

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

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DON SMIES,  
Charging Party,

-v-

TOWN OF FAIRVIEW,  
Respondent/Appellee.

HRB CASE NO.0160347

FINAL AGENCY DECISION

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Charging Party, Don Smies, filed a complaint with the Department of Labor & Industry (Department) against the Town of Fairview (Fairview), which alleged unlawful discrimination in employment on the basis of disability and retaliation. Following an informal investigation, the Department determined that reasonable cause supported Smies' allegations. The case went before the Office of Administrative Hearings of the Department of Labor & Industry, which held a contested case hearing, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a Decision on March 16, 2018. The hearing officer determined that discrimination and retaliation did occur, and awarded damages.

Both parties filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on July 20, 2018. Eric E. Holm, attorney, appeared and presented oral argument on behalf of Smies. Jared S. Dahle, attorney, appeared and presented oral argument on behalf of Fairview. All members of the Commission present stated they had each reviewed the entire record submitted to the Commission.

**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. Mont. Code Ann. § 2-4-621(3). The commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. “Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance.” *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305.

The Commission may accept or reduce the damages awarded by the hearing officer, but may not increase them without a review of the complete record. Mont. Code Ann. 2-4-621(3).

### **DISCUSSION**

A number of issues are presented by Fairview for consideration on appeal, one issue is presented on cross appeal from Smies. The Commission does not reach the cross appeal issue presented by Smies because it is moot based on the Commission’s decision on the last issue raised by Fairview. The issues presented by Fairview are:

1. Were the hearing officer’s findings and conclusions that Fairview discriminated against Smies when they terminated him rather than provide additional accommodations based on substantial evidence and correct as a matter of law?
2. Were the back pay damages awarded to Smies based on substantial evidence?
3. Were the front pay damages awarded to Smies based on substantial evidence?

As a threshold matter in response to the first issue raised by Fairview, Smies argues that because the damages awarded were for both discrimination and retaliation, Fairview’s failure to appeal the retaliation liability makes moot Fairview’s appeal regarding liability for discrimination. In other words, Smies asserts he would be entitled to the same damages even if the discrimination liability is reversed because the damages were awarded for retaliation as well.

Fairview argues it did properly preserve the issue of retaliation. Fairview asserts its argument that the hearing officer's finding that Smies could return to work was not based on substantial evidence necessarily incorporates the retaliation component. The Commission determined that it was proper to address Fairview's argument on liability for discrimination. It did not address the question of retaliation because it determined Fairview was liable to Smies for discrimination.

Issue 1: Were the hearing officer's findings and conclusions that Fairview discriminated against Smies when they terminated him rather than provide additional accommodations based on substantial evidence and correct as a matter of law?

Fairview argues the hearing officer misapprehended the effect of the evidence and that Smies was not actually released to return to work on Jan. 1, 2016. Smies argues the hearing officer's decision is based on substantial evidence that Smies was released to return to work.

Findings of fact that are supported by substantial credible evidence are binding on the Commission. *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. After reviewing the complete record, the Commission agrees that the hearing officer's decision was based on competent substantial evidence. Specifically, there was evidence that the only medical information available to Fairview at the time of Smies' termination was the note Dr. Roccisano wrote to Fairview regarding Smies on November 11, 2015, stating "Light duty lifted Jan 1<sup>st</sup> 2016, can return to full duty."

Fairview also argues the hearing officer's conclusions regarding the requested accommodations were in error. Fairview asserts the conclusions regarding an additional leave of absence, light duty work, and hiring temporary employees were incorrect statements of law on what is a reasonable accommodation. Smies argues the hearing officer's decision regarding possible accommodations is based on findings of fact rather than conclusions of law. Smies further asserts the hearing officer's findings regarding accommodations are based on substantial evidence and the hearing officer's conclusions of law are correct.

After reviewing the complete record, the Commission agrees that the hearing officer's decisions regarding possible accommodations are correct. Specifically, the hearing officer found (1) that the evidence did not show that granting the requested accommodations would have caused Fairview undue hardship, and (2) that Fairview, before terminating Smies, failed to conduct the necessary assessment and analysis to determine whether the accommodations requested would have posed a direct threat.

Issue 2: Were the back pay damages awarded to Smies based on substantial evidence? Fairview asserts the back pay damages were not based on substantial evidence because it argues Smies failed to prove he could return to work. Fairview argues that because Smies was never released to full-duty work, he would not have been able to continue to work regardless of Fairview's actions. Smies argues that Fairview's position is based solely on its interpretation of the facts. Smies again asserts the hearing officer's finding was based on competent substantial evidence and that Fairview terminated him prior to his January 1, 2016, scheduled return to work date.

The Commission agrees the hearing officer's findings that Fairview had no information from any medical professional treating Smies that he would be unable to return to work on January 1, 2016 were based on competent substantial evidence in the record. The Commission determined, therefore, that Fairview failed to overcome the presumption Smies was entitled to back pay by clear and convincing evidence.

Smies asks the Commission to correct the mathematical or typographical error in Finding of Fact number 73, concerning the amount of back pay to which he is entitled. Fairview concedes that the computation of back pay is incorrect, and it agrees that the proper calculation of the amount of back pay due Smies, if upheld, is \$142,567.04. The Commission concludes the correct back pay amount is \$142,567.04.

Issue 3: Were the front pay damages awarded to Smies based on substantial evidence? Fairview argues the hearing officer's finding that Smies could return to work for purposes of front pay damages is not based on substantial evidence, because the evidence shows, for example, that Smies had a third surgery. Fairview further asserts the hearing officer's finding that there was no medical evidence that showed Smies could not return to work was based on a negative rather than a positive and therefore was not based on substantial evidence. Fairview argues Smies did not meet his burden to show he was entitled to front pay. Smies asserts the hearing officer's decision is based on substantial evidence, and that Smies could return to work.

The Commission agrees with Fairview that the award of front pay is not based on substantial evidence. Back pay damages are presumed. *P.W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521 (1989). The burden for proving the amount of front pay damages rests upon the charging party. *Barbour v. Merrill*, 48 F.3d 1270 (1989). After his termination by Fairview and its subsequent refusal to rehire him, Smies underwent further back surgery. After a review of the complete record, the Commission concludes that following that final back surgery, there is not substantial evidence in the record demonstrating that Smies could work as a patrol officer again. Because the burden of proof for demonstrating future wage loss rests on Smies, he has failed to carry his burden of proof. Accordingly, Finding of Fact number 75 is not based on substantial evidence, as are the portions of Finding of Fact numbers 68 and 69 regarding Smies' future wage loss.

## **CONCLUSION**

In summary, after careful consideration of the complete record and the argument presented by the parties, the Commission determines it will affirm the Hearing Officer decision with the following changes:

1. amend Finding of Fact numbers 68 and 69 to remove references to future wages and front pay;

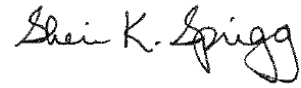
2. amend Finding of Fact number 73 to correct the amount of back pay damages to \$142,567.04;
3. amend by deleting Finding of Fact number 75, with respect to front pay damages award as not supported by substantial evidence in the record;
4. amend Conclusions of Law number 6 to reflect the correct back pay damage award as \$142,567.04, plus interest, and \$35,000.00 for emotional damages; and
5. amend Order number 3, to reflect that the City of Fairview must pay Smies the sum of \$142,567.04 plus interest, and \$35,000.00 for emotional distress.

### **ORDER**

IT IS HEREBY ORDERED, that the hearing officer decision is AFFIRMED IN PART; hearing officer decision Findings of Fact numbers 68 and 69 are AMENDED to remove the references to future wages and front pay; hearing officer decision Finding of Fact number 75 is REVERSED as being not supported by substantial evidence in the record; hearing officer decision Conclusion of Law number 6 is AMENDED to correctly reflect the amount of damages awarded as being \$142,576,04 plus interest for back pay, and \$35,000.00 for emotional distress, and hearing officer decision Order paragraph number 3 is AMENDED accordingly to reflect the correct dollar amount of damages. Therefore, entry of the FINAL AGENCY DECISION AND ORDER, reflecting the above modifications, shall be made this date.

Either party may petition the district court for judicial review of the Final Agency Decision. *Sections Mont. Code Ann. §§ 2-4-702 and 49-2-505.* 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. Mont. Code Ann. § *Section 2-4-702(2).*

DATED this 11th day of October 2018.



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Sheri Sprigg, Chair  
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 11th day of October 2018.

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