Billings for the general manager position (which they did not), he was not a better qualified candidate than Woolsey.

30. The decision to hire Woolsey was a consensus decision among the special trustees, the single local trustee, the exalted ruler, and the others at the January 27 meeting. The single local trustee, Orley, exercised the local trustees' hiring and firing power and "hired" Woolsey, since the "house committee" had fallen into disuse and was defunct. If the special trustees, the exalted ruler or a vocal minority of the others present at the meeting questioned the hiring of Woolsey, it would not have occurred.

31. Aasved signed the general manager employment agreement with Carol Woolsey in 2004. After Aasved left the exalted ruler position in April 2004, he assumed a position on the board of trustees and was identified as one of two people responsible for making decisions on behalf of the organization in the lodge application for renewal of its gaming license. Bjelland, who had succeeded Aasved as exalted ruler in April 2004, was the other decision maker identified in the renewal application.

32. Woolsey worked as general manager of the Elks from February 2004 through the end of the 2004 golf season. As a bartender, Woolsey had been Billings' co-worker. In 2003, she had been in conflict with Billings because he attempted to do work behind the bar, and she tried to enforce the Elks' policy that only bartenders on duty should be behind the bar. As general manager, she was Billings' supervisor.

33. Billings was upset about the decision to hire Woolsey. He did not want to work for her. He believed he had better qualifications to be general manager than she did. He also believed that the encouragement to work harder he had received from Bergstrom and others was a sham; he felt that they should have understood he wanted them to consider him for the general manager position and suggest him as a candidate during the process. He concluded they were biased against him because he had AIDS.

34. Starting in February and March 2004, Billings expressed renewed interest in bartending positions at the club.³ Woolsey did not respond to his inquiries and did not ask him for a resume or application. She did hire summer help in temporary and part time bartender positions. She knew Billings was interested in the positions. She did not consider him for any such positions. He redoubled his efforts to act as a surrogate bartender by doing work behind the bar when the chance

³ The various bartending positions in which he professed an interest were part time and seasonal and could only have increased his wages by \$99.00 per month (see finding 41) without imperiling his medical coverage.

presented itself. She attempted to prevent him from working behind the bar under any circumstances.

35. Billings told Woolsey that he wanted to advance in his employment. She assigned him more duties, including setting up events, heavy lifting for garbage disposal, and tasks to be done during the day even though his regular hours were at night. Billings then objected to some of the duties. Woolsey complained to the trustees. The trustees began to pay more attention to Billings' unauthorized bartending and his presence at the club during the day, outside of his normal working hours. Their inquiry expanded to his time records, McCrary's work at the clubhouse, and Billings' efforts to perform work (outside his assigned janitorial duties) in the kitchen.

36. At the trustee meeting of April 20, 2004, numerous items on the agenda related to Billings' employment. By then, the Elks knew or suspected that Billings had or perhaps would file a discrimination complaint. The minutes of that meeting reflect the decisions reached. "Eric is not to be bartending. Eric is on a salary for cleaning." "Lonny [Bergstrom] or the Trustees should talk to Eric on the rules of his employment." "Eric should not be talking to suppliers or other employees." "The trustees requested that Carol make a list of problems and what Eric's duties should be. The Trustees will talk to Eric about these issues." "Eric should clean during the night and not the day when members are present." "Eric and Larry [McCrary] should not punch each other's time cards." "What is Larry's hourly wage? Who authorized it?" "Eric is not to work in the Kitchen." "At the next Lodge meeting, we should discuss the Eric problem."

37. Billings filed a complaint with the Department of Labor and Industry on April 27, 2004, and an amended complaint on May 10, 2004, alleging employment discrimination against him by the Elks, due to his disability.

38. Billings did not cooperate with the trustees in their efforts to formalize a job description for his position. He objected to some of his new duties. He also no longer trusted his employer, and manifested his resentment and his belief he had been unfairly treated. Eventually he was relieved of some of the new duties Woolsey had assigned. After the April decisions, Billings was segregated from his co-workers, banished from working when members were present, and excluded from any work in the kitchen or the bar. Communications from Woolsey were mainly via notes left for him at the facility. Communications from Johnson were mainly via his patronage at the club bar when Billings came to work late at night. By June or July 2004, the Elks gave up the effort to implement a written job description for Billings.

39. Billings had been told, over the course of his efforts to advance his career, that the Elks had concerns about the effect on the business should he, with AIDS, work in either food or beverage sales. Kallam told him this. Aasved made a similar comment. Billings' conduct, in attempting to work without authorization behind the bar and in the kitchen, contributed to the Elks' increasing efforts to limit him purely to janitorial duties beginning in April 2004. It is more likely than not that the Elks also tried to limit his work activities beginning in April 2004 because he had AIDS.

40. The financial difficulties of the Elks' enterprises continued through 2004.

41. Billings' employment continued until October 26, 2004, when the Elks laid off all its staff for the winter, including Billings. The prior practice of the Elks had been to continue janitorial and custodian services throughout the year, even during periods when most or all business operations at the clubhouse were closed for the season. By October 2004, the Elks no longer viewed Billings as a good employee who "did his work about the same as anybody else," but instead saw him as someone who was "stirring up trouble."

42. Since October 2004, the Elks have not employed a janitor or a general manager, and have leased the restaurant and bar facilities to "Harry's On the Hill," another local bar and restaurant business.

43. The Elks actively avoided considering hiring Billings as a bartender in 2004. Had the Elks considered Billings and allowed him to compete fairly with the other prospects for the bartending jobs, he would have obtained such a position. As a proximate result of the Elks failure and refusal to considering hiring Billings as a bartender, he lost the opportunity to earn an additional \$99.00 per month (the difference between the wages he received—\$721.00 every four weeks—and the maximum he could earn and still retain full eligibility for his social security benefits—\$820.00 per month—from April 2004 through October 2004, the time over which the longest term 2004 bartender hire worked). Billings lost earnings in the sum of \$693.00 from April through October 2004.

44. Simple interest at 10% per annum on these lost wages is the sum of \$86.58 as of the date of this decision ($.1 \times \$99.00 / 365 \times 3,192$ days: 365 days + 200 days for April 2004 wages, 365 days + 169 days for May 2004 wages, 365 days + 139 days for June 2004 wages, 365 days + 108 days for July 2004 wages, 365 days

+ 77 days for August 2004 wages, 365 days + 47 days for September 2004 wages and 365 days + 17 days for October 2004 wages).

45. The Elks' treatment of Billings in 2004 had a significant adverse effect on him, eroding his sense of self-confidence and self-worth, his ability to trust and his hopefulness about working and living in Lewistown. This effect resulted primarily from his perception of mistreatment in the Elks' decision to hire Woolsey. Until that time, he had maintained, even through some adversity, the perspective that if he worked hard and did his job and more to help the club prosper, he had a chance to progress in his employment. Billings felt betrayed by the hiring of Woolsey, convinced that the Elks had been nice to him to his face while expressing contempt for him behind his back and working against his efforts because he had AIDS. Angered, humiliated and depressed, his emotional distress was exacerbated by his treatment in April 2004 and his subsequent rejection for bartending positions.

46. In February 2004, Billings was already worried and distressed about maintaining his job as janitor. As his efforts to enhance his income was rebuffed in April through October 2004, his stress increased and manifested itself in visits to the emergency room to diagnose and treat panic attacks, lost appetite, fear of leaving his house, and sleeplessness. As his isolation in his job grew so did his depression, reaching a point in the fall of 2004 where his doctor placed him on a prescription antidepressant. Billings suffered compensable emotional distress resulting from the Elks' directives regarding his work in April 2004 and the Elks' rejection of his efforts to obtain a bartending position thereafter, for which he is entitled to recover the sum of \$10,000.00, without regard to the emotional distress resulting from other and prior actions of the Elks (as to which Billings failed to prove illegal discrimination).

IV. OPINION⁴

Billings proved that the Elks discriminated against him because of disability when, in April through October 2004, it both refused to consider him for a bartending job and adversely changed the terms and conditions of his employment. He did not otherwise prove illegal discrimination.

Liability

⁴ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Montana law prohibits employment discrimination based on disability, except when the safety or essential tasks of the job require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). To establish his case of disability discrimination in employment, Billings had to prove that (1) he had a disability; (2) he was otherwise qualified for jobs for which he applied or was satisfactorily performing the job he had; and (3) the Elks denied him the jobs he sought or took adverse action against him in the job he had because of his disability. *E.g.*, *Reeves v. Dairy Queen*, 1998 MT 13, 287 Mont. 196, 953 P.2d 703; *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947; Mont. Code Ann. § 49-2-303(1)(a).

When there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof of a *prima facie* case articulated by the United States Supreme Court in *McDonnell Douglas v. Green* (1973), 411 U.S. 792. *E.g.*, *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *see also*, *Martinez v. Yellowstone Cty. Welf. Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246. When the charging party presents direct evidence of discrimination, Montana courts apply a different standard of proof. *Laudert v. Richland County Sheriff's Dept.*, ¶¶27-29, 218 MT 2000, 301 Mont. 114, 7 P.3d 386; *Reeves, op. cit.* The elements the charging party must prove remain essentially the same—membership in a protected class, qualification for or satisfactory performance of the job and adverse action because of protected class membership—the difference in standard of proof comes into play for the respondent who seeks to rebut or avoid the proof of discrimination.

Billings complained that the Elks discriminated against him by not considering him for the general manager position or the subsequent bartender openings and by subjecting him to different and more onerous terms and conditions of employment as a janitor in 2004, all because of he had AIDS. The Elks admitted Billings had a disability, denied that it had taken any adverse action against him because of his disability, and did not interpose the safety or essential tasks defenses. The first element of Billings' case was established by stipulated fact—Billings had a disability. That disability was known to the Elks from the date he was hired and became more widely known after the newspaper article in December 2001. Billings established both that he was a member of a protected class and that his employer knew it.

The second element of Billings' case—that he applied for jobs for which he was qualified or was performing his job satisfactorily—is subject to different analyses regarding the various jobs he allegedly sought.

Billings offered evidence that before the general manager position opened, he attempted to advance from a purely janitorial position to that, apparently, of either a

bartender or a bartender and janitor, in 2002 and 2003. This evidence was only potentially relevant for purposes of showing a discriminatory motive, because it involved events that occurred more than 180 days prior to Billings' filing of his complaint. Mont. Code Ann. § 49-2-501(4)(a).

Billings sought the general manager position only indirectly. He did not directly ask any of the people to whom he talked to sponsor him for membership⁵ or to endorse and support his candidacy for general manager. Billings may have trusted these people and expected their support, even as late as early January 2004, but none of them had any individual obligation to volunteer to sponsor him or to carry his candidacy for general manager to the organization. Billings knew or should have known that to become a member of the Elks he had to submit an application (with a sponsor member supporting it). He also knew or should have known that since he had limited access to the membership (not being a member) he needed to make a clear and unequivocal request to be considered for the general manager position.⁶ He took neither action.

Billings never applied for the general manager position, nor did he otherwise give any clear notice to the Elks that he sought the position. His inquiries in his private conversations did not amount to such notice. He did not prove that the people with whom he talked knew that his inquiries were indirect requests for help and support. Billings failed to prove that he made it clear to the Elks that he sought the general manager position before the Elks hired Woolsey for that job. His proof fell short of establishing the second element of his case with regard to the general manager position in 2004.

With regard to bartending jobs in 2004, the evidence was different. Upset at the hiring of Woolsey, Billings became more direct. He made it clear to Woolsey and other officers that he wanted a bartending job. He challenged the Elks by continuing to go behind the bar, contrary to policy, when chances presented themselves. He let the Elks know that he questioned the basis upon which they had not offered him the general manager position, in effect letting the Elks also know that he wanted a bartending job. Billings proved that from April through October 2004, when

⁵ Membership would have given Billings far greater opportunities to pursue the general manager position. Woolsey's status as member and officer was integral to her selection for the job.

⁶ Woolsey never made such a clear and unequivocal request, but because she was already a member and an officer, she had far greater access to the decision makers. As a result, Woolsey was readily able to present an action plan to address the problems facing the Elks and thereby make herself a candidate. Given that Billings was a janitor and not a member, he could not expect to be considered without a clear and formal statement of his interest in the position.

additional bartenders were hired and worked, he was, to his employer's knowledge, seeking a bartending job.

Billings was at least as qualified as the applicants the Elks hired as bartenders in 2004. Aside from trying to work in the bar, and sometimes also in the kitchen, Billings generally performed his janitorial job satisfactorily. Although he was disgruntled, there was no evidence that a janitor had to display contentment as an essential part of his job at the Elks. Regarding the bartending jobs he sought and the changes in his janitorial duties in 2004, Billings proved the second element of his case.

The third element of Billings' case requires both proof of adverse action and proof of motive, either by presumption or from direct evidence. With regard to the general manager job, failure of proof that Billings applied defeated his case. Failing to offer Billings a job that he had not clearly sought was different from rejecting him for the job. Because the Elks did not reject him for the job, there can be no inquiry into its motives for an action it never took. Clearly, there was some evidence (see, for example, finding 13) that some Elks' members and officers expressed a discriminatory animus toward Billings because he had AIDS. Nonetheless, the evidence of motive does not provide a sufficient basis for the hearing examiner to speculate about what the Elks might have done had Billings actually presented a clear request that he be considered for the general manager job. The evidence Billings presented did not establish that the people with whom he conversed about the general manager position decided, on behalf of the Elks, to withhold the help and support he sought because he had AIDS. Even less did his evidence establish that the Elks, with notice of his interest in the job, made a decision not to consider him for the general manager position because he had AIDS.

With regard to the Elks' 2004 refusal to consider Billings for bartending positions, which he did seek, Billings presented a basis for presuming a discriminatory motive with (1) proof of the other elements of his case, as already discussed above, (2) proof that the Elks took adverse actions regarding his janitorial job in 2004 and (3) proof that the Elks, including some of the decision-makers, considered whether fear of AIDS would have a negative effect on the bar and restaurant business.

Billings established that the Elks took formal actions against him after he specifically told Woolsey that he wanted to be considered for bartending positions. Several of those formal actions directly addressed and rebuffed his attempts to work behind the bar and in the kitchen.

Billings also presented admissible testimony from several witnesses that various members, officers and trustees either expressed or reported concerns that employing Billings in the bar or the kitchen would be bad for business. The statements, in some instances, were admissions by party-opponents, statements made by the party's agents or servants (officers or trustees) within the scope of their agency or employment (Billings' work for the Elks). Mont. R. Ev. 801(d)(2)(C). In other instances, the statements were made about the then-existing mental states of the declarants (their intent, motives and feelings). Mont. R. Ev. 803(3). Testimony that specific officers and trustees reported that others made such comments was also relevant to the Elks' motives in taking adverse action against Billings. There may not have been a consensus, but the decision makers clearly were aware of a groundswell of comment adverse to employing Billings as a bartender or kitchen worker. In this context, the truth of the comments (that Billings should not work in bar or kitchen jobs) was not at issue, and therefore testimony about negative comments by members or unidentified persons who may not even have been members was not hearsay when offered to prove that the comments were made and either directly heard or reported to decision makers, rather than true. Mont. R. Ev. 801(c).

Billings' evidence contained statements by decision makers that others did not want him working behind the bar or in the kitchen, so that putting him in either place might be bad for business. These statements were not undisputed admissions by decisions makers that because he had AIDS they did not want Billings bartending or working in the kitchen. Nonetheless, these statements were certainly more substantial than a stray remark by a decision maker in casual conversation, which together with discriminatory comments by non-decision makers, was insufficient to support even an inference of discriminatory motive. *See Mysse v. Martens* (1996), 279 Mont. 253, 926 P.2d 765, 772.

Billings' evidence of statements by members, officers and trustees did not establish a direct evidence case, but it did establish an indirect evidence case, supporting the inference or presumption that the Elks worked hard to keep Billings a janitor in April through October 2004 because of concern over the fears of the public and the members regarding the fact that he had AIDS. Despite the Elks' admitted knowledge of discrimination law, its officers and trustees took no action to dispel these fears or stereotypes. Instead, the decision makers decided to keep Billings out of the food and beverage service end of their business.

Billings proved discrimination against him in April though October 2004 through presumption or inference. Admin. R. Mont. 24.9.610(2)(b)(iv) and (v). The Elks' burden of responding to that proof was therefore appropriately measured by the indirect evidence test. The Elks had to show legitimate, nondiscriminatory reasons

for altering the terms and conditions of Billings' employment and avoiding consideration of his request to tend the bar. Admin. R. Mont. 24.9.610(3).

The Elks presented evidence that the adverse actions taken were in response to Billings' increasingly persistent incursions behind the bar, occasional forays into working in the kitchen and negative comments about Woolsey and the operation in general to other employees. On its face, this evidence tended to show legitimate business reasons for limiting Billings to janitorial duties.

Once the Elks produced this evidence of a legitimate, nondiscriminatory reason for the challenged actions, Billings had to demonstrate that the reason was a pretext for unlawful discrimination. He could do so by proving either that the Elks' acts were more likely based on an unlawful motive or that the explanation for the challenged acts was not credible. Admin. R. Mont. 24.9.610(4).

Billings' evidence persuaded the hearing examiner that the Elks' opposition to his attempts to tend bar was out of all reasonable proportion to the explanations given (*i.e.*, to keep non-bartenders from behind the bar and to create a current job description). The hearing examiner was left with a clear conviction that the Elks went to extraordinary lengths to assure that Billings would neither be hired nor allowed to work even momentarily as a bartender or kitchen worker, out of their discriminatory animus toward Billings because he had AIDS. "We hired him as a janitor" and "he was a discontent" did not meet and rebut the merits of Billings' case that the reason the Elks were committed to keeping him a janitor was that he had AIDS. The explanations given were pretexts for discriminatory action. Billings met his ultimate burden of proving that the Elks illegally discriminated against him in April to October 2004. *Crockett, op. cit.*, 761 P.2d at 818; *Johnson v. Bozeman S. D.* (1987), 226 Mont. 134, 734 P.2d 209, 213.

In terms of the Elks' ultimate decision not to keep Billings on after October 2004 and not to rehire him in 2005, the evidence was clear and uncontroverted that continued financial difficulty led the Elks to close its operations and lease the premises. Thus, Billings proved his case solely for the bartender jobs in 2004 (including the changes to the terms and conditions of his janitorial job).

Damages and Affirmative Relief

The department may order any reasonable measure to rectify any harm Billings suffered as a result of illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding 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 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.

Billings sought lost wages from the bartender job he would have obtained in 2004. He also claimed emotional distress as a proximate result of the Elks' strenuous avoidance of considering him from a bartending job and their adverse acts against him as a janitor.

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 (or to the end of the job at issue, October 2004 in this case) as a result of the unlawful discrimination. *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626. The charging party may also recover for losses in future earnings if and only if the evidence establishes that future losses are likely to occur because of the discriminatory acts. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 439. The findings here confirm that Billings suffered no future lost earnings. Billings' economic loss is the \$693.00 more he would have earned from April through October 2004. Prejudgment interest on lost income is a proper part of the damages award. *P. W. Berry, Inc., op. cit.*, 779 P.2d at 523; *Foss v. J.B. Junk* (1987), HR No. SE84-2345.

Billings also sought recovery for his emotional distress. The department can require any reasonable measure to rectify "any harm, pecuniary or otherwise" suffered because of the discrimination. Mont. Code Ann. § 49-2-506(1)(b). Emotional distress damages are within the scope of the statute. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601.

Ten years ago, Montana adopted a uniform standard of proof for emotional distress damages. *Sacco v. High Country Ind. Press, Inc.*, (1995) 271 Mont. 209, 896 P.2d 411. Four years ago, the Court held that emotional distress recoveries for illegal discrimination under the Montana Human Rights Act follow federal case law, rather than *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. Billings did not lose an existing income because of the illegal discrimination—he lost a slightly higher income.

Billings' emotional distress was more akin to that of the plaintiffs in the case of *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. Those 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 appeals court increased their awards from \$125.00 to \$3,500.00 each for the overt racial discrimination.

Billings' emotional distress was considerably greater than that demonstrated in *Johnson*. There are some analogies—Billings had prior personal experience with discrimination because he had AIDS and he belonged to a class of people (gay men with AIDS) that the hearing examiner takes administrative notice has a history of being the object of societal hatred and discrimination. Montana law expressly recognizes that freedom from unlawful discrimination is a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. The 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. Choteau Bar and Steak Hse.* (1993), HR No. 8901003828. Billings suffered emotional distress as a result of the Elks' both refusing to consider him for a bartending job and making his janitorial job more difficult. The evidence of his emotional distress was sufficient to merit an award of \$10,000.00.

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. Mont. Code Ann. § 49-2-506(1)(a). Given the reduced operations of the Elks, injunctive relief alone is proper, in addition to the financial award to Billings.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. The respondent, Benevolent and Protective Order of the Elks, No. 456, Lewistown, Montana, illegally discriminated against the charging party, Eric Billings, in employment by avoiding and refusing consideration of Billings for bartending positions that opened in April through October 2004 and by making the terms and

conditions of his employment as janitor more onerous during that same time, because he had a physical disability (AIDS). Mont. Code Ann. § 49-2-303(1)(a).

3. The respondent did not otherwise illegally discriminate against the charging party in employment.

4. The respondent is liable to the charging party for lost wages of \$693.00 resulting from the illegal discrimination, for prejudgment interest of \$86.58 on the lost wages, and for the pecuniary value of \$10,000.00 for the emotional distress suffered as a result of the illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b).

5. The law mandates affirmative relief against the respondent. The department enjoins it from avoiding and refusing to consider as applicants for employment persons with AIDS who actively seek such consideration, when the respondent has openings for which having AIDS does not legitimately disqualify prospective applicants. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. The department grants judgment in favor of Eric Billings and against Benevolent and Protective Order of the Elks, No. 456, Lewistown, Montana, on the charge that the Elks illegally discriminated against Billings when it avoided and refused his requests to be considered for bartending positions from April through October 2004, and when it made the terms and conditions of his employment as janitor more onerous during that same time, because he had a physical disability (AIDS).

2. The department grants judgment in favor of Benevolent and Protective Order of the Elks, No. 456, Lewistown, Montana, and against Eric Billings on all other and further charges of illegal discrimination in his complaint and dismisses those claims.

3. The department awards Billings the sum of \$10,779.58 and orders the Elks to pay him that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

4. The department enjoins and orders the Elks to comply with all of the provisions of Conclusion of Law No. 5.

Dated: November 17, 2005.

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