BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0081012948:

KEVIN TRUMBLE,	)	Case No. 923-2009
	)	
Charging Party,	)	
vs.	)	**ON REMAND FROM HRC:**
	)	**REVISIONS TO THE**
GLACIER WELL SERVICE, INC.,	)	**HEARING OFFICER DECISION**
	)	
Respondent.	)	

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This document sets forth the changes in the original decision that the Hearing Officer has now made in compliance with the Human Rights Commission's Order on Remand. With this document, a revised decision and notice of issuance of that decision issues, incorporating the changes detailed herein with the rest of the original decision. For clarity and convenience, this document provides the changes only, with notations of which portions of the original decision remain unchanged in the revised decision.

I. PROCEDURE AND PRELIMINARY MATTERS

There are no changes to this section of the original decision, except to note that proceedings after the original decision, leading to this revised decision, are matters of record.

II. ISSUES

On remand, the issue submitted is reconsideration of damages, in light of eight findings of fact the Commission modified and the conclusions of law the Commission revised and reversed, to determine (a) Trumble's recovery of lost wages and bonuses, with prejudgment interest, for a period reasonably designed to ensure that Trumble is made whole (considering inclusion of lost future earnings within the remedy), and (b) the remedy for his severe emotional distress. Of necessity, the Hearing Officer has also revisited findings of fact that were not modified by the Commission, to avoid internal inconsistencies contrary to the Commission's mandate.

III. FINDINGS OF FACT

MODIFIED FINDINGS: Of the eight findings the Commission modified (Nos. 19, 40, 41, 42, 45, 46, 48, and 51), Nos. 19, 40, 41, and 46 have been revised,

with No. 19 expanded into three subparts (19(a), (b), and (c)). Nos. 42, 45, 48, and 51 have been deleted in their entirety (retaining the numbering of all other findings). In addition, the length of Trumble's continued projected employment (No. 44), the lost wage and bonus calculations (No. 49, prejudgment interest calculations (No. 50) and the particularization of the award of emotional distress (No. 52) have been revised to conform this decision to the Commission's mandate. The revised findings are set forth herein and the deleted findings are not repeated herein. All other original findings are unchanged and are also not repeated herein.

19(a). The job of tool pusher required Aldrich to leave the site to obtain materials, making it impracticable at best for Aldrich always to assist Trumble with the paperwork. Aldrich probably did not truly grasp how difficult Trumble found the paperwork. Nonetheless, he led Trumble to believe that Dave Withers was aware of Trumble's limited reading and writing ability and had approved Aldrich helping Trumble do the paperwork if Trumble accepted the rig operator position. Dave Withers was not, in fact, aware of Trumble's limited reading and writing ability. However, since Aldrich was Trumble's immediate supervisor at the time and would be Trumble's immediate supervisor on the job if Trumble took the rig operator position, Aldrich reasonably appeared to Trumble to have the authority to promise to help Trumble with the paperwork, as an inducement for Trumble to take the job.

19(b). During the first month after Trumble assumed the rig operator duties, Aldrich wrote up the daily reports based on the information Trumble provided. The paperwork composed approximately 2% of the job and Glacier Well needed to know the daily tally of materials and equipment used at each drill site for client billing purposes. Trumble competently tracked the hours worked and number of rods, tubes, and types of pumps used each day on the drill rig site he supervised. Trumble was unable to write the information down on the company's standardized reporting form due to his disability, and needed a literate person to assist him. The relevant essential function of the rig operator's job is accounting for the human resources, equipment and materials used at the drill site each day, which Trumble performed capably. The assistance of a literate employee to commit Trumble's knowledge to paper was a reasonable accommodation, with which Trumble could and did perform this essential job function.

19(c). Completion of the paperwork went smoothly between late August and early October 2007, although it remained difficult and stressful for Trumble. Because the rig operator's daily written reports constituted about 2% of the job, taking from 9 to 14 minutes each day, the assistance promised and provided by Aldrich was a successful accommodation for Trumble's disability. Only when Aldrich balked at continuing to assist Trumble with the daily paperwork did insurmountable

problems arise. Trumble performed his duties as rig operator very well, with the single exception that he found the written part of the reporting to be "frustratingly impossible." He was able to keep accurate track of the equipment and materials used each day but lacked the capacity to complete the daily reports on his own. But for Aldrich's willful refusal either to continue himself, or to train another employee to assist Trumble, the few minutes of writing assistance each workday, provided by another Glacier Well employee, constituted a realistic reasonable accommodation for Trumble's known disability.

40. The accommodation of having other workers assist with the paperwork would have been workable as a permanent accommodation whenever Aldrich's responsibilities as the tool pusher delayed or prevented him from assisting Trumble. Such an accommodation would have reduced Aldrich's frustration with the additional work of assisting Trumble. Relying upon other crew members, whose reliability for paperwork was, at best, untested, and whose longevity on the job was always uncertain, would sometimes have required Aldrich's involvement, but it would have been a viable long term accommodation that would not have posed an undue hardship for the employer.

41. Had Trumble talked to Dave Withers instead of quitting his rig operator job, Withers would have arranged continued assistance with the daily reports for Trumble, through other crew members. However, Aldrich, his immediate supervisor, had effectively discouraged him from going to Dave Withers for help. Since the assistance of other crew members would have been a viable permanent reasonable accommodation, the onus for the failure to pursue that accommodation rested upon Glacier Well rather than Trumble.

44. Had Aldrich done what Withers suggested to Trumble and assigned to other crew members the task of assisting Trumble with the daily reports, while Aldrich continued to complete the other paperwork for Trumble, Trumble could have continued his employment. The nature of the work and limited geographical area in which Glacier Wells worked, together with fluctuations in its work and the stress and difficulties for Trumble in doing the paperwork even with assistance, make it too speculative to project Trumble's continued employment beyond two years after he quit his job.

46. With the viable accommodation that should have been offered to him by his relatively small and relatively local employer, Trumble would have continued to work, although not without stress and struggle, with his continued employment and earnings subject to the vicissitudes of the economy, changes in his circumstances, injuries, etc. It is reasonable to calculate his lost wages and bonuses, at the rate he last earned them while he worked as the rig operator, for a period of two years from

his quit date. Because that two-year period has already run, it is not reasonable to include future damages in the award.

49. At the time his employment with the corporation ended, Trumble was earning $17.00 per hour regular pay, and $25.50 per hour for overtime. Shortly after Trumble's employment ended, the corporation raised the pay rates for rig operators to $18.25 per hour, with time-and-a-half for overtime, which would have been a 7.35% increase in Trumble's pay rate. According to the corporation's payroll records (Exhibit 6), from the second week in September 2007 (when his pay rate was increased to reflect his rig operator position) through January 23, 2008, a period of 20 weeks, Trumble worked 830 hours of regular time and 170.5 hours of overtime. In addition, he received bonuses during those same 20 weeks of work that totaled $1,391.27. Those 20 weeks of work thus earned him a total of $19,849.02 in wages and bonuses [830 times $17.00 plus 170.5 times $25.50 plus $1,391.27], so that he averaged $992.45 per week [$19,849.02 divided by 20]. Beginning the last week in January 2008, Trumble would have earned $1,065.40 per week [$992.45 times 1.0735], which would be $2,130.80 in wages for regular and overtime hours and bonuses for each successive 2-week pay period. After the pay period ending on February 4, 2008 (during which Trumble would have earned an additional 12/14ths of $2,130.80, or $1,826.40), Trumble lost $2,130.80 every two weeks. Following the February 4, 2008, pay period through the end of the two years following his departure from his job (through January 23, 2010), there have been 51.36 two week pay periods (719 days[1] divided by 14), for a total loss of wages and bonuses to the end of that two years of $111,264.29 [$2,130.80 times 51.36 plus $1,826.40]. Trumble has not been able to earn wages since he quit his job, due to the deterioration of his emotional condition, and thus there is no offset for residual earning capacity.

50. Prejudgment interest on Trumble's lost wages and bonuses accrue as a matter of law, at 10% simple per year. For the initial pay period after he quit his job, interest accrued beginning February 5, 2008 and ending August 18, 2010 (the date of this revised decision), on Trumble's loss of $1,826.40. For those 66.07 pay periods (925 days divided by 14), prejudgment interest is $462.84 [$1,826.40 times .1 divided by 365 times 14 times 66.07]. For subsequent lost wages and bonuses, interest accrues on $2,130.80 for a total of one less pay period for each successive pay date, through the last regular pay date within the two years during which additional wages and bonuses were lost. In other words, the prejudgment interest on losses during each of those full regular pay periods is the amount lost per pay period,

[1] In this and following calculations, the Hearing Officer has noted that 2008 was a Leap Year.

times the daily interest rate as a decimal, times 14 (number of days in each pay period), times the sum of the number of pay periods coming after each pay period (for which loss occurs) up to the date of this revised decision [65.07 + 64.07 . . . + 15.07 + 14.07, the sum of which is 2,049.55]. Thus, the prejudgment interest accruing on the losses from these full pay periods is $16,750.83 [$2,130.80 times .1 divided by 365 days times 14 times 2,049.55]. For the final partial pay period within the two years of loss, Trumble lost 64% of two weeks' wages and bonuses (***cf.*** Finding 49, ***supra***), which was $1,363.71, for 13.07 pay periods, or 183 days, for which the prejudgment interest was $68.37 [$1,363.71 times .1 divided by 365 days times 183 days]. The total prejudgment interest is thus $17,282.04 [$462.84 plus $16,750.83 plus $68.37].

52. The corporation is liable for the emotional distress that Trumble experienced. The loss of his livelihood had a deep emotional effect on Trumble and his self esteem. Since the corporation was able reasonably to provide a permanent accommodation, the devastating impact upon Trumble, which contributed significantly to his subsequent decompensation and decline after he lost his livelihood, is compensable and occurred over a period of months while he worked as the rig operator, due to the hostile work environment, and after he had no choice but to leave that job, when his fragile ability to cope with the demands of his job had been shattered by both the hostile environment and the insistence that he do what he was unable to do without any accommodation. The reasonable value of that emotional distress is $50,000.00.

IV. DISCUSSION[2]

1. Liability

The first seven paragraphs of the original discussion of liability, at pp. 12-15 of the original decision, are unchanged and remain as issued. The following discussion replaces and expands the last two paragraphs of the original discussion of liability, at p. 15 of the original decision.

Although Aldrich denied offering to do the paperwork, to induce Trumble to take the rig operator job, he did provide that accommodation, at first willingly and then grudgingly. Aldrich would not have gone as far as he did in helping Trumble unless he had actually offered the accommodation. A witness false in one part of his testimony is to be distrusted in other parts. Mont. Code Ann. § 26-1-303(3). Aldrich denied verbal abuse of Trumble, but Trumble's testimony about such abuse

[2] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Hoffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

was corroborated, not just by Gladue, whose credibility was suspect, but also by Postma, who had no motive to shade his testimony in favor of Trumble. Trumble often misunderstood communications, but the evidence that Aldrich was not telling the truth about the verbal abuse was credible and substantial. Being false about that part of his testimony, his denial that he made the accommodation offer was not credible. Distrust of his denial of offering the accommodation, together with the weight and credence his subsequent conduct lent to the testimony that he made the offer, constituted a preponderance of the evidence, making it more likely than not that Aldrich did offer an accommodation to Trumble, on behalf of the corporation.

The accommodation offered to Trumble worked, and would have continued to work with the addition of training for other members of the rig crew to assist Trumble with the paperwork when Aldrich was not available. Trumble did have a disability and the corporation had promised the accommodation of providing help with the paperwork. The corporation had a duty to follow through with that accommodation if it was reasonable (it was) and if with it Trumble could perform the essential job functions of his job (he could). Mont. Code Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.606(2). An accommodation is unreasonable if it imposes an undue hardship on the business operation. Admin. R. Mont. 24.9.606(1) and (4). An undue hardship means an action requiring significant difficulty or extraordinary cost when considered in light of the nature and expense of the accommodation as well as the overall financial resources and type of operations of the corporation. Admin. R. Mont. 24.9.606(5).

The refined accommodation that Withers proposed would have worked, without an undue hardship on Glacier Well's operations, but it was never tried. Aldrich did not follow through with it and Withers did not assure that it was actually tried. With no policy to address disability discrimination, or any discrimination issues, for that matter, Trumble's failure to talk to Withers again did not provide the corporation with a defense for its failure to implement the refined accommodation Withers proposed. When Trumble quit because he could not do the paperwork alone, as he reasonably believed Aldrich was demanding, the corporation engaged in illegal disability discrimination for its failure to try Withers' refinement of the accommodation Aldrich promised to Trumble. Mont. Code Ann. § 49-2-303(1)(a).

Unlawful discrimination also includes subjecting an employee to harassment in the workplace on the basis of his disability. Admin. R. Mont. 24.9.604(3)(b). To establish a claim for hostile work environment harassment, an employee must prove membership in a protected class and unwelcome harassment because of that class membership, so severe or pervasive that it altered his employment conditions and created an abusive working environment. *Campbell v. Garden City P&H,* ¶¶15-19,

2004 MT 213, 322 Mont. 434, 97 P.2d 546. The employee also must show he perceived the work environment to be hostile and abusive, and that a reasonable person in his shoes would also have perceived the environment as hostile and abusive. *Campbell*, ¶19.

Clearly, Trumble was a member of a protected class because of his disability, and he endured months of unwelcome frustration and verbal abuse at his job with Glacier Well because of that disability. The verbal abuse was so severe and pervasive that it altered his employment conditions and created a hostile working environment, causing him to experience excruciating emotional distress and ultimately to quit his job. Not only did he perceive the work environment to be hostile and abusive, any reasonable person subjected to the same treatment would have perceived the environment as hostile and abusive. Trumble proved the necessary elements of the hostile work environment claim.

2. Damages

The first four paragraphs of the original discussion of damages (including the offset quotation as one such paragraph), at pp. 15-16 of the original decision, are unchanged and remain as issued. The following discussion revises and expands the rest of the original discussion of damages, at pp. 16-18 of the original decision.

Trumble is entitled to recover lost wages and bonuses, with prejudgment interest, for a period reasonably designed to ensure that Trumble is made whole. In addition, he is also entitled to recover for the excruciating emotional distress he suffered during October 2007 through January 2008, from the hostile working environment Aldrich created, and thereafter suffered due to loss of his livelihood when he left his job because his supervisor demanded that he now do that which he could not do – complete paperwork without the modified reasonable accommodation available without undue hardship to the corporation.

As already noted, 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*, ¶27. As time passes since Trumble quit his job, an ever increasing number of uncertainties come into play in determining the value of what he lost. It is uncertain whether Glacier Well, a small and fairly "local" enterprise, would have continued to operate at a level that sustained Trumble's employment after the original hearing, particularly in light of the continued future economic difficulties that have impacted virtually all employers, large as well as small. It is uncertain whether Trumble would have remained healthy and able to work, assuming the work would still have been available.

The Montana Legislature has limited recovery of lost wages and fringe benefits resulting from wrongful discharge from employment to not more than 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 maximum pecuniary recovery is a useful measure of what is reasonable to remedy comparable pecuniary harm under the Montana Human Rights Act, particularly beyond the date of hearing. Therefore, the Hearing Officer, having considered how far to extend past pecuniary damages as well as whether to include prospective pecuniary damages, starts with the practice already used by the Hearings Bureau in these cases – using the WDEA's four year maximum and deciding whether to shorten the time or use the full four years, with or without "augmented" pecuniary damages based upon "reasonability" factors pertaining to certainty of continued losses, such as the degree of stability and job security realistically available through the particular employer, the attractiveness of the job in the market, the peculiar situation of the charging party, etc.

The practice of using the WDEA's maximum recovery period has been in use in the Hearings Bureau for at least 10 years. *Houle v. Great Falls Native American Center*, HRC Nos. 0009008982, 0009008954, 9901008915, 0009008964 (June 12, 2000); *Wombold v. Cascade S.D. No. 3*, HRC Case Nos. 0021010079 and 0021010078 (July 18, 2003); *Chebul v. Montana Standard/Lee Newspapers*, HRB #0061011788, Case No. 114-2007 (March 15, 2007); *Feit v. BNSF Ry. Co.*, (August 5, 2010), HRB #0091013577, Case No. 475-2010. In each of those cases, with larger and more stable employers, as well as (in some instances) better job security and greater financial return for the lost jobs in the particular markets, the full four years was used, with augmentation in some of the cases. In the present case, the Hearing Officer has found that two years of lost wages and bonuses is a <u>reasonable</u> measure to make Trumble whole for his pecuniary losses.

Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a *per se* invasion of a legally protected interest, and a person who suffers emotional distress due to violation of such a fundamental human right is entitled to a remedy. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Campbell v. Choteau Bar and S. H.* (March 9, 1993), HRC #8901003828. In this case, the extreme emotional distress generated by the hostile work environment and the eventual loss of livelihood is remedied by the substantial award for emotional distress set forth in the findings.

The emotional damage to Trumble was greater than that suffered by charging parties who may have subjected to what could be characterized as more outrageous conduct, ***e.g.***, *Smith v. Cynergy Adv., Inc.* (March 26, 2010), HRB #0091013593,

Case No. 655-2010 (Smith's humiliation at unwelcome physical sexual contact by her supervisor, including having her top torn off her, and her subsequent anguish, compounded by being discharged for resisting the unlawful sexual advances, justified a $40,000.00 emotional distress award). The measure of emotional distress is the suffering of the charging party, not how egregious the illegal discrimination may have been. Similarly, although Trumble's financial consequences were not as large as those suffered by the charging party in *Feit*, Trumble's emotional distress was so much greater and so much more debilitating than that suffered by Feit, that it is reasonable to award him twice as large a recovery for his emotional distress as was merited by Feit's distress (Feit was awarded $25,000.00).

3. Affirmative Relief

There is no change to this section of the original decision, so it is not included.

V. CONCLUSIONS OF LAW

There are no changes to conclusions 1 and 4, so they are not included. Conclusions 2 and 3 are revised as follows, and replace those conclusions as they appeared in the original decision.

2. Trumble was an otherwise qualified individual with a disability who with a reasonable accommodation could perform the essential functions of his rig operator job. The corporation illegally discriminated against him because of disability when it stopped providing the accommodation it promised and failed and refused to try an alternative reasonable accommodation that was possible and when it subjected him to a hostile work environment that caused him extreme emotional distress. Refusal to accommodate, with the hostile work environment, forced him to quit his job.

3. Trumble is entitled to recover $111,264.29 in lost wages and bonuses, $17,282.04 for prejudgment interest on those losses, and $50,000.00 for emotional distress resulting from the corporation's illegal disability discrimination.

VI. ORDER

There are no changes to paragraphs 1, 4, and 5 of the original decision, which are not included here. Paragraphs 2 and 3 are revised as follows, and replaces those paragraphs as they appeared in the original decision.

2. Glacier Well Service, Inc., is ordered immediately to pay to Kevin Trumble the sum of $178,546.33, representing $111,264.29 in lost wages and bonuses, $17,282.04 for prejudgment interest on the lost wages and bonuses, and $50,000.00 for emotional distress. Post judgment interest accrues by operation of law.

3. The department permanently enjoins Glacier Well Service, Inc. from discriminating against any person with a disability by failing (a) to provide reasonable accommodation and (b) to prevent its employees from subjecting such a person to a hostile work environment because of the disability, both as required by law.

Dated: August 18, 2010.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer