

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

LISA BOYINGTON,
Charging Party/Appellee,

-v-

MONTANA DEPARTMENT OF
CORRECTIONS - PROBATION AND
PAROLE,
Respondent/Appellee

HRB CASE NO. 0121015452

FINAL AGENCY DECISION

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 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 Charging Party's allegations of discrimination on the basis of disability were supported by the record, that the allegations of discrimination as a result of retaliation were not supported by the record, and awarded Boyington damages for discrimination on the basis of disability.

On August 8, 2014, Charging Party filed an appeal to the hearing officer decision. On August 11, 2014, Respondent also filed an appeal to the hearing officer decision. 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. The Commission overruled Charging Party, Lisa Boyington's appeal. The Commission sustained Respondent, Montana Department of Corrections – Probation and Parole's appeal,

made amendments to the Hearing Officer Decision, and issued its Final Agency Decision dated June 18, 2015.

On July 17, 2015, Charging Party filed a Petition for Judicial Review in the Montana Fourth Judicial District Court, Missoula County. Charging Party noted the Commission failed to review the entire record before the March 20, 2015 hearing because a Commissioner stated that all the materials were not provided.

On November 13, 2015, the Honorable Judge John W. Larson, issued an order remanding the case to the Human Rights Commission “for the review of the entire record and for a determination by it of whether its Final Agency Decision issued on June 18, 2015 should be modified in any way or preserved as worded based upon its review of the entire record.”

On March 14, 2016, the Commission considered the matter on remand after the members reviewed the entire record.

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. *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 Final Agency Decision issued on June 18, 2015 is

correct, but should be modified for clarity. The Commission determines that factual findings in three paragraphs of the Hearing Officer's Findings of Fact were clearly erroneous and not supported by substantial, credible evidence.

Findings of Fact Paragraph 175.

Hearing Officer Decision:

175. The reasonableness of Gentry's repeated refusals, before finally agreeing, to permit Boyington to leave work on October 26, 2011, and specifically his insistence upon provision of medical verification of her illness, depended entirely upon whether Gentry knew that Boyington had need for an accommodation (and that she had received the slight accommodations necessary) from DOC for her migraines. Boyington had notified Beccari about her migraine problem and her "most recent regression" (Ex. 7, p. 294), which was happening still on October 25-27, 2011, according to her testimony. There is no specific evidence that Boyington ever advised Gentry, when he was supervising her as her POII, or at any other time, about her migraines. But there is evidence (Ex. 7, p. 294) that the office was aware of her migraines, and the medical evidence of record, together with Boyington's testimony, established that her migraines were a physical impairment that substantially limited her in the major life activities of working, driving and sleeping, by requiring her to seek time off work when the migraines regressed to daily occurrence and maximum intensity, and that she was an otherwise qualified person with a physical disability. Gentry, as her former supervisor and current RA, reasonably knew or should have known that her migraine problem was real and was documented.

Commission determination:

The Commission determines that the last sentence of the Hearing Officer Decision is not supported by substantial, credible evidence, and is clearly erroneous. There is no evidence Gentry or the Department of Corrections knew that Boyington had a migraine on October 26, 2011, until he asked her to deliver a report of violation (ROV) to CM in jail. There is no evidence the Department of Corrections knew that Boyington's migraines rose to the level of a disability that needed accommodation. The evidence of knowledge of "the office" of Boyington's migraines does not equate to knowledge of a disability, and does not equate to Gentry knowing that Boyington needed an accommodation for a disability prior to October 26,

2011. Medical documentation of a disability (Exh. 7) was not furnished by Boyington until later. As found by the Hearing Officer in the first sentence of Finding of Fact paragraph 175, the reasonableness of Gentry's action is based on what Gentry knew or should have known at the time. Although Boyington ultimately established via competent evidence that because of migraines of maximum intensity she was a qualified person with a physical disability, there is no substantial credible evidence that Gentry actually knew, or should have known that, Boyington needed an accommodation for a disability prior to October 26, 2011. Accordingly, the last sentence of finding of fact paragraph number 175 is stricken.

Final Agency Decision (as modified by the Commission):

175. The reasonableness of Gentry's repeated refusals, before finally agreeing, to permit Boyington to leave work on October 26, 2011, and specifically his insistence upon provision of medical verification of her illness, depended entirely upon whether Gentry knew that Boyington had need for an accommodation (and that she had received the slight accommodations necessary) from DOC for her migraines. Boyington had notified Beccari about her migraine problem and her "most recent regression" (Ex. 7, p. 294), which was happening still on October 25-27, 2011, according to her testimony. There is no specific evidence that Boyington ever advised Gentry, when he was supervising her as her POII, or at any other time, about her migraines. But there is evidence (Ex. 7, p. 294) that the office was aware of her migraines, and the medical evidence of record, together with Boyington's testimony, established that her migraines were a physical impairment that substantially limited her in the major life activities of working, driving and sleeping, by requiring her to seek time off work when the migraines regressed to daily occurrence and maximum intensity, and that she was an otherwise qualified person with a physical disability.

Findings of Fact paragraph 176.

Hearing Officer Decision:

176. In addition, Beccari later denied Boyington's grievance about Gentry's actions regarding her request for sick leave, not because Gentry was unaware of her migraine problems, but because he "had good and sufficient reason to suspect sick leave abuse due to the timing of your claim coming precisely after you had been given a directive to deliver your revised report of violation to [CM]." Ex. 7, p. 278. Boyington, already angry with Gentry even before his directive to take the revised ROV to CM and explain it to him, was not about to explain her migraine history to him on the spot. Based upon witnesses accounts of how these two interacted in other

conflict situations, they were more likely than not shouting at each other during the confrontation on October 26, 2011, which could not have been conducive to enduring a migraine headache. Since DOC did not deny the grievance based upon Gentry's ignorance of the condition, but instead on the "possible sick leave abuse" policy, that silence about his knowledge was a negative pregnant. It provided more credible and sufficient evidence that Gentry did know about Boyington's history of migraines and her occasional need for limited accommodations.

Commission determination:

Likewise, with respect to paragraph number 176 of the Hearing Officer Decision, the Commission determines that the last two sentences are not supported by substantial, credible evidence, and therefore are clearly erroneous. Having determined that Gentry did not have prior knowledge that Boyington's migraines constituted a disability and that there was a need to accommodate her disability, the Commission also determines that the "negative pregnant" finding does not itself constitute substantial, credible evidence. Accordingly, the last two sentences of finding of fact 176 are stricken as being not being supported by substantial, credible evidence.

Final Agency Decision (as modified by the Commission):

176. In addition, Beccari later denied Boyington's grievance about Gentry's actions regarding her request for sick leave, not because Gentry was unaware of her migraine problems, but because he "had good and sufficient reason to suspect sick leave abuse due to the timing of your claim coming precisely after you had been given a directive to deliver your revised report of violation to [CM]." Ex. 7, p. 278. Boyington, already angry with Gentry even before his directive to take the revised ROV to CM and explain it to him, was not about to explain her migraine history to him on the spot. Based upon witnesses accounts of how these two interacted in other conflict situations, they were more likely than not shouting at each other during the confrontation on October 26, 2011, which could not have been conducive to enduring a migraine headache.

Findings of Fact paragraph 177.

Hearing Officer Decision:

177. Despite knowledge of her migraine problems, Gentry refused her initial requests to take sick leave and insisted that first she must run the errand of delivering

the revised ROV to CM and explaining to him the changes. He finally relented and released her to seek medical care, but then he shouted after her to demand that she bring a medical excuse upon her return to work. This kind of childish bullying, while perhaps an understandable response to the childish conduct of Boyington in resisting Gentry's efforts to clean up the ROV, was inappropriate conduct for an RA, under circumstances where the paramilitary nature of "chain of command" for DOC did not justify the bullying in the least. That Boyington would tell Gentry that she needed sick leave for her migraine, given how very difficult it must have been for her to show any kind of weakness to him, speaks volumes about how severe her pain must have been. His initial insistence that she run the errand first, and then his insistence upon a medical excuse, indicated a callous disregard for an employee's entitlement to accommodation for a documented pain disability resulting at least in part from injuries sustained on duty.

Commission determination:

With respect to paragraph number 177 of the Hearing Officer Decision, the Commission determines that the last two sentences are not supported by substantial, credible evidence, and therefore are clearly erroneous. Having determined that Gentry did not have prior knowledge that Boyington's migraines constituted a disability and that there was a need to accommodate her disability, the Commission determines that Gentry's actions, while inappropriate, could not have constituted a disregard for the need to accommodate Boyington's disability, much less a callous disregard. As acknowledged in the second sentence of finding of fact paragraph 177, "He finally relented and released her to seek medical care." Accordingly, the last two sentences of finding of fact paragraph number 177 are stricken as not being supported by substantial, credible evidence.

Final Agency Decision (as modified by the Commission):

177. Despite knowledge of her migraine problems, Gentry refused her initial requests to take sick leave and insisted that first she must run the errand of delivering the revised ROV to CM and explaining to him the changes. He finally relented and released her to seek medical care, but then he shouted after her to demand that she bring a medical excuse upon her return to work. This kind of childish bullying, while perhaps an understandable response to the childish conduct of Boyington in resisting Gentry's efforts to clean up the ROV, was inappropriate conduct for an RA, under circumstances where the paramilitary nature of "chain of command" for DOC did not

justify the bullying in the least.

Findings of Fact paragraph 183.

Hearing Officer decision:

183. There is no evidence that Boyington suffered any economic damages or expenses from Gentry's initial refusal to allow her sick leave, on October 26, 2011, while insisting that she deliver the revised ROV to CM and explain the changes to him. There is no evidence that Boyington suffered any economic damages or expenses from Gentry's subsequent insistence that Boyington provide medical documentation to prove her illness justified her absence. However, Boyington suffered emotional distress for these additional indignities at the hands of her nemesis, Gentry. This was the only proven illegal discrimination involved here. It came after a series of conflicts between DOC and Boyington, over an extended period of time. By the time it occurred she had been subjected to multiple disciplinary actions, several grievances she submitted had been denied, and she had found little to no support for her resistance to supervision by Beccari, to some extent, and by Gentry, to a much greater extent. Worried about losing her career, forced to deal at length with Gentry, a supervisor she distrusted and disliked, October 26, 2011, Boyington was beset with anger, fear, and insecurity about her future – the emotional turmoil that being “on the brink” at work, in a career she sought out and come to consider fundamental to her life, was substantial.

Commission determination:

Because of the changes to paragraph numbers 175, 176, and 177 which determine there is no substantial evidence that Gentry and Department of Corrections had knowledge Boyington's condition constituted a disability, they did not engage in unlawful discrimination against Boyington. Therefore, the findings of emotional distress caused by the employer's actions are clearly erroneous and not supported by substantial, credible evidence. Paragraph number 183 of the Hearing Officer Decision is amended by striking all except the first two sentences of the paragraph.

Final Agency Decision (as modified by the Commission):

183. There is no evidence that Boyington suffered any economic damages or expenses from Gentry's initial refusal to allow her sick leave, on October 26, 2011, while insisting that she deliver the revised ROV to CM and explain the changes to him. There is no evidence that Boyington suffered any economic damages or

expenses from Gentry's subsequent insistence that Boyington provide medical documentation to prove her illness justified her absence.

Findings of Fact paragraph 184.

Hearing Officer decision:

184. Her significant other was a police officer. A large part of her social community was involved in law enforcement. Her conflicts at work were casting huge shadows across her life. Put in that context, and focusing upon the illegality of Gentry's conduct, and the outrage it generated in Boyington, her emotional distress was severe, and was made even more severe by coming at a time when she was already all but overwhelmed by the migraine she was suffering. Boyington is entitled to recover the sum of \$25,000.00 for her emotional distress resulting from the discriminatory conduct of her RA, Gentry, on October 26-27, 2011.

Commission determination:

As a consequence of paragraph numbers 175, 176, 177, and 183 being amended to find that Gentry did not engage in unlawful discrimination against Boyington, the findings in paragraph 184 are clearly erroneous and the award of damages in paragraph number 184 of the Hearing Officer Decision is based on an incorrect application of the law to the facts of the case. Accordingly, paragraph number 184 is deleted in its entirety from the Final Agency Decision.

Conclusions of Law.

The hearing officer's conclusions of law paragraph numbers 1 and 2 are correct. The Commission, as a result of the application of the law to the findings of fact as modified above, determines that hearing officer's conclusions of law paragraph number 3 is incorrect as not being supported by the facts, and therefore amends conclusions 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 law to the amended findings of fact, determines that hearing officer's conclusion of law paragraph numbers 4, 5 are incorrect as not being supported by the facts, 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."

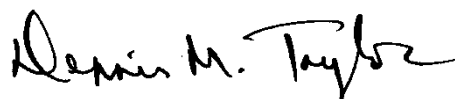
ORDER

IT IS HEREBY ORDERED that the appeal of the Department of Corrections is sustained.

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

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 13th day of June, 2016.



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 13th day of June, 2016.

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