

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0119014933 and
0111015010:

LISA WHITE,)	Case Nos. 784-2012 & 785-2012
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
REAL WORLD DIRECT INC./THE REAL)	
WORLD DIRECT CORPORATION, AND)	
RICK ADKINS, AKA RICHARD "RICK" F.)	
REYNOLDS, AKA RICHARD "RICK" P.)	
ADKINS, AKA RICHARD "RICK" F.)	
REYNOLDS-- ADKINS,)	
)	
Respondents.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS:

Lisa White filed a discrimination claim against Real World Direct and Rick Reynolds, aka Rick Adkins and various other monikers, alleging age discrimination and retaliation. Real World Direct's statutory agent, Northwest Registered Agent, LLC, was served with notice of hearing and a copy of the complaint in Whitefish, Montana on December 2, 2011, but never appeared through counsel in this matter. Rick Reynolds submitted to this tribunal's jurisdiction when in his own behalf he submitted an answer to White's complaint on March 9, 2012.

With the concurrence of the parties (as noted in this tribunal's March 12, 2012, order confirming hearing date), the matter was initially set for telephonic hearing on March 30, 2012. At the time of the March 30, 2012 hearing, Reynolds did not appear but his spouse, Lori Reynolds, appeared on behalf of both Reynolds and the corporation. After informing Ms. Reynolds (who is not a Montana licensed attorney) that she could not appear on behalf of either Rick Reynold or the corporation, the hearing officer reset the matter for telephonic hearing on April 27,

2012 to permit Reynolds time to retain counsel for the corporation. On April 13, 2012, Reynolds objected to holding the April 27, 2012 hearing by telephone. The charging party indicated that she did not object to having the hearing in-person in Bozeman, Montana (even though she lives in Butte, Montana). In light of this, the hearing officer acquiesced to Reynolds' objection and ordered that the matter be held in-person at the Bozeman Job Service in Bozeman, Montana. In reliance on this, the charging party subpoenaed witnesses to appear in Bozeman and made arrangements to appear in-person in Bozeman on April 27, 2012. Reynolds subsequently rescinded his request for in-person hearing and asked that the matter be held by telephone. The charging party objected, noting that she had already made arrangements to appear in Bozeman with her witnesses. Accordingly, the hearing officer denied the request for a telephonic hearing.

On April 27, 2012, the matter proceeded to hearing. The charging party appeared with her witnesses. Without any legally cognizable excuse, neither respondent appeared at hearing, despite having been properly noticed and having requested the in-person hearing. Accordingly, the matter proceeded in the absence of the respondents. White, her daughter Sabrina White, and her husband, Robert White testified under oath. Exhibits A through O were admitted into the record. Based on the testimony and exhibits admitted into evidence, the following findings of fact, conclusions of law and hearing officer decision are made.

II. ISSUES:

1. Did the respondents discriminate against White on the basis of her age?
2. Did the respondents retaliate against White for engaging in protected activity?
3. If the respondents either discriminated or retaliated against White, what remedies should be implemented?

III. FINDINGS OF FACT:

1. At all times material to the complaint in this matter, Lisa White was 45 years old. Lisa's daughter is Sabrina White. At the times material to this case, Sabrina was 26 years old.

2. Rick Reynolds is the president and CEO of Real World Direct. In addition to an office in Montana, Real World Direct maintained offices in Florida and Kansas.

3. In June, 2010, Reynolds hired Sabrina. In December, 2010, Sabrina informed Lisa that Reynolds was seeking an executive assistant for his position for the Montana office. Sabrina recommended that Lisa apply.

4. On December 1, 2010, Reynolds interviewed Lisa for the position. During her interview, Lisa asked to be paid an annual salary of \$50,000.00. Prior to hiring her, Rick left the interview and spoke to both Sabrina and Jennifer Banks about hiring Lisa and about the amount of salary she was requesting. Jennifer, a 27 year-old, felt that the amount of salary Lisa was requesting was too much and recommended Lisa be paid an annual salary of \$42,000.00. Reynolds then returned to the interview and hired Lisa at an annual salary of \$42,000.00 per year, and the promise to raise her salary to \$48,000.00 per year effective March 1, 2011. Lisa accepted the job and agreed to the salary and the raise on March 1, 2011. She was placed on a 90-day probationary period. All of these terms were set out in the written employment agreement that she signed.

5. Reynolds had also hired two other executive assistants at about the same time, Ericka and Dianna for the Florida office. Ericka was 24 years old and Dianna was 25 years old. Ericka was hired at an annual salary of \$48,000.00 per year and Dianna was hired at an annual salary of \$36,000.00 per year.

6. Ericka and Dianna were each given a raise of \$1,000.00 per month almost immediately after they began working. Ericka's raise was implemented on December 22, 2010 and Dianna's was implemented on January 8, 2011. Neither Ericka nor Dianna was placed on a 90-day probationary period. Instead, their probationary period lasted only 30 days.

7. Lisa's, Ericka's and Dianna's salary agreements were set forth in their respective employment agreements at the time they were hired. Lisa had several years experience as an executive assistant. Ericka and Dianna were new out of college at the time and did not have the experience that Lisa possessed.

8. Lisa learned of the discrepancies between her pay and that of Ericka and Dianna on January 3, 2011. She approached Reynolds about the pay discrepancy. Reynolds told her that it was just the way it worked out. Lisa did not indicate to Reynolds at anytime that she thought it was the result of any type of discrimination.

At no time during her employment did she ever suggest to Reynolds that she felt he was discriminating against her.

9. At one point during her employment, Lisa had to remain at home due to personal illness. She was not able to come into the office but was capable of fulfilling her work duties from home. Her pay was docked for the time she was absent. Sabrina had also experienced a time where she was off of work due to personal illness. At no time was Sabrina's pay docked due to her absences.

10. In January 2011, Reynolds took Sabrina and Jennifer Banks on a trip to Miami, Florida. Reynolds bought them expensive clothing and took them out to various shows. Reynolds had Lisa remain behind at the Montana office to run it while the others were on the trip to Florida.

11. In February 2011, Reynolds took Sabrina and Ericka on a trip to Kansas City, Kansas. Lisa was not taken on this trip either.

12. On March 6, 2011, Lisa was laid off of work from Real World Direct. At the time, Reynolds indicated that he might hire her back on a salary and commission basis. However, despite numerous inquires from Lisa, Reynolds never hired her back.

13. After Lisa was laid off, Reynolds hired a 24-year-old worker by the name of Marissa to serve as a secretary. Reynolds also hired a 29-year-old worker on salary and commission even though he had told Lisa at her layoff that he hoped to hire her back. On May 28, 2011, almost three months after Lisa was laid off, Reynolds advertised on Craig's List for a sales position to be filled at Real World Direct which paid an annual salary of \$36,000.00.

14. By April 2011, Real World had laid off not only Lisa, but also Ericka and Dianna and even Sabrina. By August 2011, Real World Direct laid off all personnel.

15. As discussed below, the testimony demonstrates that Lisa is entitled to \$22,000.00 in lost wages, \$5,000.00 in emotional distress damages and \$1,667.25 in interest on the lost wages through the date of decision in this matter, May 23, 2012.

IV. OPINION¹

A. White Has Proven Age Discrimination.

White contends that she was paid a lesser salary, kept on probation longer, and not given not as much of a salary increase as the other two executive assistants because she was older than her colleagues. Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of age commits an unlawful discriminatory practice. When there is no direct evidence of discrimination, the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996). *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386. Under that burden-shifting scheme, a claimant who makes out a prima facie case of discrimination is entitled to judgment if the respondent does not come forward to rebut the prima facie case with evidence that the adverse employment action taken was done for legitimate business reasons.

The failure to pay an equivalent salary and the failure to provide a similar pay raise are adverse employment actions. Because the conduct of which White complains is adverse, the only remaining question is whether she has made out a prima facie case. *Heiat*, supra.

In an indirect evidence case, a charging party makes out a prima facie case when she presents evidence that is sufficient to convince a reasonable fact finder that all of the elements of a prima facie case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In Montana, a prima facie case of age discrimination is made out where the charging party shows (1) that she is a member of a protected class; (2) that she was qualified for the position she sought, (3) she suffered detriment in employment and (4) she is replaced by a substantially younger person. Cf., *Clark v. Eagle Sys.*, (1996), 279 Mont. 279, 927 P.2d 995. In *Clark*, the Montana Supreme Court, in reviewing the propriety of granting a motion for summary judgment for the respondent, noted that the plaintiff's prima facie case is established by showing that the plaintiff (1) is in a protected class, (2) performed his job in a satisfactory manner, (3) was discharged, and (4) was replaced by a substantially younger worker. *Clark*, supra, 279 Mont. at 286, 927 P.2d at 999. The

¹ 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).

McDonnell Douglas standard of proof, however, is flexible rather than rigid. The four elements are not woodenly applied to every claim, but instead adapt to the nature of the proof proffered.² Here, at a minimum, White must show that she is in a protected class, that she performed her job satisfactorily, that she suffered adverse employment action and that no other similarly situated younger workers suffered such adverse action.

White has proven her prima facie case in two ways. First, she has demonstrated that the failure to increase her salary in the same manor in which Erica and Dianna's salary was increased and the decision to leave her on probation for 90 days was discriminatory. White was in a protected class, being almost 20 years older than both Ericka and Dianna. Her credible testimony that (1) she was more experienced in her work than Ericka and Dianna, (2) all three were hired at the same time, (3) she was not offered a similar increase in pay despite doing the same work and being more capable than Ericka and Dianna, and (4) that younger workers were not subjected to having their pay docked due to being absent establishes her prima facie case.

Second, Lisa has also made a prima facie showing that the decision to lay her off was based upon age discrimination. She was laid off on March 6, 2011 with a promise to attempt to hire her back on a salary and commission basis. Despite numerous inquires from Lisa, however, Rick never hired her back. In late March 2011, Reynolds hired a 29- year-old to fill the sales position which paid both salary and commission. On this front of her case, Lisa had proven that she was (1) in a protected class, (2) that she was qualified for the position she sought, (3) that she was told by Reynolds that he would try to hire her back for a sales position, and (4) that Reynolds hired a 29-year-old for the position and even into May 2011, Reynolds continued to advertise a sales position on Craig's List.

As White established her prima facie case, the burden shifted to Real World Direct and Reynolds to show legitimate business reasons for the adverse employment action it took against White. By not appearing at hearing despite requesting an in person hearing, the respondents failed to meet their burden under the McDonnell Douglas test. White's prima facie case is sufficient to carry her burden of persuasion. As such, she has proven that the respondent discriminated against her on the basis of her age in violation of the Montana Human Rights Act.

² See, e.g., Crawford v. Western Electric Company, Inc. 614 F.2d 1300 (5th Cir. 1980)(fitting the first tier elements of McDonnell Douglas to the allegations and proof of the particular case).

B. White Has Failed To Make Out A Prima Facie Case of Retaliation.

Montana law prohibits retaliation in employment practices for protected conduct. Mont. Code Ann. §49-2-301. A charging party can prove her claim of retaliation under the Human Rights Act by proving that (1) she engaged in protected activity, (2) thereafter her employer took an adverse action against her and (3) a causal link existed between her protected activities and the employer's actions. *Beaver v. D.N.R.C.*, ¶71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857. See also, Admin. R. Mont. 24.9.610 (2).

Circumstantial or direct evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence (as it is in this case), the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9th Cir. 1996). White, however, bears the ultimate burden of persuasion to demonstrate that the reasons for the employment action were at least in part motivated by retaliatory animus. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632.

Lisa has failed to establish that she engaged in protected activity. When she approached Reynolds about the pay discrepancy between her and the other two executive assistants, Ericka and Dianna, she never imparted to Reynolds that she felt it was the result of discrimination of any type. Lisa stated candidly at hearing (which only adds to her credibility) that at the time she approached Reynolds about the salary discrepancy, she had no idea that the difference might be based upon age discrimination. Indeed, at no time during her employment did she ever complain or even suggest to Reynolds that any of his conduct was discriminatory. There is no evidence to show or even suggest that Reynolds would reasonably have understood that Lisa's complaint about her salary or any other complaint she might have broached with him was protected activity. Because there is no evidence that Lisa engaged in protected activity, her retaliation claim fails.

C. Damages

White seeks damages of approximately \$150,000.00 in what she denominates as lost wages. She has arrived at this figure by determining the difference between

what she was paid and what Erica was paid. She also asks that she be paid her full salary through the date of the hearing even though she acknowledges that Real World Direct laid off all of its employees in April, 2011. White also acknowledges that she agreed to her salary of \$42,000.00.

The department may order any reasonable measure to rectify any harm White suffered as a result of illegal discrimination or 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, (6th Cir. 1983).

Damage awards must include compensation for emotional distress suffered as a result of the illegal discrimination when the facts show that the charging party has suffered from emotional distress. The value of this distress can be established by testimony or inferred from the circumstances. *Vortex Fishing Systems*, ¶ 33.

White has proven that the respondents discriminated against her on the basis of age. However, she failed to prove that the respondents retaliated against her. White's damages must flow from illegal conduct in order to be compensable. Therefore, in order to recover damages from lost income, she must prove that the lost income flows from the respondents' discriminatory conduct. Mont. Code Ann. §§ 49-2-506(1)(b).

White was paid approximately \$500.00 less per month than Ericka after the implementation of the \$1,000.00 raise for Ericka and Dianna. White has proven that age discrimination was the reason for the difference between the pay increase that she received and the pay increase that Erica and Dianna received. From January through April, 2011, this amounts to lost income for Lisa of \$2,000.00 (\$500.00 x 4 months equals \$2,000.00).

Lisa asserts that from the inception of her employment she should have been paid the same amount of salary that Ericka was and therefore she is entitled to an additional \$6,000.00 per year (the difference between her starting salary and that of Ericka). Lisa, however, agreed to the amount of starting salary and the evidence does

not prove that the difference between her and Erica's starting salary resulted from discriminatory conduct. Therefore, the difference between her starting salary and Ericka's starting salary is not compensable as it does not flow from illegal conduct.

Lisa also seeks to be compensated for the loss of her annual salary through the date of the decision in this case. As she has failed to prove that she engaged in any protected conduct upon which a claim of retaliation can be built, she must rely on the finding that her discharge and failure to hire her back on a salary and commission basis was due to age discrimination. Keeping in mind that both Erica and Dianna, the only two other persons who were in the executive assistant positions, were themselves laid off at the end of April, 2011, there are only two months (all of March and almost all of April) of income where Lisa lost wages in her position as executive assistant that flow from the illegal conduct. At the time of her lay-off, her annualized salary was \$48,000.00, approximately \$4,000.00 per month. She thus has two months damages (March and April, 2011) in her position as executive assistant that flow from the illegal conduct.

Because she has proven that she was not hired back in a sales position even though Reynolds indicated he would do so, she is also entitled to damages from the time that she could have been hired back into the sales position, May, 2011, to the date that the last employee was laid off, August, 2011. At the annualized salary rate of \$36,000.00, which represents \$3,000.00 per month, she could have made 4 months (May, June, July and August, 2011) salary at that rate, a total of \$12,000.00. By August, 2011, it is evident from the very trustworthy and candid testimony of both Lisa and Sabrina that Real World Direct had shut down all operations and laid off all personnel for reasons not in any way related to age discrimination. Thus, in any event, Lisa's employment would have ended at that time and any damages beyond that point have not been proven to flow from illegal discrimination. All together, Lisa has proven that she lost \$22,000.00 in wages due to the illegal discrimination.

White 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 \$1,667.25.³

³ The hearing officer calculated interest on the amount of lost wages by determining the daily value of interest on the monthly income lost by the unlawful discharge and then calculating the number of days that have elapsed between the date she would accrued her first full month of lost income, March 6, 2011, and the date of the judgment in this matter, May 23, 2012.. 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

Lisa suffered emotional distress from the illegal discrimination she suffered. In *Raiha v. Butte Silver Bow Local Government*, HRB No. 0061011911 (September, 2008), the Montana Human Rights Commission affirmed an emotional distress award of \$5,000.00 for a county employee who was not promoted to a higher paying position because of her age. In that case, the charging party was not directly told that she was denied the position because of her age.

Like the charging party in *Raiha*, White is entitled to emotional distress damages for the discrimination she suffered. She learned after the fact that she had been denied an equivalent salary increase, placed on a longer period of probation and not hired back to serve in a sales position based upon her age. In light of the evidence adduced at hearing, White is entitled to an award of \$5,000.00 in order to fairly and reasonably compensate her for the emotional distress she suffered as a result of the illegal discrimination.

D. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). Affirmative relief in the form of both injunctive relief and training to ensure that the conduct does not reoccur in the future is necessary to rectify the harm in this case.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. White has proven by a preponderance of the evidence that Rick Reynolds and Real World Direct violated Mont. Code Ann. § 49-2-303(a) by discriminating against her on the basis of age when it failed to extend her a similar wage increase as it did for two younger workers, kept her on probation for a longer period of time than those two younger workers and then discharged her from her executive assistant position and failed to rehire her for a sales position but instead hired a younger worker for that sales position

interest value for the period of lost income following her lay off is \$1.08 per day (10% per annum divided by 365 days = .00027% x \$4,000.00 (the monthly lost income) = \$1.08 per day) for the \$4,000.00 per month lost income and \$.81 cents per day (10% per annum divided by 365 days = .00027% x \$4,000.00 (the monthly lost income) = \$.81 per day) for the lost income of \$3,000.00 per month. The interest due on this lost income through May 23, 2012 is \$1,667.25.

3. White has failed to prove that either Rick Reynolds or Real World Direct retaliated against her for engaging in protected activity.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Rick Reynolds and Real World Direct, jointly and severally, must pay White the sum of \$22,000.00 in lost wages, \$1,667.25 in pre-judgment interest on the lost wages damages through May 23, 2012 and emotional distress damages of \$5,000.00.

5. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment is found in favor of Lisa White and against Rick Reynolds and Real World Direct as the respondents illegally discriminated against White on the basis of age.

2. Within 90 days after this order becomes final, Rick Reynolds shall enroll in and successfully complete four hours of training on the subject of age discrimination and terms and conditions of employment. Said training shall be conducted by a professional trainer in the field of personnel relations and/or civil rights law, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Reynolds shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred and that he attended for the entire period. Reynolds must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. Rick Reynolds and Real World Direct are hereby enjoined from taking any adverse employment action against any employee based on unlawful age discrimination.

4. Rick Reynolds and Real World Direct, jointly and severally, shall pay White the sum of \$28,667.25, representing \$22,000.00 in back wages, \$1,667.25 in pre-judgment interest on those wages, and \$5,000.00 in emotional distress damages.

DATED: May 23, 2012

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer
Hearings Bureau

* * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Lisa White, Charging Party; and Real World Direct Inc./The Real World Direct Corporation, and Rick Adkins, Respondents:

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 Kim Cobos, (406) 444-3870 immediately to arrange for transcription of the record.

White.HOD.ghp