

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0031010360-61 and 70:

ROBERTA DREW,)	Case Nos. 196-2004, 197-2004 &
)	198-2004
Charging Party,)	
)	
vs.)	
)	ORDER GRANTING
YELLOWSTONE COUNTY,)	SUMMARY RULING
YELLOWSTONE COUNTY)	
COMMISSIONER JIM RENO AND)	
DWIGHT VIGNESS)	
)	
Respondents.)	

* * * * *

On September 14, 2006, the counsel for the parties presented oral argument on Drew’s motion for “Motion for Supplemental Findings, Conclusions and Order,” fully briefed by the parties. Having considered the record on remand, including the transcript of the original hearing, the hearing examiner’s previous decision, the District Court remand order, the filings of the parties and their arguments, and Exhibit 47, “Decision and Order, Yellowstone County Grievance Commission, 9/26/03 in re Grievance Roberta Drew,” the hearing examiner now grants the motion, reaching the following findings and conclusions and issuing this order, supplementing the original final agency decision previously issued in the above matters.

FINDINGS OF FACT

1. In the original contested case proceeding before the department, one of the issues for decision was what reasonable relief to award to Drew to rectify any harm she suffered as a result of any violation by respondents of Drew’s rights under the Human Rights Act and the Governmental Code of Fair Practices Act, “Final Prehearing Order” (Feb. 20, 2004), p. 2, under “VIII. Issues,” No. 7.

2. With respect to this issue in the original contested case, Drew argued in her post hearing filings that the relief she should receive included an award for the reasonable fees and costs she incurred in negotiating an agreement to exercise her grievance rights and successfully pursuing her grievance through the Level III grievance hearing. “Charging Party’s Initial Post Hearing Brief” (June 4, 2004), p. 2, last paragraph under “Summary.” She specifically argued that she had “incurred legal fees and costs as a direct result of having to mitigate her damages from the failure of the County to process her grievance. She engaged legal counsel to negotiate the agreement to process her grievance and to represent her in the Level I, Level II and Level III

proceedings on the grievance. . . . The County knew at the conclusion of the Level I meeting that it had violated her rights. Drew would not have incurred any legal fees and costs after January 9, 2003, when the Level I meeting should have taken place, if the County processed her grievance in a timely manner, in a manner similar to the processing of successful grievances by male attorneys, or in a fair and objective manner.” “Charging Party’s Proposed Findings of Fact” (June 4, 2004), p. 32, Proposed Finding 112. The Level III Grievance proceeding occurred, in its entirety, between January 9, 2003 and December 31, 2003 (the date after which she sought no further damages).

3. The September 26, 2003, decision of the Yellowstone County Grievance Commission ordered that Yellowstone County “shall bear the costs and fees of the Level III proceedings.” Exhibit 47.

4. In his decision, the hearing examiner construed the grievance decision to award Drew her attorney fees and costs for the Level III grievance proceedings. “Final Agency Decision” (Nov. 11, 2004), p. 32, Finding of Fact No. 157, see also, p. 52, “[t]he grievance decision awarded her fees and costs for the Level III proceeding. . . .”

5. Because he found that the grievance decision awarded Drew her attorney fees and costs for the Level III grievance proceedings, the hearing examiner limited his further damage findings regarding attorney fees and costs to the Level I and II proceedings.

6. In late February 2003, the county, Reno, Kennedy, Vigness, Bevolden and Drew all signed an agreement to process Drew’s grievance. The parties agreed that the grievance proceedings pursuant to the agreement were binding upon them, but that Drew’s agreement did not limit, impair or waive her rights to pursue legal actions regarding alleged denial of her rights. The agreement spelled out in detail the procedure for addressing Drew’s grievance at each successive level, modifying the normal county grievance procedure. Pursuant to that process, Level I and Level II proceedings (modified and made more formal by the agreement) took place. At each of the two levels, the county had actual knowledge that the firing of Drew was improper. The county denied Drew’s grievance without explanation at both levels. “Final Agency Decision” (Nov. 11, 2004), p. 32, Finding of Fact No. 157; *see also, id. at* p. 50, Drew’s Grievance at Levels I and II, last paragraph. Level III proceedings (also modified and made more formal by the agreement) also took place pursuant to the same agreement.

7. Drew incurred attorney fees and costs because the county illegally failed to handle her grievance in accord with its policies and procedures and refused without reason to admit the improper firing at the ultimate Level I and Level II proceedings. There would have been no Level III grievance proceeding and Drew would not have incurred any costs and fees at Level III of the grievance proceeding but for the fact that respondents “illegally failed to handle her grievance in accord with its policies and procedures and refused without reason to admit the improper firing at the ultimate Level I and Level II proceedings.” *Id.*, p. 33, Finding of Fact 164. Similarly, Drew incurred attorney fees and costs at the ultimate Level III proceeding because the county refused without reason to admit the improper firing before the Level III proceedings.

8. The County has not reimbursed Drew for any Level III fees or costs and presently asserts that the grievance decision does not impose any obligation upon it to pay the fees or costs incurred by Drew during Level III of the grievance proceeding.

9. Since the County failed and refused to reimburse Drew for her Level III attorney fees and costs, Drew has suffered the harm of either paying or owing those fees and costs. That harm resulted from the County illegally failing to handle her grievance in accord with its policies and procedures and refusing without reason to admit Drew's improper firing before, during and after the Level I and Level II proceedings. The motivation for the County's illegal failure to handle her grievance in accord with its policies and procedures was retaliatory animus against Drew in violation of Montana's laws against discrimination, as detailed in the previous decision.

10. Drew is entitled to recover the attorney fees and costs incurred, in an amount to be determined in accord with Paragraph 3, Section VI, Order, in the original decision, which states, in pertinent part:

If respondents do not appeal this final order Drew shall by November 30, 2004, file with the department a statement of the amount she seeks for attorneys' fees and costs incurred in the Level I and II grievance proceedings and the respondents shall by December 17, 2004, file a response, stating either their agreement with the amount sought by Drew or in the alternative the reasons they dispute the amount; the hearing examiner will either issue a further order for payment of the agreed amount, or convene a telephone conference regarding possible evidentiary proceedings to set the amount. If respondents do appeal this final order, further proceedings regarding the attorneys' fees and costs portion of the damages can be addressed by the tribunal exercising appellate jurisdiction.

OPINION¹

The damages the department may award a charging party who has suffered illegal discrimination include any reasonable measure to rectify any harm resulting from that illegal discrimination. 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. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; **accord**, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).²

The department cannot award the costs and attorney fees incurred in prosecuting the discrimination claim itself, because the power to do so is reserved to the district courts. Mont.

¹ 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.

² Montana looks at analogous federal cases in interpreting this state's antidiscrimination laws. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. MDU Co.*, 198 Mont. 56, 643 P.2d 841 (1982).

Code Ann. § 49-2-505(7). However, costs and attorney fees incurred in prosecuting a grievance made necessary by the illegal discrimination clearly is “harm resulting” from that discrimination, which the department can remedy pursuant to the express provisions of Mont. Code Ann. § 49-2-506(1)(b).

Double recovery is not intended under Mont. Code Ann. § 49-2-506(1)(b). Since the Human Rights Act does not specifically discuss how to address double recovery, the department has to take into account any possible double recovery in fashioning the reasonable measures required by the statute. For example when a charging party has received Unemployment Insurance benefits for unemployment resulting from illegal discrimination, recoupment by the department’s Unemployment Insurance Division is proper, rather than any offset against the recovery for the illegal discrimination. *See, Bosch v. Limelight, Inc.* (9/10/98), HRC Case No. 9201005315, p. 9, footnote 4. In this instance, there is no reason to require that Drew litigate the dispute over whether the grievance decision entitles her to recover her attorney fees and costs for the Level III proceeding. The law does not require useless acts. Mont. Code Ann. § 1-3-223. The harm Drew suffered because of the illegal discrimination included incurring costs and fees for the Level III proceeding. She can only recover those costs and fees once. Since the county refuses to pay the costs and fees, she can recover them in this proceeding, obviating the need to embark upon further legal proceedings to see if she can recover the same fees and costs there.

If there are no further proceedings in this matter, Drew can, in accord with the original decision, seek a determination of her fees and costs recovery (for fees and costs awarded in both the original decision and this one, not for fees and costs incurred in this case) in this forum. Otherwise, she can seek it as part of those further proceedings.

Judge Sherlock believed, with good reason, a more extensive review of the record than he could readily undertake was involved in deciding the issue addressed in this summary ruling. That would not be the case for a determination of the amount of the fees and costs recovery for the fees and costs awarded in both the original decision and this one. Therefore, consistent with the original decision, no determination of the amounts due is currently made. Drew can petition the Hearings Bureau for such a determination, when and if there are no further possible reviews pending or possible and the amounts involved have still not been determined.

CONCLUSIONS OF LAW

1. Respondent Yellowstone County illegally discriminated against charging party Roberta Drew in violation of the Montana Human Rights Act and the Governmental Code of Fair Practices by failing and refusing to acknowledge the merit of her grievance without the necessity of the formal Level III grievance proceedings, despite the absence of an adequate basis for her discharge, in retaliation for her filing of complaints under both the Montana Human Rights Act and Montana Governmental Code of Fair Conduct Act. *See*, Mont. Code Ann. §§ 49-2-301, 49-2-303(1)(a), 49-3-201(1) and 49-3-209.

2. The attorney fees and costs Drew incurred at the Level III grievance proceeding with Yellowstone County in 2003 constitute a harm she suffered as a result of the county's illegal discrimination, and the department should include in the reasonable measures required to rectify this pecuniary harm an order requiring that the county pay her (or her attorney, for all or any part of the amount not already paid) the amount of the costs and attorney fees she incurred to prosecute and prevail in that proceeding as well as any unreimbursed fees and costs for the Level I and II proceedings. Mont. Code Ann. § 49-2-506(1)(b).

ORDER

1. Yellowstone County must pay Roberta Drew an amount equal to the reasonable attorney fees and allowable costs she incurred (or pay to her attorney, for all or any part of the amount she has not already paid) to prosecute and prevail in Level I, Level II and Level III grievance proceedings on the grievance she filed regarding the termination of her employment.

2. Within 30 days of Drew having knowledge that there are no further proceedings regarding this matter pending in any other tribunals, Drew may, if the issue of how much the county must pay her pursuant to paragraph 1 remains in dispute, petition the Hearings Bureau to determine the amount of the costs and fees awarded to her in this decision by filing with the Hearings Bureau a statement of the amount she seeks for attorneys' fees and costs incurred in the Levels I, II and III grievance proceedings together with documentation supporting the amount sought and proof that the filing is timely, serving copies by mail upon counsel of record for the respondents. Upon such filing and service, respondents shall, by the first business day falling on or after the 33rd calendar day after service by mail (this includes 3 days for service by mail), file a response, stating the reasons they dispute the amount. After the deadline for the response, the hearing examiner will either issue an order for payment of the amount sought if no response is timely filed or convene a telephone conference regarding possible evidentiary proceedings to set the amount if a response is filed.

3. This order of the department regarding the issue remanded from district court is final unless a party aggrieved thereby timely seeks review by an appropriate tribunal.

Dated: January 18, 2007.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner