BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0083012911 & 0083012912:

GEOFFREY ANGEL,	) Case Nos. 851-2009 & 852-2009
	)
Charging Party,	) FINDINGS OF FACT;
	) CONCLUSIONS OF LAW;
vs.	)AND DECISION AFTER REMAND
	)AND NOTICE OF ISSUANCE OF
BAXTER HOMEOWNERS ASSOCIATION,	)ADMINISTRATIVE DECISION
AND HIGHSTREET PROPERTIES, INC.,	)
	)
Respondents.	)

* * * * * * * * * *

I. INTRODUCTION

This matter is back before the hearings officer upon remand from the Human Rights Commission. The commission rejected the hearings officer's decision and remanded for a finding of whether "the requested modification would fundamentally alter the nature of the public accommodation." Human Rights Commission Remand Order, Page 6. The commission further ordered that "should the hearings officer determine that Angel's request would not fundamentally alter the public accommodation supplied by Baxter, the Bureau must also determine damages." Id. The commission affirmed the previous findings of fact in this tribunal's May 22, 2009 Hearings Officer's Decision.

The hearings officer permitted Angel and Baxter Homeowners Association (hereinafter BHA) to brief the issue of whether the modification proposed by Angel would fundamentally alter the nature of the public accommodation. In addition, the hearings officer permitted the respondent to argue why the hearing in this matter should be reopened. The last of the parties' closing briefs were timely received on June 22, 2010.

Having reviewed the parties briefing after remand, there is no basis upon which the hearing can be reopened. The existing factual record and the procedural

history of this case do not require reopening the hearing in this matter because BHA has had a full and fair opportunity to litigate this issue. Based on the facts adduced at the hearing, the inescapable conclusion is that the accommodation Angel requested would not fundamentally alter the public accommodation. Therefore, adhering to the determination of the commission, the hearings officer finds that BHA discriminated against Angel because his requested modification would not fundamentally alter the public accommodation supplied by BHA. Angel is entitled to damages as discussed below.

Angel has also requested that the hearings officer find that he "lost at least $150,000.00 in future business due to the elevator being locked during business hours." The hearings officer cannot do so because the hearings officer has already determined that issue and the commission has not yet decided but has specifically preserved that issue for purposes of any future appeal. See generally, Commission Order, page 6.

II. FINDINGS OF FACT:

1. In accordance with the order of the commission, the hearings officer incorporates each and every finding of fact contained in his May 22, 2009 decision into this Decision after Remand.

2. Both the residential floors and the basement area of the Baxter Hotel building are private areas. For security reasons they are not open to the public. Only the lobby and the second floor are areas that are held open to the public.

3. The front doors of the building that provided access to the lobby were locked at night and unlocked during business hours. Prior to 2008, the elevator was unlocked during the day to permit access to the second floor and then locked at night. Testimony of Claude Matney.

4. On the elevator control panel in the elevator, each floor has its own button (a call button) that a person wishing to access a particular floor must push. In addition, next to each button is a key lock that can be locked or unlocked by utilizing a master key. Unlocking the second floor call button during business hours would have permitted disabled persons to have unfettered access to the business offices during those hours without allowing access to the basement or the residential floors or any other private area of the Baxter Hotel.

5. In addition, to protect against the possibility of public access to the basement or residential floors, the second floor call button could have been re-keyed separately from the other floors. Keying one floor separate from the rest of the floors (by changing out the lock core) takes only about one hour of a tradesman's time and would cost only $200.00 or $300.00 dollars. Because each floor can be separately keyed, the elevator could have been keyed such that the second floor could be left open to the public during business hours while the rest of the building could have remained secured from public access.

6. Angel's concern about locking the elevator as expressed to BHA indicated that he was concerned about allowing equal access for disabled persons to the second floor businesses which non-disabled persons enjoyed. He did not ask BHA to permit disabled non-residents unfettered access to the private areas of the Baxter Hotel.

7. The stairwell door to the second floor was chained or propped open during business hours and had been for several years. The stairwell to the second floor remained open and unsecured, allowing non-disabled persons unfettered access to the second floor during business hours.

8. Ethan Cade installed the time lock that was placed on the elevator on January 29, 2009. It only took one day to order the parts and only one day to install the time lock.

9. Angel did not seek damages for emotional distress at the hearing in this matter. See, e.g., Angel's Lists of Witnesses, Exhibits, Contentions, Request for Relief, Proposed Uncontested Facts and Identification of Discovery dated February 3, 2009 and the final pre-hearing order in this matter dated April 14, 2009. He did not broach emotional distress damages at any time until after the commission remand in this matter where, for the first time, he now seeks $25,000.00 in such damages. Because Angel's decision not to seek emotional distress damages rendered that issue moot for purposes of the hearing, BHA understandably had no reason to litigate the matter at hearing and no opportunity to cross-examine Angel on this issue or seek to call witnesses regarding emotional distress damages.

10. As a member of the home owner's association, Angel paid out $6,000.00 in assessments to defend that lawsuit which he brought against Baxter.

III. OPINION[1]

A. Due Process Does Not Require Reopening The Evidentiary Hearing In This Case As There Is No Indication That The Respondent Would Adduce Any Additional Evidence That It Has Not Already Submitted.

Preliminarily, BHA requests that an additional hearing be held to permit it to adduce additional evidence that Angel's request would fundamentally alter the nature of the public accommodation. It appears to the hearings officer, however, that BHA adduced its evidence in that regard at the hearing (specifically with respect to the nature of the residential floors and the basement being private places, not public accommodations, and the security concerns attendant to permitting unfettered access to private areas of the Baxter Hotel if the elevator was unlocked). Certainly, BHA has not made an offer of proof nor has it even suggested what additional evidence it would adduce that has not already been presented. And BHA has obviously not been hindered in making any arguments in briefing during remand by a failure to adduce evidence at the original hearing. In light of this, there is no basis for reopening the hearing.

B. Providing An Alteration To Permit The Elevator To Be Open To The Second Floor During Business Hours Would Not Have Fundamentally Altered The Nature Of The Accommodation.

The commission has remanded this matter to the hearings officer to determine the very narrow question of whether the requested accommodation would have fundamentally altered the nature of the public accommodation provided at the Baxter Hotel and, if the hearings officer does not find that it would have, to then determine damages. Confined to this very narrow issue, and considering the applicable case law and the facts adduced at hearing, there is no way that the hearings officer can find that the requested alteration would have fundamentally altered the nature of the public accommodation at the Baxter Hotel.

Once a charging party has established that a suggested modification is reasonable, the respondent must make the modification unless it can show that the requested modification would fundamentally alter the nature of the public accommodation. Johnson v. Gambrinius Co., 116 F.3d 1052, 1059-60(5th Cir.

---

[1] 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.

1997). The type of evidence necessary to satisfy the burden focuses on the specifics of the defendant and not the general nature of the accommodations. Id.

The essence of BHA's argument is that "Any modification to the elevator or otherwise which allowed unfettered access [to the residential floors or the basement] would fundamentally change the character of these floors from private to public." Respondent's Response to petitioner's Brief re: Fundamental Alteration/Undue Burden, page 6. That plainly is not the case as demonstrated by the resolution that BHA eventually took to remedy the problem: the installation of the time clock. Indeed, the evidence shows that there were other simpler and less costly alternatives available. BHA could have simply unlocked the call button to the second floor during business hours to provide unfettered access only to the second floor during business hours and yet keep patrons out of the private areas of the building. BHA could have re-keyed the second floor call button and still maintained restricted access to the private areas of the Baxter Hotel. As Ethan Cade's testimony demonstrates, that fix would have taken about one hour to complete and would cost no more than $200.00 to $300.00.

Angel did not ask BHA to permit disabled persons to have unfettered access to any of the residential floors or the basement. He made it fairly plain to BHA that his concern was to permit disabled persons to have the same type of access to the second floor businesses that non-disabled persons enjoyed. BHA could have done this (and eventually did) through any number of inexpensive means available to them.

BHA also argues that permitting the elevator to be unlocked would have created a problem because the elevator bypassed the security door on the second floor and "no person or entity was responsible for locking or unlocking the elevator in the morning or night." Baxter's opening brief, page 9. The problem with this argument is that BHA does not dispute that it was the entity that had the power to control the locking of the elevator. Since BHA was the entity that undertook the complained of action, BHA had the obligation to provide the modification. It would have been a simple matter to have the property manager or other onsite person unlock the elevator in the morning at the beginning of the business day and then lock the elevator each evening. BHA's argument in this regard does not show that Angel's requested modification would have fundamentally altered the nature of the public accommodation. Considering all of the facts and circumstances, as this tribunal is required to do, BHA has failed to prove that Angel's requested accommodation would have fundamentally altered the nature of the public accommodation provided at the Baxter Hotel. Angel, therefore has proven that BHA committed discrimination in violation of the Montana Human Rights Act.

C. Damages

The department may order any reasonable measure to rectify any harm Angel suffered as a result of illegal retaliation. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. E.g., P. W. Berry v. Freese, 239 Mont. 183, 779 P.2d 521, 523, (1989). See also, Dolan v. School District No. 10, 195 Mont. 340, 636 P.2d 825, 830 (1981); accord, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). To be compensable, however, the damage must be causally related to making the victim whole. In other words, the damage must flow from the discriminatory conduct. Berry, supra. See also, Village of Freeport Park Commission v. New York Division of Human Rights, 41 A.D. 2d 740, 341 N.Y.S. 2d 218 (App. 1973)(loss of earnings which did not flow from the discriminatory act is not compensable as it does not flow from the discrimination).

Angel has reiterated his request for $150,000.00 in compensatory damages for alleged lost business while his office was in the Baxter. For the reasons stated in the introductory portion of this order, the hearings officer cannot and will not revisit that issue.[2]

Angel has also reiterated the request he made at hearing regarding recovery of expenses for the costs he incurred in moving out of the Baxter and into his present office at 803 West Babcock, a total of $15,173.16.[3] On remand, he also seeks for the first time emotional distress damages based on the $6,000.00 amount he has paid out as a member of the Baxter Homeowner's Association. At the hearing, he pointed out that he had incurred the $6,000.00 expense but at no time did he argue that he was seeking emotional distress damages. Indeed, it is the hearings officer's recollection that he indicated he was not seeking emotional distress damages. His final pre-hearing statement did not make any mention that he sought emotional distress

[2] Angel has attached an exhibit (Exhibit A) to his opening brief on remand and asks that the hearings officer consider this newly proffered evidence. He also argues that the respondent is not entitled to a second hearing to determine the validity of its argument that the modification sought in this case would fundamentally alter the nature of the public accommodation(and the hearings officer agrees with his position on this issue, see Opinion. Part A, supra). Angel's Response Brief, page 5. As Angel has argued against reopening the hearing, and because Angel's Exhibit A was never presented at the hearing in this matter, the hearings officer is not at liberty to consider Exhibit A because to do so would clearly violate BHA's due process rights.

[3] Angel has proven that those expenses amount to $15,173.16. However, for the reasons stated below, they cannot be awarded to him.

damages and the issue was never broached at hearing (not even during his closing statement).

The hearings officer is constrained to apply the facts that he previously found to the instant remand (as the commission has affirmed the findings of fact previously made by the hearings officer). Those facts do not permit Angel to recover damages for moving out of the Baxter Hotel because Angel's decision to move out did not flow from the discrimination. Angel's decision had nothing to do with disabled persons' access to his office, rather, it appears to have been an opportunity for him to move into an office where he would either not have to be a tenant of David Loseff or he would not have to pay rent. This is true for at least three reasons.

First, when Angel moved into the Baxter and then for a period of almost a year afterwards, the building elevator was not available to Angel's disabled clients because it was shut down due to safety concerns. This undercuts Angel's argument that client access via the elevator was critical to his business. Second, the coincidence of the availability of the Babcock house, coupled with Angel's agreeing at first to extend his lease with Matney and then seeking to terminate his lease upon a payment to him of $13,977.60 after he learned that Loseff would be buying Matney's units, points toward the conclusion that Angel moved out either because he did not want to be Loseff's tenant or because he had an opportunity to be in a building where he did not have to pay rent. Certainly, had Angel felt that the lack of accommodation was forcing him out of the Baxter, he would have mentioned it at some point in his July 15, 2008 e-mail to Loseff seeking $13,977.60 in order to vacate his Baxter office. The e-mail makes absolutely no mention of the lack of accommodation as a basis for Angel's seeking to terminate the lease. Third, Angel moved into a location that suffered from a lack of disabled access as well. The Babcock office he occupies is clearly not accessible as demonstrated by Exhibits 118 a, b, and c. Had disability access been of so much concern to him, he would have at least considered other buildings with disability access. He did not do so. Because of these facts, the hearings officer concludes that Angel did not move out of the Baxter due to the discrimination. The moving and renovation expenses, therefore, do not flow from the discrimination and they cannot be awarded to Angel.

In arguing that he is entitled to recover his moving and renovation expenses, Angel cites McDonald v. Dep't. Of Environmental Quality, HRB No. 0051011379 (2006) for the proposition that despite the lack of causation from the discrimination for the sought after damages, he is still entitled to his moving expenses. McDonald does not support his proposition. In McDonald, the hearings officer found that because the discrimination was not the sole motivation for the charging party leaving

her job, her claim for emotional distress damages of $40,000.00 was overinflated and the hearings officer found that $10,000.00 was a more appropriate measure of the harm inflicted upon the charging party by the respondent's discrimination. Unlike McDonald, however, the facts in this case do not show any causal link between the discrimination and Angel's move. Angel moved because it was advantageous for him to do so for reasons wholly removed from the lack of elevator access to disabled persons. As there is no causal link between the discrimination and the move, there is no legally cognizable basis for awarding the moving expenses as damages.

Angel further argues that "the hearings officer found Angel moved to be in control of his own situation" and "there is no evidence in the record Angel lost control of anything other than elevator access to his disability firm." Angel's response brief, page 4.[4] In reality, there is ample evidence in the record that Angel's move had nothing to do with the elevator access. As iterated above (and previously noted in this hearings officer's May 2009 decision), the facts and inferences from those facts point to Angel moving either not to have Loseff as his landlord or not have to pay rent. Angel continued to practice law in the Baxter during the elevator shut down in 2006-2007 and never complained of the lack of access during that time period. He re-upped his lease with Matney even after Baxter Homeowners locked out second floor access in February 2008 and only sought to move after he learned that Loseff had bought the office that Angel occupied and would become Angel's landlord. Furthermore, in his e-mail to Loseff, Angel made absolutely no mention of the lack of disabled access having any bearing on moving out. All of this, coupled with the availability of the Babcock Office at the time makes it clear that Angel did not move out of the Baxter due to the lack of disabled access through the elevator.

Angel also seeks emotional distress damages for the first time in this remand. Angel's opening brief, page 7. In doing so, he argues that this tribunal is required to award them to him whether or not he sought them in his pleadings. In making this argument, he relies on Rule 54 (c), M.R. Civ. Pro. Angel's response brief, page 4, footnote 2. That rule requires that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings. Montana case law is clear, however, that a trial court "may not grant relief not specifically requested when the facts and

[4]Angel incorrectly asserts that the hearings officer "found (based on BHA's closing arguments) Angel moved to have control over his office." Angel's opening brief, page 7. The hearings officer did not make any factual finding based on closing argument of counsel. All of the hearings officer's findings in his decision were based on the facts adduced at hearing, and the inferences from those facts.

issues necessary to support such relief have not been tried and proven at trial." In re George Trust, 253 Mont 341, 345-46, 834 P.2d 1378, 1381 (1992). Cf. Sprow v. Centech, 2006 MT 27, ¶24, 331 Mont. 98, 128 P.23d 1036 (holding that it was error for hearings officer to permit modification of complaint to find discrimination with respect to full time employment where complaint alleged discrimination only in part time employment).

By Angel's own choice, the issue of emotional distress damages was not litigated. In his final pre-hearing statement, he indicated only that he sought compensation for having to move his offices and for lost income due to reduced client intake. The final pre-hearing order, relying on the charging party's limited scope of damages, noted the same parameters. Angel made no effort to raise the issue of emotional distress damages at hearing and made no argument seeking such damages at any time, not even during his closing statement. As the charging party did not make an issue of emotional distress damages, the respondent had no opportunity or incentive to litigate the issue at hearing as it was not on notice (and under no circumstances could fairly be found to be on notice) that Angel was seeking emotional distress damages. Under the circumstances of this case, the hearings officer cannot grant the relief requested. In Re George Trust, supra.

The amount Angel has paid out as a member of the association to defend the lawsuit that resulted from the discrimination, namely, the $6,000.00, was at issue in the hearing and the parties had a full and fair opportunity to litigate the issue.[5] That amount has been proximately caused by the discrimination and is compensable. A party entitled to recover damages which are certain or capable of being made certain is entitled to interest on those damages. Mont. Code Ann. §27-1-211. The $6,000.00 sought at the time of hearing is a sum certain (and was not seriously disputed by the respondent). The interest due on the $6,000.00 amount at 10% from the date of the April 17, 2009 hearing amounts to $815.08.[6]

---

[5] Angel has argued that the assessment he has paid out as a member of BHA has now risen to $8,000.00. As noted in Footnote 2 above, Angel has argued against reopening the hearing in this matter. Because he has so argued, and because BHA has not had any opportunity to litigate the issue of his assessment beyond the $6,000.00 amount discussed at the hearing, the hearings officer cannot impose an award of $8,000.00 without violating BHA's due process rights. Therefore, the hearings officer has limited this damage award to the $6,000.00 plus the interest due on that amount from the date of the hearing to the date of this decision after remand.

[6] The hearings officer calculated interest on the amount claimed by determining the daily value of interest on the lost amount, $6,000.00, calculating the number of days that have elapsed between the hearing date of April 17, 2009 and the date of this decision on remand, August 27, 2010, and then

D. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct. Mont. Code Ann. § 49-2-506(1)(a). Affirmative relief in the form of injunctive relief to ensure that such discrimination does not occur in the future is appropriate here.

Affirmative relief beyond the above injunction is unnecessary. BHA has already modified the elevator to ensure that it will permit unfettered access by disabled person to the second floor of the building during business hours. It has also modified its bylaws to require that the elevator remains unlocked during business hours to permit access to the second floor during business hours. The injunction will ensure that access to the elevator will not again be changed to result in unlawful discrimination.

IV. CONCLUSIONS OF LAW

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

2. BHA violated the Mont. Code Ann. §49-2-304 (1)(a) when it failed to provide a reasonable alteration to the elevator to permit disabled persons to have unfettered access to the second floor business offices in the Baxter Hotel during business hours. Such a modification would not have fundamentally altered the nature of the public accommodation that BHA provided.

3. BHA's discrimination did not cause Angel to leave the Baxter Hotel and he cannot, therefore, recover damages incurred in moving his office to the Babcock Street office.

4. Angel is entitled to compensation for the assessments he has paid to the homeowner's association ($6,000.00) as a result of defending against Angel's discrimination claim. He is also entitled to interest on that amount in the sum of $815.08.

---

multiplying the daily value by the number of days that have elapsed . The daily interest value for the period of lost income is $1.64 per day (10% per annum divided by 365 days =.00027% x $6,000.00=$1.64 per day). The interest due through August 27, 2010, starting from the date of the hearing in this case (April 17, 2009, which is 497 days prior to the date of the entry in this matter), is $815.08 ($1.64 x 497= $815.08).

5. The circumstances of the discrimination in this case 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 Geoffrey Angel and against BHA.

2. BHA is enjoined from discriminating against disabled persons in the provision of public accommodation.

3. BHA must pay Angel the sum of $6,815.08, representing damages incurred as a result of the discrimination and interest due on that amount, no later than 14 days after the order in this matter becomes final.

DATED: August 27, 2010

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

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Kimberly Howell, (406) 444-4341 immediately to arrange for transcription of the record.

Angel.FOF.RMD.ghp