

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

KEITH BLOUNT,
Charging Party/Appellant,

HRB CASE NO.0170482

REMAND ORDER

-v-

MONTANA STATE LIBRARY,
Respondent/Appellee.

Charging Party Keith Blount (Blount) filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of age against his former employer, Respondent Montana State Library (MSL). Following an informal investigation, the Department determined that reasonable cause supported Blount's allegations. The case went before the Department's Office of Administrative Hearings for contested case proceedings pursuant to Mont. Code Ann. § 49-2-505. The Hearing Officer issued a decision (HOD) on July 3, 2019, holding that discrimination did not occur and dismissing Blount's claim.

Blount filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on November 15, 2019. Scott Peterson, attorney, appeared and presented oral argument on behalf of Blount. Katherine Orr, attorney, appeared and presented oral argument on behalf of MSL.

STANDARDS OF REVIEW

Conclusions of law and interpretations of statutes and administrative rules are reviewed for correctness. Admin. R. Mont. 24.9.123(4)(a). The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the Hearing Officer's decision. 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 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).

BACKGROUND

Blount began working for the State of Montana as a Geographic Information Systems (GIS) Analyst under the Montana Department of Administration in 2002. Blount worked to develop and maintain the State’s cadastral parcel database, a popular online service. The Department of Administration merged certain services with MSL in 2011, and Blount and other GIS Analysts became employees of MSL.

In 2017, the Montana Legislature cut nearly one million dollars from MSL’s operating budget in House Bill 2, the General Appropriations Act (HB 2), and Senate Bill 261 (SB 261), a companion appropriations bill that specifically cut funding from MSL. Due to the cuts, MSL determined that a Reduction in Force (RIF) was necessary. The RIF resulted in the loss of 12 positions, ten of which were staffed at the time of the RIF.

Based on the State of Montana’s RIF Policy, MSL terminated Blount. Blount was 63 years old at the time of the RIF. Two other GIS analysts were also terminated in the RIF –

Duane Lund, who was then 58 years old and Diane Papineau, who was then 56 years old. MSL retained GIS Analysts Maya Daurio, who was then 39 years old, and Meghan Burns, who was then 37 years old.

Blount filed a complaint of discrimination based on age with the Department. After an informal investigation and proceedings in front of the Office of Administrative Hearings, the Hearing Officer held that Blount established a prima facie case of discrimination based on age, HOD, p. 21; however, MSL provided legitimate, nondiscriminatory reasons for his termination, HOD, p. 23. The Hearing Officer held that Blount was unable to prove that the reasons provided by MSL were pretext for discrimination. HOD, pp. 23-37.

DISCUSSION

Were the Hearing Officer's conclusions of law correct?

It is unlawful for an employer to discriminate against an employee in a term, condition, or privilege of employment on the basis of age. Mont. Code Ann. § 49-2-303(1). Terms, conditions, or privileges of employment include discharge or termination of employment. Admin. R. Mont. 24.9.604(2).

To prove a prima facie case of age discrimination, a plaintiff must prove that (1) that he is in a protected class based on age; (2) that he performed his job in a satisfactory manner; (3) that he was discharged; and (4) that he was replaced by a substantially younger worker. *Clark v. Eagle Sys.*, 279 Mont. 279, 286, 927 P.2d 995, 999 (1996). Once a plaintiff proves a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action. *Heiat v. E. Mont. Coll.*, 275 Mont. 322, 912 P.2d 787, 791 (1996) (citing *Texas Dep't of Community Affairs v.*

Burdine, 450 U.S. 248, 252-53 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973))).

If a defendant articulates a legitimate, nondiscriminatory reason for their employment decision, the plaintiff then has “an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Heiat*, 912 P.2d at 791 (citing *Burdine*, 450 U.S. at 253). A plaintiff can prove pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Heiat*, 912 P.2d at 792 (citing *Burdine*, 450 U.S. at 256). When considering the plaintiff’s claim of pretext for discrimination, the “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Burdine*, 450 U.S. at 253.

In this case, it is undisputed that Blount established a prima facie case of discrimination based on age and that the Library gave legitimate, nondiscriminatory reasons for their RIF decisions. On appeal to the Commission, Blount argues the Hearing Officer erred by not considering the statistical evidence along with the other evidence to determine if Blount proved pretext. Blount’s evidence showed that the average age of MSL’s 42 employees before the RIF was 49.2 years old, while the average age of employees terminated in the RIF was 56.78 years old, and the average age of employees retained after the RIF was 46.93 years old. HOD, p. 19, ¶¶ 102, 107. Blount argues that dismissing this evidence based on the small number of employees will render such comparative evidence useless in Montana because the majority of businesses in Montana are considered “small” by the Hearing Officer’s cited standard. MSL

argues that the Hearing Officer properly weighed and considered Blount’s statistical evidence based on the applicable law.

The Hearing Officer held that “[t]he value of statistical evidence relied upon by Blount is lessened due to the small sample size used. Such evidence does not show that the reasons offered by MSL for Blount’s layoff was pretext for discrimination.” HOD, p. 28. After careful consideration of the complete record and the argument presented by the parties, the Commission concludes the Hearing Officer erred as a matter of law by considering and rejecting Blount’s statistical evidence in isolation and by failing to consider the evidence in combination with the other evidence to determine its impact on the determination of pretext.

ORDER

IT IS HEREBY ORDERED, that the Hearing Officer decision is REVERSED and REMANDED to the Office of Administrative Hearings for further proceedings consistent with this Opinion.

DATED this 29th day of January 2020.



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 29th day of January 2020.

Scott Peterson
Robert Farris Olsen
Morrison, Sherwood, Wilson & Deola, PLLP
P.O. Box 557
Helena, MT 59624

Jeffrey Doud
Katherine Orr
Assistant Attorney General
Agency Legal Services Bureau
P.O. Box 201440
Helena, MT 59620-1440



Annah Howard, Legal Secretary
Montana Human Rights Bureau