BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0081013108:

CHAD CRINGLE,	)	Case No. 1233-2009
	)	
Charging Party,	)	
	)	
vs.	)	**HEARING OFFICER'S DECISION**
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Chad Cringle filed a complaint with the Department of Labor and Industry on July 7, 2008. He alleged that BNSF Railway Co. (BNSF) had illegally discriminated against him in employment because of perceived disability. On January 23, 2009, the department's Human Rights Bureau forwarded the complaint with a request that the Hearings Bureau commence contested case proceedings on it. On February 6, 2009, after Cringle had acknowledged service of notice of hearing and BNSF had been served with notice of hearing, the Hearing Officer issued an "Order Setting Contested Case Hearing Date and Prehearing Schedule" in this case. Both parties filed preliminary prehearing statements and formal discovery commenced.

In March 2009, Cringle filed his motion for summary disposition, essentially a motion for summary judgment imposing liability for illegal discrimination because BNSF, regarding Cringle as disabled, denied him employment unless he either lost weight or paid for additional medical testing to assess individually whether his employment would create safety risks. On May 1, 2009, after the parties fully briefed and submitted the motion, the Hearing Officer granted summary judgment on liability.

The Hearing Officer held the contested case hearing on the remaining issues in Kalispell, Montana, on May 21, 2009. At the commencement of the hearing, various changes were made on the record to the final prehearing order and BNSF filed its motion for reconsideration of the summary ruling, which was deferred, with the parties to submit briefs simultaneously with their post hearing submissions.

The parties also proposed, and the Hearing Officer agreed, that they would file exhibits and discovery that either side wished to have in the record for possible review on appeal of the summary ruling, and file for the record any objections each party might have to the other side's exhibits and discovery. The Hearing Officer also encouraged both sides to take appropriate steps to safeguard any information as to which there existed potential privacy interests, so that those portions of the file as well as the hearing record could be sealed subject to any subsequent rulings upon the privacy rights asserted. No requests for sealing have been submitted.

Cringle, Don Agan and Joseph E. Kasperick testified under oath. Exhibits 18 and 19, including the May 2009 update to Exhibit 19, were admitted into evidence.

On July 20, 2009, the final post hearing submissions were filed and the case was submitted for decision.

II. Issues

The issues at hearing were: (a) what harm, if any, did Cringle sustain as a result of BNSF's illegal discrimination and what reasonable measures (within the relief requested by Cringle) should the department order to rectify such harm and (b) in addition to an order to refrain from such conduct what should the department require to correct and prevent similar discriminatory practices (affirmative relief)?

III. Findings of Fact[1]

1. Chad Cringle applied for a track maintenance position with BNSF. He completed the orientation, the written tests and the interview. BNSF extended a conditional offer of employment, subject to successful completion of a physical examination, a drug screen and a background investigation, presentation of proof of permanent employment eligibility in the United States and completion and submission of the BNSF Medical History Questionnaire. Cringle successfully completed the physical examination, drug screen and background investigation. He completed and submitted the BNSF Medical History Questionnaire. His start date for work with BNSF was to be May 5, 2008.

2. BNSF then refused to hire Cringle, effectively withdrawing its offer of employment, asserting that it could not determine his medical qualification for the track maintenance position and that to be reconsidered for hire he must either (a) lose 10% of his body weight and maintain the loss for six months or (b) present to BNSF the results of several thousand dollars of additional health and medical tests (at his own expense) before he could reapply for work. The justification for the alternative requirements imposed by BNSF was Cringle's body weight to height ratio, which resulted in his statistical classification, under occupational medicine standards, as morbidly obese.

3. As a matter of logical necessity, BNSF viewed Cringle as presumptively unable safely to perform any job requiring the same activities as those involved in the track maintenance job, unless and until he met the alternative conditions placed upon his hire. BNSF would have disqualified Cringle, based upon weight, for train crew positions and every other position that BNSF elected to label "safety sensitive," in exactly the same fashion as it disqualified him for the track maintenance position.

4. As a statistical class, morbidly obese persons have higher risks of developing a number of health problems. If and when Cringle developed these health problems with sufficient severity, the resulting conditions could have interfered with his performance of particular kinds

[1] The Hearing Officer has incorporated in these findings of fact the substance of the summary ruling imposing liability upon BNSF for illegal disability discrimination.

of job duties. Many other statistical classes of persons have greater risks, as a class, due to tendencies or predispositions that could potentially become hazardous in the workplace. People with small wrists may be at higher risk of developing carpal tunnel syndrome from assembly line work, for one easy nontrivial example. BNSF disqualified Cringle, an otherwise qualified candidate, from employment (subject to the alternative conditions imposed for reapplication) based upon this general statistical possibility that he might become a direct safety risk to himself or others in the workplace.

5. Cringle was 45 years old at the time of the hearing. His life expectancy from the date of trial was 33.52 years. His work life expectancy was 17.92 years.

6. Cringle graduated from high school in New York in 1982 and received a two-year associate of applied science degree in natural resources, forestry option, from Flathead Valley Community College in Kalispell, Montana, in 1997.

7. Cringle worked as a correctional officer in the New York State prison system for 9 ½ years. He left that position after being diagnosed with post-traumatic stress disorder. Returning to that occupation is not a reasonable option for Cringle, even if it were available where he now resides.

8. In Montana, Cringle worked as a landscaper, a contract laborer and a wildland firefighter. His wages ranged from $6.50 an hour to $12.00 an hour, with his higher wages earned in seasonal firefighting work. He worked for a landscaping and lawn sprinkler installation company, on Christmas tree farms and as a construction laborer. Cringle worked for six years as a wildland firefighter for the State of Montana, advancing to a crew boss position with managerial responsibility over a 20-man crew.

9. For the past year-and-a-half, Cringle has been a member of the Martin City volunteer fire department. He held a similar position in New York for seven-and-a-half years. Cringle dedicates up to 20 hours per week as a volunteer firefighter and his duties include flagging, heavy extrication using the "jaws of life," fighting wildfire, fighting structure fires, search and rescue, and "pretty much anything [he's] called to do." He is not paid as a volunteer firefighter and does not receive health benefits, but accumulates credit toward a small State-funded retirement program.

10. When Cringle applied for employment with BNSF, he was creating and selling chainsaw art, something he has been doing for the past ten years. In recent years, his annual earnings from selling his art have ranged from $10,000 to $13,000. Because this is self employment, he is able to deduct a significant amount of his business expenses, rendering his work as a chainsaw artist more valuable than employment at a job with a comparable annual wage.

11. Since applying for the position with BNSF, Cringle has held one job in addition to his ongoing chainsaw art business. He has worked a total of 30 hours for Premiere Restoration, cleaning fire-damaged items and structures. That employer had no more work for him at the time of the hearing.

12. Although Cringle received his Associate of Applied Science Degree from FVCC in 2000, jobs in that field would be difficult for him to obtain. He is beyond the cutoff age for some positions[2] and many other positions are seasonal.

13. Cringle lives east of Columbia Falls, Montana, about 20 to 25 miles from Kalispell and 15 miles from Whitefish. He owns (subject to a mortgage) .96 acres of property in Martin City on which he has constructed a shop that he uses for his woodcarving work. He lives in a small portion of that building.

14. If Cringle found a low paying job to which he would have to commute and for which he would have to give up chainsaw art, he would actually be worse off financially than he is in his current business because he would no longer be able to deduct his transportation and home from his reportable income.

15. Cringle applied online for the track labor job with BNSF because of the wages, the benefits, the retirement and the outdoor nature of the work. He felt that it was something he was capable of doing and thought he would enjoy the work. He was shocked and upset by the withdrawal of the offer of hire.

16. Cringle offered to go to work for a probationary period conditioned on losing the weight. BNSF refused his offer. He understood that he had the option to have additional tests performed at his own expense, but that even if he paid for them and successfully completed them he would not be guaranteed employment. He was unable to afford the additional testing. He knew from personal experience that the MRI alone would probably cost $1,200.00.

17. The job with BNSF was important to Cringle. He needed the job because income from chainsaw carving was declining and he needed to earn more money. He felt he was physically capable of performing the job. He was not under a doctor's care for any health issue. He felt that the job was a perfect match for his ability and interest.

18. When he found out that he was disqualified from work because of his weight, Cringle was frustrated, angry and bewildered. He knew after carrying 4-foot logs out of the woods for his chainsaw carving that he could do the job. Loss of the job, particularly given the local market for other work, left him with grave concerns about his finances and his future.

19. After he applied with BNSF but before he had been conditionally hired, Cringle had also applied for a job at the Columbia Falls Aluminum Plant and received an interview. After he had been conditionally hired by BNSF, he was called back to the aluminum plant for the next step in the employment process. He turned down the opportunity because of BNSF's conditional hire offer. He called the aluminum plant back after being turned down by BNSF and asked if the job was still available. When asked, he told them why he had not been hired on BNSF. He was told that he probably would not be able to work at the aluminum plant

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[2] *Jaksha v. Butte Silver Bow County*, 2009 MT 263, ___ Mont. ___, ___ P.3d ___, could ultimately eliminate or change cutoff age requirements for many jobs beyond those of local fire fighters, but it is too speculative to project such changes as a basis for fact finding in this case.

either. The aluminum plant job would have paid more than $20.00 an hour with fringe benefits.

20. Since being turned down by BNSF, Cringle has had no choice but to accept financial help from his family and to borrow money by taking a line of credit on his property. He has charged the limit on his credit card. At the time of hearing, he was behind on his credit card payments, his car payments and his mortgage payments.

21. If Cringle found a job earning $8.00 to $10.00 an hour for which he was required to relocate, he would not be able to accept the job because he can only afford to live where he is.

22. Because of his rejection by BNSF, Cringle has been hurt emotionally as well as economically. He is teased by people he works with at the volunteer fire department. The teasing makes him question whether they believe he can actually perform his job. Every time the train goes by his home, he is reminded that he did not get the job because of the height weight ratio on some chart.

23. Cringle intended to work for BNSF until he was eligible for full retirement, which he assumed would be in 20 to 25 years. He had no better employment options then, and has no better or even equal employment options now.

24. Cringle has no health insurance. He has no retirement benefits other than what he earns with the volunteer fire department. In ten more years, that retirement benefit will be worth about $75.00 a month.

25. Since being turned down by BNSF for work as a track laborer, Cringle has looked for other jobs by going through LC Staffing which contracts for laborers. He has applied for work through the Bureau of Reclamation and goes to the Columbia Falls Job Service weekly looking for work. Most of the available jobs are landscaping jobs, part-time jobs and fast food jobs from which he would actually net less than he earns now in chainsaw art. He has been unable to find work that would replace the job he was denied by BNSF.

26. Don Agan and Joseph Kasperick testified to their respective credentials – both experience and knowledge. Each was qualified to express their opinions regarding the areas in which they provided opinion testimony. Their testimony supports the following findings regarding Cringle's lost wages and fringe benefits.

27. Employees hired by BNSF on or about the date on which Cringle was supposed to go to work, who have worked in track laborer or track maintenance positions for BNSF since, have earned an average of more than $4,000.00 a month, for a base earning capacity of $49,000.00 per year. Cringle had and has the residual capacity to earn $20,000.00 per year (at $9.50 per hour full-time). BNSF workers earn fringe benefits (including health insurance and retirement) that are as good as or better than those earned by workers in any class of the economy, amounting to a fringe benefits value of 39% of earnings. For the four years beginning May 5, 2008, with no reduction to present value, Cringle lost $29,000.00 per year in wages, plus 39%, or $11,310.00 per year for fringe benefits, for a total annual loss of $40,310.00. Four times that amount is $161,240.00. To avoid unduly inflating the losses, no additional amount has been

added for the difference between BNSF fringe benefits and fringe benefits from Cringle's potential earnings in other employment.

28. May 5, 2008, through the date of this decision, September 2, 2009, is one year and 120 days. Rounding to the nearest dollar, wages and fringe benefits lost by Cringle to date total $40,310.00, plus $13,302.00 (120/365, or .33, times $40,310.00), which is $53,612.00. From September 2, 2009, to May 5, 2010, the wages and fringe benefits Cringle will lose total $27,008.00 ($40,310.00 minus $13,302.00). From May 5, 2010, to May 5, 2011, Cringle will lose $40,310.00 and from May 5, 2011 to May 5, 2012, he will again lose 40,310.00.

29. With regard to lost earnings in the future, there remains the question of finding reasonable measures to remedy Cringle's losses more than four years after BNSF illegally refused to hire him. If but for the discrimination Cringle ultimately would have worked for another 17.92 years from his hire date BNSF, and would have earned the same amounts as those workers with similar seniority who were identified in the supplemental discovery over those years, the present value of his apparent future lost wages and fringe benefits (in March 2009) would range from almost $585,000.00 to more than $650,000.00, according to the expert testimony. That same expert testimony estimated Cringle's losses from May 5, 2008 to March 2009 as $47,496.00, using Cringle's actual earnings for that period.

30. Cringle's living situation, which he chose long before the discrimination in this case, makes it unreasonable to ignore the additional projected loss of wages and fringe benefits going beyond the initial four year period. On the other hand, awarding Cringle the present value of his entire projected lifetime earnings, under the assumption that he would have remained a successful full-time employee of BNSF for the rest of his working life, is not a reasonable measure to rectify the actual pecuniary harm he suffered. Therefore, following the reasoning applied in prior cases,[3] the Hearing Officer finds that a reasonable measure to remedy Cringle's loss of the opportunity to continue to work as a successful full-time employee of BNSF for the rest of his working life is to increase Cringle's award, given the magnitude of his projected future losses, by $50,000.00 per year. If BNSF elects not to limit its damages (see following finding No. 40), the enhancement of Cringle's recovery over the entire four years will total $200,000.00. Adding together the entirety of his lost wages and fringe benefits for the first four years and the total enhancement factor, Cringle's recovery for pecuniary loss of earnings and fringe benefits, together with the lost opportunity to continue working for BNSF thereafter totals $368,240.00. This total is slightly more than half of both the low and high total pecuniary loss valuations presented in expert testimony (covering Cringle's past and future wage and fringe benefit losses), which are $631,923.00 and $699,635.00, respectively.

31. With this enhancement factor it is reasonable not to include monthly or daily interest on the future payments except for post judgment interest that applies by law upon each payment ordered, commencing upon the due date for that payment and continuing until that

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[3] *Bilbruck v. Burlington Northern Railroad Co.* (8/3/04), HR No. 0031010549; *O'Dea v. BNSF Ry. Co.* (5/15/07), HR No. 0051011210, Case No. 2091-2005.

payment is actually made, and also reasonable not to include retroactive seniority as part of the option for BNSF to hire Cringle and limit its losses.

32. Cringle is entitled to prejudgment interest on the amounts awarded immediately for past lost wages and fringe benefits (but not for the enhancement of those losses). That prejudgment interest amounts to $28.00 per month ([$40,310.00 divided by 12] times [.1 divided by 12]) for the monthly lost wages and fringe benefits accrued each month during the 16 months from the illegal discrimination to the decision date times 120 months of interest (15 + 14 + 13 ... + 3 + 2 + 1) totals $3,360.00 of prejudgment interest as of the date of this final order.

33. Cringle's total past lost wages and fringe benefits to the date of decision, plus the enhancement for that same time, together with the prejudgment interest to date, total $123,472.00 ($53,612.00, plus $50,000.00, plus 33% of $50,000.00, plus $3,360.00).

34. BNSF's refusal to hire Cringle because of his weight proximately caused emotional distress to Cringle, because he was refused for a job for which he had qualified and which he reasonably believed would ameliorate his financial problems and support his chosen life style. After that refusal, Cringle experienced continuing and worsening financial problems, which intensified his emotional distress. He was also exposed to ridicule in his volunteer fireman work because of BNSF's refusal to hire him. All these events contributed to his emotional distress. The value of the emotional distress he suffered that is attributable to BNSF's adverse action, for purposes of recovery from BNSF, is $25,000.00. Therefore, the reasonable measure to remedy the pecuniary and other harm suffered by Cringle to the date of this decision is $148,472.00 (including the enhancement amount to date).

35. On May 5, 2010, the amount due to Cringle for lost wages and fringe benefits from the date of decision to that payment date is $60,508.00 ($27,008.00 plus $33,500.00). On May 5, 2011, the amount due to Cringle for lost wages and fringe benefits from May 5, 2010, to that payment date is $90,310.00 ($40,310.00 plus $50,000.00). Using the same calculation, on May 5, 2012, the amount due to Cringle for lost wages and fringe benefits from May 5, 2011, to that final payment date is $90,310.00.

36. This is not the first Montana case in which BNSF has refused to employ otherwise qualified candidates because they belong to the class of persons who are morbidly obese (***see*** footnote 3 above, p. 7). It is neither reasonable nor feasible in this case to compel BNSF to hire Cringle. It is also neither reasonable nor feasible to permit BNSF to resume the hiring process by obtaining at its own expense the additional medical information it demanded, with a far smaller award to Cringle for a far shorter time period, because there is too great a likelihood that BNSF would advance an arguable basis in the medical information to refuse again to hire Cringle, which more likely than not would engender a new discrimination case and further prolonged delay and expense. However, it is reasonable to give BNSF an option to resume the hiring process in whatever form it sees fit, and to limit its liability for future lost wages and fringe benefits, as found above, to the amounts awarded for dates up to the date upon which either (a) Cringle begins paid employment with BNSF, in accord with BNSF's standard practice and policies, in a full-time track maintenance position at the location where he would have been working under the original conditional offer in 2007or (b) Cringle, with an unconditional

offer of such a position from BNSF, declines to accept the offer. This offers an incentive to BNSF. The sooner it makes such a genuine and unconditional offer of hire to Cringle, the sooner its liability will be limited by Cringle either commencing work in the position offered or refusing the offer.

37. The affirmative relief stated in the order is necessary, in addition to enjoining BNSF from further similar discriminatory hiring decisions.

IV. Opinion[4]

1. BNSF engaged in and is liable for a discriminatory refusal to hire Cringle because it regarded him as disabled.

The summary ruling adequately addresses and explains this determination. The motion for reconsideration is denied.

2. Cringle is entitled to a reasonable measure of damages to rectify the harm he suffered as a result of the illegal discrimination.

The damages the department may award include any reasonable measure to rectify any harm a charging party suffered as a result of the illegal discrimination. Mont. Code Ann. §49-2-506(1)(b); *Mercer v. McGee*, ¶25, 2008 MT 374, 346 Mont. 484, 197 P.3d 961; ***see also*** *P. W. Berry Co., Inc. 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*, (1975), 422 U.S. 405.[5]

By proving discrimination, Cringle established an entitlement to actual lost wages from the date of the discriminatory act to the date of the department's decision. *Albermarle Paper Co.* ***at*** 417-23. He must prove the amount lost, but not to unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Systems Company* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626.

"The purpose of the remedies provided by Montana's Human Rights Act is to return employees who are victims of discrimination to the position they would have occupied without the discrimination." *Vortex Fishing Systems v. Foss*, ¶27, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. ***See***, Conference Committee Report on the Equal Employment Opportunity Act of 1972:

> [T]he courts have stressed that the scope of relief under [the Equal Employment Opportunity Act of 1972] is intended to make the victims of unlawful discrimination

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[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. This opinion hereby incorporates by reference the body of the summary ruling, which determined liability before hearing.

[5] Analogous federal law can be used (when appropriate) in interpreting the Montana Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841; *P.W. Berry Co.*, ***supra***..

> whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

See also, *Albermarle Paper* ***at*** 421; *EEOC v. Ilona of Hung* (7th Cir. 1997), 108 F.3d 1569, 1580 ("The court must do its best to recreate the conditions and relationships that would have existed if the unlawful discrimination had not occurred."); *Keyes v. School District No. 1* (10th Cir. 1990), 895 F.2d 659, 665 ("A valid desegregation remedy must ... be designed to restore the discrimination victims to the position they would have occupied had the discrimination not occurred[.]"); *Duncan v. Wash. Metro. A. T. A.* (D.D.C. 2006), 425 F. Supp.2d 121, 128, n. 3 (("A central purpose of [federal anti-discrimination laws] is 'to put a plaintiff in the same position he/she would have been in had the discrimination not occurred, not in a better position.'") (***quoting*** *Harper v. Godfrey Co.* (7th Cir. 1995), 45 F.3d 143, 149).

BNSF argued that the Hearing Officer should not order it to place Cringle in the track laborer position without requiring that he first successfully complete the medical testing it imposed (now to be done at its expense). It argued that a placement order (or, by analogy, any award of future damages based upon what he would lose in the future had BNSF performed its conditional offer of hire) would place Cringle in a better position than he would have occupied had the alleged discrimination not occurred. In essence, BNSF asserts that but for the illegal requirement that Cringle finance the further testing, he would have undergone that testing (funded and facilitated by BNSF), rather than being automatically medically qualified for the position of track laborer. Thus, according to BNSF, his damages (setting aside mitigation issues) only extend to the point of adjudication in this proceeding and the hiring process should simply be resumed at the point of its wrongful interruption.

BNSF is construing the summary judgment ruling too narrowly. Cringle was conditionally hired. Cringle then satisfied the conditions, establishing that he was fully qualified for the job for which he applied. BNSF's acts of discrimination extended beyond its refusal to pay for the additional tests that it required. The only reason BNSF imposed those additional testing requirements (not required of other applicants for the same position) was the statistical classification of obesity applied because of his body weight to height ratio. Based upon that statistical classification, BNSF withdrew its conditional offer of hire after Cringle had satisfied all of the conditions, and invited Cringle to reapply (with the additional testing results or with a sustained weight loss). BNSF illegally refused to hire Cringle <u>before</u> the additional testing, no matter who was going to pay for it.

In addition, the individual evaluation done by Douglas Pitman, M.D. whose affidavit was submitted in support of Cringle's Motion for Summary Disposition, confirmed not only that Cringle was fully qualified for the job of track laborer, but also that he had none of the health conditions about which BNSF asserted concern, was not at direct risk for the injuries about which BNSF was concerned, and was not an appropriate candidate for a polysomnogram or MRI scan of his lumbar spine. Following his examination and tests, Dr. Pitman concluded that

Cringle was fully qualified for the position of track laborer and presented no danger to himself or others. Dr. Pitman's uncontroverted affidavit established that had BNSF obtained, in 2008 (at its expense), the additional testing Dr. Pitman found appropriate, Cringle would have qualified and would already be employed by BNSF. To require him to undergo the additional testing at this time would place him in a worse position than he would now be in without the illegal discrimination.

Even if BNSF's interpretation of the law and facts were correct, its proposed option of starting the hiring process over and paying for the additional testing is not feasible in this case. BNSF has repeatedly rejected otherwise qualified applicants because of morbidly obesity. *Bilbruck v. Burlington Northern Railroad Co.* (8/3/04), HR No. 0031010549 ***and*** *O'Dea v. BNSF Ry. Co.* (5/15/07), HR No. 0051011210, Case No. 2091-2005. Providing BNSF with what counsel for Cringle termed a "do over" would create too great a risk that BNSF would again reject Cringle based upon whatever more or less tenuous arguments it could raise from the additional medical evidence, to avoid hiring a morbidly obese worker.

For future relief from a discriminatory refusal to employ, the preferred remedy is reinstatement. *Cassino v. Reichhold Chem. Inc.*, (9th Cir. 1987), 817 F.2d 1338, 1346. However, an award of income which will be lost in the future has been held appropriate when it is not feasible to order the respondent to hire a successful charging party. *Fortino v. Quazar Company* (7th Cir. 1991), 950 F.2d 389, 398.

"Front pay" as an alternative remedy in lieu of future employment has been approved in *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 378, 852 P.2d 628, 635. Based upon BNSF's illegal refusals to hire Cringle, and before him O'Dea, after the *Bilbruck* decision almost five years ago, it is unlikely that future employment with BNSF is feasible for Cringle if BNSF is accorded another opportunity to find a more specific basis to refuse him. The "antagonism" between the parties is not personal, but it is clear that BNSF, because of the statistical risks its occupational medicine specialists find in hiring morbidly obese train workers, will go to considerable lengths to avoid hiring persons in that class. Thus, it is inappropriate to order reinstatement. *Cassino*, ***supra***; *Thorne v. City of El Segundo* (9th Cir. 1986), 802 F.2d 1131, 1137; *E.E.O.C. v. Pac. Press. P.A.* (N.D. Cal., 1979), 482 F. Supp. 1291, 1320 (when effective employment relationship cannot be reestablished, front pay is appropriate), ***affirmed***, 676 F.2d 1272 (9th Cir. 1982); ***disapproved on other grounds***, *American Friends Serv. Com. Corp. v. Thornburgh* (9th Cir. 1991), 941 F.2d 808. On the other hand, it is perfectly appropriate to give BNSF similar opportunities to limit its liability as were accorded in both *Bilbruck* and *O'Dea*.

Montana has considered how to approach damage awards under "make whole" legislative mandates. The issue arose in *Swanson v. St. John's Lutheran Hospital* (1980), 189 Mont. 259, 615 P.2d 883, applying a statute that provided for monetary damages for injuries suffered as a result of specific illegal conduct. The recovery right in *Swanson* arose out of unlawful interference with the statutory "conscience right" to refuse to participate in a sterilization procedure in a health care facility where the plaintiff worked. The decision considered the absence of any specific theory of how to determine damages, and reasoned from

analogy that the determination of damages would be akin to that utilized in civil rights cases, *Swanson* ***at*** 884-86:

> Section 50-5-504, MCA, provides [emphasis supplied in the *Swanson* opinion]:
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> > Unlawful to interfere with right of refusal. (1) It shall be unlawful to interfere or attempt to interfere with the right of refusal authorized by this part, whether by duress, coercion, or any other means.
> >
> > (2) The person injured thereby shall be entitled to injunctive relief, when appropriate, and shall further be entitled to monetary damages for injuries suffered. [Emphasis supplied in *Swanson* opinion.]
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> While no case in Montana has construed this statute, the intent of the legislature is clear. The statute is designed at the outset to prevent unlawful actions under this section through injunction, where appropriate, and further to monetarily compensate persons who suffer injuries as a result of said unlawful actions. This law creates a statutory right to receive damages above and beyond the employment contract. As such, there is no specific theory set forth for determining damages (***e.g.***, contract or tort) as is argued by the parties here. The legislature instead sought to compensate injured persons no matter what form the injuries took. Its effect is similar to 42 U.S.C. §1983, which is derived from §1 of the Civil Rights Act of 1871. The basic purpose of a §1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus* (1978), 435 U.S. 247, 254 ....
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> In *Carey* the United States Supreme Court provided an excellent discussion of the application of the compensation theory to a § 1983 action. It stated [435 U.S. ***at*** 254-259]:
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> > .... Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.
> >
> > Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty." [Authority omitted.] The Court implicitly has recognized the applicability of this principle to actions under § 1983 by stating that damages are available under that section for actions "found ... to have been violative of ... constitutional rights and to have caused compensable injury." [Emphasis supplied in *Swanson* opinion.] ....
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> > ... To the extent that Congress intended that awards under §1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. [Citation omitted.]
> >
> > It is less difficult to conclude that damages awards under §1983 should be governed by the principle of compensation than it is to apply this principle to

> concrete cases. But over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under §1983 as well.
>
> It is not clear, however, that common-law tort rules of damages will provide a complete solution to the damages issue in every §1983 case. In some cases, the interest protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to the §1983 action. [Citations omitted.]
>
> In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts. [Citations omitted.] In those cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.
>
> Although this task of adaptation will be one of some delicacy -- as this case demonstrates -- it must be undertaken. The purpose of §1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action. [Citations omitted.] ....

Federal courts appear to generally agree that damages awards under §1983 should be determined by the compensation principle. *United States ex rel. Tyrrell v. Speaker* (3rd Cir. 1976), 535 F.2d 823; *Magnett v. Pelletier* (1st Cir. 1973), 488 F.2d 33; *Donovan v. Reinbold* (9th Cir. 1970), 433 F.2d 738. ....

Montana follows a similar compensatory scheme for awarding damages. There is no question that in Montana every person who suffers detriment from the unlawful act or omission of another may recover damages from the person at fault. Section 27-1-202, MCA. An injured person is also entitled to receive compensation for future damages which are shown to be reasonably certain. Section 27-1-203, MCA, *Frisnegger v. Gibson* (1979), 183 Mont. 57, 598 P.2d 574. ....

....

No reasons were given as to the court's decision not to grant future damages. We must, however, assume that the District Court was aware that it had the power to grant future damages under section 27-1-203, MCA, and *Frisnegger v. Gibson*, *supra*. Therefore, we can only conclude that, in its opinion, the District Court did not feel that the future damages, as claimed by plaintiff, were reasonably certain to occur. It was properly within the District Court's discretion to make this determination, and we cannot hold that it was error for the court to refuse to grant future damages. [Emphasis added.]

Since it was within the court's discretion in *Swanson* to deny future damages, it was also within that court's discretion, and similarly within this Hearing Officer's discretion under the Human Rights Act, to award such damages, as recognized in *Rasmussen*, ***op. cit.***

It is tempting to award Cringle his requested present value recovery for the rest of his projected working life with BNSF. If the Human Rights Act contained the same remedial mandate as was interpreted in *Swanson*, there would be a legal basis for doing so, to deter BNSF from doing the same thing in the future and because the only question of reasonableness is whether the damages requested are proved to be reasonably certain. However, the statutory mandate of the Human Rights Act is to take reasonable measures to rectify the harm actually suffered by Cringle, not to punish BNSF, nor to limit the reasonableness inquiry strictly to the amount of proof.

Even without the different statutory mandate, the Hearing Officer could still find that Cringle failed to establish that his pecuniary losses more than four years after the discriminatory act were reasonably certain to be the present value of his projected work life future wages and fringe benefits as a BNSF employee, less his apparent future residual earning capacity.

Front pay "is intended to be temporary in nature" and an award of front pay "does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing." *Cassino* ***at*** 1347. Front pay, like every forecast of the future, is inherently speculative and "[t]he longer a proposed front pay period, the more speculative the damages become." *McKnight v. GM* (7th Cir. 1992), 973 F.2d 1366, 1372.

As one Court has noted regarding an award of front pay under the federal Age Discrimination from Employment Act:

> Because of the potential for windfall, however, its use must be tempered. It can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment. If a plaintiff is close to retirement, front pay may be the only practical approach. The infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages. Its award, as an adjunct or an alternative to reinstatement, must rest in the discretion of the court in shaping the appropriate remedy.

Duke v. Uniroyal, Inc. (4th Cir. 1991), 928 F.2d 1413, 1424 (emphasis added); ***accord***, *Dotson v. Pfizer, Inc.* (4th Cir. 2009), 558 F.3d 284, 300.

Many federal courts have weighed in on the issue of limiting front pay amounts, especially when the recipient of the pay is as young as Cringle, who is 45 years old. While there may be isolated examples of claimants as young as Cringle receiving front pay until retirement, awards of 20 years or more are the exception to the generally accepted rule restricting such payments, although failure to mitigate damages is usually the context of the question. In *Peyton v. Dimario*, 287 F.3d 1121, 1130 (D.C. Cir. 2002), for example, the court reviewed the case law and rejected a front-pay award through retirement because the assumption that the plaintiff would remain in a low paying job for her entire working life (Peyton was 34 years old and not

incapacitated) would be "to give her a tremendous windfall rather than to make her whole." 287 F.3d ***at*** 1130.

In *Dobson*, the court rejected a plaintiff's cross-appeal seeking 15 years' of front pay, holding the trial court did not abuse its discretion in concluding that such an award was too speculative. *See U.P.I.U. Local 274 v. Champion Int'l Corp.* (8th Cir. 1996), 81 F.3d 798, 805 ("Instead of warranting a lifetime of front pay, [plaintiff's] relatively young age should improve his future opportunities to mitigate through other employment."); *Hybert v. Hearst Corp.* (7th Cir. 1990), 900 F.2d 1050, 1056-57 (five-year front pay award to 67 year-old plaintiff too speculative); *Stafford v. EDSC* (E.D. Mich. 1990), 749 F. Supp. 781, 789 ("[O]ther courts seem to agree that plaintiffs in their forties are too young for lifetime front pay awards"); ***see also***, *Goss v. Exxon Office Sys. Co.* (3d Cir. 1984), 747 F.2d 885, 890. In *Davis v. CEI.* (6th Cir. 1984), 742 F.2d 916, 923, the court upheld an award of front pay until retirement to a 59 year-old plaintiff but noted that a similar "until retirement" front pay for a 41 year-old might be unwarranted.

In determining the value of what Cringle lost when BNSF withdrew its conditional employment, there remain many uncertainties. It remains uncertain whether Cringle would have left BNSF before retirement due to future health problems. It remains uncertain whether BNSF will face future economic difficulties that would result in layoffs of employees including Cringle, had he been hired. It remains uncertain whether Cringle would avoid problems with co-workers or supervisors, whether he would dislike the work or embark upon a different career for other reasons, any of which would shorten his career with BNSF. For example, at some point in the projected future, Cringle's beloved chainsaw art might become sufficiently lucrative so that he could make it his sole vocation.

The Montana Legislature has limited recovery of lost wages and fringe benefits resulting from wrongful discharge from employment to four years from the date of discharge. Mont. Code Ann. §39-2-905(1). Although the Wrongful Discharge from Employment Act does not apply to Human Rights Act cases, its limitation upon pecuniary recovery does support following the lead of the federal cases cited and used herein when determining reasonable measures under the HRA to remedy Cringle's future pecuniary losses.

The Hearing Officer is not dictating appropriate tax or withholding treatment of the monetary award, since BNSF is required to follow the applicable laws in making the required payments to Cringle.

Prejudgment interest on lost wages and fringe benefits is a proper part of Cringle's award of damages. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d ***at*** 523; ***see also***, *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). Calculation of prejudgement interest is proper based on the elapsed time without the lost income for each pay period times the appropriate rate of interest applied over the elapsed time. ***E.g.***, *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. 10% per annum simple interest is appropriate, being the rate for tort losses that are capable of being made certain by calculation. Mont. Code Ann. § 27-1-210. Thus, the appropriate calculation of prejudgment interest is based upon the months elapsed after each successive month (to the date

of this decision) in which the gross wages and fringe benefits would have been earned, times the monthly prejudgment interest on the average monthly lost gross wages and fringe benefits.

Post judgment interest accrues upon the final order, now that it has issued, as a matter of law, and is only addressed in this decision to emphasize that such interest will only apply to payments required and not timely made.

Considering the economic difficulties in our society today, Cringle's award may seem rather large. On the other hand, Cringle qualified for and was conditionally offered a position for which the present value of his career wages and benefits could potentially have been nearly $700,000.00. The entire award to Cringle, for lost wages and fringe benefits, spread over four years, is (as noted in the findings) barely more than half of that amount. The size of his recovery reflects the value of the career opportunity he lost, and BNSF has the power to reduce its liability by offering Cringle the job it should have hired him to work.

Some years ago, Montana conformed its Human Rights Act to the ADA, before a number of federal decisions that have narrowly applied federal disability law. The Hearing Officer has explained why federal cases addressing front pay provide appropriate guidance for the damage award. For the summary judgment on liability, interpretation of Montana law need not and should not respect subsequent federal case law that narrowly interprets the ADA.[6] Congress recently disavowed many of the federal decisions narrowing the scope of the ADA, returning the ADA to its originally intended scope. ADA Amendments Act of 2008 (effective 1/1/2009). Thus, Montana public policy correctly looks to the original scope of the ADA, as it existed when this state conformed its HRA to the ADA. The Hearing Officer, after careful consideration, has determined that Montana law, and federal law consistent with Montana's underlying public policy, mandate the findings and conclusions in this decision.

V. Conclusions of Law

1. The Department has jurisdiction over Cringle's discrimination claims against BNSF. Mont. Code Ann. §49-2-512(1) MCA.

2. BNSF illegally discriminated against Cringle because of a condition it regarded as a disability when it withdrew its conditional offer to employ him, after he had satisfied the conditions, and required that before he reapply he either lose 10% of his body weight and keep it off for six months or provide, at his own expense, additional medical information from which BNSF could undertake an independent individualized assessment of the risk of substantial harm to Cringle or to others if he were to commence working in the employment BNSF had conditionally offered. Mont. Code Ann. §§ 49-2-101(19) and 49-2-303(1)(a).

[6] *State ex rel. Kommers v. District Court* (1939), 109 Mont. 287, 96 P.2d 271, 272 (rejecting originating jurisdiction's case interpretations issued after the date Montana adopted statute).

3. BSNF's illegal discrimination resulted in harm to Cringle. Reasonable measures to remedy that harm are required, as set forth in the following order herein. Mont. Code Ann. § 49-2-506(1)(b).

4. The department must permanently enjoin BNSF from discrimination in employment against prospective employees because of conditions it regards as disabilities without first undertaking an independent individualized assessment to verify the risk of substantial harm to the prospective employees or others. The department further should also enjoin and require BNSF, to undertake appropriate steps to correct the discriminatory practice found. Both the injunction and the affirmative relief appropriately imposed by the following order herein. Mont. Code Ann. § 49-2-506(1)(a) and (b).

VI. Order

1. Judgment is found in favor of charging party Chad Cringle and against respondent BNSF Railway Company on the charge of illegal disability discrimination by denial of employment commencing upon May 5, 2008, and continuing into the future.

2. Respondent BNSF Railway Company must immediately pay to charging party Chad Cringle the sum of $148,472.00.

3. Thereafter, unless either (a) Cringle begins paid employment with BNSF, in accord with BNSF's standard practice and policies, in a full-time track maintenance position at the location where he would have been working under the original conditional offer in 2007 or (b) Cringle, with an unconditional offer of such a position from BNSF, declines to accept the offer, respondent BNSF Railway Company must pay charging party Chad Cringle, the following amounts, due on the following dates:

(A) May 5, 2010, $60,508.00;

(B) May 5, 2011, $90,310.00;

(C) May 5, 2012, $90,310.00.

If and only if either 3(a) or 3(b) above occur before May 5, 2012, upon the date of said occurrence BNSF must pay to Cringle any amounts already due and unpaid (with accrued post judgment interest) and a pro rata portion of the amount next to become due, based upon how days of that payment period have already passed on the date of said occurrence.

4. The Montana Department of Labor permanently enjoins Respondent BNSF Railway Company from discrimination in employment against prospective employees because of conditions it regards as disabilities without first undertaking an independent individualized assessment at its own expense to verify the risk of substantial harm to the prospective employees or others.

5. The Montana Department of Labor enjoins and requires Respondent BNSF Railway Company:

(a) Within 60 days after this decision becomes final, to submit to the department's Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment;

(b) Immediately upon Bureau approval, to adopt and to implement those policies, with any changes mandated by the Bureau;

(c) Within 60 days after this decision becomes final, to develop internal training or identify outside training (duration of at least four hours in either case) in disability discrimination under Montana law for its employees who make decisions regarding rejection or further investigation of prospective employees because of conditions regarded as disabilities, specifically including within the training the necessity for independent individualized assessments (at BNSF's expense) to verify the risk of substantial harm to the prospective employees or others, and to submit to the Human Rights Bureau a plan for provision of that training to the appropriate employees;

(d) Immediately upon Bureau approval, to adopt and to implement that plan, with any changes the Bureau mandates.

Dated: September 2, 2009.

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

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