

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

LISA BOYINGTON,
Charging Party,

HRB CASE NO.0121015452

-v-

FINAL AGENCY DECISION

MONTANA DEPARTMENT OF
CORRECTIONS - PROBATION AND
PAROLE,
Respondent.

Charging Party, Lisa Boyington, filed a complaint with the Department of Labor and Industry (Department), which alleged unlawful discrimination in employment on the basis of disability, and for retaliation. Following an informal investigation, the Department determined that a preponderance of the evidence supported Boyington's allegations. The case went before the Office of Administrative Hearings of the Department of Labor and Industry, which held a contested case hearing, pursuant to § 49-2-505, MCA. The hearings officer issued a Decision on July 28, 2014. The hearings officer determined that Boyington's allegations of discrimination on the basis of disability were supported by the record, the allegations of discrimination as a result of retaliation were not supported by the record, and awarding damages.

Boyington and the Montana Department of Corrections – Probation and Parole filed a cross appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on March 20, 2015. David Vicevich, attorney, appeared and presented oral argument on behalf of Boyington. Katherine Orr, attorney, appeared and presented oral argument on behalf of Montana Department of Corrections - Probation and Parole (hereinafter, Probation and Parole).

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)*. A factual finding is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the Commission with a definite and firm conviction that a mistake has been made. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3rd 284, ¶ 39. The Commission reviews conclusions of law to determine whether the hearing officer's interpretation and application of the law is correct. *See, Denke*, 39.

DISCUSSION

After careful consideration of the complete record and the argument presented by the parties, the Commission determines that the hearing officer's findings of fact are, for the most part, supported by substantial credible evidence. The arguments presented by Boyington do not persuade the Commission that the hearing officer failed to award Boyington adequate damages.

However, with respect to finding of fact paragraph number 175, the Commission is left with the definite and firm belief that the hearing officer misapprehended the effect of the evidence concerning the effect of Gentry's decision to deny Boyington permission to leave work on October 26, 2011. The Commission finds that the knowledge of "the office" of Boyington's migraines does not equate to her supervisor knowing that Boyington needed an accommodation for a disability. Accordingly, the last sentence of finding of fact paragraph number 175 is stricken, and replaced with the following sentence: "The general knowledge that "the office"

was aware of Boyington's migraines, however, does not mean that Gentry had knowledge that Boyington needed an accommodation for her disability ."

Likewise, with respect to finding of fact paragraph number 176, the Commission is left with the definite and firm belief that the hearing officer misapprehended the effect of the evidence concerning the effect of Gentry's knowledge of Boyington's migraines. The Commission finds that the "negative pregnant" finding is not justified, and that the Department of Corrections actions regarding the grievance do not constitute unlawful discrimination on the basis of disability. Accordingly, the last two sentences of finding of fact 176 are stricken.

With respect to finding of fact paragraph number 177, the Commission is left with the definite and firm belief that the hearing officer misapprehended the effect of the evidence concerning the effect of Gentry's knowledge of Boyington's migraines. The Commission finds that while Gentry's action might reasonably be characterized as bullying, the action does not constitute unlawful discrimination on the basis of disability. Accordingly, the last two sentences of finding of fact paragraph number 177 are stricken.

As a consequence of findings of fact paragraph numbers 175, 176, and 177 being amended to find that Probation and Parole did not engage in unlawful discrimination against Boyington, the findings of emotional distress caused by the employer's actions are clearly erroneous. Finding of fact paragraph number 183 is amended by striking all except the first two sentences of the paragraph.

As a consequence of findings of fact paragraph numbers 175, 176, and 177 being amended to find that Probation and Parole did not engage in unlawful discrimination against Boyington, the award of damages in finding of fact paragraph number 184 is clearly erroneous. Accordingly, finding of fact paragraph number 184 is deleted.

The hearing officer's conclusions of law paragraph numbers 1 and 2 are correct. The Commission, as a result of the application of the amended findings of fact to the law, determines

that hearing officer's conclusion of law paragraph number 3 is incorrect, and therefore amends conclusion of law paragraph 3 to read as follows:

"3. The Montana Department of Corrections – Probation and Parole, through Regional Administrator Tanner Gentry, did not illegally discriminate against Lisa Boyington on the basis of disability, and those charges should be dismissed. Mont. Code Ann. § 49-2-303."

The Commission, as a result of the application of the amended findings of fact to the law, determines that hearing officer's conclusion of law paragraph numbers 4, 5, and are incorrect, and are stricken.

As a result of the foregoing findings and conclusions, the Commission finds paragraphs number 1 and 2 of the proposed Order are amended to read as follows:

" 1. Judgment in favor of the Montana Department of Corrections – Probation and Parole, and against Lisa Boyington on the charge of disability discrimination in employment."

"2. IT IS HEREBY ORDERED that Lisa Boyington's charges of disability discrimination in employment, made against the Montana Department of Corrections – Probation and Parole, under the Montana Human Rights Act, are dismissed."

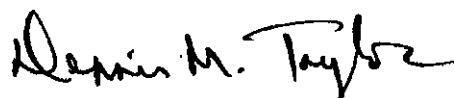
ORDER

IT IS HEREBY ORDERED that the appeal of Lisa Boyington is overruled.

IT IS HEREBY ORDERED that the appeal of the Montana Department of Corrections – Probation and Parole is sustained, and that the Hearing Officer Decision is amended as set forth above.

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 18 day of June, 2015.



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 18th day of June, 2015.

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A handwritten signature in black ink, appearing to read 'Mark Cadwallader', is written over a horizontal line. The signature is stylized and somewhat cursive.

Mark Cadwallader
Agency counsel, as counsel for
Montana Human Rights Commission