

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012381:

MITCHELL REINHARDT, ) Case No. 748-2008  
)  
Charging Party, )  
) ON SECOND REMAND:  
vs. ) THIRD HEARING OFFICER DECISION  
) AND NOTICE OF ISSUANCE OF  
BNSF RAILWAY COMPANY, ) ADMINISTRATIVE DECISION  
)  
Respondent. )

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Effective May 27, 2014, the name of what previously was the department’s Hearings Bureau has been changed to the “Office of Administrative Hearings” (“OAH”). Contact information regarding OAH and its employees are unchanged, except replacement of “Hearings Bureau” with “Office of Administrative Hearings.”

I. PROCEDURE AND PRELIMINARY MATTERS ON REMAND

After the initial decision and affirmation of that decision by the Human Rights Commission, a judicial review proceeding initiated in state district court by Reinhardt was removed to federal court by BNSF. The federal court ruled that Reinhardt’s evidence at hearing was direct evidence of illegal discrimination, in response to which BNSF might prove either that Reinhardt’s direct evidence was not worthy of belief, or that no unlawful motive played a part in the action taken. Reinhardt v. BNSF Ry. Co., CV 10-H-CCL, “Opinion and Order” (D.Mt., Hel. Div., Feb. 6, 2012), p. 14.

The Commission received the federal court’s remand order, and directed the Hearings Bureau to conduct the proceedings the court had required. Reinhardt v. BNSF, “Order to Remand,” Case No. 748-2008, Case No. 0071012381 (2/27/2012).

On March 11, 2013, the Hearing Officer issued his “First Remand Decision,” “On Remand: Hearing Officer Decision and Notice of Issuance of Administrative Decision,” Case No. 748-2008, HRB Case No. 0071012381. On appeal, the Commission reversed and remanded, finding “the hearing officer failed to conduct a full legal analysis of the direct evidence of discrimination in BNSF’s . . . decision to terminate Reinhardt’s employment. The legal framework for analysis set out by Opinion & Order of the United States District Court on February 6, 2012, requires more than a determination that BNSF did not act with discriminatory animus.” “Remand Order,” Case No. 0071012381 (9/26/13), p. 2, “Discussion.”

The Commission’s Remand Order went on to make a series of what appear to this Hearing Officer to be fact findings, reversing the First Remand Decision on

liability, finding liability and then directing the Hearing Officer to determine and award damages to Reinhardt. This current Second Remand Decision will incorporate those fact findings herein, citing to the pages of the Commission's Remand Order. By footnote the Hearing Officer will incorporate the findings herein as conclusions of law, for the benefit of any reviewing body. Rather than trying to reconcile the Commission's Remand Order with the First Remand Decision, by blending them together in the findings, the Hearing Officer will simply add the findings required by the Commission to the findings in the First Remand Decision, ordering that any findings or conclusions in the First Remand Decision inconsistent with the added findings are void, and adding a new discussion, new conclusions and a new order.

## II. ISSUE ON SECOND REMAND

The dispositive issue for this Second Remand Order is what damages are due to Reinhardt. BNSF argued valiantly and ably for yet another Hearing Officer Decision in favor of the railroad, but the Commission's Remand Order bars the door against any such decision. The Commission Remand Order is clear – Reinhardt prevails on liability and damages must be determined and awarded.

## III. FINDINGS OF FACT ON SECOND REMAND

1-44. FINDINGS OF FACT 1-44, AS SET FORTH IN THE FIRST REMAND DECISION, ARE INCORPORATED BY REFERENCE AS IF SET FORTH AT LENGTH. ALL STATEMENTS IN THOSE INCORPORATED FINDINGS INCONSISTENT WITH THE FOLLOWING ADDITIONAL FINDINGS ARE VOID, EFFECTIVE IMMEDIATELY.

45. BNSF terminated Reinhardt's employment because BNSF determined that Reinhardt was unable to fulfill the essential functions of his position as a conductor-in-training in a safe manner. Commission Remand Order, p. 3.

46. BNSF based its decision to terminate Reinhardt's employment on the assessments offered by various BNSF employees that Reinhardt may be too old for the position because he was at risk of injury because of his slowness and hesitancy in performing his work – he sometimes walked in an unstable manner, and he moved as if he were recovering from a stroke. Ultimately, BNSF determined that Reinhardt exhibited certain physical limitations that prevented him from safely performing some essential job tasks. Commission Remand Order, p. 3.

47. BNSF regarded Reinhardt as physically limited in the performance of the major life activity of work, therefore, BNSF regarded Reinhardt as physically disabled. BNSF believed Reinhardt to have a physical impairment that gave rise to safety and performance issues. Therefore, BNSF's termination of Reinhardt's employment is direct evidence of discrimination on the basis of disability and possibly age. Commission Remand Order, pp. 3-4.

48. BNSF had a duty to provide a reasonable accommodation to a person with a physical disability if, with such accommodation, the person could perform the job's essential functions. An accommodation that would require an undue hardship or that would endanger the health or safety of any person would not be a reasonable accommodation, and BNSF had a duty to make a reasonable accommodation, if possible. Rather than engage in the mandatory interactive process and determine whether there were any potential accommodations that would have allowed Reinhardt to safely carry out the functions of a railway conductor, BNSF summarily terminated Reinhardt's employment on November 10, 2006. Commission Remand Order, pp. 4-5.

49. BNSF failed to comply with Montana law prohibiting discrimination in employment on the basis of disability. Reinhardt established that disability discrimination was more likely than not. He only established the possibility of discrimination based upon age, which did not prove that age discrimination was more likely than not. Commission Remand Order, pp. 4-6.

50. An order requiring BNSF to refrain from discriminating in employment on the basis of physical disability is necessary. It is also reasonable to require BNSF hereafter, whenever BNSF personnel judge a current employee within the Division operating in Montana to be suffering from a physical condition rendering him or her physically incapable of performing her or his job adequately or safely, to undertake an interactive process with that employee to determine whether a reasonable accommodation is possible that would allow the employee adequately and safely to perform the essential functions of his or her job, and, provided it is possible within the applicable employment and privacy laws, to undertake that process even if the employee denies having any physical disability, before discharging said employee for safety reasons. It is also reasonable to require BNSF management personnel and employees responsible for training and evaluating new train crew personnel, within the Division operating in Montana, to be trained regarding accommodation of physical disabilities.

51. The employer should not benefit from failing to undertake the interactive inquiry with Reinhardt about accommodation, when its failure left uncertain whether Reinhardt could have performed his essential job duties with an accommodation that would have been reasonable. On the other hand, Reinhardt denied any physical debility that interfered with performance of his job duties, and thus contributed to and participated in the failure to evaluate his problems and consider whether an accommodation might be reasonable. Under the unique circumstances of this case, with the evidence unclear about whether such an accommodation would have been successful, it is reasonable to rectify the harm suffered by Reinhardt by awarding him one-half his earning losses, over the four year period beginning November 9, 2006, together with the full costs (including the interest he paid) of his NARS training, together with the full amount necessary to compensate him for his emotional distress.

52. Reinhardt's losses resulting from his discharge in early November 2006, over the next four years, were proved at hearing, and the amounts later updated ("Charging Party's Updated Damage Summary," (filed 10-29-13). His net wage and benefit losses over four years totaled \$208,990.00 (the lost wages were \$139,340). He is entitled to prejudgment interest on the half of his lost wages and benefits for which BNSF is liable. His expenses for NARS training for railroad work, with interest, totaled \$23,347.20, and his emotional distress damages sought and proved were \$50,000. Neither of these damage figures should be cut in half. The emotional distress recovery sought was reasonable and should not be diminished because of the uncertainty about Reinhardt's capacity to work with a reasonable accommodation. The NARS expenses he paid (including interest) were incurred to have a career in railroad work, and likewise was reasonable as a damage item without reduction for uncertainty about his capacity to work with an accommodation. However, no prejudgment interest accrues on NARS training expenses or emotional distress damages since it was not for lost earnings.

53. 10% per year prejudgment simple interest on one/half the lost net wage and benefit income, \$104,495.00, calculated monthly over 48 months, totals \$22,475.32 in interest [ $\$104,495.00 / 48 = \$2,176.98$ ;  $\$2,176.98 \times .1 = \$217.70$ ;  $\$217.70 / 12 = \$18.14$ ;  $\$18.14 \times 1238 \{47+46+45 \dots +4+3+2+1 = 1238\}$ ].

54.  $\$104,495.00 + \$22,475.32 + \$23,347.20 + \$50,000.00$  equals \$200,317.52.

#### IV. DISCUSSION ON SECOND REMAND<sup>1</sup>

The Commission's Remand Order explains the basis for finding illegal disability discrimination. That order only finds a "possibility" of age discrimination, which is not a sufficient standard of proof to impose liability for that alleged discrimination. However, given the nature of the evidence involved, there would be no difference in the amount recovered and no difference in the affirmative relief imposed (aside from extending the injunctive relief and training to include age discrimination), because the only circumstances that gave rise to the discharge and to the losses was the perceived substantial limitation upon the ability to function in the major life activity of work, whether it was attributed to his perceived physical disability or to his age. Commission Remand Order, pp. 3-4.

The Hearing Officer failed to discern what the Commission has now found in the Federal District Court order. Hopefully this decision provides what is sought, but in the regrettable event that the Hearing Officer still has not grasped the entire concept, perhaps the findings herein will provide the Commission with what it may need to provide what is lacking without the necessity for another remand.

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<sup>1</sup> Fact statements in this discussion are incorporated by reference as additional findings. Hoffman v. Niece (1940), 110 Mont. 541, 105 P.2d 661.

In terms of the damages awarded, had BNSF undertaken the interactive process of determining whether a reasonable accommodation would allow Reinhardt to perform the essential functions of his job, the result might have been that he would have been able to continue his work for BNSF, and would not have had any lost wages and benefits. Of course, the result might also have been that he would have been unable to continue and would still have had lost wages and benefits, for which no recovery would be available from BNSF. Both parties's conduct caused the failure to engage in the interactive accommodation process – Reinhardt denied that he had any conditions that were interfering with his ability to do his job, and BNSF took him at his word and fired him. Thus, half Reinhardt's earning losses of wages and benefits in the first four years of his lost employment are BNSF's responsibility.

Since the Hearings Bureau (now the Office of Administrative Hearings) first began to decide cases involving train crew jobs with BNSF, the question of how many years of lost earnings to award has been important. Train crew work with BNSF is some of the most lucrative and long-lasting skilled physical labor available to laborers in Montana. It is hard physical work, with some physical danger involved, but those who qualify for it and perform it safely and well are paid what constitutes a premium Montana wage, and so many of them stay with the work for their entire working life. Thus, there are fact considerations that support extending awards a considerable distance into the future, as well as fact considerations that support placing some limits on the extensions.

This Hearing Officer began to use a four years of lost income after discharge, with some "front-loading" increases in the annual amounts, to recognize that BNSF train crew employment tended to be long term work as well as to encourage BNSF to consider actually hiring the individual illegally discriminated against and thereby reduce the amount of their liability. It has never been likely that BNSF would rehire the individuals in cases where it had relied upon occupational medicine data that projected increased long-term statistical risk of debilitating health problems for the individual, resulting in significant expenses and safety risks for BNSF, so some kind of inducement seemed appropriate. The four year limitation was drawn from the Montana Wrongful Discharge from Employment Act, in which recovery of lost wages and fringe benefits is for not more than four years after the plaintiff's discharge date. Mont. Code Ann. §39-2-905(1).

Reinhardt's first four years of damages have already passed. There is no reason to "front load" the four years with enhanced recoveries as an incentive to BNSF to hire this claimant, because the four years are already over. There is also no reason to go beyond the four years, which remains the maximum available for lost earnings in a successful MWDEA recovery. Pre-judgment interest is available here just as it is under the MWDEA. Using the four year limitation from the MWDEA is still a reasonable and appropriate approach to long-term damages in Human Rights Act cases, including this one.

Awarding the NARS training cost is fair. Mont. Code Ann. §49-2-506(1)(b) states, “The order may . . . require any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against”. NARS training better the prospects for a candidate to procure train crew work, and there is no evidence it is otherwise useful to Reinhardt, who no longer has that job.

Pre-judgment interest on lost earnings is proper for the department to award as damages. *P. W. Berry, Co., Inc. v. Freese*, 239 Mont. 183, 184, 779 P.2d 521, 522 (award by Hearing Officer including 10% prejudgment interest on lost wages affirmed); *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). Calculation of prejudgment interest is properly based on the elapsed time without the lost income for each pay period times the appropriate rate of interest applied over the elapsed time. E.g., *Reed v. Mineta* (10<sup>th</sup> Cir. 2006), 438 F.3d 1063. 10% per annum simple interest is appropriate, being the interest rate applicable to tort losses capable of being made certain by calculation. Mont. Code Ann. § 27-1-210. Not requiring a written statement of damages to the defendant to start the interest accruing is likewise reasonable, since it was not required in the earlier cases in which it was initially awarded, in which the interest accrued for the period from discharge to award. *P. W. Berry*, supra. Thus, the appropriate calculation of prejudgment interest is 10 percent of the monthly wage loss attributable to BNSF, divided by 12 (months in a year), multiplied by the number of months of interest for each month’s wages, which can be generating by adding 47 + 46 + 45 . . . + 4 + 3 + 2 + 1.

The department has the clear power and duty to award money for proven emotional distress. *Vainio v. Brookshire* (1993), 258 Mont 273, 852 P.2nd 596, 601. Damages in discrimination cases are reasonably available precisely to rectify the harm suffered because of the discrimination. E.g., *P. W. Berry, Inc.*, supra. “Compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances.” *Benjamin v. Anderson* (2005), 327 Mont. 173, 112 P.3d 1039; see *Trumble v. Glacier Well Services, Inc.*, H.R.B. No. 0081012948, Case No. 923-2009 (2009). “Because of the broad remunerative purpose of . . . civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions.” *Id.* The circumstances of losing a high-pay career position, clearly among the best jobs available for capable laborers in Montana, unquestionably generate a substantial amount of emotional distress, and the amount sought by Reinhardt was reasonable.

## V. CONCLUSIONS OF LAW

1. BNSF illegally discriminated against Reinhardt in employment because of physical disability when it regarded him as having a physical impairment that prevented him from safely performing the essential functions of his conductor job, Mont. Code Ann. §49-2-303, and discharged him without first engaging in an interactive process to determine whether with a reasonable accommodation he could safely perform his essential job functions. Mont. Code Ann. § 49-2-101(19).

2. The department should require the reasonable measures detailed in the findings and discussion to rectify the harm, pecuniary and otherwise, that Reinhardt suffered. Mont. Code Ann. § 49-2-506(1)(b).

3. The department must order BNSF to refrain from engaging in the discriminatory conduct and should prescribe conditions on BNSF's future conduct relevant to the type of discriminatory practice found by requiring the reasonable measures detailed in the findings and discussion to correct the discriminatory practice. Mont. Code Ann. § 49-2-506(1)(a) and (b).

4. Because Reinhardt failed to prove that, more likely than not, BNSF also engaged in age discrimination against him in employment, the department should dismiss the age discrimination charges in his complaint.

## VI. ORDER

1. The department grants judgment in favor of charging party, Mitchell Reinhardt, and against respondent, BNSF Railway Company, on Reinhardt's charges of illegal disability discrimination against him as alleged in his complaint.

2. BNSF must immediately pay Reinhardt the sum of \$200,317.52. Interest accrues hereafter as a matter of law.

3. The department enjoins BNSF from discriminating in employment on the basis of physical disability, and requires BNSF hereafter, whenever BNSF personnel judge an current employee to be suffering from a physical condition rendering him or her physically incapable of performing her or his job adequately or safely, to undertake an interactive process with that employee to determine whether a reasonable accommodation is possible that would allow the employee adequately and safely to perform the essential functions of his or her job, and, provided it is possible within the applicable employment and privacy laws, to undertake that process even if the employee denies having any physical disability, before discharging said employee for safety reasons. The department also requires BNSF management personnel and employees responsible for training and evaluating new train crew personnel, within the Division including Montana, to be trained regarding accommodation of physical disabilities.

4. The department requires BNSF, within 60 days after this decision becomes final, to submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them. The policies adopted must also provide that BNSF will not discriminate in employment on the basis of physical disability, and that whenever BNSF personnel judge an current employee to be suffering from a physical condition rendering him or her physically incapable of performing her or his job adequately or

safely, that BNSF will undertake an interactive process with that employee to determine whether a reasonable accommodation is possible that would allow the employee adequately and safely to perform the essential functions of his or her job, before discharging said employee for safety reasons. The policies adopted must also further provide that, so long as it is possible within the applicable employment and privacy laws to undertake that process even if the employee denies having any physical disability, BNSF will do so. The policies adopted must also provide for training of BNSF management personnel and employees responsible for training and evaluating new train crew personnel within the Division including Montana, to be trained regarding accommodation of physical disabilities.

5. The department grants judgment in favor of respondent, BNSF Railway Company, and against charging party, Mitchell Reinhardt, on Reinhardt's charges of illegal age discrimination against him as alleged in his complaint, and those charges are hereby dismissed.

Dated: August 5, 2014

/s/ TERRY SPEAR

Terry Spear, Hearing Officer  
Office of Administrative Hearings  
Montana Department of Labor and Industry

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## NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Peter Michael Meloy, Meloy Law Firm, attorney for charging party Mitchell Reinhardt, and Michelle T. Friend, Hedger Friend, PLLC, attorney for respondent BNSF Railway Company:

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 a final decision and is not reviewable or appealable in 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 Office of Administrative Hearings, 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).

THIS IS A DECISION ON REMAND WITH NO NEW HEARING TRANSCRIPT. If your appeal requires review of the original hearing transcript, please include a request for that review in your notice of appeal. The appealing party or parties must then assure that the original transcript is moved to the current appellate file for Commission review. Contact Annah Smith, (406) 444-4356 immediately to arrange for availability of that original transcript.