

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1037-2017:

SALVADOR PENA,	)	
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
JAY NEWTON POCOCK,	)	
	)	
Respondent.	)	

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I. PROCEDURAL AND PRELIMINARY MATTERS

On August 20, 2016, Salvador Pena filed a complaint with the Montana Human Rights Bureau alleging Jay Newton Pocock discriminated against him in housing based upon race.

On January 13, 2017, the matter was transferred to the Office of Administrative Hearings (OAH) to be set for a contested case hearing.

On May 4, 2017, the Hearing Officer conducted a telephone conference in this matter with Torrance Coburn, Attorney at Law, appearing on behalf of Pena and Jay Newton Pocock appearing on his own behalf. The parties agreed to a change of venue to allow the Hearing Officer to conduct the hearing in Bozeman, Montana rather than Livingston, Montana in an effort to accommodate the parties and their witnesses. See Mont. Code. Ann. 49-2-505(3)(a)(change of venue may be granted upon a showing of good cause).

On July 12, 2017, the Hearing Officer convened a contested case hearing in this matter at the date and time set in the Draft Final Prehearing Order issued on June 29, 2017; the Final Prehearing Order issued on July 6, 2017; and the Amended

Order Setting Contested Case Hearing Date and Prehearing Schedule issued on May 5, 2017.

The Hearing Officer arrived at the Bozeman Job Service at approximately 8:45 a.m., MDT, and discovered Pena and his attorney, as well as Pena's witnesses awaiting her arrival. At 9:00 a.m., which was when the hearing was scheduled to start, the Hearing Officer opened the record and announced Pena and his attorney were present but Pocock was not. The hearing was delayed for approximately 15 minutes. At approximately 9:10 a.m., the Hearing Officer stood in the lobby area of the Bozeman Job Service and did not observe anyone who appeared to be waiting for hearing.

At approximately 9:15 a.m., the Hearing Officer reconvened the hearing. At that time, the Hearing Officer entered default against Pocock for his failing to appear at hearing and noted for the record Pocock's failure to participate in the final prehearing telephone conference held on June 29, 2017 and his failure to abide by the orders issued by the hearing officer regarding the filing of his preliminary prehearing statement, which was filed on April 28, 2017 - approximately 80 days after the deadline set in the Notice of Certification for Hearing issued on January 17, 2017. The testimony of the first witness commenced at approximately 9:25 a.m.

Pocock appeared in the hearing room at approximately 9:50 a.m., and announced he had been waiting in the lobby for approximately 30 minutes. Pocock also indicated he thought the hearing was scheduled to start at 10:00 a.m. The hearing officer informed Pocock that default had been entered and the hearing was proceeding only on the issue of damages.

At hearing, Charging Party's exhibits 1 through 9, 13, 18 and 19 were admitted. Pena, Adrian Benavidez, Margarita Pena, Monica Benavidez, and Pocock testified under oath. The parties did not object to the Hearing Officer taking judicial notice of a record maintained by the Montana Secretary of State that shows Pocock Holdings, LLC, a company owned by Respondent that owned and maintained his rental properties, was involuntary dissolved effective December 1, 2015. The Secretary of State's record also shows an involuntary intent date of September 1, 2015. That record was marked and received as Exhibit A.

Based upon the evidence adduced at hearing and arguments presented in respondent's post-hearing brief, the following hearing officer decision is hereby rendered.

## II. ISSUES

1. Did Jay Newton Pocock discriminate against Salvador Pena on the basis of race in the area of housing in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Jay Newton Pocock did illegally discriminate against Salvador Pena as alleged, what harm, if any, did he sustain as a result and reasonable measures should the department order to rectify such harm?

3. If Jay Newton Pocock did illegally discriminate against Salvador Pena as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

## III. FINDINGS OF FACT

1. Jay Newton Pocock owns the Ebert, an apartment building located at 219 West Callender Street in Livingston, Montana.

2. Pocock understood the Ebert was owned and operated through Pocock Holdings, LLC. Pocock Holdings, LLC, was a registered domestic limited liability corporation with the Montana Secretary of State until it was involuntarily dissolved effective December 1, 2015. Ex. A.

3. The Ebert was managed at all times material to this matter by Fred Manus and Cami Meader. Manus and Meader worked for Pocock. Pocock relied upon information provided by Manus and Meader regarding the operations of the Ebert, including whether rents were paid in full and in a timely manner and what hours individuals performed work at and around the Ebert. Manus and Meader were Pocock's agents as managers of the Ebert.

4. In September 2015, Salvador Pena began renting apartment #A3-2 at the Ebert. Pena, his wife and six other family members lived in the two-bedroom apartment. All family members were included on the lease. Pena understood through Manus and Meader that his family's living arrangement was acceptable.

5. Pena and his son, Adrian Benavidez, began performing maintenance work at the Ebert shortly after moving into the building. Pena understood he would be paid \$8.00 per hour and would be required to work approximately 30 hours per week. Pena understood he would be paid on a weekly basis.

6. From September 2015 through December 31, 2015, Pena worked an average of 40 hours per week performing tasks assigned to him by Manus and Meader.

7. Pena turned in his hours to Meader and/or Manus at the end of every week as directed. Pena was not paid for the work he performed. Pena was told Pocock had to review his hours and would send Manus and Meader the money to pay Pena. If Pena was paid at all, he was typically only paid a portion of what he was owed.

8. Pena was owed approximately \$5,440.00 for the work he performed from September 2015 through December 2015. Pena was paid only \$2,720.00, which was roughly half of what he was owed in wages.

9. In January 2016, Pena began working as a pipe fitter in South Africa. Pena paid all rent due and owing for the Ebert rental unit from September 2015 through January 2016.

10. In February 2016, Pena returned to Livingston. Meader requested he return to working for Pocock at his other rental properties in the Livingston area. Pena initially resisted due to Manus and Meader previously failing to pay him a timely and complete manner for work he had performed. Meader offered Pena \$10.00 per hour. Pena agreed to return to work for Pocock and worked approximately 52 hours per week at the Ebert and other properties owned by Pocock. Again, Pena was not paid what was owed to him and received approximately half of the wages owed to him.

11. During this period, Meader approved Pena's request to have a dog in his rental unit.

12. In March 2016, Pena had not yet been paid in full for the work he performed in 2015 or for the work he had performed in February 2016. Meader offered to apply the wages owed to Pena's rent and then pay Pena the balance of the amount owed for work performed.

13. For work performed in February 2016 and March 2016, Pena was owed \$4,160.00 for which he was not paid.

14. In April 2016, Meader informed Pena that his hourly wage was being increased to \$13.00 and his rent was being reduced to \$750.00. Pena still had not been paid for work performed in February and March 2016.

15. Pena continued performing work for Manus and Meader for which he was not paid in April and May 2016. Pena earned approximately \$5,746.00 for work performed during April and May 2016 for which he was not paid. Meader informed Pena during this period that he still owed back rent and paid him only \$432.00.

16. Pena stopped working June 10, 2016 due to his not being paid for his work and the money he had earned not being properly applied to his rent. Pena was owed \$936.00 for 72 hours he worked during those ten days and has never been paid those wages.

17. In July 2016, Pena was served with a Notice to Vacate informing him that he and his family were required to vacate the premises within 30 days and he owed \$1,453.00 in back rent. The notice also indicated Pena had an unauthorized pet in the unit. Manus signed the notice. Ex. 18.

18. Upon receiving the notice, Pena wrote to Pocock in an effort to correct the situation. Pena wrote:

I have been employed full time working at the Ebert, Edgewater, the vacation rental, the E. Street house, and Cami's house. Now Adrian and I have been the only employees not receiving our wages or receipt of our wages. I am told that you are the reason behind this. There are several witnesses who can testify that I have been working full time for them Now my son and I are the only Hispanic employees that are working at these properties and we are the only ones who don't get paid with documentations [sic] or proof as to why.

Ex. 19.

19. Pocock did not stop the eviction or otherwise instruct Manus and Meader to stop their mistreatment of Pena. In fact, Pocock acknowledged in an email to Manus that Manus had "billed me tons of hours for him [Pena] and Adrian. More than enough to pay rents." Ex. 13. However, the eviction of Pena and his family proceeded.

20. In late July 2016, Meader confronted Pena in the building's courtyard. Meader "hollered" at Pena and referred to him and his family as "you kind of people" and called them "squatters" and "freeloaders." Meader also called him "good for nothing." Meader's comments were heard by members of Pena's family, as well as other tenants. Other tenants could also be heard referring to Pena and his family as Mexicans and terms being used by Meader.

21. In September 2016, Pena and his family vacated the Ebert rental unit.

22. The reasons offered for the eviction of Pena and his family were false. The evidence does not show Pena owed back rent at the time of the eviction. Pena had the permission of Manus and Meader for himself, his wife and his six family members to live in the Ebert rental unit. Pena also had Meader's permission to have a dog in the unit. It is more likely than not that the true reason for the eviction was Pena's race.

23. As a result of the discriminatory conduct of Pocock's agents, Manus and Meader, Pena and his family have felt upset and degraded. Pena lost approximately 30 pounds as a result of the distress he felt due to the conduct of Manus and Meader. Pena's wife felt upset at having to explain to her children why individuals such as Manus and Meader would make derogatory comments to their father. Additionally, Pena and his family were forced to seek food from a local food pantry.

24. The conduct of Pocock's agents toward Pena constitutes race discrimination in housing under the Montana Human Rights Act.

25. At the time of his eviction, Pocock owed Pena approximately \$8,580.00 for work performed. Based upon the parties' arrangement allowing Pena to apply wages earned to his rent, Pena and his family lost the use and enjoyment of the Ebert apartment for approximately 11.5 months as a result of his illegal? eviction.

26. Pena was required to borrow \$5,000.00 to pay for expenses related to his obtaining new housing for him and his family. The housing Pena was able to secure required a monthly rent of \$1,500.00, which was double his monthly rental rate at the Ebert, which resulted in an increased cost of \$8,625.00 for Pena during the approximately 11.5 months he could have been living at the Ebert but for the illegal discrimination resulting in the eviction of his family from the Ebert.

27. Pena suffered emotional distress as a result of the discrimination conduct of Pocock's agents. \$10,000.00 represents a reasonable amount of compensation for the discrimination he suffered.

28. Imposition of affirmative relief, which requires Pocock to ensure that employees and/or agents working on his behalf in conducting business in Montana are thoroughly trained with respect to prohibitions against discrimination in housing and appropriate methods of dealing with such discrimination are appropriate.

#### IV. DISCUSSION

On August 29, 2016, Pena filed a Charge of Discrimination (Charge No. 0160610) alleging race discrimination in the area of housing based upon his eviction in July 2016. At no time has the complaint been amended to include a charge of race discrimination in the area of employment. The hearing officer understands based upon pre-hearing filings in this matter that Pena had filed another charge alleging discrimination in employment based upon race, which was dismissed by the Montana Human Rights Bureau. Therefore, the only issue certified for hearing is whether Pocock discriminated against Pena on the basis of race in the area of housing in violation of the Montana Human Rights Act.

##### A. The Entry of Default Against Pocock

On February 6, 2017, the hearing officer issued a Scheduling Order in this matter setting forth the hearing dates and prehearing deadlines. It is noted on page two of the order that “[f]ailure to comply with an order of the Hearing Officer or to participate in a prehearing conference may result in sanctions. Sanctions include dismissal of the charge, default of Respondent or other appropriate action, as a prerequisite of continuing to prosecute or resist the complaint.” Scheduling Order, ¶7 Compliance (Feb. 6, 2017).

On June 29, 2017, Pena, by and through his attorney, filed a motion seeking entry of default against Pocock based upon his failure to attend the final telephone prehearing conference, as well as Pocock’s failure to abide by the deadlines and procedural rules set by the hearing officer. Pocock failed to timely file his preliminary prehearing statement by the deadline set in the Notice of Certification for Hearing issued on January 17, 2017. Pocock failed to timely respond to Pena’s First Combined Discovery Requests. Pocock failed to timely file his contentions and lists of witnesses and exhibits by the May 1, 2017 deadline initially set by the hearing officer. In response to Pena’s motion, Pocock argued the final telephone conference was redundant and he had submitted all necessary papers “with in [sic] a reasonable time frame.”

On July 6, 2017, the hearing officer issued an Order Denying Charging Party’s Motion for Entry of Default Against Respondent on the basis that Pena had not shown that he had been substantially prejudiced by Pocock’s actions.

As noted above, the hearing officer attempted to convene a contested case hearing in this matter at 9:00 a.m., MDT, on July 12, 2017, at the Bozeman Job

Service. The parties had agreed to the start time and location of hearing at the final prehearing conference held on June 29, 2017. In fact, the parties agreed to move the hearing from Livingston to Bozeman to make it easier for Pocock to attend the hearing as he was flying into the Bozeman airport and to facilitate the appearance of various witnesses at hearing. As noted above, Pocock was not present when the hearing officer first attempted to convene the hearing; nor did he make himself known to the hearing officer, who was standing in the open area of the Bozeman Job Service office during the 15 minutes she delayed the hearing to see if he would appear. Pocock did not appear until approximately 9:50 a.m., at which time he alleged he had been waiting in the lobby for 30 minutes and indicated he thought the hearing was scheduled to start at 10:00 a.m.<sup>1</sup>. It is noteworthy that Pocock appeared on his own without any of the witnesses listed in his prehearing disclosure and appeared to be unprepared for hearing.

Based upon Pocock's repeated failures to abide by the hearing officer's prehearing orders, as well as his failure to appear at hearing at the agreed upon start time, the hearing officer entered default against Respondent on the issue of whether Pena was discriminated against on the basis of race in the area of housing. See Mont. Code Ann. § 2-4-603(1)(a) ("Unless precluded by law, informal disposition may be made . . . by default). Each side was then afforded an opportunity to present evidence regarding the appropriateness of damages in this matter.

#### B. Pena has Shown he is Entitled to Damages

The Montana Human Rights Act (MHRA) prohibits an "owner, lessor, or manager having the right to sell, lease, or rent a housing accommodation" from discriminating on the basis of race "in a term, condition, or privilege" relating to the property's "use" or "lease." Mont. Code Ann. § 49-2-305(1)(b).

The department may order any reasonable measure to rectify any harm Pena suffered as a result of illegal discrimination. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages is to make the victim whole. See, 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)). To be compensable, however, the damage must be causally related to making the victim whole. In other words, the

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<sup>1</sup>It should be noted that the hearing officer issued two subpoenas requested by Pocock for Manus and Meader on June 19, 2017. Pocock was given time at hearing to try to locate Manus and Meader, who did not appear at hearing to testify.



damage must flow from the discriminatory conduct. Mont. Code Ann. §§ 49-2-506(1)(b); Berry, supra.

The goal in determining the appropriate amount of damages to be awarded to a victim of housing discrimination is "to put the plaintiff in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained." Lee v. Southern Home Sites Corp., 429 F.2d 290, 293 (5th Cir. 1970). There are generally recognized to be three categories of relief appropriate in fair housing cases: (1) compensatory damages; (2) emotional distress damages, including loss of rights damages; and (3) injunctive relief.

1. Pena has shown he is owed \$13,625.00 in compensatory damages.

Compensatory damages can include out-of-pocket and other tangible expenses caused by defendants' denial of housing. An award of compensatory damages typically includes the cost of temporary housing, the increased cost of alternative housing, in addition to any moving expenses incurred by the plaintiff. See Gonzalez v. Rakkas, 1995 U.S. Dist. LEXIS 22343, at \*16, n. 4 (E.D.N.Y. July 25, 1995).

Pena seeks \$8,580.00 for amounts owed by Pocock for work Pena performed. Pena argues that amount, applied to his rent as per his agreement with Manus and Meader, would have covered approximately 11.5 months of rent after he vacated the Ebert rental unit. Pena also seeks \$8,625.0 for "the increased monthly rental costs associated with his new rental over the same [11.5] months." Charging Party's Post-Hearing Proposed Findings of Fact, Conclusions of Law and Brief, p. 13 (filed Aug. 18, 2017). Pena also seeks \$5,000.00 in moving costs.

Pena seeks damages on essentially two grounds. First, the number of months of rent he could have paid if Pocock and/or his agents had properly applied the wages he earned to the rents he would have owed during those 11.5 months. Second, the additional costs associated with his move from the Ebert and the costs associated with housing he obtained after leaving the Ebert. Granting Pena's request for both the months he could have lived at the Ebert if his wages had been applied to his rents in accordance with his agreement with Manus and Meader and Pena's request for the costs associated with his move from the Ebert, would not place him in the position he would have been in but for the discriminatory conduct of Manus and Meader. Granting both requests would place Pena in a better position in that he would not only receive the benefit of the 11.5 months of rent he could have paid if Manus and

Meador had not denied him his wages but also the benefit of having the costs associated with his move and new housing covered.

Further, it appears that Pena is attempting to pursue a claim of unpaid wages in a human rights proceeding. The hearing officer is unable to find any authority that allows her to grant an award of unpaid wages under a housing discrimination claim. It is therefore determined that Pena is entitled to receive \$8,625.00 for the increased rental costs incurred as a result of his eviction from the Ebert, as well as \$5,000.00 for the costs associated with his move. Therefore, Pena has shown he is entitled to receive a total of \$13,625.00 in economic damages.

2. Pena is entitled to \$10,000.00 in emotional distress damages.

Damages can also include emotional distress endured as a result of unlawful discrimination. *Vortex Fishing Systems v. Loss*, 2001 MT 312, ¶33, 308 Mont. 8, 38 P.3d 836. The value of this distress can be established by testimony or inferred from the circumstances. *Id.*

Pena has shown that he experienced at least one incident where Manus hurled insults at him in front of his family and other tenants that were mostly likely due to his race. Pena's son testified he experienced at least one incident where racist jokes were told and Manus did nothing to stop it. However, the evidence does not show Pena was present for that incident, and Pena's son is not a named Charging Party in this matter.

In *Johnson v. Hale*, 13 F.3d 1351 (9<sup>th</sup> Cir. 1994), two African-American men responded to an advertisement to rent an apartment. When they met with the landlord's wife to see the apartment, she told them "that her husband would not allow her to rent to 'Negro men.'" *Id.* The district court awarded the plaintiffs \$125.00 each. The court of appeals set aside the district court order and awarded \$3,500.00 to each man, noting that "sum would appear to be the minimum that finds support in recent cases . . ." *Id.* at 1354.

In *Herron v. Blackwell*, 908 F.2d 864, 872 (11<sup>th</sup> Cir. 1990), the Court of Appeals upheld an emotional distress award of \$40,000.00 against a property owner who refused to sell his home to a black couple because of their race. The plaintiffs were anguished over, among other things, the fact that someone would deny them the ability to purchase a home for which they were financially qualified, their disappointment that their race would be a factor after thirty years of fighting for equal justice, and the invasion of privacy caused by the publicity. *Id.* at 873.

In *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992), the Court of Appeals upheld an emotional distress of \$50,000.00 against a property owner who denied housing to a plaintiff due to the race of her boyfriend and their child (plaintiff was white, her boyfriend black). After paying a security check, receiving a key, and spending a significant time painting and cleaning, the landlord refused to rent to the plaintiff after discovering her boyfriend was black. He told the boyfriend that "the old man" (himself) had rented the apartment to someone else. He told her that "the boss" (also himself) had rented the apartment to someone else. He told her he changed the locks and put her belongings out on the porch. He called her at home and, "mimicking a stereotypical black manner of speaking, told her he wanted to: move in with her and 'six black guys, . . . quit work and take welfare . . . and drugs with [her] . . . and swap wives with [her boyfriend].'" *Id.* at 1341. He called her sister, told her he was a member of the Ku Klux Klan, and asked her how her sister (plaintiff) "could have [gone] to bed with a nigger and how she could . . . have a nigger baby." *Id.* He attempted to lure plaintiff's sister outside on one occasion. He tracked down plaintiff's home address and left a note threatening the life of her boyfriend: "By THE Time you read this message Kiss your Niger [sic] friend goodbye Bitch -> he's dead!!!" *Id.* at 1348.

In *Wazoua v. Ames Construction Inc.*, Case No. 240-2010, the charging party endured being called "nigger" and "jungle bunny" by his co-workers and having such comments broadcast over the radio to the entire work crew. In that case the hearing officer found that the employer did nothing to curtail the racial slurs and awarded emotional distress damages of \$30,000.00.

The facts of this case are most similar to the facts in *Johnson*. There was one incident during which Pena was subjected to offensive and derogatory comments that were most likely due to his race. Pocock's argument that Pena was technically a "squatter" at that point is not persuasive. The substantial evidence shows Pena had worked sufficient hours to cover his rent and was still legally the leaseholder at the time Meader confronted him in the courtyard. What distinguishes this case from *Johnson* is the fact that Meader chose to confront Pena when she had an audience and in an area she knew or should have known that her comments would be heard by other tenants, including Pena's wife and young children. It seems more likely than not that Meader intended her conduct to embarrass and humiliate Pena and his family and to provoke Pena's removal, either voluntarily or involuntarily, from the premises.

Pena testified he was hurt and upset at Meader's conduct and lost 30 pounds as a result of the distress he experienced following the confrontation. Pena's wife was

still emotional at hearing when she testified about the incident and the fact she was forced to explain why Meader acted the way she did to her young children. Pena's daughter also testified observing her father acting calmly in the face of Meader's hate and having to explain to her sisters why someone would call her family "squatters." Clearly, Meader's behavior was disturbing to not only Pena but his family. Given the tenor of the comments made, it is more likely than not that Meader directed her bile at Pena due to his race. Further, the evidence shows Pena suffered a great deal of emotional distress as a result of the unlawful eviction and the efforts required to find him and his family suitable housing. Therefore, Pena has established he is owed \$10,000.00 in emotional distress damages.

C. A Civil Penalty of \$5,000.00 is Warranted

Montana Code Ann. § 49-2-510(2) provides:

If in a hearing under 49-2-505 the department finds that a person against whom a complaint was filed under this part has engaged in a discriminatory practice in violation of 49-2-305, the department may, in addition to the remedies and injunctive and other equitable relief provided by 49-2-506, to vindicate the public interest, assess a civil penalty:

(a) in an amount not exceeding \$10,000 if the respondent has not been adjudged in any prior judicial or formal administrative proceeding to have committed any prior discriminatory housing practice in violation of 49-2-305;

Neither party provided a methodology to determine the appropriate amount of the civil penalty to be imposed in this case. Pena advocates for \$10,000.00. Pocock generally argues that no damages, and presumably no civil penalty, should be imposed in this case.

The Montana Supreme Court has found that "because the MHRA is modeled on federal anti-discrimination laws, such as the ADA, it is useful and appropriate to consider federal statutes, regulations and case law as persuasive authority when interpreting provisions of the MHRA." *McDonald v. Dept. of Environmental Quality*, 2009 MT 93, fn. 4, 214 P.3d 749. The hearing officer is, therefore, left to look to federal law for guidance.

The federal housing regulations provide that administrative judges "shall consider the following six (6) factors: (i) Whether that respondent has previously been adjudged to have committed unlawful housing discrimination; (ii) The respondent's financial resources; (iii) The nature and circumstances of the violation; (iv) The degree of that respondent's culpability; (v) The goal of deterrence; and (vi) Other matters as justice may require." 24 C.F.R. §180.671(c)(1). A civil penalty may be imposed to "vindicate the public interest." 42 U.S.C. § 3614(d)(1)(C). It has also been noted that civil penalties and punitive damages serve a common purpose--to punish wrongdoing. *United States v. Balistreri*, 981 F.2d 916, 936 (7th Cir. 1992).

The evidence shows Pocock was not personally involved in the arrangements between Pena, Manus, and Meader and relied upon the information provided to him by Manus and Meader. However, Pocock was put on notice at or near the time Pena was served with the eviction notice that there were irregularities in the method used by Manus and Meader to calculate the wages owed to Pena for work performed and the amount of rent actually owed by Pena. Pocock did nothing to correct the situation and instructed Manus and Meader to move forward with the eviction.

It is fundamentally unfair to allow a property owner to escape culpability merely because there is an intermediary between the property owner and the tenant particularly in a case such as this, where the intermediaries are treating a tenant in an unjust and discriminatory manner. No evidence was offered showing Pocock or any corporation associated with him that owned and managed property in Montana have been adjudged to have committed unlawful housing discrimination. As such, the full penalty of \$10,000.00 seems excessive. A more appropriate civil penalty of \$5,000.00 will serve to deter future behavior and to serve as a reminder that the Montana Human Rights Act prohibits both owners and their agents from discriminating against individuals on the basis of race. It is therefore determined that a civil penalty of \$5,000.00 is appropriate in this case.

#### D. Affirmative Relief is Appropriate

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). Pocock's failure to address Pena's complaints about the conduct of Manus and Meader after being notified of such in July 2016 is inexcusable. 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. Jay Newton Pocock violated the Montana Human Rights Act by permitting his employees to discriminate against Pena on the basis of race in the area of housing.

3. Pena is owed compensatory damages in the amount of \$13,625.00.

4. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Pocock must pay Pena the sum of \$10,000.00 as damages for emotional distress.

5. Pursuant to Mont. Code Ann. § 49-2-510(2), Pocock must pay a civil penalty of \$5,000.00.

6. The circumstances of the discrimination in this case 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).

7. For purposes of attorneys' fees, the Charging Party is the prevailing party. Mont. Code Ann. § 49-2-505(8).

## VI. ORDER

1. Judgment is found in favor of Salvador Pena and against Jay Newton Pocock for discriminating against Pena on the basis of race in housing in violation of the Montana Human Rights Act.

2. Jay Newton Pocock is enjoined from discriminating against or allowing any employee or agent to discriminate against any tenant on the basis of race or national origin.

3. Jay Newton Pocock must pay Pena \$13,625.00 in compensatory damages and \$10,000.00 for emotional distress.

4. Jay Newton Pocock must consult with an attorney with expertise in human rights law to develop and to implement policies for the identification, investigation and resolution of complaints of discrimination that include training for his employees

and agents involved in the managing of his rental properties located in Montana. The policies must be approved by the Montana Human Rights Bureau. In addition, Jay Newton Pocock shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 9th day of November, 2017.

/s/ CAROLINE A. HOLIEN  
Caroline A. Holien, Hearing Officer  
Office of Administrative Hearings  
Montana Department of Labor and Industry

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Salvador Pena, Charging Party, and his attorney, Torrance Coburn; and Jay Newton Pocock, Respondent:

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 ONE DIGITAL COPY, with:

Human Rights Commission  
c/o Annah Howard  
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 ONE DIGITAL COPY 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).

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 Annah Howard, (406) 444-4356 immediately to arrange for transcription of the record.