BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0091013577:

ERIC FEIT,	)	Case No. 475-2010
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
BNSF RAILWAY COMPANY,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Eric Feit filed a complaint with the Department of Labor and Industry on February 27, 2009. He alleged that BNSF Railway Company discriminated against him illegally when it refused to employ him because of disability. On September 14, 2009, the department gave notice Feit's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer. The Hearing Officer issued his Order Granting Summary Disposition on March 10, 2010, ruling that BNSF engaged in and is liable for a discriminatory refusal to hire Feit because it regarded him as disabled.

The contested case hearing regarding remedies was held on May 17, 2010, in Helena, Montana. Feit attended with his counsel, Terry N. Trieweiler, Trieweiler Law Firm. BNSF participated without a designated representative and was represented by its counsel, Benjamin O. Rechtfertig, Hedger Friend, P.L.L.C.

Eric Feit, Don Agan, Joseph E. Kasperick and Christie Lende testified. For purposes of the hearing, Exhibits 1-15, 17-18 and 134 (as identified in the record) were admitted into evidence. For purposes of any appellate review, Exhibits 16, 19-21 and 101-133, as well as the transcripts of the depositions of Eric Feit, Michael Jarrard, M.D. and Travis DeVault and BNSF's responses and supplemental responses to Charging Party's First and Second Written Discovery were included in the record, with counsel making a record of objections they may interpose to use of some of those documents any subsequent appellate review. The parties filed their post hearing responses by July 2, 2010, and the case was deemed submitted for decision. A copy of the hearing officer's docket accompanies this decision.

II. Issues

The issues for hearing were (a) What harm, if any, did Feit sustain as a result of BNSF's illegal discrimination and what reasonable measures 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?

III. Findings of Fact

1. As of hearing, charging party Eric Feit was 30 years old. His work life expectancy from the date he was scheduled to begin employment with respondent BNSF Railway Company ("BNSF") as a conductor trainee (February 18, 2008) was 32.24 years.

2. On December 6, 2007, Feit applied for a job as a conductor trainee with BNSF, because of the opportunities for income and benefits that the job provided. From the job description for the conductor trainee position, from BNSF's website, the average annual wage for the position was $67,128 and the annual value of benefits was $22,986.

3. Feit received a conditional offer of employment on January 16, 2008. The offer was conditioned on background screening, physical exam, hair analysis, drug screen, background investigation, proof of employment eligibility, and a completed medical questionnaire all of which he satisfactorily completed.

4. Before Feit started work for BNSF on February 18, 2008, he was advised by email (dated February 6, 2008) that he could not start work due to his weight. BNSF told him that he could lose 10 percent of his weight or have additional tests performed but would not be guaranteed employment. The only explanation BNSF gave Feit for its refusal to implement his conditional hire and its imposition of these additional requirements was Feit's height and weight at the time of his application.

5. Feit had all of the tests requested by BNSF done, except for a sleep study which his physician did not deem necessary. The tests that he had done cost him $600. The sleep study would have cost him an additional $1,800 for one night and he didn't know how many nights would be necessary.

6. After satisfactory completion of the rest of the tests, he received a second email message from BNSF (dated February 19, 2008), telling him he still could not be employed without a sleep study result, but was again advised that even that result would not guarantee employment.

7. Feit lost the weight he had been told to lose by BNSF. He understood that he had to lose 22 pounds, which he did, by March 2008. He documented the weight loss by going to the Valley County Health Department where he was weighed and his weight recorded. He then took that documentation to the Glasgow Clinic where it was faxed to Comprehensive Health Services (CHS), a contractor for BNSF, on September 23, 2008. The documentation indicated on its face that he had maintained the 10% weight loss from March 21, 2008, through September 22, 2008.

8. After documenting his weight loss and sending the documentation to CHS, Feit heard nothing further. BNSF denied receiving the weight loss documentation prior to these contested case proceedings. BNSF has never implemented its conditional offer of employment. Given BNSF's continued efforts to avoid hiring otherwise qualified applicants whose height and weight make them (statistically) "morbidly obese," as apparent in other cases pursued under Montana discrimination law to date, it is not appropriate or practical to give BNSF an option hereafter to hire Feit, without or without any further or updated test results.

9. Feit graduated from high school in 1999 in Glasgow, Montana, and attended the Universal Technical Institute in Phoenix for a year and half where he received a degree in Applied Science for Automotive Mechanics. After BNSF refused to employ him, he elected to attend Lake Region State College in Devils Lake, North Dakota, studying wind technology to become a wind technician, working on wind turbines. He completed the first year of the two-year program in May 2010, and cannot afford to return to school to complete the second year of the program. Feit had no income during his attendance at Lake Region State College, and borrowed an amount in excess of $10,000 for school expenses including books and living expenses.

10. Feit's work history includes work as an automotive mechanic in Texas and at Hi-Line Ford in Glasgow, Montana, for several years. He has also worked at Pehlke Furniture in Glasgow where he delivered and repaired furniture, at a bowling alley in Glasgow where he served as a bartender and maintained pin-setting equipment, and has driven a truck for a harvesting company, although that was a seasonal job. Other than the seasonal harvesting job and his work as a mechanic, the wages paid in those positions ranged from $10-12 per hour.

11. Feit earned $15.50 per flat rate hour for work actually done at Hi-Line Ford. However, that did not translate to $15.50 per hour of work actually done, because "flat rate hour" means a defined amount of time for each defined task as a mechanic, effectively a piece rate for his work. His mechanic work for Hi-Line Ford was the highest paying job in Glasgow for which he was qualified, aside from work for BNSF. His annual income at Hi-Line Ford averaged almost $23,000 from 2005 to 2008.

12. Feit found the work at Hi-Line Ford to be inconsistent and unstable. If there was not work to be done, he didn't get paid. For that reason, and for reasons of personal preference, his plans at the time of the hearing were to start a job at Nemont Beverage, driving a truck and delivering beer and energy drinks, earning $11-12 an hour with no benefits during the first year, and some benefits after that, although he did not know what the actual benefits would be.

13. Had Feit been hired by BNSF, he planned to work for the railroad as long as possible. He would have traveled if necessary in order to work at other sites from which BNSF assigned employees work, such as Glendive or Forsyth, Montana, Aberdeen, South Dakota, and Minot or Mandan, North Dakota. If he had been unable to hold a regular job as a conductor, he would have worked as a brakeman, switchmen, conductor helper, or utility worker, and could have bid for such jobs within BNSF's operations.

14. Feit's willingness to travel if necessary for work is corroborated by the fact that his original application with BNSF was for a job in Glendive. Before that, he had applied for jobs in St. Mary, Saco and Baker. He has since applied for jobs as a wind technician in North Dakota, Wyoming, South Dakota, Iowa, and Colorado.

15. Although there have never been any health reasons which would have prevented Feit from working for BNSF, the refusal to hire him is well known in Glasgow and he is derided frequently. It bothers him that he is now called "fat" and teased by people he barely knows. Being rejected for the job because of his weight affected his self confidence and his productivity at Hi-Line Ford, which in turn affected his income.

16. Don Agan, a certified vocational rehabilitation counselor, regularly evaluates a person's capacity for employment in the general workforce. In his occupation, he has become familiar with the wages paid for various occupations. Based on his interview with Feit and the labor market research that he conducted, Agan appraised what Feit can reasonably expect to earn in the open labor market. Based upon his testimony, the other evidence of record and the other findings herein, it is more likely than not that Feit's earning capacity without the BNSF position is as follows.

17. Feit's alternate earning capacity, upon completion of school, with employment in wind technology, is too speculative to utilize. The likelihood of Feit finding employment in that field, given that he has tried to do so and has failed, is questionable without completing school, which he cannot afford to do. In addition, long-term prospects for employment in wind technology depend on government incentive money, which may not be available in the future.

18. Feit's current efforts at finding employment are reasonable considering his education, experience, training and the job market in Glasgow where he lives.

19. There are many job applicants in Glasgow, but few jobs. Feit's best employment opportunity would be as an auto mechanic earning at best $15.00 a "flat" hour with an estimated benefit package of $4.35 an hour. Other than that, his capacity was in the $8.25-$9.00 an hour range. The $15.00 an hour rate flat rate, based on work available and the amount of time allocated by the employer to complete the work, did not generate $15.00 per working hour. That rate, as well as the job which Feit expected to start the week after the hearing, earning between $11 and $12 an hour, established an earning capacity without the BNSF position of approximately $11.50 per hour.

20. Taking into consideration Feit's actual earnings, as summarized by Kasperick, as well as Agan's estimates of Feit's earning capacity, without regard to the lower earnings resulting from Feit's time spent in school in an unsuccessful attempt to become qualified and competitive in wind technology work, Feit could have earned $25,000.00 in 2008 and $29,120 in 2010, which generates an average in 2009 of $27,060.00, with benefits at 22% of earnings. This is higher than $11.50 per hour, but it would not be reasonable to penalize BNSF for Feit's decision to leave the highest paying job he had actually held successfully. The Hearing Officer is therefore using the "could have earned" annual figures set forth in this finding.

21. During much of 2009 and the first part of 2010, BNSF employees similarly situated to Feit (had he been hired) were furloughed due to a downturn in the economy and had substantially lower average earnings in 2009 than in 2008. For BNSF employees as well as the rest of the populace, earnings can vary with the economy, and 2009 was a bad year.

22. Earnings also vary with seniority, and an employee who did not have enough seniority to hold a position in 2009 could have enough seniority to hold a job in 2010. All three conductors in the hiring "class" to which Feit would have belonged (hired out of the same applicant pool at the same time and place) are still employed by BNSF. They have all been recalled and there are currently no conductor trainees in the Montana division who are furloughed.

23. Even in the same seniority group, earnings can vary based on whether employees are willing to bid on positions available at other locations. Had Feit been hired as originally planned and subsequently furloughed, he could have exercised seniority in Glendive, Minot, Mandan, Aberdeen, or Forsyth. In 2009, a BNSF employee with Feit's seniority could have worked 7½ months in Aberdeen. In 2009, one individual with comparable seniority to Feit's earned $35,614.92 in Minot.

24. Joseph Kasperick is a retired professor in economics and an economic consultant with 35 years experience, including substantial experience projecting future earnings of an individual, based upon personal and educational background, employment and earnings history, and work life expectancy. Based upon Feit's personal and educational background, employment and earnings history, and work life expectancy, Kasperick prepared an appraisal of lost income and fringe benefits sustained by Feit as a result of BNSF's refusal to hire him. Based upon Kasperick's testimony and his written submissions in evidence, the other evidence of record and the other facts found herein, taking into account furloughs of similarly situated employees and Feit's willingness to relocate, it is more likely than not that Feit suffered the following wage and benefits earning losses during the indicated periods.

25. Had Feit commenced work for BNSF on February 18, 2008, his wage earnings from that date through the end of that calendar year would have been 85%[1] (312/366) of $55,444.00, which is $47,238.00. In calendar 2009, working at other locations, Feit's wage earnings would have been $35,615.00. Kasperick concluded that by 2010 Feit would be earning $67,128.00, the amount BNSF told prospective hires the position would pay. However, that figure was based upon steadily increasing earnings through 2009, which did not occur. It is reasonable to conclude that instead of reaching that figure in 2010, Feit's reduced earnings in 2009 would extend the time required to reach that amount by another year. Thus, in 2010, Feit would instead be at the $58,381.00 figure Kasperick had projected for 2009. Thus, for January 1, 2010, through August 5, 2010 (the date of this decision) Feit's wage earnings would have been 59% (216/365) of $58,381.00, which is $34,445.00. For all three periods, his benefits would have been 34% of his wage earnings. His total earning losses from February 18, 2008, through August 5, 2010, are:

Date	Wages	Benefits	Total
2/18/2008 thru 12/31/2008	$47,238.00	$16,061.00	$63,299.00
2009 calendar year	$35,615.00	$12,109.00	$47,724.00
1/1/2010 thru 8/5/2010	$34,445.00	$11,711.00	$46,156.00
TOTAL			$!57,179.00

26. Since Feit was not permitted to commence work with BNSF on February 18, 2008, his residual earning capacity (without regard to his schooling efforts) during those same time periods, using the earnings set forth in Finding 20 and applying the percentages of 2008 and 2010 used in finding 25 to Finding 20 earnings, Feit's residual earning capacity for those same periods are:

[1] Percentages are rounded to the nearest whole percent. Dollar figures are rounded to the nearest whole dollar.

Date	Wages	Benefits	Total
2/18/2008 thru 12/31/2008	$21,250.00	$4,675.00	$25,925.00
2009 calendar year	$27,060.00	$5,953.00	$33,013.00
1/1/2010 thru 8/5/2010	$17,181.00	$3,780.00	$20,961.00
TOTAL			$79,899.00

27. Applying the figures from Findings 25 and 26, Feit's earning and benefits losses, through the date of this decision, are:

Date	BSNF Total	Residual Total	Loss
2/18/2008 thru 12/31/2008	$63,299.00	$25,925.00	$37,374.00
2009 calendar year	$47,724.00	$33,013.00	$14,711.00
1/1/2010 thru 8/5/2010	$46,156.00	$20,961.00	$25,195.00
TOTAL			$77,280.00

28. In addition to these losses to date, Feit will also suffer economic losses into the future, because he lost the opportunity to continue in employment with BNSF. The longevity of employment is related to the income and benefits provided by the job. Since BNSF offers its employees better income and benefits than are otherwise available to Feit in his community, with his current levels of experience, education and training, it is more likely than not that had BNSF hired Feit, he would have kept that job long-term had he been able. According to the calculations of his economist, Kasperick, Feit's future losses over his working life, reduced by his residual earning capacity, had he worked for BNSF until he retired, and reducing the future losses to present value, would exceed a million dollars, using conservative assumptions.

29. As explained in the "Opinion" section of this decision, according to BNSF the option of hiring Feit to end its future damage liability is not appropriate, and therefore it is reasonable to calculate the economic losses Feit will suffer after this decision to the fourth anniversary of his February 18, 2008, hire date, and then to augment that amount to account for the loss of opportunity to earn further higher wages and benefits from BNSF thereafter. From this decision date through the end of 2010 is 41% of this calendar year (148/365 days). After the entire 2011 calendar year, there will remain, to the fourth anniversary of the discrimination in 2012, 13% of that calendar year (49/366 days). Thus, after the date of this decision there remains, of the four years after the date of the impact of the illegal discrimination, 1.54 calendar years of future losses.

30. The current economy is too uncertain to project increases in either Feit's projected or residual earning capacities, except for Feit reaching (in 2011 rather than 2010) the full wage BNSF stated in its information to prospective applicants for the

job. Feit's future loss over the next 1.54 years will be $67,128.00 times1.54 (wages), plus .34 (benefits) times that sum, which totals $138,525.00. His future residual earning capacity over that same time is $29,120.00 times 1.54, plus .22 times that sum, which totals $54.711.00. Therefore, it is more likely than not that Feit's net lost wages and benefits resulting from the discrimination over the next 1.54 calendar years will be $83,814.00, the difference between his future loss and his residual wage and benefit earning capacity over that time.

31. The value of Feit's total wage and benefit loss over the four years after the discriminatory impact began, as calculated herein, is $161,193.00, before calculation of prejudgment interest. That amounts to about 16% of the lowest present value his economist assigned to his total economic loss over his work life expectancy of 32 years. Four years is about 13% (⅛) of that work life expectancy. Augmentation of his recovery for economic loss is reasonable in light of the 28 years of additional earnings opportunities lost because of the discrimination. For a charging party who lost slightly more than half as long a potential career with BNSF (almost 18 years as opposed to Feit's 32 years), this Hearing Officer augmented the economic award by $50,000.00 for each of the four years (past and future as of the decision date), in a case in which BNSF was given the option to end future damages by hiring the charging party.[2] Since the future work life expectancy is almost twice as great, but there is no deferral of payment of future damages, it is reasonable, to rectify the wage and benefit loss Feit has and will suffer, to enhance his wage and benefit loss recovery by $75,000.00 per year, for a total of $300,000. Thus, Feit's entire wage and benefit loss award, including augmentation for the reasonable value of his lost opportunities to earn wages and benefits working for BNSF beyond four years after the discrimination, totals $461,193.00.

32. Prejudgment interest on Feit's actual wage and benefit loss (not including augmentation), during partial calendar 2008 (a leap year) loss was $119.79 per day ($37,374.00 divided by 312 days, to the nearest penny) times .000273 (10%, or .1, divided by 366) times 48,828 days (312+311+310 . . . + 3+2+1 days), which is $1,596.81, to the nearest penny. In 2009, his prejudgment interest on the 2009 actual wage and benefit loss was $40.30 per day ($14,711.00 divided by 365 days, to the nearest penny) times .000274 (10% or .1, divided by 365) times 66,795 days (365+364+363 . . . +3+2+1 days), which is $737.56, to the nearest penny, plus $3,737.40 (10% of $37,374.00), for 2009 interest on the 2008 wage and benefit loss, for total prejudgment interest for 2009 of $4,474.96. In 2010, his prejudgment interest on the 2010 actual wage and benefit loss was $116.64 per day ($25,195.00

[2] Chad Cringle v. BNSF Railway Co., (Hearings Bureau Case No. 1233-2009, Sept. 2, 2009).

divided by 216 days, to the nearest penny) times 0.000274 (again, daily interest at 10% per annum over 365 days) times 23,436 days (216+215+214+ . . . +3+2+1 days), which is $749.00, to the nearest penny, plus $258.78 ($40.30 times .00274 times 23,436 days) for 2010 prejudgment interest on the 2009 wage and benefit loss, plus $769.23 ($119.79 times .000274 times 23,436 days) for 2010 prejudgment interest on the 2008 wage and benefit loss, for total prejudgment interest in 2010 of $1,777.01. The total prejudgment interest on Feit's actual wage and benefit loss as of the date of this decision is $7,848.78.

33. Feit also spent $600.00 on medical tests he obtained at BNSF's demand.

34. There have never been any health reasons which would have prevented Feit from working for BNSF, but it's the refusal to hire him is well known in Glasgow and he is derided frequently. It bothers him that he is now called "fat" and teased by people he barely knows. Being rejected for the job because of his weight affected his self confidence and impacted his productivity at Hi-Line Ford, while he still worked there as a mechanic. More likely than not, the emotional distress he suffered because BNSF never implemented its conditional offer of hire due to his weight was also intensified because the job he did not get was the best job, in terms of pay, benefits and job security, that he had ever had the opportunity to take. Feit has experienced substantial emotional distress from the financial and personal consequences that resulted from BNSF's act of discrimination and from the demeaning and ultimately futile experience he had, trying to meet BNSF's demands after it questioned his fitness to work because of his weight. In substantial measure, his emotional distress is comparable to that suffered by Chad Cringle (decision citation on p. 8, supra). The amount reasonable to compensate Feit for his emotional distress is $25,000.00.

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

IV. Opinion[3]

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

The summary ruling adequately addresses and explains this determination.

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

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

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.[4]

By proving discrimination, Feit 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 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

[4] 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..

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 first allow it to resume the screening process, since it had not finally rejected Feit. However, a fair interpretation of the events in this case is that BNSF did withdraw its conditional offer of hire, purporting to offer Feit the opportunity to reapply by providing further information at his own expense, but continuing its refusal to hire him even after he met one of its two screening requirements (weight loss) and arguably met the other (passing all tests except the sleep test, which his physician considered unnecessary). 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 Feit's weight. BNSF illegally refused to hire Feit before the additional testing, without any basis for its refusal except his weight, no matter who was going to pay for the additional testing, and has maintained its refusal to hire him, even after it unquestionably knew of his weight loss, at latest during these contested case proceedings.

Based upon the evidence submitted in support of Feit's summary judgment motion, he was fully qualified for the job he was conditionally offered, there was no evidence that he had any 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 the sleep test. Thus, had BNSF honored either of the additional conditions it wrongly imposed upon Feit without a basis other than his weight, Feit would already be employed by BNSF. To require him to undergo any additional testing at this time would place him in a considerably worse position than he would now be in without the illegal discrimination.

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 is proper. H.A.I. v. Rasmussen (1993), 258 Mont. 367, 378, 852 P.2d 628, 635.

Within the limited context of determining appropriate remedies for future losses in this case, consideration of BNSF's pattern of conduct with morbidly obese conditional hires for train service positions is appropriate. BNSF has repeatedly rejected otherwise qualified applicants because of morbid obesity, most recently in

Cringle, op. cit., page 8 of this decision, ftnt. 2. See also, Bilbruck v. BNSF Ry. Co. (8/3/04), HR No. 0031010549; O'Dea v. BNSF Ry. Co. (5/15/07), Hearings Bureau Case No. 2091-2005. The "antagonism" between the parties in this case results from BNSF's practice, because of the statistical risks its occupational medicine specialists find in hiring morbidly obese train service workers, of going to considerable lengths to avoid hiring persons in that class. Providing BNSF with a "do over" would create too great a risk that BNSF would search for and find a colorable basis to reject Feit again, to avoid hiring a morbidly obese worker. Based upon BNSF's illegal refusal to hire Feit, and before him Cringle and O'Dea, after the Bilbruck decision almost five years ago, it is inappropriate to order resumption of the screening process, or even to offer reinstatement as an alternative to an award for Feit's future losses. Cassino, supra; see also, Thorne v. City of El Segundo (9th Cir. 1986), 802 F.2d 1131, 1137; E.E.O.C. v. P.P.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.

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, concluding that legislature sought to provide compensation to persons injured in violation of the statute, with an effect similar to 42 U.S.C. §1983 (itself derived from §1 of the Civil Rights Act of 1871), in amounts appropriate to remedy whatever harm they suffered:

> 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.
> . . . .
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> 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. . . . .
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> 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.

If the Human Rights Act contained the same remedial mandate as was interpreted in Swanson, that could provide a legal basis to award Feit the present value of the rest of his projected working life with BNSF. However, the statutory mandate of the Human Rights Act is to take reasonable measures to rectify the harm actually suffered by Feit. BNSF's past conduct with otherwise qualified morbidly obese conditional hires is relevant to whether resuming the screening process would be appropriate and whether future damages awarded should be an alternative to hiring Feit hereafter. It is not relevant in determining the reasonable scope of the future damages necessary to rectify the harm done to Feit. BNSF is still litigating some of the prior cases involving its attempts to avoid hiring otherwise qualified morbidly obese conditional hires. It would be error suddenly to depart, in this case, from the methods utilized in those prior cases for ascertaining reasonable measures to rectify future harm. There is no significant difference between this case and the prior cases that would justify such a departure.

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 Feit, who has 32 working years remaining. While there may be isolated examples of claimants as young as Feit 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 Feit lost when BNSF withdrew its conditional employment, there remain many uncertainties. It remains uncertain whether Feit would have left BNSF before retirement due to future health problems. It remains uncertain whether BNSF will face further future economic difficulties that would result in further future layoffs of employees (perhaps including Feit), had he been hired. It remains uncertain whether Feit 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 these future events would have shortened his career with BNSF, and are not part of the present value calculations used by Kasperick.

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 Feit's future pecuniary losses. Therefore, the Hearing Officer has continued the same practice, for setting the amount of an award to rectify future wage and benefit losses, with the noted changes herein, as utilized in the previous cases.

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 Feit.

Prejudgment interest on lost wages and fringe benefits is a proper part of Feit'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. Neither side established the actual pay periods for BNSF employees. Thus, the appropriate calculation of prejudgment interest is based upon the elapsed time between discrimination and decision, the amounts awarded, and the accrued daily simple interest for each day's wages (using the annual loss to set a daily loss during each calendar year). This requires summation of the number of days between each day's loss and the date of this decision, times the daily interest for the days of that loss, which varies only for leap years, times the amount of the

daily loss. That calculation is specified in Finding 32, for the losses in the calendar days from February 18, 2008, to the date of this decision.

Post judgment interest accrues upon the final order, now that it has issued, as a matter of law.

Some other comments made in the Cringle decision apply equally here. With the economic difficulties in society today, Feit's award may seem large, substantially more than the present value of four years of loss after the illegal discrimination. That four-year limit is not directly applicable to recoveries under the Human Rights Act, and only serves as a reasonable starting point in calculating damages. For charging parties whose lost jobs or lost job opportunities far exceed their residual earning capacity, it can be unreasonably low as an absolute recovery limit. Feit lost, because of illegal discrimination, a position for which the present value of his career wages and benefits could potentially exceed one million dollars. His entire award herein, for lost wages and benefits, prejudgment interest, emotional distress and medical tests, now almost two and a half years later, is less than half of that amount. The size of his recovery reflects the value of the career opportunity he lost, rather than present value of an entire potential career with BNSF, and that is reasonable.

V. Conclusions of Law

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

2. BNSF effectively withdrew its conditional offer to employ him, after he satisfied the normal conditions upon it, and imposed additional conditions, which it required him to satisfy at his own expense (with no guarantee of hire), all directly related to his weight. Even after satisfaction of one additional condition (weight loss) and all but one subpart of the other condition, BNSF still failed and refused to honor its original conditional hire. BNSF illegally discriminated against Feit in employment because of it regarded him as having a physical condition that substantially limited a major life activity. Mont. Code Ann. §§ 49-2-101(19) and 49-2-303(1)(a).

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

4. The department must permanently enjoin BNSF from discrimination in employment against prospective employees because it regards them as disabled due to a statistical classification of them as morbidly obese, without first undertaking an independent individualized assessment to verify the risk of substantial harm to the prospective employees or others, at BNSF's expense. The department should also

order BNSF to undertake appropriate steps to correct the discriminatory practice found. The injunction and appropriate additional affirmative relief are specified by the following order. Mont. Code Ann. § 49-2-506(1)(a) and (b).

VI. Order

1. Judgment is issued for charging party Eric Feit and against respondent BNSF Railway Company on the charge of illegal disability discrimination by denial of employment commencing February 18, 2008, and continuing into the future.

2. Respondent BNSF Railway Company must immediately pay to charging party Eric Feit the sum of $494,641.23.

3. The Montana Department of Labor permanently enjoins Respondent BNSF Railway Company from discrimination in employment against prospective employees because of a statistical classification of them as morbidly obese, unless and until it verifies the risk of substantial harm to the prospective employees or others through an independent individualized assessment, at BNSF's expense, and requires that BNSF submit to the department's Human Rights Bureau, within 60 days after this decision becomes final, proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and immediately upon Bureau approval, to adopt and to implement those policies, with any changes mandated by the Bureau.

4. The Montana Department of Labor enjoins and requires Respondent BNSF Railway Company, within 60 days after this decision becomes final, to submit to the department's Human Rights Bureau proposed internal or outside training (duration of at least four hours) in disability discrimination under Montana law for its employees who make decisions regarding rejection or further investigation or evaluation of prospective employees because of a statistical classification of them as morbidly obese, 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 before taking adverse employment action against them, and immediately upon Bureau approval, to adopt and to implement those policies, with any changes mandated by the Bureau.

Dated: August 5, 2010.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Terry N. Trieweiler, Trieweiler Law Firm, attorney for Eric Feit, and Jeff Hedger and Benjamin O. Rechtfertig, Hedger Friend, P.L.L.C., attorneys for BNSF Railway Company:

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

Serve your notice of appeal, and all later filings, on all other parties of record.

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

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 any appeal 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 original transcript is in the contested case file.

FEIT.HOD.TSP