

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

WILLIAM OUTLAND,
Charging Party/Appellant,

HRB CASE NO.0170316

-v-

REMAND ORDER

MONTANA DEPARTMENT OF
CORRECTIONS, MONTANA STATE
PRISON,
Respondent/Appellee.

Charging Party, William Outland (Outland), filed a complaint against the Department of Corrections, Montana State Prison (MSP) with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of disability and retaliation for protected activity. Following an informal investigation, the Department determined that reasonable cause supported Outland’s allegations. The case went before the Office of Administrative Hearings, which held a contested case hearing, pursuant to *Mont. Code Ann.* § 49-2-505. The hearing officer issued a Decision on April 5, 2019. The hearing officer determined discrimination and retaliation did occur but did not award any damages.

Outland filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on July 19, 2019. Elizabeth Griffing, attorney, appeared and presented oral argument on behalf of Outland. Ira Eakin, attorney, appeared and presented oral argument on behalf of MSP.

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 conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. 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.

BACKGROUND

Outland brought discrimination and retaliation claims based on two adverse actions, the extension of his probation and his later termination. Outland brought both a discrimination claim and a retaliation claim regarding his probation extension. He also brought both a discrimination claim and a retaliation claim regarding his termination. The hearing officer determined he met his burden of proof on all four claims. Then the hearing officer determined Outland was not due compensatory damages on any of the four claims under the mixed motive defense. Outland appeals the hearing officer’s application of the mixed motive defense as a matter of law to all four claims. Neither Outland nor MSP appeal any of the hearing officer’s findings of fact.

DISCUSSION

In his appeal, Outland asserts the hearing officer made a number of errors as a matter of law and therefore incorrectly failed to award him compensatory damages for his claims. MSP asserts the hearing officer was correct, and that Outland was not due damages. After careful consideration of the complete record and the argument presented by the parties, the Commission agrees with Outland and remands this case to the hearing officer for a determination of damages.

Outland first asserts the hearing officer erred by applying mixed motive analysis to his termination discrimination and retaliation claims because those claims were based on circumstantial evidence. MSP asserts the hearing office correctly applied the mixed motive analysis to a circumstantial evidence situation. In this case, the hearing officer analyzed the discrimination and retaliation claims regarding Outland's his termination and determined Outland prevailed. However, the hearing officer then applied the mixed motive defense and determined Outland was not due damages because he found MSP had legitimate reasons for its actions regarding the termination.

The Commission determines as a matter of law that the hearing officer incorrectly applied the mixed motive analysis to determine there were no damages for the termination. Pursuant to *Laudert v. Richland County Sheriff's Department*, 2000 MT 281, 301 Mont. 114, 7 P.3d 286 and *Beaver v. Montana Dept. of Natural Resources*, 2003 MT 287, ¶ 63 318 Mont. 25, 78 P.3d 857, mixed motive applies to direct evidence cases while the *McDonald Douglas* burden shifting analysis applies to a circumstantial evidence case. This distinction is set forth in the Administrative Rules of Montana.

In a circumstantial evidence case, after the claimant proves their prima facie case, the respondent has the burden to show evidence of a legitimate, nondiscriminatory reason for the challenged action. ARM 24.9.610(3). If the respondent meets this burden, the charging party can prove pretext with evidence that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief. ARM 24.9.610(4).

Where a charging party has established a prima facie case with direct evidence case, on the other hand, the respondent can only avoid liability by proving that an unlawful motive played no role in the challenged action or that the direct evidence is not credible. ARM 24.6.610(5). Where the charging party proves discrimination in such cases—that is, where the respondent

cannot show that the unlawful motive played *no role* in the challenged action—the respondent can still limit its damages by proving that the same action would have been taken in absence of the unlawful retaliation.¹ ARM 24.9.611. In those cases, the commission will order the respondent to refrain from discriminatory conduct and may impose other conditions to minimize future violations, but will not award compensation for the adverse action. *Id.*

In this case, which was properly determined to be a circumstantial evidence case, the hearing officer determined Outland met his burden to prove pretext when he determined that MSP’s decision to terminate was based on the unlawful motive of discriminating against Outland for his disability, rather than any other reason that was offered. At page 30 and 31, the hearing officer concluded Outland proved pretext when he determined Outland overcame MSP legitimate reasons. He stated among other things that:

All indications are that, given his highly abnormal treatment under the circumstances, Outland was given a write-up because of the only factor that separated him from other correctional officers: his disability status and the fact he was not performing the job he was required to do....Whatever other, legitimate reasons MSP may have had for Outland’s discharge, Outland was ultimately terminated because of MSP management’s own frustration with having to deal with “unnecessary drama” when Outland spoke out in his e-mail against receiving disparate treatment as a result of his disability. Appropriate behavior for Outland would have apparently been to remain quiet, even if he felt he was being targeted.

Proceeding on to MSP’s mixed motive defense, however, the hearing officer then states in contrast:

MSP management’s primary consideration was that Outland-as an employee who they perceived was intentionally disregarding the chain of command...[and] had a poor attitude-be terminated while MSP could still do so without cause under the CBA during his probationary period. While it is true that Outland was not creating “unnecessary drama” in a vacuum from his complaints of discrimination, it does not change the fact of his situation. Outland was a probationary employee and MSP could terminate him at any time, without cause under the CBA”

¹ In circumstantial cases, where the charging party necessarily proved that any proposed legitimate, nondiscriminatory reason for the challenged action offered by the respondent is a pretext for unlawful discrimination, ARM 24.9.610(4), the action necessarily would not have been taken in absence of the discrimination.

Those two statements characterize the very same facts and actions by MSP as both a pretext for discrimination and as an action that would be taken in absence of discrimination. It was legal error for the hearing officer to determine Outland succeeded in proving MSP's reasons for terminating him were pretextual, then also determine those same reasons were legitimate for purposes of determining damages. To apply the mixed motive defense to the exact same facts and come up with two different conclusions regarding those same facts is error as a matter of law. MSP did not cross appeal the hearing officer's determination that Outland met his burden to prove pretext. Therefore, Outland proved his case and the hearing officer should have awarded damages on the claims regarding the termination.

Outland next asserts the hearing officer erred on his claims regarding the probation extension. The hearing officer determined the claims regarding the probation extension were direct evidence claims, which neither party appealed. As detailed above, in a direct evidence case, after the charging party makes a prima facie case, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. The hearing officer found Outland made a prima facia case that his probation extension was based on direct evidence of discrimination because his probation was unilaterally extended "tied to his disability." Then the hearing officer stated on page 26, the only dispute [regarding the probation] concerned whether MSP's motive in extending Outland's probation was unlawful. The hearing officer found that "Outland's light duty status was the result of his disability, and was inseparable from that disability," and "but for his disability which prevented him from performing the job of a correctional officer, he was able to perform the job. [P. 27-28.] As a result, the hearing officer concluded that when MSP extend Outland's probation based on the light duty assignment, it discriminated against him by "treating him differently than other, non-disabled employees." [P. 28.]

The hearing officer then analyzed damages and applied the mixed motive analysis to the probation extension, concluding the same action would have been taken in absence of the illegal discrimination or retaliation. The Commission determines this analysis was incorrect as a matter of law. Although the mixed motive defense properly applies in a direct evidence case, it was legal error for the hearing officer to determine the probation extension would have been taken *in absence of* the unlawful discrimination when the only reason given for it was Outland's disability. Although the hearing officer concluded that "all indications are that anyone who was in a light duty position while on probation would have had their probation extended," the hearing officer held that *Outland's* light duty assignment was the result of his disability and constituted unlawful discrimination. [P. 28.] Therefore, the mixed motive defense was applied incorrectly as a matter of law to the probation extension claims because the facts the hearing office concluded failed to prove MSP had no unlawful motive were found to be legitimate business reasons in the damages analysis. Again, MSP did not cross appeal the hearing officer's determination that the probation extension was discriminatory and retaliatory.

ORDER

IT IS HEREBY ORDERED, conclusion of law number 5 is STRUCK.

IT IS FURTHER ORDERED, this case is REMANDED to the Office of Administrative Hearings for a damage reward determination in favor of the Appellant Outland on the discrimination and retaliation claims due to the probation extension and the termination.

DATED this 15th day of October 2019.



Timothy A. Tatarka, 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 15th day of October 2019.

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