

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

MITCHELL REINHARDT,
Charging Party,

HRB CASE NO. 0071012381

-v-

FINAL AGENCY DECISION

BNSF RAILWAY COMPANY,
Respondent.

Charging Party, Mitchell Reinhardt (Reinhardt), filed a complaint with the Department of Labor and Industry (Department), which alleged unlawful discrimination in employment on the basis of disability and age. Following an informal investigation, the Department determined that a preponderance of the evidence supported Reinhardt’s allegations.

The case went before the Hearings Bureau of the Department of Labor and Industry, which held a contested case hearing, pursuant to § 49-2-505, MCA. The hearing officer issued a Decision on November 24, 2009 (HOD 1). That determination found that Respondent BNSF Railway Company (BNSF) had not discriminated against Reinhardt on the basis of age or disability. The matter was appealed to the Human Rights Commission (Commission). The Commission affirmed HOD 1 in April of 2010. The Commission’s April Order found that HOD 1 was “supported by conclusions of law which are correct,” and that no factual issues had been raised on appeal.

Reinhardt appealed the April Order to District Court. BNSF removed the matter to Federal District Court. Reviewing HOD 1, the District Court determined in its February 2012 Order (Federal Order) that the hearing officer had inappropriately applied the *McDonnell Douglas* burden shifting test, which is only appropriate in circumstantial evidence cases. Federal Order at 13. The Federal Order determined this matter to be one of direct evidence. The Federal Order additionally noted that BNSF had asserted the “safety defense,” thus requiring it to engage

in an independent assessment of risk to Reinhardt and others from Reinhardt's continued employment. Federal Order at 17-18. The Federal Order concluded that:

This Court does not determine herein that BNSF's termination of Reinhardt was illegal. Instead, the Court determines that the Hearing Officer's legal analysis was not correct and should be revisited. The error in the analysis lies in its failure to recognize properly the nature of the direct evidence and to apply an appropriate analysis to the undisputed facts.

Federal Order at 19. The matter was remanded to the Commission for further action.

The Commission, then, in its February Order further remanded the matter to the hearing officer "for further proceedings consistent" with the Federal Order. *Id.* at 2. The Commission directed "the hearing officer to revisit the issue of liability of BNSF for the alleged unlawful discrimination against Mitchell Reinhardt on the bases of age and disability and, if appropriate, to determine appropriate affirmative relief and monetary damages." *Id.* at 2.

In the second hearing officer determination (HOD 2), issued March 11, 2013, the hearing officer again found no discrimination and thus no liability. HOD 2 at 19. The determination noted that "Reinhardt could only have a disability if he had a [sic] impairment, a record of an impairment, or if BNSF regarded him as having an impairment." *Id.* at 17. Since Reinhardt "emphatically rejected" having an impairment, and BNSF did not regard him as having one, BNSF had no need to accommodate. *Id.* Further, the hearing examiner found that age discrimination was not proven by a preponderance of the evidence. *Id.*

HOD 2 was appealed to the Commission. Upon a complete review of the record, the Commission determined that the hearing officer had erred as a matter of law by failing to consider whether an independent assessment had been conducted, as would be required under the Federal Order and Montana law as a result of the safety defense's assertion. The Commission therefore moved "to remand the hearing officer's decision to determine if an independent

assessment occurred and what determinations can be made from that.” The motion carried, and the matter was remanded.

On remand, based on the written order of the Commission, the hearing officer awarded damages to Reinhardt in excess of \$200,000. *Id.* at 7. HOD 3 additionally found for BNSF for the purpose of age discrimination. *Id.* at 8.

HOD 3 is the subject of the current cross appeals—this matter’s fourth appearance before the Commission. The Commission considered the matter on November 14, 2014. Peter Michael Meloy, attorney, appeared and presented oral argument on behalf of Reinhardt. Michelle T. Friend, attorney, appeared and presented oral argument on behalf of BNSF Railway Company.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer’s decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *Admin. Rules of Mont. 24.9.123(4)*.

DISCUSSION

Having reviewed the complete record, this Commission determines that HOD 3 did not comply with the essential requirements of law because it did not assess whether an independent assessment was done. However, because the previous Commission order did not clearly instruct the hearing officer to determine if an independent assessment was done, the Commission believes the proper course is to adopt the March 11, 2013, order. In the interests of judicial economy, the Commission adopts as final HOD 2.

The Commission believes that the hearing officer, having multiply heard the arguments of both parties, is in the best position to determine the facts and to weigh the credibility of


witnesses. The hearing officer twice found no liability—once while viewing the case as one of circumstantial evidence, and once while viewing it as a direct evidence case. The Commission believes the hearing officer’s factual findings in HOD 2 are supported by the record. Further, the hearing officer’s application of fact to law does not appear to be incorrect.

ORDER

IT IS HEREBY ORDERED that the August 5, 2014, order from the Office of Administrative Hearings is REJECTED. It is FURTHER ORDERED that the March 11, 2013, order from the Office of Administrative Hearings is ADOPTED AND AFFIRMED as the final agency decision from this Commission.

Either party may petition the district court for judicial review of the Final Agency Decision. *Sections 2-4-702 and 49-2-505, MCA.* This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. *Section 2-4-702(2), MCA.*

DATED this 23rd day of December, 2014.



Dennis M. Taylor, Chair
Montana Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 23rd day of December, 2014.

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