

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

KEVIN TRUMBLE,

Charging Party,

-v-

GLACIER WELL SERVICE INC.,

Respondent.

Case No.: 0081012948

**ORDER TO REMAND**

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Kevin Trumble (Trumble) filed a complaint with the Department of Labor and Industry asserting that Glacier Well Service, Inc. (Glacier Well) unlawfully discriminated against him on the basis of his disability when it stopped providing a reasonable accommodation, refused to try an alternative accommodation and subjected Trumble to a hostile work environment. The Hearings Bureau held a contested case hearing pursuant to Section 49-2-505, MCA. Following the hearing, the Hearings Bureau issued a decision that determined Glacier Well discriminated against Trumble and awarded damages. Trumble filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on March 17, 2010. Phillip Hohenlohe appeared and argued on behalf of Trumble. Thane Johnson appeared and argued on behalf of Glacier Well.

## **STANDARD OF REVIEW**

“The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” *Admin. Rules of Mont.* 24.9.123(4).

A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3d 284, ¶ 39. Substantial evidence means more than a scintilla, but it may be somewhat less than a preponderance. *Total Mech. Heating & Air Conditioning v. ERD*, 2002 MT 55, ¶ 22, 309 Mont. 84, ¶ 22, 50 P.3d 108, ¶ 22.

## **DISCUSSION**

After careful and due consideration, the Commission determines that Findings of Fact Nos. 19, 40, 41, 42, 45, 46, 48, and 51 were not based on substantial credible evidence. The Commission determines that modification of each cited finding of the hearing officer is appropriate, as discussed in detail below. Further, the Commission concludes that the hearing officer erred, as a matter of law, when he neglected to evaluate Trumble’s claim of hostile work environment discrimination; incorrectly analyzed whether the reasonable accommodation provided by Glacier Well posed an undue hardship upon the company; and failed to determine damages for the extreme

emotional distress and lost future earnings experienced by Trumble due to the loss of his livelihood.

The Commission hereby modifies eight findings of fact, corrects certain conclusions of law, affirms those findings of fact and conclusions of law not modified or corrected by this Order, and remands for further proceedings on damages.

### **Overview of Affirmed Findings of Fact**

To briefly summarize the affirmed findings of the hearing officer, Trumble was an otherwise qualified employee who has a disability, which has been diagnosed as a learning disorder, borderline intelligence and substantial cognitive defects. The hearing officer found that Trumble learned to compensate by working very hard and concentrating to the best of his ability.

Trumble successfully worked in the Montana oil fields for 8 to 9 years and began at Glacier Well as a “floor hand” on a drilling rig before moving up to the position of “derrick hand” in February 2007. Neither position at Glacier Well required Trumble to complete paperwork.

Brandon Aldrich<sup>1</sup> was Trumble’s immediate supervisor at Glacier Well. Aldrich offered Trumble a promotion to the “rig operator” position during the summer of 2007. Aldrich knew of Trumble’s disability and promised to help Trumble complete the rig operator’s daily written reports if Trumble accepted the promotion. The hearing officer found that Aldrich falsely led Trumble to believe the owner of Glacier Well, Dave Withers, had been informed by Aldrich of Trumble’s disability and had approved of Aldrich’s plan to provide Trumble a reasonable accommodation.

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<sup>1</sup> The Commission notes the hearing officer mistakenly referred to Brandon Aldrich as “Aldridge” a number of times in his decision.

Trumble accepted rig operator position on August 28, 2007, in reliance upon Aldrich's promise to assist with the paperwork. As the rig operator, Trumble supervised three crew members; made sure the work was done safely; kept track of the rods, tubing and pumps used on a daily basis; and prepared daily written reports to enumerate the hours worked and the equipment and materials used in order for the company to bill clients. The daily reporting was a critical function of the rig operator's job and consumed approximately 2% of the operator's day. The hearing officer found it was not reasonable for Glacier Well to expect Trumble to complete the rig operator reports without assistance with the writing, given Trumble's disability.

Aldrich aided Trumble by recording onto the company's standardized reporting forms the required information provided by Trumble regarding daily work activities. Aldrich stopped assisting Trumble after the first month of the arrangement and insisted Trumble learn to complete the paperwork on his own. In October 2007, Trumble spoke with Dave Withers, owner of Glacier Well, about his need for writing assistance with the daily reports. Withers advised Trumble that Aldrich could train another employee to assist with the paperwork when Aldrich was not available to help. Aldrich refused to allow another crew worker to assist Trumble.

The hearing officer found credible the testimony of Trumble and other rig employees who described Aldrich verbally abusing Trumble over the course of a number of months. Aldrich called Trumble "stupid, retarded and ignorant." Aldrich threatened Trumble repeatedly, insisting that if Trumble did not learn to prepare the written reports by himself, Trumble would lose his job.

Trumble tolerated Aldrich's verbal abuse rather than jeopardize his job. For months, Trumble endured extreme stress, which was aggravated by Aldrich's abuse. Tensions at work continued to mount. On January 23, 2008, Aldrich tossed a collection

of incomplete paperwork at Trumble and told Trumble that he had to do all the written reports himself or “go home.” Trumble understood Aldrich to be giving him an ultimatum: either complete written assignments that Trumble was incapable of producing or be fired. Trumble left work believing that his employment with Glacier Well was terminated.

Following the termination of his employment, Trumble made diligent efforts to secure another job, albeit without success. The hearing officer found Trumble was devastated by the treatment he received from Aldrich and the loss of his livelihood. Trumble experienced extreme emotional distress.

### **Modifications to Findings of Fact**

After careful review of the entire record, the Commission determines that the hearing officer failed to ground a number of findings upon substantial credible evidence. Therefore, the Commission modifies specific findings in the manner discussed below.

**Finding of Fact No. 19.** The hearing officer found Aldrich’s promise to help Trumble complete the paperwork for the rig operator position was “unrealistic.”

The Commission determines this portion of the finding is clearly erroneous because it is not based on competent substantial evidence. During the first month after Trumble assumed the rig operator duties, Aldrich wrote up the daily reports based on the information Trumble provided. All witnesses agreed that the work went very smoothly between late August and early October 2007. Because the rig operator’s daily written reports constituted about 2% of the job, from 9 to 14 minutes each day, the evidence shows the assistance promised and provided by Aldrich was a successful accommodation for Trumble’s disability.

Only after Aldrich balked at continuing to assist Trumble with the daily paperwork did 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.” Substantial credible evidence demonstrates that Trumble was able to keep accurate track of the equipment and materials used each day but he simply lacked the capacity to complete the daily reports on his own. But for Aldrich’s willful refusal to continue, himself, or to train another employee to assist Trumble, the Commission finds that the few minutes of writing assistance each workday provided by another Glacier Well employee constituted a realistic and reasonable accommodation for Trumble’s known disability.

**Finding of Fact No. 40.** The hearing officer found that a workable accommodation could not be achieved by training other workers at the drill site to assist Trumble in completing the paperwork when Aldrich was unavailable. The hearing officer cited the “untested reliability” and “uncertain longevity” of these other employees as the basis for inevitable failure. While acknowledging that the paperwork assistance provided by Aldrich worked well for a month, the hearing officer determined that having Aldrich continue to assist or training other employees to assist Trumble posed an “undue hardship” upon the employer.

The Commission concludes this finding is clearly erroneous. The paperwork component of the rig operator job requires a straightforward accounting of the human resources, materials and equipment used daily for the purpose of billing Glacier Well clients. The record supports a finding that, as the rig operator, Trumble was able to keep track of the hours worked and the rods, tubing and pump(s) that were put into service by the drilling crew each day. However, Trumble needed assistance from a literate person to transfer his knowledge to the daily written reports. In the past, Trumble successfully worked as a rig operator for another company when he had his wife help him with the written reports during the evening hours. Undisputed evidence

shows that Aldrich and Glacier Well did nothing to test the alternative accommodation of training another employee at the drill site to help Trumble write up the daily reports. In the absence of an attempt by Glacier Well to test the alternative accommodation, the Commission concludes the hearing officer's finding that training other employees to assist Trumble was unworkable is not based on competent substantial evidence.

Furthermore, the hearing officer erred in finding that a permanent accommodation for Trumble constituted an "undue hardship." Glacier Well knew of Trumble's disability and had a duty to provide a reasonable accommodation. No substantial credible evidence demonstrates that paperwork assistance for Trumble presented a significant difficulty or a financial burden on the company, with no evidence even suggesting extraordinary cost. Consequently, the Commission deletes the clearly erroneous references to an "unworkable accommodation" in the hearing officer's findings and reverses the finding that the accommodation posed an undue hardship on the employer.

**Finding of Fact No. 41.** The hearing officer reiterated a finding of "undue hardship" and further found that, whether Aldrich or another employee assisted Trumble, such a reasonable accommodation would ultimately fail.

As discussed above, the Commission determines the finding is clearly erroneous. Competent substantial evidence demonstrates that the accommodation, in fact, worked well for one month and problems arose only when Aldrich willfully refused to continue assisting Trumble or to train another employee to help. The Commission modifies this finding and deletes the hearing officer's speculation that an alternative accommodation would necessarily fail.

**Finding of Fact No. 42.** The hearing officer found that a permanent accommodation for Trumble to work as a rig operator was not possible, and that

Withers would have offered Trumble a derrick hand position when a replacement rig operator became available.

In the absence of an attempt by Glacier Well to implement the alternative accommodation identified, the Commission finds no evidence to support the hearing officer's finding that a permanent accommodation was impossible. The Commission also finds the record silent regarding any consideration by Withers to move Trumble into a derrick hand position. Instead, Trumble testified that he felt any hope of returning to the derrick hand position had been foreclosed when his immediate supervisor Aldrich advised him, "you don't go backwards in life, you go frontwards in life." Therefore, the Commission reverses the finding that a permanent reasonable accommodation was not possible and excises the hearing officer's speculation regarding a hypothetical job reorganization by the company owner.

**Finding of Fact No. 45.** Had Glacier Well offered Trumble the possibility of returning to the derrick hand position, the hearing officer found Trumble would have quit working for the company entirely due to the stress, strain and resentment Trumble experienced as a rig operator.

The Commission again determines the record fails to support a finding that Trumble would have rejected a hypothetical offer to return to the derrick hand position. Trumble testified that he had worked as a derrick hand for many years, felt comfortable in that job and was reluctant to accept the higher position of rig operator. Trumble worked very hard for his entire adult life to remain gainfully employed despite his disability. Because Glacier Well never offered Trumble the option of a demotion to the derrick hand job, the Commission concludes the hearing officer's finding is clearly erroneous because no substantial evidence supports the supposition.



**Finding of Fact No. 46.** Had Trumble decided to quit working for Glacier Well six months after Trumble actually quit, the hearing officer found that Trumble, then, would have experienced “greater anxiety and depression, magnified by the loss of his income and the decline in his ability to be self-supporting and supportive of his family, together with a sense of failure for losing the rig operator job that he had never really wanted in the first place.” The hearing officer further observed that a theoretical decision to quit working six months after actually leaving his employment “would have led to the same collapse” in Trumble’s life, albeit six months after the actual collapse occurred.

The Commission determines the hearing officer’s projections regarding a postponed work termination for Trumble to be immaterial, speculative and clearly erroneous. The Commission determines that if Glacier Well had made a good faith effort to provide the reasonable accommodation identified and if Aldrich had never verbally abused Trumble, the competent substantial evidence indicates that Trumble would have continued working without interruption. In an occupation where workers come and go frequently, Trumble was known as a reliable, long-term employee. Trumble’s work in the oil fields for 8 to 9 years allowed him to provide consistent support for his family. The hearing officer suggested that a six-month postponement in Trumble’s loss of employment would have made little difference to Trumble’s damaged life prospects. The Commission finds, conversely, that Trumble deserved to rely upon the reasonable accommodation identified by his supervisor and to continue his employment with Glacier Well without harrassment.

**Finding of Fact No. 48.** The hearing officer found that the general economic downturn in America after Trumble left his employment with Glacier Well would have resulted in Glacier Well laying off Trumble within six months.

The Commission determines that this finding of fact, which relies upon the cyclical nature of work in the Montana oil fields, is clearly erroneous and fails to justify a six-month limit on damages for Trumble's lost earnings. The Commission notes that Glacier Well owner, Dave Withers, and company secretary, Suzanne P. Grimm, testified regarding the impact decreased oil prices had upon Glacier Well's business. Both affirmed that Christmas bonuses were paid to all employees in December 2008. Both also testified that reduced oil prices in early 2009 resulted in a decline in Glacier Well's business receipts. Neither witness asserted that business dropped off significantly by June 2008, six-months after Trumble left his employment with Glacier Well. And neither witness suggested that Trumble, as one of the company's more reliable employees, likely would have lost his job during the Spring of 2008 had Trumble remained employed. Therefore, the Commission determines there is no substantial credible evidence to support the finding that Trumble would have been laid off within six months of January 2008 and modifies the hearing officer's finding accordingly.

**Finding of Fact No. 51.** The hearing officer found Trumble's loss of livelihood was inevitable and only might have been delayed for six months. Together with the finding that a permanent accommodation for Trumble was unreasonable, the hearing officer found Glacier Well was not liable for the emotional distress Trumble experienced as a result of losing his job in January 2008.

Based on the Commission's modifications to Findings Nos. 19, 40 and 41, the Commission finds a reasonable accommodation had been successfully employed for at least one month and Glacier Well had a duty to provide the alternative reasonable accommodation of training another employee besides Aldrich to assist Trumble in preparing the written daily reports.

As the Commission notes in modified Finding No. 48, the record fails to support the hearing officer's finding that Trumble inevitably would have been laid off by June 2008. Moreover, the record is replete with competent substantial evidence depicting the devastation Trumble experienced by the loss of his job, his inability to secure other employment, the resultant deterioration of his mental health, and his re-qualification for Social Security Disability Insurance benefits. Therefore, the Commission determines Glacier Well is liable for the extreme emotional distress Trumble experienced due to the loss of his livelihood in January 2008.

### **Corrections to Conclusions of Law**

The hearing officer concluded Trumble was an otherwise qualified individual with a disability who needed an accommodation in order to carry out an essential function of his job with Glacier Well. The corporation illegally discriminated against Trumble because of his disability when Glacier Well stopped providing the reasonable accommodation promised by Trumble's immediate supervisor. The hearing officer also concluded that Glacier Well refused to try the alternative reasonable accommodation identified by the company owner, which was to train another employee to assist Trumble when Aldrich was unavailable.

**Essential Function.** To promote clarity, the Commission refines the hearing officer's conclusion that infers the writing of the daily reports constituted an essential function of Trumble's job. The hearing officer determined that completion of daily paperwork was a "critical function" of the rig operator position. *Finding of Fact No. 9.* 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.

The evidence demonstrates that 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. However, because Trumble was unable to write the information down on the company's standardized reporting form due to his disability, Trumble needed a literate person to assist him. The Commission concludes that the relevant essential function of the rig operator's job is the accounting of human resources, equipment and materials used at the drill site each day, which Trumble performed capably. The Commission observes that the assistance of a literate employee to commit Trumble's knowledge to paper is precisely the kind of reasonable accommodation the law contemplates. Glacier Well had the duty to provide a reasonable accommodation and failed to do so.

**Undue Hardship.** Based upon the hearing officer's finding that Trumble needed an accommodation, the law required Glacier Well to provide an accommodation unless the accommodation posed undue hardship. *Admin. Rules of Mont. 24.9.606(4)*. The burden is on the employer to prove undue hardship. *Admin. Rules of Mont. 24.9.606(1)(a)*. An undue hardship is defined as a "significant difficulty" or "extraordinary cost." *Admin. Rules of Mont. 24.9.606(5)*. In determining whether an accommodation creates an undue hardship, various factors are considered including the financial resources of the employer, the nature and expense of the accommodation, and the impact of the accommodation on the employer's operations. *Admin. Rules of Mont. 24.9.606(5)*.

As discussed above, the Commission determines the hearing officer's ultimate finding that the accommodation posed an undue hardship on the employer was clearly erroneous. The Commission further notes the hearing officer failed to place the burden on Glacier Well to prove that an accommodation for Trumble posed an undue hardship

for the company. Because the Commission reverses the hearing officer's finding of undue hardship, the Commission concludes, as well, that the hearing officer's corresponding conclusion of law is incorrect and reverses that conclusion.

**Hostile Work Environment.** Unlawful discrimination may also include subjecting an employee to harassment in the workplace on the basis of his disability. *Admin. Rules of Mont. 24.9.604(3)(b)*. In order to establish a claim for hostile work environment harassment, an employee must prove: 1) he is a member of a protected class; 2) he was subject to harassment because of his membership in a protected class; 3) the harassment was unwelcome; and 4) the harassment was so severe or pervasive that it altered the conditions of his employment and created an abusive working environment. *Campbell v. Garden City Plumbing and Heating*, 2004 MT 213, ¶¶ 15-19, 322 Mont. 434, ¶¶ 15-19, 97 P.2d 546, ¶¶ 15-19. 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 to be hostile and abusive. *Campbell*, ¶ 19.

The Commission notes that the hearing officer's findings recount the months of frustration and verbal abuse Trumble endured at his job with Glacier Well, which caused Trumble to experience "excruciating" emotional distress. However, the hearing officer's decision did not specifically address Trumble's claim of hostile work environment harassment.

Based upon the Findings of Fact, as affirmed and modified by the Commission, the Commission concludes Trumble proved the necessary elements of the hostile work environment claim. Trumble was a person with a well documented disability. When his supervisor, Aldrich, called Trumble "stupid" and "retarded" for having trouble writing the report forms, Trumble experienced harassment due to his disability, as Trumble could

only read and write at the most rudimentary level. Aldrich harassed Trumble frequently, several times each week over a period of several months. Trumble did not invite or welcome Aldrich's persistent abuse. As a disabled employee, Trumble felt compelled by his supervisor to complete paperwork he simply could not comprehend. The verbal abuse from Aldrich was accompanied by threats to Trumble's livelihood. Aldrich instructed Trumble that if he failed to learn to complete the daily reports on his own Trumble would need to leave his employment. The abuse had a definite impact on Trumble's psychological well-being, necessitating professional treatment and psychotropic medication. Consequently, the Commission concludes that Glacier Well, through its employee Aldrich, subjected Trumble to a hostile work environment in violation of the Human Rights Act.

#### **Damages and Affirmative Relief**

The Department of Labor and Industry may order any reasonable measure to rectify harm Trumble suffered as a result of illegal discrimination. *Mont. Code Ann. § 49-2-506(1)(b)*. Remedies provided by the Montana's Human Rights Act seek to return an employee who is a victim of discrimination to the position that he would have occupied absent the discrimination. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 27, 208 Mont 8, ¶ 27, 38 P.3d 836, ¶ 27.

The Commission notes that the hearing officer found that Trumble experienced "excruciating" emotional distress during the months of October 2007 through January 2008, when Aldrich verbally abused Trumble repeatedly and insisted Trumble undertake the impossible task of completing the daily paperwork by himself. In addition to illegally discriminating against Trumble, the Commission concludes that Glacier Well created a hostile work environment during these months. Trumble deserves to be compensated accordingly.

Based upon the modified findings of fact, the Commission concludes that the hearing officer incorrectly imposed a six-month cap on damages. Therefore, Trumble is entitled to recover lost wages and bonuses, with prejudgment interest, for a period reasonably designed to ensure that Trumble is made whole.

The Commission directs the Hearings Bureau to award damages to Trumble for severe emotional distress experienced by Trumble for the loss of his livelihood. The Commission further directs the Hearings Bureau to consider lost future earnings as an appropriate remedy for the loss of Trumble's employment at Glacier Well.

By this Order, the Commission modifies eight findings of fact, corrects the conclusions of law, and affirms those findings of fact and conclusions of law not modified or corrected. In accord with Section 2-4-621(3), MCA, the Commission remands this case to the Hearings Bureau with instructions to increase the damage award.

DATED this \_\_\_\_ day of June, 2010.

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Ryan C. Rusche, Chair  
Human Rights Commission

## **CERTIFICATE OF SERVICE**

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail; postage prepaid, on June\_\_\_\_, 2010.

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