

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011559:

BRIAN TOCHER,) Case No. 1961-2006
)
)
 Charging Party,)
)
 vs.) **FINAL AGENCY DECISION**
)
 DEPARTMENT OF PUBLIC HEALTH)
 AND HUMAN SERVICES,)
)
 Respondent.)

* * * * *

I. Introduction

Brian Tocher filed a human rights complaint alleging that the Montana Department of Health and Human Services (DPHHS) illegally discriminated against him in employment on the basis of a physical disability (vision impairment) because DPHHS did not hire him for any of four positions for which he applied. This matter is before the Hearings Bureau on remand from the Human Rights Commission which reversed an earlier determination of the Human Rights Bureau that found no reasonable cause for Tocher's allegations.

Hearings Examiner Gregory L. Hanchett held a contested case hearing in this matter on September 13, 2006 in Helena, Montana. Tocher, Gary Huffmeister, Marilyn Brush, Lori Kelim, Deb Spitzer, Elen Weg, and Betty Pettibone all testified under oath in this matter. The parties stipulated to the admission of Respondent's Exhibits 101 to 146, 164 and 165. In addition, the parties stipulated to admit into evidence the deposition of Tina Berkshire.

Counsel for each party requested time to submit post-hearing briefs. These requests were granted and the last brief was submitted on November 8, 2006, at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law, and final agency decision.

II. Issues

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

III. Findings of Fact

1. Tocher is disabled within the meaning of the Montana Human Rights Act. He suffers from a visual impairment.

2. Tocher engaged in two application processes for four different positions for the job of eligibility examiner that were advertised by DPHHS. Three of these openings, Position numbers 30151, 30716, and 30722, were located at the DPHHS facility in Billings, Montana. The fourth, position number 30091, was located at the DPHHS facility in Great Falls, Montana. Tocher has never held a job as an eligibility examiner.

3. Applicants for the three Billings positions were solicited in one application and interviewing process. Applicants for the Great Falls position were solicited in a different application and interviewing process.

4. Tocher met the minimum qualifications for all four positions. That does not mean, however, that he was as qualified as other individuals who applied for the positions.

5. The job descriptions for all four positions are substantively the same. They describe a position that investigates applicant's eligibility for all types of assistance programs, including Medicare, administered by the State of Montana. Among other things, the incumbent in the position must be able to conduct in-depth interviews with applicants by phone to determine eligibility, be able to interact professionally with persons suffering from all sorts of maladies and with all sorts of temperaments, and to be able to control the direction and scope of contacts with applicants. The incumbent must be aware of the investigative techniques to be employed to ensure that accurate information regarding an applicant's eligibility is obtained and verified. The incumbent in the position must also be able to "discern and comprehend with sensitivity" the underlying needs and concerns of applicants. Exhibit 101, position description, page 2, Paragraph 9.

6. The interviewing and selection process for all four of the positions followed the same format. First, DPHHS solicited applications for the vacant positions. Once received, the applications were screened to determine which of the applicants met the minimum qualifications for the positions. All applications meeting the minimum qualifications are then forwarded on to the hiring manager who then reviews the applicant pool, including the DPHHS PERS-40 form, to determine how many of the applicants would be interviewed.

7. The methodology of screening the applicants for the position and assigning them a score is straightforward and quite impartial. As demonstrated by Exhibit 115 and Exhibit 145, the application screener goes through and assigns between 0 and the maximum points for each area of experience pertinent to the job for which applications are being taken. The source of the information utilized to apply points is the information contained on the application provided by the applicant. In the case of all of the applications for the positions at issue in this case, the pertinent areas of experience were (1) course work at college or a tech school in related field, (2) workshop or class room experience in related fields including use of a personal computer, (3) experience utilizing a personal computer, (4) amount of public contact the applicant has had in various job fields (such as counseling or as an educator), (4) amount of interviewing experience the applicant has had in those job fields, (5) amount of experience the applicant has had in verifying information in various job fields, and (6) experience as an eligibility examiner or eligibility examiner assistant.

8. It is only where two candidates are found to be substantially equivalent in qualifications that DPHHS applies a disability preference to award an applicant a position. That is, in the event that a person who has a disability is found to be substantially equivalent to another person applying for the same position, then the person with the disability will be awarded the position.

9. The decision as to which applicants will be interviewed for a job position is discerned from reviewing the PERS-40 form which ranks the applications from highest score to lowest score (Exhibit 107 for Billings positions, Exhibit 117 for Great Falls position). After a decision is made as to which of the applicants will be interviewed, an interview panel comprised of DPHHS personnel convenes to review the questions and the model answers for those questions. The panel also discusses the interview scoring system to ensure uniform scoring for all applicants. The panel then reviews the applications and then sets dates for conducting all interviews.

10. The questions that are given to the applicants who are selected for interviews are developed before the interview panel convenes and long before the applicants are interviewed. The question forms provided to the panel members identify model answers. *See, e.g.,* Exhibit 102.

11. Utilizing the interview questions discussed above, the panel then conducts oral interviews of the applicants selected for interview. All applicants are asked the same questions. As the interview is undertaken, the panel members have before them the Oral Interview Rating Form (Exhibit 104) as well as the questions and model answers. The panel members utilize these forms to jot down notes about an applicant's answer to the interview questions. As each question is asked, the interviewer scores the applicant's answer. Immediately after the interview is concluded, the panel members discuss their individual interview scores to come to a consensus score. The average score given to the applicant is a consensus score arrived at through the panel members discussion.

12. The interview panel for the three Billings positions was comprised of Gary Huffmeister, director of Human Resources in Yellowstone County, Lori Kelim, DPHHS eligibility examiner supervisor and Deb Spatzier, Human Resources Supervisor at DPHHS in Billings. The human resources initial compilation of the applicants' education and experience gave Tocher an education/experience rating of 45. The highest education/experience rating accorded to any of the applicants was 55.

13. After receiving the PERS-40 form for the applicants for the three open positions, Huffmeister determined that all 21 applicants who were found to meet the minimal qualifications (including Tocher) would be interviewed. The questions and model answers were provided to the panel in accordance with established procedure prior to the interviews of the applicants.

14. The questions themselves (as demonstrated by Exhibit 102) are logically related to helping the interviewers assess the applicants with the best qualifications for the position. Question number one is plainly designed to test the applicant's knowledge of the position for which he or she applied. Question Number 2 accesses the applicant's ability to make eligibility determinations in accordance with applicable laws and regulations. Question Number 3 seeks insight into the applicant's abilities to elicit pertinent information from persons seeking benefits. Question Number 4 tests the applicant's willingness to place a high priority on customer service. Question Number 5 tests the applicant's ability to recognize training he or she might need in order to effectively carry out the duties of the position. All of these inquires elicit information that is highly relevant to determining the applicants' fitness for the positions as measured by the duties described by the job position descriptions.

15. All 21 applicants for the Billings positions were interviewed and their interview scores were totaled. Tocher received a final score of 78. Several persons scored higher in the interviews than Tocher. Eight applicants received higher final scores than Tocher. Applicants Marie, Mark and Lisa received final scores of 119.05, 119, and 114.50 respectively, representing the three highest final scores of all applicants. These three persons were offered the three positions and Tocher was not offered a position.

16. For legitimate, non-discriminatory reasons, the interviewers determined that Tocher was not as qualified as the three persons who were offered the three positions. Tocher's answers were not as good as some of the other applicants. For example, in response to Question #1. His answer was limited with respect to the programs administered by the eligibility office. He did not talk about any of the legitimate qualities for the position that the interviewers were looking for. In response to Question #2, Tocher did not as fully address some of the other options that a client might pursue. On Question #3, Tocher gave a limited answer and "did not fully answer the question or discuss the importance of communication." Exhibit 105, Oral Interview rating of Tocher

prepared by interviewer Lori Kelim. On Question #4, Tocher did not address the emergency situation. On Question #5, Tocher did not acknowledge the importance of good training. His answers in several important aspects fell short of the model answers to the interview question.

17. A comparison of the interviewer's notes of the interviews conducted with applicant's Marie, Mark, Lisa and Tocher does not reveal any impropriety or inappropriate considerations in the scoring of the four candidates. Marie, Mark and Lisa could legitimately have been considered to have had better interviews than Tocher resulting in merited higher scores than that received by Tocher.

18. Tocher and 21 other persons also applied for the eligibility examiner position in the Great Falls office of DPHHS (Position # 30091). Tocher and 18 other applicants were found to meet the minimum qualifications for the position. As occurred with the Billings position, the applications were screened by DPHHS human resources and then forwarded to the persons who would be making the hiring determination in the Great Falls office to determine which of the applicants would be interviewed. The same point system that was used to evaluate the Billings applicants (discussed in Findings of Fact Paragraph7, above) was utilized.

19. Tocher's education/experience score for the Great Falls position was 40. Exhibit 143. 14 other applicants who also met the minimum qualifications received higher education/experience scores. The top three applicants, Carol, Denise, and Suzette, received scores of 78, 60 and 60 respectively. With 14 people receiving higher scores than Tocher, Tocher was not selected for an interview.

20. For legitimate, non-discriminatory reasons, Tocher was not selected for an interview because his education/experience was less than those who were interviewed. The application reviewers at DPHHS properly concluded that Tocher was not as qualified as the other fourteen persons who were given interviews for the Great Falls position.

21. A comparison between Tocher's application and the review of his application and the applications and reviews of the applications of the 14 other applicants who received interviews does not reveal any impropriety or inappropriate considerations in the scoring of the applicants. The 14 applicants who received interviews could legitimately have been considered to have more useful education/experience than Tocher resulting in merited higher scores for the other applicants than the score which Tocher received. One example among many is Carol who had been an eligibility examiner assistant in a state office for 10 years prior to applying for the Great Falls position. Exhibit 126, page 3. As mentioned earlier, Tocher had never had such experience. There is no evidence in any of the exhibits related to the Great Falls applicants (Exhibits 120 through 143) that shows that the cut off line for granting an interview was based on any discriminatory animus directed toward Tocher. To the

contrary, the only consideration DPHHS utilized was the relevant and legitimate consideration of the applicants' relative education/experience as reflected in each applicant's application and resume.

IV. Opinion¹

Montana Code Annotated § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of physical disability commits an unlawful discriminatory practice when the reasonable demands of the position do not require a disability distinction. When there is no direct evidence of discrimination, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) standard applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, ¶ 22, 7 P.3d 386, ¶ 22. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. *E.g.*, *Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Tocher must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a *prima facie* case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). He must show (1) that he is a member of a protected class; (2) that he was qualified for the positions which he was denied; and (3) that he was denied the appointment to the position in circumstances "which give rise to a reasonable inference that [he] was treated differently because of [his] membership in the protected class." *Id.*; Admin. R. Mont. 24.9.610(2)(a). If Tocher proves a *prima facie* case of discrimination by a preponderance of the evidence, the burden shifts to DPHHS, who must then offer evidence that is sufficient, if believed, to support a finding that its failure to appoint Tocher was based on a factor other than marital status. *St. Mary's Honor Center*, 509 U.S. at 506-07; *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *Tx. Dpt. Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)). Should DPHHS carry that burden, Tocher must then "prove by a preponderance of the evidence that the legitimate reasons offered by [DPHHS] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). Tocher, however, at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *St. Mary's Honor Center*, 509 U.S. at 507; *Heiat*, 912 P.2d at 792.

"[A] reason cannot be proved to be a '*pretext for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."

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.

Heiat, 275 Mont. at 328, 912 P.2d at 791 (quoting *St. Mary's Honor Center*, 509 U.S. at 515) (emphasis added). See also *Vortex Fishing Systems, Inc. v. Foss*, 2001 MT 312, ¶ 15, 308 Mont. 8, ¶ 15, 38 P.3d 836, ¶ 15. “The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has ‘use[d] the factor reasonably in light of the employer’s stated purpose as well as its other practices.’” *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). “[T]o establish pretext [a Charging Party] ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [DPHHS’s] proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence.’” *Mageno v. Penske Truck Leasing, Inc.*, 213 F.3d 642, (9th Cir. 2000) (quoting *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 807 (Cal. App. 1999))

Moreover, as long as a business decision is made for non-discriminatory reasons, employers may make their business decisions as they see fit and not run afoul of anti-discrimination statutes. See *St. Mary's Honor Ctr. v. Hicks*, *supra*. Both the Montana and federal courts recognize that a claim of discrimination does not authorize courts to “second-guess” an employer’s personnel decisions. “It is not the function of the courts to become the arbiter of all relationship decisions between employers and employees.” *Finstad v. Montana Power Co.* (1990), 241 Mont. 10, 29, 785 P.2d 1372, 1383. See also, *Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1109 (3rd Cir. 1997) (citing *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (“The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination].” The question here is whether DPHHS’s decision was based on disability discrimination.

While it is true that Tocher was a member of a protected class (disability), it is not at all clear that he was the most qualified or that he was not hired into the positions under circumstances that give rise to a reasonable inference that his disability was the basis for the denial. In their respective closing briefs, both parties gloss over this facet of the prima facie case. However, the hearings examiner does not find that as a matter of fact or law that a reasonable inference exists in this case that Tocher was denied employment because of his disability.

Tocher’s main quailm with the failure to hire him for the Billings’s positions centers on the interview questions that were posed to the candidates. Tocher opines that some of the questions were unfair (such as asking an applicant what training he or she might need on the job) or were not relevant. There are at least three short comings in his argument. First, Tocher completely ignores that fact that the applicants for the Billings positions were all asked the same questions and all graded in the same manner. There is nothing in the process that gives rise to any inference of discrimination, let alone a reasonable inference of discrimination. Second, the argument glosses over the fact that Tocher’s answers were not as good as some who scored higher than him. Third, nothing in the questions suggests a discriminatory bias nor can it be said that the

questions were not relevant to the position. Asking an applicant what training he or she might need on the job is quite pertinent to determining a particular candidate's relative fitness for a position vis-a- vis other candidates. Eliciting this type of information can help extract the candidate's true understanding of the duties of the position and help the interviewer to determine the relative strength and weaknesses of the various applicants. Asking a candidate about his or her knowledge about other community resources is obviously also highly useful to determining a candidate's relative strengths and weaknesses. Such knowledge is critical to effectively performing the duties of an eligibility examiner. Asking a candidate about why he or she should be selected over other qualified candidates is obviously designed to elicit additional legitimate information about the candidate's fitness for a job position.² Far from suggesting a reasonable inference of discriminatory animus, the questions seek highly pertinent information for drawing lawful distinctions between various candidates for a position.

With respect to the Great Falls applications, Tocher asserts that permitting only those applicants with a score of 47 or more to interview provides a reasonable inference of discrimination. He has provided no authority nor any compelling argument for his assertion. Given the inherent time and manpower limitations facing any agency, limiting interviews to the top fourteen candidates (2/3 of the entire applicant pool for the position) does not demonstrate a reasonable inference of discrimination. Moreover, a comparison of Exhibits 120 through 145 reveals that the 14 candidates who received interviews could have been considered to have more pertinent education/experience than Tocher. Looking at the objective evidence, the hearing examiner can find no reasonable inference of discrimination in the facts of this case.

Even if Tocher had made a prima facie case of discrimination, DPHHS has proffered legitimate business reasons for hiring someone other than Tocher and, as demonstrated by the substantial evidence adduced at the hearing, those reasons were not mere pretext for perpetrating discrimination. As previously shown, the questions posed to the candidates for the Billings position were highly relevant to the employer's legitimate goal of finding the best suited candidates for the three open positions. They were not discriminatory but were designed to elicit appropriate information from the candidates to enable the interviewers to make a legitimate business decision about which of the applicants was most qualified to fill the three positions. Likewise, the reasons for not interviewing Tocher for the Great Falls position were not discriminatory. The cut off for conducting interviews was based on legitimate considerations, not discriminatory ones and Tocher has failed to carry his burden of persuasion to show that the proffered reasons were merely pretextual. In addition, the hearing examiner agrees with and hereby adopts the succinctly stated rationale of the respondent in its closing brief that DPHHS has convincingly demonstrated legitimate non-discriminatory

² It is this hearing examiner's experience over several years of applying for jobs and interviewing applicants for jobs that interviewers frequently ask this type of question.

reasons for not hiring Tocher for any of the four positions and Tocher has failed to show that the proffered legitimate reasons were pretextual.

Tocher also appears to argue that he is entitled to an absolute disability preference (that he had to be hired even over other qualified candidates even if he was found to be less qualified than those applicants) under Montana Code Annotated §39-30-103(7). This argument is misplaced for two reasons. First, the failure to implement the statutory preference contained in Montana Code Annotated §39-30-103(7) is not an issue that can be decided by this tribunal. The department's jurisdiction in these matters is limited to statutory discrimination claims under the Human Rights Act (Title 49 Chapter 2). Quasi-judicial administrative proceedings before the department cannot adjudicate other types of claims, such as a disability preference claim. Mont. Code Ann. § 49-2-501(1).

Second, even if Montana Code Annotated §39-30-103(7) could somehow be deemed relevant to resolving this human rights claim, Tocher is not entitled to an absolute employment preference because of his disability. The Montana Supreme Court has specifically held that the enactment of the present form of the statute was "meant to abolish the absolute employment preference for veterans and handicapped persons who possess the minimum qualifications for the job. Being minimally qualified for the job is no longer enough." *Olson v. Department of Revenue* (1988), 235 Mont. 31, 35, 761 P.2d 171, 173. Thus, the fact that Tocher was minimally qualified is not enough to show that he gets the job. He must show that he was at least as qualified if not more qualified than other persons who received the job. This he has failed to do.

In sum, Tocher's assertion that discrimination was at the root of the hiring decisions at issue in this case is utterly unsupported. Accordingly his claim must be denied and dismissed.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. DPHHS' hiring decisions in this case were not based on discrimination due to physical disability.
3. Because there has been no showing that DPHHS discriminated against Brian Tocher, there has been no showing that DPHHS violated the Montana Human Rights Act.
4. This tribunal has no subject matter jurisdiction to adjudicate disability preferences articulated in Montana Code Annotated §39-30-103(7).
5. Because Tocher has failed to prevail in any of his claims, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. Order

Based upon the foregoing, judgment is entered in favor of Respondent DPHHS and Brian Tocher's complaint is dismissed.

Dated: January 10, 2007

/s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT, HEARING EXAMINER

Tocher FAD ghp