

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 765-2020:

MICHELLE RASLACK,)	
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
GOURMET GALS,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Charging Party Michelle Raslack brought this complaint alleging Respondent Gourmet Gals discriminated against her on the basis of disability by discharging her due to her dyslexia in June 2019.

On April 21, 2020, Hearing Officer Caroline A. Holien issued a Notice of Intent to Enter Default based upon the failure of Gourmet Gals to abide by the orders of the Hearing Officer and to maintain contact with the Office of Administrative Hearings. Gourmet Gals was ordered to respond to the notice no later than May 1, 2020. After Gourmet Gals failed to timely respond, the Hearing Officer issued an order entering default on the issue of liability on May 15, 2020. The only issue left for hearing was what damages, if any, Raslack is entitled to as a result of the discrimination she suffered due to the termination of her employment for discriminatory reasons.

On August 31, 2020, the Hearing Officer attempted to convene a hearing via Zoom. Due to technical difficulties, the Hearing Officer ultimately conducted the hearing via telephone. The Hearing Officer tried calling Gourmet Gals at the telephone number of record. Unable to leave a message, the Hearing Officer proceeded to call Michelle Raslack and her witness, Jamie Parker. Raslack agreed to proceed by telephone. Raslack's Exhibits 1 through 12 and Exhibit A, which

included the damage worksheet Raslack submitted with her preliminary prehearing statement, were admitted. Exhibits 3, 4, 5B, and 6B were redacted to remove personal and/or confidential information. At hearing, Raslack and Parker testified under oath.

Raslack declined to submit post-hearing briefing. Based on the evidence adduced at hearing, the following hearing officer decision is rendered.

II. ISSUE

What harm, if any, did Michelle Raslack, suffer as a result of the discrimination she suffered when Gourmet Gals discharged her due to her dyslexia. If Gourmet Gals was harmed, what reasonable measures should the department order to rectify such harm and to correct and prevent similar discriminatory practices?

III. FINDING OF FACT

1. Gourmet Gals, a catering company and retail store located in Big Sky, Montana, is owned and operated by Nancy Butler. Butler hired Michelle Raslack in March 2019 to assist her in preparing for and working catering events and working at the retail store. Raslack worked an average of 40 hours per week, with an hourly wage of \$15.00.

2. Raslack and Butler had a generally good working relationship throughout the majority of Raslack's employment. Raslack considered Butler a friend and enjoyed socializing with Butler.

3. Raslack informed Butler that she had dyslexia and struggled, at times, with reading, writing, and math.

4. Raslack lived with her friend, Jamie Parker and Parker's husband, in Big Sky. Parker's husband learned in June 2019 that his employer was transferring him to Salt Lake City, Utah. Raslack was undecided at that time if she wanted to remain in Big Sky or relocate to Salt Lake City with the Parkers.

5. Parker's son worked with a young woman who informed Butler that the Parker family, and presumably Raslack, were planning to leave Big Sky. Butler confronted Raslack, who told Butler that she had not yet decided if she was going to leave Big Sky. Raslack promised Butler that she would provide her ample notice if and when she decided to leave Big Sky.

6. Butler and Raslack's relationship became increasingly strained. Butler began insulting Raslack's intelligence and questioning her competency to do her job, citing Raslack's dyslexia. Raslack became increasingly more despondent as a result of Butler's treatment.

7. On June 19, 2020, Raslack was working at a local farmer's market on behalf of Butler. Raslack had difficulty adding a customer's purchase in her head. Raslack also made mistakes when writing information on a black board used at the stand. Butler was harsh in her criticism of Raslack's performance and sent Raslack home before the scheduled end of her shift.

8. On June 20, 2020, Raslack sent a text message to Butler asking if she should come into work that day. Butler told Raslack that she had "some pretty severe disabilities when it comes to literacy and numbers." Ex. 11. Raslack responded by reminding Butler that she had told her of her dyslexia at the beginning of her employment. Butler replied that it was not a "perfect fit" for either party and wished Raslack well. *Id.*

9. Raslack had not received any warnings that her performance was unacceptable or that Butler was displeased with her as an employee. Butler, at no time prior to the text message exchange on June 20, 2020, informed Raslack that her performance was unsatisfactory or her continued employment with Gourmet Gals was in jeopardy.

10. Butler discharged Raslack due to her dyslexia. Butler discriminated against Raslack on the basis of Raslack's disability.

11. Raslack became more and more concerned about running into Butler in public or at social occasions due to comments Butler made about not wanting Raslack to contact her or the business anymore. Raslack perceived Butler's comments as threatening and avoided community events and social gatherings where she could possibly encounter Butler.

12. Raslack decided to leave Big Sky due to her anxiety about running into Butler. Raslack did not attempt to find work in Big Sky due to it being a small community and the apparent sway Butler had in the community due to her prominence in the community. On or about September 6, 2019, Raslack moved to Salt Lake City, where she lived with her friend for approximately one month prior to moving to her own apartment on October 1, 2019.

13. On October 2, 2019, Raslack began working full-time for a hotel in its special events department in Salt Lake City. Raslack earned an average of \$22.00 per hour, including tips. Raslack's wages fluctuate based upon the number of special events hosted at the hotel.

14. Butler's insults and comments regarding Raslack's dyslexia caused Raslack to become increasingly depressed and anxious. Raslack was sad and frustrated by the way Butler discharged her and the suggestion she was discharged due to her dyslexia. Raslack has struggled with dyslexia throughout much of her life and has experienced feelings of sadness, frustration and anxiety as a result. Butler's behavior toward Raslack and manner of discharging Raslack exacerbated those issues and caused Raslack to seek out counseling.

15. Raslack's subsequent employer laid her off due to COVID-19 restrictions in late-March 2020. Raslack decided to seek counseling at that time, because she now had time to address the issues related to her separation from Gourmet Gals. Raslack's cost for her weekly counseling session is \$15.00. Raslack anticipates continuing with her weekly counseling sessions into the near future.

16. If Butler had not discharged Raslack for discriminatory reasons, Raslack would not have left Big Sky, and she would have continued working for Gourmet Gals an average of eight hours per day. There were 57 days between June 20, 2019, and September 6, 2019, when Raslack moved from Big Sky. Raslack would have earned \$6,840.00 in wages during that 57-day period (57 days x 8 hours x \$15.00).

17. Raslack typically worked two special events for Butler per month. Raslack typically earned \$300.00 in tips from those events. There would have been at least three special events during that 57-day period, and possibly more due to increased activity at the Yellowstone Club during that period. Raslack would have earned at least \$900.00 in tips during that 57-period.

18. Raslack's total lost wages for that period totals \$7,740.00 (\$6,840.00 + \$900.00). The interest on those lost wages is \$613.63, calculated at a rate of 6.25% per year¹. Raslack is entitled to \$8,353.63 in back pay, including interest on those lost wages through the date of this decision.

¹Mont. Code Ann. § 25-9-205(1)(a) provides that interest payable on judgments is equal to the rate for bank prime loans on the day the judgment was entered, plus 3%. As of August 5, 2019, the bank prime loan interest rate was 3.25%. Therefore, the interest rate for the judgment entered in this matter is 6.25%.

19. Raslack is not seeking front pay damages; nor is she entitled to front pay damages based upon her having secured similar employment shortly after relocating to Salt Lake City.

20. Raslack suffered emotional distress as a result of TSA's discriminatory actions. \$3,000.00 represents a reasonable amount of compensation for the discrimination she suffered based upon her having sought counseling that cost her \$15.00 per session. An award of \$3,000.00 would allow Raslack to continue counseling for approximately one year, while compensating her for any work she may have to miss in order to attend her counseling sessions.

21. Imposition of affirmative relief, which would require Gourmet Gals to engage an attorney with experience with the Montana Human Rights Act (MHRA) to review and/or prepare anti-discrimination policies and procedures to ensure Gourmet Gals does not discriminate in the future, is appropriate. Gourmet Gals shall provide a copy of those policies and procedures for approval no later than 90 days from the date of this decision. Gourmet Gals shall also be required to implement any changes mandated by the Montana Human Rights Bureau (MHRB).

IV. DISCUSSION

As a result of default having been entered against Gourmet Gals on the issue of whether it discriminated against Raslack in her employment on the basis of her disability (dyslexia), the only issue remaining is what damages, if any, she is entitled to receive as a result of the discriminatory conduct².

1. Back Pay

In employment discrimination, once the charging party has established that her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Berry*, 779 P.2d at 523-24. Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). To defeat this presumptive entitlement, the respondent must demonstrate by clear and

² The Ninth Circuit has recognized dyslexia and other learning disabilities as qualifying impairments under the ADA. See *Vinson v. Thomas*, 288 F.3d 1145, 1152 (9th Cir. 2002); *Wong v. Regents of Univ. of Calif.*, 410 F.3d 1052, 1069 (9th Cir. 2005). The Ninth Circuit has also held that reading is a major life activity. *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1061 (9th Cir. 2005).

convincing evidence that a lesser amount of back pay is due the charging party. *Id.*; *see also, Benjamin v. Anderson*, ¶62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay at the rate of 8.25% per year is also reasonable. *Berry*, 779 P.2d at 523.

The Charging Party has an affirmative duty to mitigate lost wages by “us[ing] reasonable diligence” to locate “substantially equivalent” employment, *see Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982), and a failure to mitigate damages can reduce or completely cancel out a back pay award. *See* 42 U.S.C. § 2000e-5(g) (“interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable”); *e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence). There is no offset for unemployment insurance benefits received against wage loss recovery resulting from illegal discrimination. *Vortex Fishing Sys. Inc. v. Foss*, ¶ 28, 2001 MT 312, 308 Mont. 3, 38 P.3d 836. *See also Kauffman v. Sidereal Corp.*, 695 F.2d 343, 347 (9th Cir. 1982), *quoting Nat’l Labor Rel’ns Bd. v. Gullett Gin Co.*, 340 U.S. 361 (1951).

The Respondent bears the burden of proving the Charging Party failed to mitigate his or her damages. *Cromwell v. Victor Sch. Dist. No. 7*, 2006 MT 171, ¶25, 333 Mont. 1, 140 P.3d 487. Gourmet Gals, if it had appeared for hearing, would be required to show “that, based on undisputed facts in the record, during the time in question there was substantially equivalent jobs available, which [Raslack] could have obtained, and that [Raslack] failed to use reasonable diligence in seeking one.” *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994). The reasonableness of mitigation efforts depends upon the particular circumstances of the plaintiff/claimant. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 684-85 (9th Cir. 1997).

Raslack testified she did not attempt to find similar work in Big Sky due to the community’s size and the relatively close knit nature of the community she was a part of, which included Butler. Given the nature of the catering business in a small, remote, affluent community, it makes sense that Raslack was reticent about seeking similar work in Big Sky. It would have been an impossible task to find work that did not require Raslack to engage with Butler or, at the very least, run into her while performing her job duties.

There has been no showing Raslack failed to mitigate her damages. Raslack has shown she would have worked approximately 57 days during the period of June 20, 2019 and September 8, 2019. At the time of her termination, Raslack worked an average of eight hours per day, with an hourly wage of \$15.00. Therefore,

Raslack has shown she is entitled to back pay damages in the amount of \$7,752.00 (57 days x 8 hours x \$15). Additionally, Raslack has shown she would have worked at least three special events during that same period but for Butler's discriminatory conduct. Raslack credibly testified she earned at least \$300.00 in tips when she worked a special event. Therefore, Raslack has shown she is entitled to an award of \$8,652 in back pay. Raslack is also entitled to \$613.63 in interest on the lost wages through the date of the date of the decision at the rate of 6.25% per annum, for a total of \$8,353.63.

2. Front Pay

Front pay compensates the Charging Party for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the plaintiff could return to her former position. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001). Future damages need only be reasonably certain and not absolutely certain, and of necessity are the subject of some degree of conjecture and speculation. *Kerr v. Gibson Products Co. of Bozeman, Inc.*, 226 Mont. 69, 74, 733 P.2d 1292, 1295.

Raslack is not seeking front pay damages. Raslack obtained suitable employment shortly after her move to Salt Lake City on or about September 6, 2019. Therefore, front pay is not appropriate in this case.

3. Emotional Distress

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994); *Vainio*, p. 16, fn. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828. Medical evidence is not required to establish emotional distress damages, and such damages may be established by testimony or inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991). "[N]o evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted." *Id.*

Vortex Fishing Syst. at ¶33, succinctly explains emotional distress awards:

For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the “broad remunerative purpose of the civil rights laws,” the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn. Transp. Auth.* (3d Cir.1994), 21 F.3d 29, 34; *see also Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden*, in many cases, “the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts.” 21 F.3d at 34 (quoting *Carey v. Phiphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, “the severity of the harm should govern the amount, not the availability, of recovery.” *Chatman*, 107 F.3d at 385.

The severity of the harm governs the amount of recovery. *Vortex Fishing Systems*, 2001 at ¶ 33. From a factual standpoint, the instant case is similar to *Vainio*. In that case the Montana Supreme Court found that an emotional distress award of \$20,000.00 was appropriate in a case where the plaintiff was subjected to conduct that “included, among other things, brushing his body against her buttocks, putting his hand up her skirt, grabbing her breasts, and requesting [the plaintiff] to have sex with him.” *Vainio*, 258 Mont. at 280-281.

The Montana Supreme Court affirmed a district court’s award of \$5,000.00 in emotional distress damages in *Beaver v. DNRC*, 2003 MT 287, ¶71, 318 Mont. 287, 78 P.3d 857. In *Beaver*, the plaintiff was subjected to a single incident of sexual assault by her supervisor outside of work prior to receiving a less desirable position. The court noted that Beaver did not have any further contact with the supervisor after the incident; the employer did not take inappropriate action against her; and her therapist reported she was unlikely to need further therapy related to the sexual assault and required no medication and was able to return to work. *Id.* at ¶88. The court found “the award of compensatory damages. . . [was] not so grossly out of proportion to Beaver’s injury as to shock the conscience.” *Id.* at ¶94. Factoring in the current rate of inflation of 1.4%, the current value of that award would be \$7,072.83. *See* <http://www.bls.gov/cpi>.

The credible evidence of record demonstrated Raslack suffered emotional distress as a result of Butler's discriminatory conduct. Raslack has sought therapy since late March 2020 as a result of the feelings of insecurity, hurt, and embarrassment related to her lifelong struggle with dyslexia that were exacerbated by the manner in which Butler discharged her in June 2019. Raslack testified she intends to continue in therapy at least once per week for the foreseeable future. Raslack's cost is \$15.00 per session.

After considering the severity of the issues experienced by Raslack as a result of Butler's discriminatory conduct, an award of \$3,000.00 for emotional distress is appropriate. Such an award would allow Raslack to seek the counseling she requires for approximately one year and to compensate her for any time she may be required to miss from work in order to attend her counseling sessions.

4. Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the Respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of any further violations of the MHRA. Mont. Code Ann. § 49-2-506(1).

Given the failure of Gourmet Gals to provide any evidence showing it has policies and procedures in place to prevent employment discrimination, it is appropriate it be required to seek the services of an attorney versed in human rights laws to review and/or draft policies and provide appropriate employee training to ensure that similar acts of discrimination do not occur in the future. Gourmet Gals shall submit these policies and procedures for review by MHRB no later than 90 days from the date of this decision. Further relief should also include injunctive relief against Gourmet Gals.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1).

2. Gourmet Gals illegally discriminated against Michelle Raslack by subjecting her to discrimination because of her disability (dyslexia).

3. Michelle Raslack is entitled to recover a total of \$8,353.63 in back pay due to the discriminatory conduct of Nancy Butler as owner of Gourmet Gals, which includes interest in the amount of \$613.63.

4. Michelle Raslack is entitled to recover \$3,000.00 for the emotional distress she suffered as a result of the illegal discrimination. Raslack is entitled to post judgment interest on that amount.

5. The circumstances of the discrimination in this case mandate the imposition of affirmative relief in order to eliminate the risk of future violations of the Montana Human Rights Act. Mont. Code Ann. § 49-2-506(1).

6. For purposes of Mont. Code Ann. § 49-2-505(8), Michelle Raslack is the prevailing party.

VI. ORDER

1. Judgment is granted in favor of Michelle Raslack and against Gourmet Gals. Gourmet Gals discriminated against Michelle Raslack in violation of the Montana Human Rights Act.

2. Within 90 days of the date of this decision, Gourmet Gals, shall pay to Michelle Raslack the sum of \$11,353.63, representing \$8,353.63 in back pay and \$3,000.00 in emotional distress damages.

3. The department permanently enjoins Gourmet Gals from discriminating against any person on the basis of disability.

4. Gourmet Gals must consult with an attorney with expertise in human rights law to ensure that its harassment policies and procedures are sufficient to identify, investigate and resolve employee complaints of discrimination. This review should also include training for its employees to prevent and timely remedy discrimination. Gourmet Gals shall provide this plan and policies to the Montana Human Rights Bureau for review no later than 90 days from the date of this decision. In addition, Gourmet Gals shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 25th day of November, 2020.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Michelle Raslack, Charging Party; and Gourmet Gals, 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) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505(4), 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 at (406) 444-4356 immediately to arrange for transcription of the record.