

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0089013260:

DARCIE DAVEY,	)	Case No. 1545-2009
	)	
Charging Party,	)	
	)	HEARING OFFICER
vs.	)	DECISION ON REMAND
	)	
IPC INTERNATIONAL CORPORATION,	)	
	)	
Respondent.	)	
	)	

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This matter has been remanded from the Human Rights Commission for the purpose of determining the appropriate damages to be awarded in this case. The Commission has directed the hearing officer to consider the amount of lost wages, lost future earnings (together with the possibility of reinstatement), lost fringe benefits, medical and dental costs, emotional distress damages, and interest. HRC remand, pages 18 and 19. With respect to the question of lost wages, the HRC 's remand highly circumscribed the hearing officer's inquiry. Specifically, the HRC noted that Davey was entitled to a back pay award which may be reduced "if she would have been unavailable for employment due to nondiscriminatory reasons." HRC order, page 18.

The parties to this matter requested that additional evidence be taken. After a request by the parties to continue the additional presentation of evidence, further hearing on this matter was held on February 8, 2012 in Great Falls, Montana. Darcie Davey, Corrine Fisch, Licensed Clinical Addiction Counselor, Steven Potts, attorney at law, Catherine Satra, social worker for Adult Protective Services at the Montana Department of Health and Human Services, and Tim Robbins, manager of the Great Falls Job Service, all testified under oath. The parties were permitted to file post hearing briefs, the last of which were filed on February 21, 2012. In light of the directives contained in the HRC's remand, the following findings of fact, conclusions of law and order on damages are made.

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## II. ADDITIONAL FINDINGS OF FACT:

In conformity with the commission's order, the following findings of fact regarding damages are made:

1. Davey was discharged from her employment on March 22, 2008. She was employed full-time as a security guard and was paid \$9.65 per hour. Davey also received health benefits which included dental and medical insurance. She paid a monthly premium for her benefits. Since her discharge, she has not had insurance because she has not been able to afford it. The total cost of Davey's COBRA premium per month over the last 48 months, had she been able to pay it, would have been \$17,016.48.

2. Davey did not feel well after her discharge due to the stress the discharge placed upon her physical and mental well being. She was in the hospital on occasion due to chest pains. She had recurrent oral infections due to her loss of ability to pay for the care of her teeth after she lost the income from her job. She lost all of her back teeth due to her inability to afford dental insurance after she was fired. She has difficulty chewing due to the loss of her teeth. Her teeth are decaying and falling out. She could not continue her post-hysterectomy estrogen medication and follow up and this only exacerbated her illnesses, causing her to feel well enough to work only 10% to 20% of the time.

3. Davey was unable to pay for her medical bills after her discharge due to her lack of income. She is facing \$15,000.00 in dental and restorative work in order to get her teeth fixed. She has unpaid medical bills in the amount of \$9,502.00 as well as interest on those bills in the amount of \$1,851.23.

4. Davey suffers from post traumatic stress syndrome due to her being discharged from her position as a security guard with IPC. As of February 8, 2012, Davey had incurred \$1,045.00 in counseling costs. Davey's counselor, Corrine Fisch, believes that it will take at least an additional 6 months of therapy to stabilize Davey's psychological issues resulting from her discharge. This additional counseling will cost Davey \$2,641.76.

5. Davey loved her job as a security guard. Her discharge was emotionally devastating to her. The loss of her job created a great deal of financial stress for her which included the inability to pay several bills, including rent for her own home and medical bills. The loss of her job also precluded her from seeking the dental care that she needed. She could not sleep. She found herself depressed and in need of

counseling. She also suffered from suicidal ideation. Although she did not immediately seek counseling, at the suggestion of her attorney in this matter, she did eventually undergo counseling to deal with the stress she felt from the discharge. While it is true that some of the stress she felt was due in part to other stressors in her life, it is also true that the stress of the discharge and the concomitant loss of income caused her tremendous anxiety.

6. Since her discharge, Davey has repeatedly applied for work. Her testimony at the original hearing in this matter indicated that she had some job interviews at places such as “Sam’s Club, Wal Mart . . . video, video places like that.” Record Transcript, page 409 (hereinafter RT p. \_\_\_\_). She also applied at Dos Amigos restaurant and she applied at the “West Side Vets” as a bartender. RT p. 410. In addition, Davey testified at the hearing on February 8, 2012 that she had “applied all over.” Her search for work was also confirmed through the testimony of Tim Robbins, Great Falls Job Service manager. According to Robbins, Davey registered two times at the Great Falls Job service, once in April 2008 and once in December 2008. Her account subsequently went inactive in 2009.

7. Davey’s mother runs an antique business in Great Falls. Davey has assisted her mother in setting up and working antique shows during this time period. Davey’s annual income over the last four years has been approximately \$2,000.00.

8. Davey cannot work as a security guard until she has a license to do so from the State of Montana. However, all that is necessary for Davey to obtain her state license is to be hired as a security guard by a security guard firm at which point she could receive a license. Davey has indicated that she is ready, willing and able to return to her position with IPC at Holiday Village. In fact, she provided a letter to the respondent indicating as much in September 2011. The respondent never responded to the letter.

9. There is no evidence regarding the present managerial structure of IPC security at the Holiday Mall. The hearing officer has no idea whether Scott Buenemeyer is still the manager there or not. It is clear from Davey’s testimony that she would go back to her job as a security guard with IPC if accorded the opportunity. She is only 54 years of age and is quite capable of performing the duties of the job. It is thus clear that Davey herself does not feel that there is sufficient animosity between her, Buenemeyer or IPC that she could not go back to working as a security guard for IPC at the mall.

10. In 2009, Davey befriended EW, an elderly person living in a nursing home. Davey became very attached to EW. She took EW to doctor's appointments and helped EW purchase groceries. Eventually, Davey obtained a power of attorney (POA) for EW and Davey began handling EW's financial affairs.

11. Davey also served as EW's care giver. Caring for EW was a full-time job. However, Davey continued to look for employment. There is no evidence to show that had Davey found full-time employment, she would have forgone such employment in order to continue to be a care giver to EW.

12. While acting as EW's POA, Davey was responsible for ensuring that EW's nursing home bill was paid. For several months, EW's nursing home bill was not paid. Because of this, DPHHS became concerned that Davey might be misappropriating EW's funds. DPHHS launched an investigation into Davey's use of EW's funds.

13. At the time DPHHS started its investigation, Catherine Satra, social worker at DPHHS assigned to the investigation, contacted Davey. Davey told Satra that she was going to use EW's funds to purchase a home that EW wanted to buy. Satra advised Davey to not purchase the home until the DPHHS could complete its investigation into the failure to pay EW's nursing home bill. Despite the advice, Davey proceeded with the purchase of the home with EW's funds.

14. Davey moved EW out of the nursing home and into the home that Davey had purchased on her behalf. Davey moved into the home with EW in May 2010. Davey and EW lived in the home until October 2010. At that time, DPHHS removed Davey as EW's POA and took over that role. Because of this and its investigation, DPHHS required Davey to move out of the house and DPHHS returned EW to the nursing home.

15. Eventually, Davey was charged with elder abuse in Cascade County District Court for her alleged mismanagement in her capacity as POA handling of EW's funds. Those charges were dismissed just prior to the commencement of the hearing in this matter.

16. At her hourly rate of \$9.65, and given the fact that she worked full-time, Davey would have made approximately \$20,072.00 per year ( $\$9.65 \times 2080 = \$20,072.00$ ) in wages between the date of her discharge and the date of the judgment in this case. During those four years, she only made approximately \$2,000.00 per year. Subtracting the total she actually made over the last four years

(\$8,000.00) from the total she would have made had she not been unlawfully retaliated against and fired (\$80,288.00), she is due a total in back pay of \$72,288.00 (\$80,288.00 - \$8,000.00=\$72,288.00). Interest on that amount at 10% per annum is \$13,934.67.

### III. DISCUSSION<sup>1</sup>

The department may order any reasonable measure to rectify any harm Davey suffered as a result of illegal retaliation. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. E.g., *P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523, (1989). See also, *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); accord, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

A charging party who has proved a human rights violation has a presumptive entitlement to an award of back pay. *Dolan*, supra. Back pay awards should redress the full economic injury the charging party suffered to date because of the unlawful conduct. *Rasimas v. Mich. Dpt. Ment. Health*, 714 F.2d 614, 626, (6<sup>th</sup> Cir. 1983). Back pay is computed from the date of the discriminatory act until the date of the final judgment. *EEOC v. Monarch Tool Co.*, 737 F.2d 1444, 1451-53 (6<sup>th</sup> Cir. 1980).

The charging party may also recover for losses in future earnings, if the evidence establishes that future losses are likely to result from the discriminatory acts. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 439. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a "rightful place" in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5<sup>th</sup> Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6<sup>th</sup> Cir. 1985); see also, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2 628 (1993). Prejudgment interest on lost income is also a proper part of the damages award. *P.W. Berry*, op. cit., 779 P.2d at 523; *Foss v. J.B. Junk*, HR No. SE84-2345 (1987).

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<sup>1</sup> Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

Davey has demonstrated lost past earnings of approximately \$72,288.00. Davey is also entitled to interest on the lost wages through the date of decision at the rate of 10% per annum. That interest amounts to \$13,934.67.<sup>2</sup>

As the commission noted, the existence of discrimination and retaliation entitles Davey to a presumptive award of back pay. As Davey has established the extent of her back pay damages with reasonable certainty, the onus is upon the respondent to demonstrate that she has failed to mitigate her damages in order to reduce or eliminate the amount she is presumptively due. See. e.g., EEOC v. Sandia Corp., 639 F.2d 600, 627 (10<sup>th</sup> Cir. 1980)(once the claimant has established entitlement to back pay as a result of unlawful discrimination, the burden is on the respondent to prove that the claimant failed to mitigate damages). While efforts to mitigate must be made in good faith, they need not be successful. *Id.*

The respondent has attempted to prove Davey's failure to mitigate damages by arguing (1) that Davey registered with the Job Service twice in 2008 and then let her registration lapse and (2) that in the last four years, there have been approximately 46 job openings for security guards in the Great Falls area and yet Davey remains unemployed. The weight of this evidence does not convince the hearing officer that Davey failed to mitigate her damages. Davey's testimony is that she continued to look for work, albeit at places other than with security guard companies. Furthermore, the fact that caring for Williams might have been the equivalent of a full-time job does not necessarily demonstrate that Davey was incapable of seeking or working a full-time job. Her testimony that she continued to look for work throughout this time is credible. Furthermore, Davey's testimony at the hearing in 2009 that the illness brought upon her by stress and loss of benefits caused by the illegal discrimination kept her from being able to work more than 10% to 20% of the time. The opposing evidence presented by the parties is of equal force on the issue of mitigation of damages. As the evidence is equal, the respondent has failed to carry its

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<sup>2</sup>The hearing officer calculated interest on the amount of lost wages by determining the daily value of interest on the monthly income lost due to the retaliatory discharge, calculating the number of days that have elapsed between the last day of that calendar month and the date of the judgment in this matter, March 23, 2012, and multiplying the two values to determine the interest on the lost monthly income. This process was applied to each of the months of lost income, and then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income. The daily interest value for the period of lost income following her discharge is \$.41 per day (10% per annum divided by 365 days = .00027% x \$1506.00 (the net monthly lost income) = \$.41 per day). The interest due on this lost income through March 23, 2012 is \$13,934.67.

burden of proof to show that the charging party failed to mitigate her damages and that her back pay should be truncated.

Although Davey's counsel argued in post-hearing briefing that she should be awarded front pay, Davey herself testified several times at hearing that she loved working as a security guard and that she would go back to work for IPC at the Holiday Village Mall. Indeed, the hearing officer noted specifically that at the February 8, 2012 hearing, Davey stated that she wanted front pay "if she could not be reinstated in her security guard position." Analogous federal case law has stated that reinstatement is the preferred method of remedying discrimination and should be utilized whenever appropriate. See, e.g., *EEOC v. Prudential Fed. Savings & Loan Ass'n.*, 763 F.2d 1166, 1172 (10<sup>th</sup> Cir, 1985), citing *Blim v. Western Electric Co.*, 731 F.2d 1473, 1479 (10<sup>th</sup> Cir. 1984)(reinstatement is the preferred remedy and should be ordered whenever it is appropriate). IPC presented no evidence to indicate that Davey's reinstatement would create acrimony between managers or existing staff or any other cognizable impediment for IPC such that reinstatement would not be feasible. Indeed, in this regard the only evidence presented by IPC to suggest that Davey could not return is the fact that she does not have an active security guard license at this time. This is not an impediment, however, since Davey will be able to obtain a security guard license simply by being employed as a security guard.

Reinstatement serves two salutary purposes in this case. First, it truly makes Davey whole by placing her back in the job that she loved so much. Given the testimony of Davey's therapist, the psychological benefits will be enormous, not to mention the benefit to her health of having full-time employment with benefits. Second, reinstatement, if feasible, is clearly a favored remedy as it mitigates the impact of the harm inflicted by not permitting the employer to escape the consequences of its unlawful conduct. In this case, reinstatement at her 2008 rate of pay plus any other hourly increases she would have received over the intervening four years had she not been discharged and benefits comparable to those she was receiving at the time of her discharge is appropriate and should be ordered. Because the hearing officer finds that reinstatement is appropriate, the issue of front pay is moot.

Davey is also entitled to damages for emotional distress inflicted upon her as a result of IPC's illegal conduct. The Montana Supreme Court has recognized that compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶133, 308 Mont. 8, ¶133, 38 P.2d 836, ¶133. The severity of the harm governs the amount of recovery. *Id.* Here, Davey has unquestionably suffered emotional distress. Her testimony adequately proves this

point. Davey's humiliation in being discriminated and retaliated against, coupled with the physical and emotional distress she encountered as a result of the illegal conduct, justifies an emotional distress award of \$30,000.00 in this case.

Davey can be adequately compensated for the loss of fringe benefits by requiring the employer to pay her for the actual damages she has incurred as result of the loss of the fringe benefits. Those amounts are as follows:

\$15,000.00 for the costs for dental repair and restorative work to be done;  
\$ 9,502.33 for medical bills left unpaid  
\$ 1,851.23 for the interest that is due on the unpaid medical bills  
\$ 1,045.00 for the counseling bills she has incurred  
\$ 2,641.75 for future mental health counseling that she will need

Total: \$30,040.31

As the preponderant evidence demonstrates that all these expenses were proximately caused by the employer's discriminatory conduct, Davey is entitled to be compensated for these bills.

Davey has also asked for the value of the COBRA insurance, a total of \$17,016.48. However, had COBRA been available to Davey, she would have had to pay the monthly premium amounts and it would only have served to at most eliminate the medical bills that she has incurred. To order the respondent to both pay the outstanding medical bills and reimburse Davey for the COBRA payments that she did not pay out in the first place would go beyond making Davey whole and would create a windfall for her. Therefore, the hearing officer cannot order both the payment of the medical bills and the COBRA premium. Accordingly, the \$17,016.48 amount sought by Davey cannot be awarded to her.

#### IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1).

2. Davey is entitled to recover \$72,288.00 for lost wages through March 23, 2012 as well as \$30,040.31 in unpaid medical and dental expenses costs and \$13,934.67 in prejudgment interest on these lost wages. Davey is also entitled to \$30,000.00 for the emotional distress she suffered as a result of the illegal discrimination.

3. Reinstatement of Davey into her security guard position with IPC is appropriate.

V. ORDER

1. Judgment is granted in favor of Davey and against Respondent, as Respondent discriminated and retaliated against Davey in violation of the Montana Human Rights Act.

2. Within 30 days of the date of this decision, Respondent shall pay to Davey the sum of \$146,262.98 representing \$72,288.00 in lost wages, \$30,040.31 in compensatory damages and \$13,934.67 in prejudgment interest, and \$30,000.00 in emotional distress damages.

3. No later than 15 days after the date that this decision becomes final, IPC shall reinstate Davey into her position as a security guard for IPC working at Holiday Mall at her hourly wage of \$9.65 per hour, plus any cost of living adjustments or hourly wage increases occurring during the four years since her discharge that she would have received had she not been discharged, and all fringe benefits that she enjoyed while in her position before she was discharged.

DATED: March 23, 2012

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer

Hearings Bureau

Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Patrick Flaherty, attorney for Darcie Davey; and Maxon Davis, attorney for IPC International Corporation:

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 Marieke Beck  
Human Rights Bureau  
Department of Labor and Industry  
P.O. Box 1728  
Helena, Montana 59624-1728

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

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

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

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

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Tam Newby, (406) 444-3870 immediately to arrange for transcription of the record.

Davey.HODRMD.ghp