

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0095013713:

MARK J. BOATMAN,)	Case No. 1054-2010
)	
Charging Party,)	
)	HEARINGS OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
MISSOULA COUNTY OFFICE OF)	
ELECTIONS,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Mark Boatman filed a human rights complaint against the Missoula County Office of Elections alleging that it discriminated against him in violation of the Montana Human Rights Act and the Governmental Code of Fair Practices Act by failing to provide him with a functional voting device during the November 2008 general election. At the joint request of the parties, jurisdiction in this matter was extended to permit the hearing to be held beyond the 12-month jurisdictional limit prescribed in Mont. Code Ann. §49-2-509.

Hearings Officer Gregory L. Hanchett held a contested case hearing in this matter on September 23, 2010, in Missoula, Montana. Beth Brenneman, attorney at law, represented Boatman and Dorothy Brownlow, Deputy County Attorney, represented Missoula County. Boatman, Theresa Martinofsky, Dustin Hankinson, Vickie Zeier, Missoula County Clerk and Elections Commissioner, James Polsin, Missoula County Polling Place manager, James Knudsen, Missoula County voting machine technician, Sharon Tandberg, Missoula County Technical Systems supervisor, and Dan Burke all testified under oath. Charging Party’s Exhibits 1, 2 and 6 and Respondent’s Exhibits 101 and 103 through 105 were admitted into evidence.

The parties filed post-hearing briefs. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the Hearings Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

A complete statement of issues appears in the final prehearing order issued in this matter on September 15, 2010. That statement of issues is incorporated here as if fully set forth.

III. FINDINGS OF FACT

1. Mark J. Boatman is a person with a disability as that phrase is defined under Mont. Code Ann. §§49-2-101 and 49-3-101. He resides in Missoula, Montana, is a registered voter and was eligible to vote in the 2006 and 2008 federal general elections. Boatman votes at the East Missoula voting precinct.

2. The Missoula County Clerk and Recorder's Office conducts elections for Missoula County. Vickie Zeier, as the elected Clerk and Recorder for Missoula County, is the Election Administrator.

3. The Montana Secretary of State's Office certified, pursuant to the federal Help America Vote Act (HAVA), the purchase and use of AutoMark machines manufactured by ES&S of Omaha, Nebraska. The Secretary of State's Office received federal money to purchase accessible voting machines in all Montana counties and to provide maintenance for the machines. The Secretary of State's Office selected the AutoMark machines as they were the only machines available that complied with Montana's requirement that a paper ballot be used. Missoula County received 37 machines, one for each of its polling locations.

4. Missoula County purchased a maintenance plan for the AutoMark from ES&S. It purchased what is called the "gold plan," which is the highest maintenance plan available for the manufacturer. The annual maintenance cost is \$18,000, which is paid for by HAVA funds by the Secretary of State's Office. The manufacturer contracts with a local company, the Copy Doctor in Butte, to perform the maintenance. The Copy Doctor technician spends at least a couple of days in Missoula each year testing every AutoMark machine. Machines that need repairs are sent back to ES&S for repair and are not repaired in Montana. ES&S also provided Missoula County technicians with training to the extent of what they needed to know, such as how to remove a jammed ballot and how to clean a printer cartridge.

5. Voters with disabilities have assisted the Elections Office in training on the use of the AutoMark and in general in working with persons with disabilities.

6. The purpose of the AutoMark machine is to enable voters with various disabilities to vote more independently than is possible with a manually marked ballot.

7. The AutoMark machines were first used in Missoula County in the primary election of 2006. They were used in a total of four poll elections prior to the general election in November of 2008.

8. Dustin Hankinson is a disabled voter who also uses the AutoMark machine and also votes at the East Missoula voting precinct. On both the 2006 general election and the 2008 primary election, Hankinson had tried voting at the East Missoula precinct using the AutoMark. It did not function either time. Hankinson advised the polling place manager of the problem, but the AutoMark was not fixed and he had to have his personal care attendant fill out the ballot for him.

9. Prior to November 4, 2008, Respondent was aware that the AutoMark machine could malfunction due to problems with the way in which the ballot was printed.

10. Despite the feasibility of doing so, prior to 2010, the County did not ask or require polling place workers to notify the election administrator of any AutoMark malfunctions in the polling places

11. Prior to 2010, the County did not direct polling place managers to test the AutoMark on the morning of the election day to determine if the machine was functioning properly. The manufacturer's operations manual, which the county received when it received its AutoMarks in 2006, requires the utilization of this election day testing protocol to ensure that the machine functioned on election day. In addition, prior to 2010, the county did not direct staff to test every machine prior to each election, which was required by the manufacturer's operations manual.

12. At least through the November 2008 election, the AutoMark machine was not consistent in whether a ballot would feed properly or have other operating errors. A machine would inexplicably and somewhat randomly accept one ballot but not the next.

13. In July 2008 Copier Doctor inspected all Missoula AutoMark machines. Several were found to be in need of repair.

14. In September 2008, at the direction of ES&S, Missoula County installed a firmware update to all AutoMark machines in Missoula County. One purpose of the firmware update was to improve the feeding of ballots. At the same time, the Missoula County Information Services employees who installed the Firmware tested every AutoMark machine to ensure it was working properly. Several machines were not working properly and were subsequently repaired.

15. The East Missoula polling location is located in a community center. The polling itself is conducted in the large community room at the center. There is a kitchen off the community room which has and can be used if a voter requests a place to vote other than in the community room.

16. James Polsin was the polling place manager at the East Missoula polling location on November 8, 2008. Polsin did not set up the AutoMark when the polling station opened. He set it up approximately two to two and one-half hours after the polling place opened. He did not perform the pre-election tests of functionality suggested by the manufacturer. He did not do this because he had never been trained to complete the election day testing protocol required by the manufacturer and such testing was not conducted by Missoula County.

17. When Polsin set up the AutoMark, he placed it on a table in the back of the room. In conformity with the county's and state's requirements, Polsin placed the machine so that a voter using it would have his back toward the wall so that the voter is facing out and the screen is not visible to anyone in the area. However, there was no privacy screen placed around the AutoMark nor was there any other privacy booth provided for disabled voters as there were for non-disabled voters. Neither were there signs or other indicators that would have told a voter that more private settings were available if requested.

18. At approximately 4:00 p.m., on November 8, 2008 Boatman arrived to vote at the East Missoula polling location. His aide, Theresa Martinofsky accompanied him.

19. Boatman attempted to use the AutoMark machine to complete his ballot. The AutoMark would not feed his ballot. The ballot would go part way in and then come back out.

20. Polsin attempted to help Boatman insert his ballot. Polsin had been advised before that there might be a “printing error of some sort or another and some of the ballots wouldn’t take.” Record transcript, page 169, lines 9 through 16. Because of this, Polsin gave Boatman a second ballot to try in the machine. This ballot was also rejected by the machine. Because Polsin could not get the machine to take the ballot either, Polsin contacted the Elections Office to send a technician to the polling place to repair the AutoMark. During elections, the county keeps technicians on hand to fix any voting machines that might break down.

21. Technician Jason Knudson arrived at the East Missoula Precinct approximately 10 minutes after Polsin called the Elections Office. Knudson had been trained by Janice Goldsby from the Missoula County Information Services office. The training included how to trouble shoot issues if the ballot got stuck or would not feed into the machine.

22. Knudson followed standard procedures in troubleshooting the problem with the AutoMark machine. He at first thought the AutoMark might not have been initialized properly. Accordingly, he shut the machine down and reinitialized and verified that it was properly initialized. Knudsen then retried the ballot, but once again the machine spat it back out.

23. Knudsen followed up with additional trouble shooting procedures which included spraying out the machine with compressed air. Knudsen then reinitialized the machine.

24. Knudsen then went to try to obtain Boatman’s ballot to reinsert it. He noticed that Boatman was voting the ballot manually at the table with the assistance of Martinofsky. Knudsen told Boatman and Martinofsky that he felt the voting machine might have a problem with the way the ballot was printed. Knudsen asked Boatman and Martinofsky if they wanted to try the ballot again. Boatman declined to do so as he was already voting at the table and would “take care of the ballot that way.” RT p. 192, lines 11-21. Knudsen then left the polling place.

25. There is no evidence that anyone other than Boatman and Martinofsky saw Boatman’s vote selections. However, it is apparent that Boatman was understandably concerned about his privacy in his voting as the area where he was voting was not secluded from public view as were the non-disabled voting booths provided for non-disabled voters.

26. The County did not provide ADA voting booths at the election. The County did not do so because the County felt the booths were too small and would not work for the AutoMark machine. The ADA booth is small, just like a non-disabled voting booth. The only difference between the ADA booth and the regular booth is that the ADA booth is shorter, brought down to the height at which a disabled voter in a wheelchair would sit. RT p. 104, lines 7 through 25.

27. In 2010, after the inception of the litigation in this case, the County adopted new election day testing procedures which require its polling place personnel to follow the manufacturer's election day testing protocol. Exhibit 1.¹

IV. OPINION²

A. Missoula County Failed to Provide Boatman a Reasonable Accommodation.

The Montana Human Rights Act makes it unlawful for any political subdivision to “refuse, withhold from or deny to a person any . . . services, goods, facilities, advantages or privileges because . . . of physical disability . . . unless based on reasonable grounds” Mont. Code Ann. §49-2-308(1) (a). An accommodation is considered reasonable unless providing the accommodation would impose an undue hardship upon the governmental agency. Admin. R. Mont. 24.9.606 (4). See also, *San Diego Port Authority v. Gallagher*, 62 Cal. App. 4th 501 (1998). Undue hardship is an affirmative defense the governmental agency must prove. Cf., *Morton v. U.P.S.*, 272 F.2d 1249, 1257 (9th Cir. 2001)(in a reasonable accommodation case, hardship is an affirmative defense that the employer must prove). Montana's Governmental Code of Fair Practices Act (GCFPA) requires political subdivisions to perform services without discrimination based on physical disability. Mont. Code Ann. §49-3-205(1). The GCFPA also requires all political subdivisions to analyze all operations, ascertain possible instances of noncompliance with GCFPA policies and initiate comprehensive steps to correct instances of noncompliance. Mont. Code Ann. §49-3-205 (3).

The county's argument that Montana Law does not provide a right to a disabled person to vote privately and independently is misplaced in this proceeding. The county has already chosen the AutoMark as a means of providing disabled voters the ability to vote privately and independently. Because the county has chosen the

¹ This fact has not been used in determining the County's liability. It is included only for purposes of evaluating the appropriate affirmative relief in this case.

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

AutoMark as its accommodation for disabled voters, the County has necessarily determined that the AutoMark is a reasonable accommodation. Whether or not Montana statutes or the Montana constitution require the county to provide the device, as a matter of fact the county does provide the device for its disabled electors. Missoula County, through its commendable implementation of the AutoMark, has “set the bar” so to speak at that level. As the county has utilized the AutoMark, it is under a duty to ensure that it maintains the AutoMark so that it is reasonably useable by disabled voters on election day. Mont. Code Ann. §49-3-205 (3). The question of whether the right to vote privately and independently actually exists under Montana statutes or the Montana constitution is, therefore, superfluous to this proceeding.

The pertinent question here is whether, once the county had settled on the Automark as a means to provide disabled voters with the ability to vote privately and independently, it thereafter took reasonable steps to ensure that the accommodation was available to disabled voters on election day. Boatman argues that the County failed to provide a reasonable accommodation for him by failing to take reasonable steps to ensure that the AutoMark would function and by failing to provide him with a private place to vote such as a voting screen. See generally, Charging Party’s preliminary and final pre-hearing statements. Boatman argues that the county failed to take reasonable steps to ensure the functionality of the AutoMark, showing that the county failed (1) to follow the manufacturer’s testing protocol for the day of the election, (2) to have any system to record and report previous malfunctions, (3) to train Knudsen properly in how to fix the machine when it broke down and (4) to provide any way for Boatman to find and use a different AutoMark when the one at Boatman’s precinct broke down. The County argues that it took adequate steps to ensure that the machine was functioning on the day of the election and that the failure of the AutoMark at Boatman’s precinct was unavoidable. The County further argues that Boatman resorted to using his care giver to vote by his own volition, not because he was forced into that position either by the machine being out of commission or by anything the county failed to do.

It is clear from the evidence presented that the problem with the AutoMark on the day of the election was the manner in which the election ballots were prepared and the AutoMark’s inability to accept those ballots as prepared. That problem was certainly avoidable if the County had taken the simple expedient of following the manufacturer’s testing procedures. Had the election personnel at Boatman’s precinct followed the manufacturer’s election day testing procedure, the ballot feeding problem would have been caught long before Boatman came into vote.

The County's failure to catch the ballot problem on the day of the election was not due to a simple failure to follow the manufacturer's testing protocol on that single occasion. The failure to undertake the election day testing protocol was due to the county's conscious decision not to follow that protocol despite the manufacturer's requirement that those procedures be followed.

Utilization of the AutoMark was a reasonable accommodation as shown by the County's implementation of the device. The only defense to the county's failure to accommodate the charging party here is to show that maintaining the AutoMark would have presented an unreasonable hardship on the county. The county cannot do that since the only hardship upon the county would have been to follow the manufacturer's election day testing protocol. There is no evidence whatsoever to suggest that would have been a hardship to the county.

In this case, the failure to follow the manufacturer's election day testing protocol was effectively turning a "blind eye" to the hardship that would be visited upon a disabled person's right to vote in the event the AutoMark failed. This is the type of conduct that the laws which proscribe discrimination against disabled persons are designed to prevent. As the courts have recognized, Title II of the ADA was designed to protect persons from both intentional and unintentional discrimination. *K.M. v. Hyde Park Central S.D.*, 381 F. Supp. 2d 343, 357 (S.D. N.Y. 2005). See also, *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (noting that "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather thoughtlessness and indifference – of benign neglect"). The county's failure to follow the manufacturer's election day testing protocol demonstrates discrimination.

To overcome Boatman's showing that the county failed to provide him a reasonable accommodation for his disability, the County argues that the failure of the AutoMark was unavoidable and that it had in place a back up system (calling out a technician) to overcome a breakdown. Neither argument is persuasive. First, the problem was certainly avoidable. The county was aware that the ballots had been a problem in the past and might be during the November 2008 election day as evidenced by the fact that Polsin had been advised that the ballots might be a problem that day. Second, if the election personnel had taken the simple expedient of setting up the device and then conducting the election day testing protocol, the problem would have been immediately discerned and alternative measures could have been taken. Far from being unavoidable, the problem that Boatman encountered most certainly could have been avoided and mitigated if the county had simply followed the manufacturer's election day testing protocol.

Likewise, the backup system of calling a technician was not a reasonable accommodation. The technician's comment that the machine would not work because there was a ballot printing error provided no accommodation at all. This same evidence also defeats any argument that Boatman was the architect of his own non-private voting and cannot blame the county. Knudsen communicated to Boatman and Martinofsky that Knudsen believed the problem might lie with the way in which the ballot was printed. Under these circumstances, Boatman reasonably concluded that the only way to vote that day was to proceed to vote without the AutoMark. The County, not Boatman, was the cause of Boatman having to vote manually that day. The county, by failing to take reasonable efforts to ensure the functionality of the AutoMark for the November 2008 election, discriminated against Boatman on the basis of his disability. By discriminating against Boatman on the basis of his disability, the county also violated the GCFPA.

B. The Department Should Order Reasonable Measures to Rectify the Harm Boatman Suffered and Must Impose Affirmative Relief.

The department may order any reasonable measure to rectify any harm Boatman suffered as a result of the illegal discrimination to which he was subjected. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in a discrimination case is to make the victim whole. E.g., *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; see also *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.

Boatman seeks compensation for the emotional distress he suffered as a result of the discrimination he suffered. Emotional distress damages are within the scope of the Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601, *Benjamin v. Anderson*, 2005 MT 13, ¶70, 327 Mont. 173, ¶70, 112 P.3d 1039, ¶70. Emotional distress recoveries for illegal discrimination under the Montana Human Rights Act follow federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

Boatman suffered emotional distress as the result of Missoula County's discrimination. Boatman has asked for \$6,000.00 in emotional distress, noting his very strong desire to vote unassisted and privately and the importance he attaches to being able to vote as other non-disabled voters do. His basis for claiming that the \$6,000.00 is reasonable to compensate him for his emotional distress has not been challenged by the County.

Boatman's emotional distress was at least as severe as that of the plaintiffs in the case of *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; cited in *Vortex* at ¶33. In *Johnson*, the plaintiffs suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. Those plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. Nonetheless, the appeals court increased their awards from \$125.00 to \$3,500.00 each for the overt racial discrimination.

Boatman's credible testimony convinces the Hearings Officer that the value of his emotional distress is at least \$6,000.00. Under the circumstances of this case, he is due that amount for emotional distress.

Lastly, upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. It is proper and reasonable to enjoin similar conduct by Missoula County in the future and to require it to adopt a policy that ensures that at a minimum the county follows all the manufacturer's protocols for testing including testing on election day as well as any annualized or more frequent testing required by the manufacturer. In addition, the County should be required to conduct additional training for all election personnel to ensure that election personnel are properly trained in election day set up and testing protocol and annualized testing of the AutoMark and to ensure that technicians are properly trained in repair and troubleshooting.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Missoula County discriminated against Boatman by failing to undertake reasonable measures to ensure the functionality of the AutoMark on election day in November 2008.
3. Boatman is entitled to \$6,000.00 for the emotional distress he has suffered as a result of the discrimination.

4. The department must order Missoula County to refrain from engaging in the discriminatory conduct and should prescribe conditions on Missoula County's conduct relevant to the type of discriminatory practice found and require the reasonable measures detailed in the findings and opinion to correct the discriminatory practice. Mont. Code Ann. § 49-2-506(1)(a) and (b).

VI. ORDER

1. The department grants judgment in favor of Boatman and against respondent Missoula County Elections Office.

2. Missoula County Elections Office shall within 20 days of the date of the entry of this order pay to Boatman the sum of \$6,000.00 in emotional distress damages.

3. The department permanently enjoins Missoula County Elections office from discriminating against any person with a disability by failing to comport with and provide reasonable accommodation as required by law.

4. Within 45 days of the entry of this order, Missoula County shall submit to the Human Rights Bureau for review its present policies and training procedures for setting up and testing the AutoMark as well as its procedures for training technicians in the repair and troubleshooting of the AutoMark. Thereafter, within 30 days of receiving notice from the Human Rights Bureau, the county shall implement all set up and testing procedures and any training procedures recommended by the Human Rights Bureau. In addition, the county shall ensure prominent posting of the policy recommended by the Human Rights Bureau which posting shall include posting at all precincts within Missoula County.

DATED: May 27, 2011

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearings Officer
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Beth Brenneman, attorney for Mark Boatman; and Dorothy Brownlow, attorney for Missoula County Office of Elections:

The decision of the Hearings 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 Hearings 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 original transcript is in the contested case file.

Boatman.HOD.ghp