

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011379:

DAVID OGDEN,	)	Case No. 275-2006
	)	
Charging Party,	)	
	)	
vs.	)	
	)	
CAPITAL ELECTRIC,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**AMENDED FINDINGS, CONCLUSION AND ORDER ON REMAND**

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**I. PROCEDURE AND PRELIMINARY MATTERS**

On June 15, 2007, the Human Rights Commission decided<sup>1</sup> the appeal and cross-appeal from the department's January 10, 2007, decision in the above matter, remanding this case, but not the companion case, to the Hearings Bureau for further proceedings in accord with the Commission decision. Neither party moved for leave to submit new evidence to the Hearings Bureau. The parties filed their proposed amended decisions, briefs in support and response briefs, submitting the case for decision on remand on August 8, 2007. This amended final decision incorporates by reference and adopts the entire previous decision in all particulars except for the following amendments to the original decision.

Section I of the previous decision, "Procedure and Preliminary Matters," is amended by adding the preceding paragraph after the entirety of the original section.

**II. ISSUES**

The two issues on remand are calculation of lost wages and inclusion of emotional distress damages in the award. Section II of the previous decision, "Issues," is amended by adding the first sentence of this paragraph after the entirety of the original section.

**III. FINDINGS OF FACT**

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<sup>1</sup> The Hearings Bureau received the signed Commission decision on June 4, 2007.

Section III of the previous decision, "Findings of Fact," is amended by replacing the following numbered findings therein, in their entireties, with the following paragraphs.

36. Deaconess certified Shepherd as medically qualified for the second "short call position" in September 2004. Capital Electric hired Shepherd who worked until October 8, 2004 and earned a total of \$2,022.77 gross pay, including base pay and overtime. In addition, he received per diem of \$33.60 (Exhibit 202) for 9 days (Exhibit 225) or \$302.40. In addition, he received \$9.67 per hour in a benefits package for the 80 hours that he worked for a total of \$773.60 (Exhibit 228, p.2, Exhibit 64-3 and Exhibit 225 p.2.) for a total compensation of \$3,098.72. Ogden would reasonably have received \$3,098.72 for the same period.

37. Capital Electric employed Mike Baker, a traveler on the out-of-work books of Local 532 as an electrician on the generating plant project beginning October 13, 2004. Based on the testimony and evidence, Baker is an adequate comparator whose base pay, overtime, double time, per diem, and benefit package received from Capital Electric can be used to determine the total compensation, per diem, and benefit package that would have been received by Ogden from October 13, 2004, through May 31, 2005. Baker's total base pay through May 31, 2005, amounts to \$33,788.19 (mathematical addition of 3<sup>rd</sup> to last column on Exhibit 226, p.2 through June 5, 2005 less \$597.12 for June 1-3, 2005). In addition, Baker received \$33.60 per diem for 5 days per week through December 31, 2004 and 6 days per week through May 31, 2005 (per diem as listed on Exhibit 22 x 33 weeks and 3 days based on a calendar count; see generally Exhibit 64-1, 64-3). In addition, Mr. Baker worked 437 hours in calendar year 2004 (mathematical addition in Exhibit 226, p.2) for which he was to receive \$9.67 per hour in a benefit package (Exhibit 64-1, 64-3) for a total of \$4,225.79 plus 948 hours through May 31, 2005 with a total benefit package of \$10.17 for a total of \$9,641.16 (Exhibit 64-1). This amounts to \$53,299.94 in base pay plus per diem and benefit package from October 13, 2004 through May 31, 2005. (See generally Exhibit 64 and May trans. at 564:24-566:3, 570:14, 556:15-577:21.) Ogden would reasonably have received \$53,299.94 for the same period.

38. Capital Electric employed Ernest M. Floyd, a traveler on the out-of-work books of Local 532, as an electrician on the generating plant project beginning May 13, 2005, and ending on February 3, 2006. Based on the testimony and evidence, Floyd is an adequate comparator whose base pay, overtime, double time, per diem, and benefit package received from Capital Electric can be used to determine the total compensation, per diem, and benefit package that would have been received by Ogden from June 1, 2005, through October 11, 2005.

39. Based on the inside wage information from Capital Electric (Exhibit 228) and the salary summary for Ernest M. Floyd (Exhibit 227) the base pay earned by Ernest M. Floyd from June 1, 2005 through October 11, 2005 amounts to \$19,904.00 (\$24.88 x 40 hrs. x 20 weeks). (Exhibit 64-1, May trans. at 556:15-577:21). In addition, the overtime pay earned by Ernest M. Floyd during the same period of time amounts to \$10,598.88 (\$37.32 x 284 hrs.) and the double time pay amounts to \$1,542.56 (\$49.76 x 31 hrs.) (Exhibit 64-1, May trans. at 556:15-577:21.) Based on the per diem rate disclosed on Exhibit 22 Ernest M. Floyd received \$4,704.00 in per

diem during the same period of time ( $\$33.60 \times 7 \text{ days} \times 20 \text{ weeks}$ ) (Exhibit 64-1, May trans. at 556:15-577:21.) In addition, Ernest M. Floyd received  $\$11,339.55$  towards his benefit package ( $\$10.17 \times 1,115 \text{ hrs.}$ ). Id. This results in a grand total of  $\$48,088.99$  earned by Ernest M. Floyd from June 1, 2005 through October 11, 2005. Ogden would reasonably have received  $\$48,088.99$  for the same period.

40. Had Ogden commenced work for Capital when Shepherd did and worked first on the “short call” and then on the “long call” (as Baker and Floyd did) he would reasonably have earned  $\$104,487.65$  in wages and benefits ( $\$3,098.72 + \$53,299.94 + \$48,088.99$ ).

41. After he did not get the “short call” job with Capital Electric in 2004, Ogden took an electrician job through Local 532 with Midland Electric beginning on October 13, 2004 and ending on November 1, 2004. On November 7, 2004, he was hired by Colstrip Electric and worked until November 13, 2004 as an electrician. On November 15, 2004, M.J. Electric, Inc. hired Ogden for an electrician job that lasted until January 18, 2005. Ogden next worked for Valley Electric as an electrician from February 11, 2005 until June 30, 2005. He then worked for Neutron, Inc., as an electrician, from July 11, 2005 until September 11, 2005. During this entire time Ogden earned  $\$57,978.15$  including per diem at Midland Electric and Colstrip Electric and including benefit packages at all five places of employment ( $\$57,810.15$  shown on Ex. 64-2 +  $\$168$  adjustment based on the evidence at the Hearing (May trans. at 571:19-572:1) as shown on Attachment 1). From this amount should be deducted the extra expenses incurred by Ogden in connection with these jobs of  $\$7,263.00$  ( $\$8,838.00$  shown on Exhibit 64-2 plus the adjustment of  $\$1,575.00$  (May trans. at 643:7-644:19) equals  $\$7,263.00$ ). This leaves a total offset of actual wages received of  $\$50,715.15$  ( $\$57,978.15$  actual gross earnings less  $\$7,263.00$  extra expenses). (See Attachment 1.) When this offset is subtracted from the total compensation, per diem, and benefits package to which Ogden was entitled of  $\$104,487.65$  there remains a balance due Ogden of  $\$53,772.50$ . Ogden lost  $\$53,772.50$  because he did not work at the generating plant project from September 28, 2004 through October 11, 2005.

42. Ogden is entitled to prejudgment interest on his lost earnings. Although the use of comparators results in apparently precise numbers, the truth is that Ogden’s dates of work and amounts earned would not have been precisely the same as those of the comparators, and therefore his total losses as determined from the evidence are most reasonably viewed as equally spread across the 378 days he would have worked for Capital Electric, September 28, 2004, through October 11, 2005, averaging his lost income over that time. Dividing  $\$53,772.50$  by 378 days, Ogden’s daily loss averaged, to the nearest penny,  $\$142.26$ . His average annual loss was  $\$51,924.90$ . For the first 365 days that he lost income, his prejudgment interest entitlement is  $\$51,924.90$  divided by 2 times 0.1, which is, to the nearest penny,  $\$2,596.25$ . For the next 13 days, his prejudgment interest entitlement is  $\$142.26$  times 13 divided by 2 times 0.1 divided by 365, which is, to the nearest penny,  $\$.25$ , plus  $\$51,924.90$  times 0.1 divided by 365 times 13, which is, to the nearest penny,  $\$184.94$  for a total of  $\$185.19$ . It has been 880 days since October 11, 2005, the last day for which Ogden claims compensation. Ogden’s prejudgment interest entitlement after October 11, 2005, is  $\$53,772.50 \times 0.1$  divided by 365 times 880,

which is, to the nearest penny, \$12,964.33. Ogden's total prejudgment interest entitlement as of March 10, 2008 on his lost earnings is \$2,596.25, plus \$184.19, plus \$12,964.33, for a total of \$15,744.77.

#### IV. OPINION<sup>2</sup>

The following sections of the opinion in the original decision are amended as indicated, with the remainder of the original opinion remaining in full force and effect.

##### B.2. Relief Accorded

The relief the department may award to a charging party subjected to illegal discrimination include any reasonable measure to rectify any resulting harm he suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. S.D. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; **accord**, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.<sup>3</sup> The harm that Ogden suffered includes lost wages and benefits (back pay) and prejudgment interest on those losses, all resulting from the illegal disability discrimination by Capital Electric. Ogden admitted he was not seeking to recover for emotional distress, and therefore is not entitled to recover for any emotional distress he suffered.

##### B.2(a). Back Pay

The pertinent portion of the remand order found, at page 3, that “the use of \$69,871.91 as the mitigation amount was clearly erroneous, that it was clearly erroneous to use Mike Baker as the only wage comparator [and] that it was clearly erroneous to subtract the portion of Ogden's wages from a period of time past the use of Mike Baker's wages as a comparator.” CE ably argued on remand that this order meant that Ogden's back pay award should consist only of the two weeks of wages lost in the short call position he did not receive. However, the clear mandate of the Commission's order requires recalculation of Ogden's back pay for the period of the short call and the year following it, eliminating the errors in fact finding as defined by the Commission. The selfsame “law of the case” authority cited by CE in support of its argument that the Hearing Officer cannot, consistent with the remand order, award any emotional distress damages militates against reducing the time period for back pay as found in the original

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<sup>2</sup> 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.

<sup>3</sup> The Montana Supreme Court has approved the use of analogous federal cases in interpreting application of the Montana Human Rights Act. *E.g.*, *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

decision. The errors defined by the Commission order involve the mitigation amount, use of only Baker as a comparator and subtracting Ogden's wages beyond the time of Baker's wages. Ignoring the plain language of the Commission order and independently amending the original decision to reduce the time period for back wages from a year and two weeks to two weeks flies in the face of the Commission order.

By proving that disability discrimination prevented him from gaining employment with Capital Electric, Ogden established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, at 417-23. He must prove the amount of wages that he lost, but not with unrealistic exactitude. *Horn v. Duke Homes* (7<sup>th</sup> Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Co.* (3<sup>rd</sup> Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Department of Mental Health* (6<sup>th</sup> Cir. 1983), 714 F.2d 614, 626 (fact that back pay is difficult to calculate does not justify denying award). In this instance, the evidence establishes an amount of wages and benefits lost for over a year after Capital Electric failed and refused to hire Ogden because he and Capital Electric would not pay for the limited functional capacities evaluation recommended by Deaconess. Ogden had applied for a short call position that lasted two weeks. Had Capital Electric paid for the limited functional capacities evaluation promptly, which Ogden would have successfully completed, Ogden would have worked that short call and thereafter would have worked for the company for approximately the next year, earning, for the short call and the following extended employment, a total of \$53,772.50 more than he earned in his actual employment over the same time period.

#### B.2(b). Prejudgment Interest

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, 779 P.2d at 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times an appropriate rate of interest. *E.g., Reed v. Mineta* (10<sup>th</sup> Cir. 2006), 438 F.3d 1063. The appropriate rate is 10% annual simple interest, as is applicable to tort losses capable of being made certain by calculation, only without the requirement of a written demand to trigger commencement of the interest accrual, which has not been required in Human Rights Act cases. Mont. Code Ann. § 27-1-210. The appropriate calculations are described in the findings.

#### B.2(c). Emotional Distress

The pertinent portion of the remand order found, at page 3, that "it was clearly erroneous to award Ogden emotional distress damages when he testified that he was not claiming them." Ogden has presented no legal argument in support of his inclusion, in his proposed amended decision, of the emotional distress award that the Commission found was in error. The clear mandate of the Commission's order precludes any such award.

## V. CONCLUSIONS OF LAW

The following conclusions in the original decision are amended as indicated, with the remainder of the original conclusions remaining in full force and effect.

3. Ogden suffered harm as a result of the unlawful discrimination by Capital Electric, due to loss of earnings (including benefits) of \$53,772.50 over the time from September 28, 2004, through October 11, 2005, plus prejudgment interest on his lost earnings in the amount of \$15,744.77. Mont. Code Ann. § 49-2-506(1)(b).

## VI. AMENDED ORDER

The following numbered paragraphs in the original order are amended as indicated, with the remainder of the original order remaining in full force and effect.

2. The department orders respondent Capital Electric to make immediate payment to charging party David Ogden of the sum of \$69,517.27, making the appropriate employer deductions, contributions and tax payments to reflect that this payment includes payment of past lost earnings and benefits of \$53,772.50 for the period from September 28, 2004, through October 11, 2005. Interest accrues on this judgment as a matter of law.

Dated: March 10, 2008.

/s/ TERRY SPEAR  
Terry Spear, Hearing Officer