

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

KEITH BLOUNT,
Charging Party/Appellant,

HRB CASE NO. 0170482

-v-

FINAL AGENCY DECISION

MONTANA STATE LIBRARY,
Respondent/Appellee.

Charging Party, Keith Blount, filed a complaint on August 22, 2017, with the Department of Labor & Industry (Department), which alleged unlawful discrimination in employment on the basis of age by his former employer, Montana State Library (MSL). Following an informal investigation, the Department determined that reasonable cause supported Blount’s allegations. The case went before the Office of Administrative Hearings of the Department of Labor & Industry (OAH), which held a contested case hearing on August 16-17, 2018, pursuant to Mont. Code Ann. § 49-2-505. The *Hearing Officer’s Decision and Notice of Administrative Decision* issued on July 3, 2019.

Blount appealed to the Montana Human Rights Commission (Commission). The Commission heard the appeal on November 15, 2019, and remanded the case to the Hearing Officer after it concluded that “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.” *Commission Remand Order dated January 29, 2020.*

After proceedings before OAH on remand, the *Hearing Officer Decision on Remand dated December 30, 2020 (HOD on Remand)* entered judgment in favor of Montana State Library (MSL) and determined that discrimination did not occur.

Blount again appealed to the Commission. The Commission considered the matter on May 20, 2021. Scott Peterson, attorney, appeared and presented oral argument on behalf of Blount. Jeffrey M. Doud, attorney, appeared and presented oral argument on behalf of MSL.

STANDARDS 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). When determining whether findings are supported by substantial credible evidence, the evidence is viewed in the light most favorable to the prevailing party. *Welu v. Twin Hearts Smiling Horses, Inc.*, 2016 MT 347, ¶ 12, 386 P.3d 937.

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

MSL employed Blount as a Geographic Information Systems (GIS) Programmer/Analyst. House Bill 2 and Senate Bill 261 from the General Appropriations Act of 2017 cut nearly \$1 million from MSL's operating budget. As a result of the budget cuts, MSL eliminated several positions through a reduction in force (RIF). One of the positions eliminated was Blount's.

Blount filed a complaint with the Human Rights Bureau alleging that MSL selected him for the RIF based on age discrimination.

After the Department found reasonable cause to believe discrimination occurred, a contested case hearing was held before OAH on August 16-17, 2018. The Hearing Officer's Decision dated July 3, 2019 found in favor of MSL in all respects. *Hearing Officer's Decision and Notice of Administrative Decision*.

Blount appealed to the Commission which heard the appeal on November 15, 2019.

The Commission remanded the matter to OAH after it concluded that "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." *Remand Order dated January 29, 2020*.

On remand, the parties submitted proposed Findings of Fact and Conclusions of Law to the Hearing Officer. Subsequently, the *HOD on Remand dated December 30, 2020* determined that Blount failed to prove, under Mont. Code Ann. § 49-2-509(7), that the Montana State Library discriminated against him illegally because of age.

On January 4, 2021, Blount filed the instant appeal of the *HOD on Remand* to the Commission.

DISCUSSION

I. Discrimination

The Hearing Officer found that Blount failed to prove that MSL discriminated against him because of age under Mont. Code Ann. § 49-2-509(7). *HOD on Remand*, pgs. 43-44. Given the severe budget cuts and the resulting merger of some MSL programs and concurrent reduction of services, the business reasons articulated by MSL for laying off Blount did not lead to an inference of intentional discrimination. *Id.*

Before the Commission, Blount argues that the Hearing Officer's finding of no age discrimination was clearly erroneous. The Hearing Officer ignored foundational principles of discrimination in that she failed to undertake a searching inquiry to assess MSL's motives. She also ignored the Commission's Order requiring her to consider Blount's comparative evidence in totality, rather than in isolation, to ascertain whether the MSL's actions were discriminatory. Blount contended that the Hearing Officer also erred with respect to five separate pieces of evidence; no one piece of evidence is definitive, but the combination of evidence points to age as a factor in Blount's RIF and that MSL's stated reasons for the RIF are pretextual.

Blount argues that his contention that he was fired because of his age (63) is supported by the fact that MSL retained younger employees who were less skilled than he was. Blount also contends that MSL tried to paint him as just a Cadastral specialist when he was the best analyst for all land-related issues. He urged the Commission to reverse the Hearing Officer's Decision finding no discrimination, remand the case for further consideration, and order that a new Hearing Officer be assigned on remand.

MSL responded that the Commission should adopt the *HOD on Remand* as its Final Agency Decision because the findings of fact are supported by substantial, credible evidence, and the conclusions of law are not clearly erroneous. MSL has consistently articulated a RIF decision-making process that was based upon the individual skills of its GIS analysts. Due to budget cuts, it had to lay off workers in Blount's work unit while maintaining as many programs as possible. Blount's knowledge, skills, and abilities were not as diverse as the retained employees. The Hearing Officer correctly determined that MSL had a reasonable job-related basis for its decision to execute a RIF for Blount. He failed to carry his burden of proving that MSL's proffered basis was pretextual.

Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or

privilege of employment because of age commits an unlawful discriminatory practice. Terms, conditions or privileges of employment include hiring, promotion, upgrading, transfer, discharge, termination of employment; rates of pay and changes in compensation; job assignments, job classifications, position descriptions, and selection and support for training. Admin. R. Mont. 24.9.604(2).

Unlawful employment discrimination conduct may include:

(a) denying, qualifying or limiting a term, condition or privilege of employment because of a person's membership in a protected class;

...

(g) classifying a person in a way that adversely affects employment status or opportunities because of a person's membership in a protected class; and

(h) using standards, criteria or methods of administering or managing employment opportunities which discriminates in the terms and conditions of employment because of membership in a protected class.

Admin. R. Mont. 24.9.604(3).

In cases such as this, where no direct evidence of discrimination exists, the legal standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996). See also, *Hagans v. Andrus*, 651 F.2d 622, 624-625 (9th Cir. 1981)(*McDonnell Douglas* analysis must be adapted to the facts of each case.)

In *McDonnell Douglas*, the U.S. Supreme Court articulated a 3-tier burden-shifting analysis which described the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the charging party has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the charging party successfully proves a prima facie case, the burden shifts to the respondent "to articulate some legitimate, non-discriminatory reason" for the employer's action. Third, if respondent successfully meets this burden, then charging party must prove that the stated

legitimate reasons offered by respondent were pretextual. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981).

“To establish pretext, a plaintiff must demonstrate that the proffered reason: 1) has no basis in fact; 2) did not actually motivate the employer’s challenged conduct; or 3) was insufficient to warrant the challenged conduct.” *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000).

The standard of review requires the Commissioners to view the evidence in the light most favorable to the prevailing party, *Welu*, 2016 MT 347, ¶ 12. After careful consideration of the complete record and the argument presented by the parties, the Commission concluded that the Hearing Officer’s finding of no discrimination is supported by substantial, competent evidence, and that the conclusions of law were correct.

ORDER

IT IS HEREBY ORDERED that the hearing officer decision is AFFIRMED IN ITS ENTIRETY.

Either party may petition the district court for judicial review of the Final Agency Decision. 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. § 2-4-702(2).

DATED this 24th day of June 2021.

/s/ Debra Broadbent
Debra Broadbent, Acting 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 24th day of June 2021.

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

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



Annah Howard, Legal Secretary
Montana Human Rights Bureau