

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011911:

LINDA RAIHA,) Case No. 591-2007
)
 Charging Party,)
)
 vs.)
)
 BUTTE-SILVER BOW LOCAL)
 GOVERNMENT,)
)
 Respondent.)

* * * * *
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND
* * * * *

I. INTRODUCTION

This matter is back before the hearing officer upon remand from the Human Rights Commission. The commission decided that the Charging Party had proven age discrimination and remanded the matter for a determination on the damages. Significantly, the commission did not rule that Raiha had proven retaliation.

The hearing officer held a telephone conference with counsel for the parties to discuss the method of processing the remand. At the conference, counsel for each party agreed that the hearing officer could determine damages by simply reviewing the transcript of the hearing and reviewing the parties closing briefs submitted after the original hearing in this matter. Accordingly, based on the remand of the commission, and having reviewed both the transcript and the parties' post-hearing briefs, the hearing officer now issues the following findings of fact, conclusions of law and final agency decision with respect to damages due to Raiha based on the commission's determination that the Respondent discriminated against Raiha on the basis of age.

II. FINDINGS OF FACT

1. The Human Rights Commission has determined that Butte-Silver Bow Local Government unlawfully discriminated against Raiha on the basis of age when she was not hired for the city court clerk position # 3025. For purposes of this decision, the hearing officer incorporates that determination into this decision order to comply with the remand of the Commission.

2. The fact that Raiha was not hired for the job was very demeaning to her. Raiha found this to be demeaning because her co-workers knew she had applied for the job and none of them could believe that she had not been selected. Record transcript, page 239, lines 15-19.

3. Raiha was eventually hired into a full-time position with the Weed Control Board. This job, however, was not guaranteed to last past July, 2009. The fact that this job had a condition attached to it (that it might not last past July, 2009) caused Raiha additional emotional distress because she plans on working until age 70. Raiha was 62 years old at the time of hearing in this matter (February 22, 2007). Record transcript, page 210, line 3.

4. In July, 2006, city court clerk position #3025 was changed from a Grade 2 to a Grade 4 position. If Raiha had been in the position at the time of the upgrade, her salary would have increased \$230.00 per month. RT p. 154, ll. 15-16.

5. Raiha has asked that she be instated into city court clerk position #3025. There is no evidence in the record to indicate that there is any animosity between the parties that would prohibit placing her in that position. In order to fully redress the damages incurred by Raiha, instating her into the position is appropriate.

6. After being rejected for city court clerk position #3025, Raiha continued to work for Butte-Silver Bow Local Government as a full-time floater. In December, 2006, she transferred into another Butte-Silver Bow Local Government position working full-time for the Butte Silver Bow Weed Control District. Since being rejected for city court clerk position #3025, Raiha has always worked full-time at the Grade 2 salary range.

7. There is no evidence that Raiha was paid any less as a Grade 2 employee in her position with the Weed Control Board than she would have been had she been hired for city court clerk position #3025. It was only after position #3025 was raised to a Grade 4 that her pay as a Grade 2 employee deviated from the pay she would have received had she been hired for the clerk position.

8. No evidence was presented to show that there was any loss of benefits as a result of not being hired into city court clerk position #3025.¹

9. The remand from the Human Rights Commission did not change the hearing officer's determination with respect to Raiha's retaliation claim. Accordingly, the hearing officer reaffirms his fact determination that no retaliation occurred in this case. Thus, the question of damages is limited to the Respondent's unlawful age discrimination which the Human Rights Commissions found to have occurred.

10. Raiha did not present any evidence of the total amount of back wages she has lost. She presented absolutely no evidence of what diminishment, if any in benefits occurred as a result of the discrepancy in pay between a Grade 2 and Grade 4 position. Likewise, she presented no evidence that her pay as a floater or in working full-time for the Weed Control District, at least until the time that the city court clerk position was raised to a Grade 4 position, was any less than it would have been had she been in the clerk position. The evidence presented in this matter shows only that once the clerk position went to a Grade 4 position, Raiha's pay fell behind in the amount of \$230.00 per month. From the date that the clerk position went to a Grade 4 pay schedule, July, 2006, through the date of the decision on remand in this matter, April 30, 2008, 21 months have passed. Multiplying this number by \$230.00 per month yields an amount due on lost wages of \$ 4,830.00 through the date of this decision on this remand.

11. Interest on the amount of lost wages due to Raiha at 10% per annum is \$440.80 through the date of this decision on remand.²

III. OPINION

A. *Damages Generally*

The relief the department may award to a charging party subjected to illegal discrimination includes any reasonable measure to rectify any harm suffered as a result of the unlawful conduct. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in

¹ For example, had there been evidence that Raiha participated in a deferred compensation program which would be affected by the amount of her salary, then the discrepancy in pay could have resulted in a diminution of deferred compensation which would be compensable in this proceeding. No such evidence was submitted, however.

² Simple interest on the amount due to Raiha was determined by calculating the monthly amount of interest due on \$230.00 per month at 10% per annum (10% per year divided by 12 months =.0083 x \$230.00=\$1.909 per month) and then multiplying that amount times the number of months that will have elapsed from July, 2006 through the date of the decision on this remand, April 30, 2008 (21 months) for each month that Raiha was not paid the additional \$230.00 in order to ascertain the total amount of interest due.

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. 405.³ The harm that Raiha suffered includes lost wages (back pay), prejudgment interest on those losses, and emotional distress, all resulting from the respondent's illegal discrimination.

B. *Back Pay*

By proving discrimination in the Butte-Silver Bow Local Government's refusal to hire her into the city court clerk position, Raiha established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, at 417-23. She was required to prove the amount of wages that she lost, but not with unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984), 747 F.2d 885, 889; see also *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award). As noted above, Raiha is entitled to \$4,830.00, representing \$230.00 per month lost salary as a result of the failure of the respondent to hire her for the clerk position.

C. *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 the appropriate rate of interest. E.g., *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. 10% annual simple interest is appropriate, as is applicable to tort losses capable of being made certain by calculation (Mont. Code Ann. § 27-1-210), and the requirement for a written demand to trigger the commencement has not been required in Human Rights Act cases. The appropriate calculations are described in the findings.

D. *Instatement Into Position #3025.*

Raiha has sought to be instated into city court clerk position #3025. Analogous federal case law has stated that in an age discrimination case, instatement or reinstatement is the preferred method of remedying discrimination and should be utilized whenever appropriate. See, e.g., *EEOC v. Prudential Fed. Savings & Loan Ass'n.*, 763 F. 2d 1166, 1172 (10th Cir, 1985), citing *Blim v. Western Electric Co.*, 731 F.2d 1473, 1479 (10th Cir. 1984)(reinstatement is the preferred remedy under the ADEA and should be ordered whenever it is appropriate). No evidence has been presented in this case to show that instating Raiha into the position is not appropriate. Accordingly, the remedies to be accorded in this case should include instating Raiha into Position #3025 in order to make Raiha whole.

³ 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.

E. *Emotional Distress*

Reasonable measures to rectify the harm Raiha suffered because of age discrimination includes an award to compensate her for emotional distress. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601; *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. The 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 v. Hale* (9th Cir.1991), 940 F.2d 1192; *cited in Vortex at ¶33 and Vainio*.

Here, Raiha reasonably felt demeaned when she did not get the city court clerk position because she and her co-workers felt she was a “shoe-in” for it. In addition, she was subjected to the stress of uncertainty in her position because the only full-time job she could find in lieu of city court clerk position #3025, a job with the Weed Board, was not guaranteed to last beyond July, 2009. Raiha expects to work until age 70 or until sometime during the year 2011. The specter of losing her full-time work before reaching age 70 undoubtedly caused her some amount of angst. While not easily quantified, the facts suggest that \$5,000 is a reasonable amount for the emotional distress Raiha endured as a result of the respondent’s illegal conduct.

F. *Affirmative Relief*

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 respondents' future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). In this case, training to reduce the likelihood of future instances of age discrimination is appropriate.

IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. In conformity with the remand order of the Montana Human Rights Commission, the hearing officer concludes that Butte-Silver Bow Local Government unlawfully discriminated against Linda Raiha on the basis of age when it failed to hire her for city court clerk position #3025 in violation of Mont. Code Ann. § 49-2-303(a).

3. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Butte-Silver Bow Local Government must pay Linda Raiha the sum of \$4,830.00 in back wages, \$440.80 in pre-judgment interest on those damages through April 30, 2008, and emotional distress damages of \$5,000.00.

4. Instating Raiha into city court clerk position #3025 is appropriate.

5. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

V. ORDER

1. Judgment is found in favor of Linda Raiha and against Butte-Silver Bow Local Government as Butte-Silver Bow Local Government illegally discriminated against Raiha on the basis of age.

2. Within 120 days of this order, Butte-Silver Bow Local Government shall provide four hours of training on the subject of discrimination and terms and conditions of employment to members of the city court, including the city court judge. Said training shall be conducted by a professional trainer in the field of personnel relations and/or civil rights law, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Butte-Silver Bow Local

Government shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred and that city court employees attended for the entire period. Butte-Silver Bow Local Government must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. Butte-Silver Bow Local Government, including the city court, is enjoined from taking any adverse employment action against any employee based on unlawful age discrimination.

4. Butte-Silver Bow Local Government must pay Linda Raiha the sum of \$4,830.00 in back wages, \$440.80 in pre-judgment interest on those wages, and \$5,000.00 in emotional distress damages. In addition, Butte-Silver Bow Local Government shall immediately instate Raiha into the city court clerk position #3025.

DATED: April 30, 2008

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry