

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0094013798:

TIFONIE SCHILLING O/B/O GS,	)	Case No. 1207-2010
	)	
Charging Party,	)	
	)	
vs.	)	ORDER AFTER REMAND
	)	
GREAT FALLS PUBLIC SCHOOL	)	
DISTRICT #1,	)	
	)	
Respondent.	)	

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I. INTRODUCTION:

The Montana Human Rights Commission remanded this matter to the Hearings Bureau with directions to “determine the harm experienced and to determine an appropriate monetary award for emotional distress damages.” Human Rights Commission Remand Order, page 11. In its order, the Human Rights Commission modified Finding of Fact # 90 of the Hearing Officer Decision. As both parties concede, the effect of the Commission’s modification of Finding of Fact #90 makes the school district vicariously liable for the acts of the paraprofessionals in placing GS’ head under running water on three various occasions. In light of the commission’s finding, the hearing officer must determine the value of the emotional distress caused to GS by the paraprofessional’s conduct.

Prior to undertaking this analyses, it is important for the hearing officer to point out what he cannot do in this remand. Except for finding # 90, the commission affirmed all findings of fact contained in the hearing officer’s decision. This included the hearing officer’s finding “that there is no causal link between the conduct of the paraprofessionals in Room 311 and GS’s alleged regression in his behavior .” Finding of Fact Number 87, page 15, Hearing Officer Decision). Therefore, despite the charging party’s suggestion that the hearing officer reevaluate and award these damages, the hearing officer is not at liberty to do so because the commission affirmed the finding that no causal link existed between GS’ alleged regression and the paraprofessional’s conduct.

With the foregoing in mind, the hearing officer sets out the following additional Findings of Fact and Conclusions of Law awarding emotional distress damages to GS resulting from the conduct of the paraprofessionals in placing GS' head under running water.

## II. FINDINGS OF FACT:

1. Findings of Fact 1 through 89 of the Hearing Officer's decision are incorporated by this reference. The Human Rights Commission's modification of Finding of Fact 90 is also incorporated into this decision after remand. Under that modification, the school district was on notice of problems in Room 311 as early as June 5, 2008, seven months before GS was subjected to having his head placed under the sink by the paraprofessionals.

2. The school district is vicariously liable for the emotional distress that GS suffered as a result of enduring the paraprofessionals' conduct of placing his head under running water in the sink.

3. GS suffered emotional distress as a result of the paraprofessional's conduct of placing his head under running water in the sink. GS's head was forced under water on three separate occasions in December, 2008. It appears that the methodology of placing GS's head under the water was to stand GS facing forward toward the sink and then make him lean forward and place the back of his head under the faucet or splash water in his face.

4. Parish's and Kallie's use of water on GS obviously caused him a great deal of emotional distress. He resisted efforts to place him under the running water, stating "I'm a good boy" (Finding of Fact #52, May 22, 2011 Final Agency Decision) or "I be a good boy" (Finding of Fact #54, May 22, 2011 Final Agency Decision). He further resisted by placing his hands on the counter and saying "no, no, no" or "go home." (Finding of Fact #54, May 22, 2011 Final Agency Decision).

5. GS is developmentally disabled. He was at the time of the water incidents in 2008 and at the time of the hearing in 2010 the intellectual equivalent of a three-year-old. Having the mind of a three-year-old, GS undoubtedly experienced fear and anguish at being forced to place the back of his head under water against his will. The suffering he endured from this abuse can only be rectified by imposing emotional distress damages of \$150,000.00.

### III. OPINION<sup>1</sup>:

The department has the authority to award money for emotional distress damages. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). The freedom from unlawful discrimination is a fundamental human right. Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. The Human Rights Act demonstrates that Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir.1991); cited in *Vainio*, supra; see also *Campbell v. Choteau Bar & Steak Hse.* HR No.8901003828. (1993). The severity of the harm governs the amount of recovery. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3rd 836. An award of emotional distress damages can be based upon humiliation and emotional distress established by testimony or inferred from the circumstances. *Foss*, supra. While damages need not be proven to a mathematical certainty, there must be some evidence to show that the damages reasonably approximate the harm inflicted upon the charging party as this tribunal can only require reasonable measures to rectify pecuniary harm resulting from the discrimination. Mont. Code Ann. §49-2-506(1)(b).

It is important to remember also, however, that emotional distress damages are not punitive damages. While the hearing officer (himself a parent) can readily sympathize with the anguish and anger that GS' parents must feel toward the school district for permitting GS to be subjected to the abuse that he endured at the hands of the paraprofessionals, this tribunal is prohibited from imposing damages which are so large or so disproportional to the anguish and suffering endured by GS that the damages can only be described as punitive. Punitive damages may not be awarded in this administrative proceeding. Mont. Code Ann. §49-2-506 (2). Where the discriminatory conduct is egregious, care must be taken not to permit any desire to punish to color the analysis of determining the appropriate amount to award for emotional distress suffered by the victim.

The credible evidence at hearing demonstrates that while being subjected to having his head placed under water, GS suffered substantial emotional distress in the form of fear. On at least three occasions, he had the back of his head placed under running water in an effort to wake him up and he had to endure this abuse. Each time he resisted the abuse, proving as a matter of fact that he was afraid of the

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<sup>1</sup> 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).

conduct. The hearing officer can only imagine the fear and trepidation GS felt given that he perceived the conduct through the intellectual filter of a three-year-old child.

The charging party has cited to cases such as *Groven v. Havre Aerie Eagles*, Case # 0101014036 (November 21, 2011) and *Benjamin v. Anderson*, 327 Mont. 173, (2005). The charging party points out that in *Groven*, for example, an award of \$100,000.00 was made. From this, the charging party argues that the award to GS should be far more substantial because the charging party believes that the emotional distress suffered in that case “did not rise to the level” of the suffering that GS endured. In some substantial ways, however, the conduct that *Groven* endured surpassed the conduct in the case before this tribunal. In *Groven*, the adult charging party who had been subjected to years of sexual harassment, which included groping the charging party’s private areas, and further included at least one instance of felony sexual assault for which the perpetrator was convicted. While the conduct perpetrated upon GS was abuse, there is no evidence that it rose to the level of a criminal assault and it took place on only three occasions within a one month time frame.

Nonetheless, in one important respect, the harm here was more substantial than the harm suffered in *Groven* because of the fact the charging party here had the effective mental capacity of a three-year-old and, was severely disabled and could do nothing to stop the paraprofessional’s conduct. Aside from the manifestations of fear exhibited by GS, one can only imagine the fear that GS endured during those three instances of having water run over the back of his head in December, 2008. Taking all of these considerations into account, an award of \$150,000.00 to compensate GS for the emotional distress he endured is warranted.

The charging party has argued that an emotional distress award of \$2,000,000.00 is appropriate in this case and has argued that various facets of the paraprofessionals conduct which GS’s counsel characterizes as (1) requiring GS to stay in a wet shirt as punishment for vomiting, (2) leaving GS in soiled pants all day long as punishment, (3) Parish yelling and threatening GS, (4) putting a wet towel across GS’s back, (5) holding GS’s hands under running water, and (6) Paraprofessional Kallie’s screaming at GS and grabbing him and yanking him down demonstrate ongoing torture and abuse over a period of eight months that justifies a \$2,000,000.00 award. GS’s brief on remand, page 7. GS further argues that \$2,000,000.00 in emotional distress is appropriate because GS “will continue to suffer the effects of his debilitating anxiety condition that will dramatically diminish the quality of his life over his 65 year projected life span.” *Id.*

Taking these contentions in reverse order, the second argument is essentially a rehash of the argument that the paraprofessional's conduct has resulted in the regressive behavior that GS has experienced and will continue to affect him throughout his life. As previously noted, the hearing officer has already rejected that factual assertion and that rejection has been affirmed by the commission. The hearing officer cannot revisit that issue in light of the commission's findings.

Likewise, the argument that leaving GS in soiled pants and yelling and screaming constitutes a basis for awarding emotional distress damages ignores the earlier determinations by the hearing officer that found that recovery on the basis of soiled pants issue was foreclosed because it was not timely filed and that granted summary judgment to the respondent on the issue of the yelling and screaming. In a discrimination case, a charging party is only entitled to emotional distress damages that result from actions for which the defendant has been found liable. Mont. Code Ann. §49-2-506(1)(b); accord, *Kahn v. HIP Centralized Services*, 2008 U.S. Dist. LEXIS 76721. Neither of the hearing officer's determinations finding no liability on the basis of the soiled pants or the yelling and screaming was reversed by the Commission. Therefore, they cannot now form a basis for awarding emotional distress.

The only conduct upon which emotional distress damages can be based is the conduct of the three instances of running water over the back of GS head and/or splashing it in his face as that was the only conduct found by the hearing officer to be a basis for finding discriminatory conduct in the actions of the paraprofessionals. See generally, Hearing Officer Decision, pages 19 through 20. This conduct, while clearly abuse in the context of an educational setting and therefore condemnable, was clearly not "water boarding" nor does it resemble what the charging party's counsel asserts is torture. Water boarding as described in case law is a method whereby a person is immobilized on their back and then water is poured over their face in order to simulate drowning. *Yousuf v. Samantar*, 2007 U.S. Dist. LEXIS 56227(E.D. Va), reversed on other grounds, *Yousuf v. Samantar*, 552 F.3d 371 (4<sup>th</sup> Cir. 2009). GS was never forced face up under the running water of the faucet. GS was made to stand face forward toward the sink and then stoop forward at the waist and water was then run over the back of his head. Moreover, there is no testimony to suggest that the splashing of the water in his face was anything more than just a splash to assist him in waking up. There is no testimony nor even any suggestion in the evidence that the water was run over the back of his head or splashed in his face in such a manner that the conduct appeared to be undertaken in an effort to in any way impede GS's breathing or that it in fact impeded GS' breathing. While the paraprofessionals placed the back of GS's head under the faucet due to frustration with GS's classroom conduct, there is nothing in the evidence to suggest that placing his head under water

was done in a violent manner. Thus, while the evidence establishes that the conduct was abuse, there is no evidence to show that it was water boarding or torture.

The main case upon which GS relies, *Price v. Socialist People's Libyan Arab Jamahiraya*, 384 F. Supp. 2d 120 (D.C. Cir. 2005), is vastly different from the conduct that occurred in this case. In that case, among other things, the plaintiffs were for a period of 105 days beaten on a regular basis, forced to clean toilets of excrement with their bare hands and then not permitted to wash up, bound to chairs and forced to watch as other prisoners were beaten or killed, subjected to mock executions which included placing a pistol in their mouths and threatening to pull the trigger or dry firing rifles at the plaintiff's temples at point blank range. Nothing even remotely resembling such conduct occurred in the case before this tribunal.

While it is admittedly difficult to place oneself in GS's position, having carefully considered the various cases presented by the parties on this issue and having carefully weighed the conduct to which GS was subjected, an emotional distress award of \$150,000.00 is appropriate and reasonable to compensate him for the emotional distress he suffered.

#### IV. CONCLUSIONS OF LAW:

1. Based on the determination of the commission that the school district is vicariously liable for the conduct of the paraprofessionals, the school district must pay for emotional distress damages accruing to GS.

2. \$150,000.00 reasonably approximates the emotional distress inflicted upon GS by the conduct of the paraprofessionals.

#### V. ORDER:

Within 30 days of the date of this order becomes final, Respondent shall pay to Tifonie Schilling as best friend of GS the amount of \$150,000.00 for emotional distress suffered as result of the discrimination that occurred in this case.

DATED: February 17, 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: Randy Tarum, attorney for Tifonie Schilling on behalf of GS; and David Dalthorp, attorney for Great Falls Public School District #1:

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 parties each have a copy of the transcript. The Hearings Bureau has an electronic copy of the transcript but does not have a hard copy of the transcript.