BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0081013311:

PAUL DUNCAN,	)	Case No. 1973-2009
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
MONTANA DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Paul Duncan filed a complaint with the Montana Department of Labor and Industry (the department) on August 19, 2008. He alleged that the Montana Department of Revenue (MDR), discriminated against him because of age when it denied him full credit for his prior employment experience for "Individual Band Placement" (IBP) as an employee of MDR.

The department's Human Rights Bureau investigated Duncan's complaint and issued a no cause finding and notice of dismissal. Duncan timely objected to dismissal. The Montana Human Rights Commission sustained his objection and remanded the complaint for an administrative contested case hearing by the department. On June 4, 2009, the department issued a notice of contested case hearing and appointed Terry Spear to hear this case.

The contested case hearing was held on September 29, 2009, in Helena, Montana. Duncan participated by speaker phone, and acted on his own behalf. MDR participated in person, through its designated representative, JeanAnn Scheuer, MDR Human Resources Director, with MDR's counsel, C. A. Daw, Chief Legal Counsel of MDR and Special Assistant Attorney General.

Duncan testified under oath on his own behalf.

MDR called Tom Bivins, Field Representative, Montana Public Employees Assn. (MPEA), Tom Burgess, Field Consultant, Montana Educ. Assn. (MEA-MFT), Eugene Walborn, Administrator, MDR Business & Income Taxes Division, Arlyn Plowman, Labor Negotiator, State Human Resources Division, Montana Department of Administration (MDA) and JeanAnn Scheuer, all of whom testified in person under oath. Exhibits 1-3 and 101-103 were admitted into evidence.

On November 2, 2009, the Hearings Bureau received the last post-hearing filing and the matter was deemed submitted for decision. A copy of the hearing officer's docket accompanies this decision.

II. Issues

The determinative issue is whether MDR discriminated against Duncan in employment because of his age by capping his IBP. A full statement of the issues appears in the amended final prehearing order.

III. Findings of Fact

1. Duncan's date of birth is 12/21/1948. MDR hired him and he began his employment as an individual income tax Field Auditor in October 2005. His relevant previous employment included 42 months of directly related audit experience and 199 months of occupationally related work experience.

2. MDR entered into a Collective Bargaining Agreement (CBA) with Local 4993 of MPEA (Duncan's union) in July 2007. The CBA, including Addendum A, states that "Individual Band Placement (IBP) between entry and market will be determined by the employee's relevant experience in accordance with Section 5", and "This addendum represents the parties' complete agreement concerning the placement, adjustment and progression of bargaining unit employees' pay under the broadband pay plan prescribed under Section 2-18-303, MCA."

3. In 2007, MDR made the transition from the Pay Plan 60 to Pay Plan 20 for compensation of its employees. Pay Plan 20 contains nine separate pay bands and within each band are five individual levels (IBP 1 through IBP 5). An employee's IBP determines their starting compensation. A new hire's placement in a particular IBP is not fixed in perpetuity. Employees can move through IBP levels each year as they gain additional seniority and demonstrate sufficient aptitude in job performance. IBP increases are whole number increases, not fractions or decimals; for instance, there is no IBP 3.50. Pay Plan 20 has much more flexibility, both in assigning initial individual placement levels and in subsequent pay changes, than exists in Pay Plan 60.

4. Based upon Duncan's employment experience, MDR calculated Duncan's compensation-placement level in Pay Plan 20 at Level 5, but placed him at Level 3 as a result of IBP "capping." MDR limits IBP placement to Band 3 for initial placements. Several state agencies have adopted similar policies without opposition from their unions (typically the same union that represents Duncan).

5. IBP "capping" has a statistically disparate impact on older "new hires." Older workers typically have longer work histories (***i.e.***, more work experience over their working lives), and thus are more likely to be subjected to the "cap," to their detriment.

6. There is no specific training program outside of state government for state tax auditor work. There is no precise equivalent position to a state tax auditor outside of state government. State tax auditors are not fully productive on initial hire, and require initial training. This is a legitimate business reason to limit ("cap") the amount of credit available to new hires, in this position and others.

7. Despite the greater flexibility available in Pay Plan 20, pay changes after initial placement start from that initial placement, and thus continue to impact pay levels through each employee's career. The effect of "capping" on the salaries of employees with greater related experience prior to hire is to protect the seniority of employees already working for the employer. Given the strong union representation of a significant number of state employees, in MDR and other agencies, this seniority protection provides another legitimate business reason for the "capping."

8. Upon learning of his IBP "capping," Duncan timely filed this complaint of age discrimination.

9. MPEA and other unions representing state workers have agreed with the transition of a number of state agencies, including MDR, from Pay Plan 60 to Pay Plan 20. The evidence in this case did not establish that MPEA, in the context of MDR's transition to Pay Plan 20, bargained for the "cap" or that the "cap" was included in the applicable MDR CBA.

10. There is no evidence that MDR developed and adopted its "capping" procedure out of discriminatory animus toward older workers, nor that MDR applied the "cap" to Duncan's IBP placement out of such animus.

IV. Opinion[1]

Montana law prohibits discrimination in employment because of age. Mont. Code Ann. § 49-2-303(1)(a).[2] In the absence of direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. ***E.g.***, *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029; *Martinez v. Yellowstone Co. Welf. Dept.* (1981), 192

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[1] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

[2] Both parties have cited the Human Rights Act, rather than the Governmental Code of Fair Practices Act. Resort to the latter Act would not change the outcome or the analysis.

Mont. 42, 626 P.2d 242. There being no direct evidence of discrimination, this is the applicable standard.[3]

The first tier of *McDonnell Douglas* required Duncan to prove a prima facie case with evidence of four elements, which are flexible and should be fitted to the allegations and proof of the particular case. *Martinez* ***at*** 626 P.2d 246, ***citing*** *Crawford v. West. Elec. Co., Inc.* (5th Cir. 1980), 614 F.2d 1300. Duncan proved that he was older (over 40 when hired, over 50 when the action to which he objected was taken), that but for MDR's "capping" procedure to which he objects he would have qualified for a higher compensation-placement level, that he was assigned a lower compensation-placement level because of the "capping" procedure, and that the procedure had a disparate impact on older workers. He established all four elements of his prima facie case.Duncan's prima facie case under *McDonnell Douglas* raised an inference of discrimination at law. The burden shifted to MDR to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas* ***at*** 802. MDR's burden was to show, through competent evidence, that it had a legitimate nondiscriminatory reason for its "capping" procedure. *Crockett* ***at*** 817.

MDR had to meet this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56. A defendant thus only need raise a genuine issue of fact by clearly and specifically articulating a legitimate reason for the rejection of an applicant. *Johnson* ***at*** 212. In this case, the substantial and credible evidence of record established that MDR adopted its "capping" procedure for two legitimate, nondiscriminatory business reasons rather than out of illegal bias against older new hires. MDR's evidence indicated the necessity of training new hires, including new hires with extensive related outside experience, which decreased the value to MDR of their outside experience, a legitimate nondiscriminatory basis for "capping." Second, "capping" preserved the seniority of workers with longer histories of employment with the department, a second legitimate nondiscriminatory basis for it. The evidence of

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[3] MDR argued that a more exacting standard, with no burden-shifting, should be applied, in light of *Gross v. FBL Financial Services* (2009), 557 U.S. ___, 129 S. Ct. 2343, 174 L. Ed. 2d 119. Ultimately, Duncan was unable to prevail under the "softer" *McDonnell Douglas* standard, and therefore this is not the case in which to decide whether the newer standard created by the United States Supreme Court for ADEA cases applies under the Montana Human Rights Act.

record led the Hearing Officer to conclude that MDR was not motivated by any discriminatory animus toward older workers, and that although older new hires were more likely to suffer an averse impact from "capping," the legitimate and nondiscriminatory business reasons for the policy justified its adoption and use.

Once MDR produced legitimate reasons for development and use of the "capping" procedure, Duncan had the burden to prove that its reasons were in fact a pretext. *McDonnell Douglas* ***at*** 802; *Martinez* ***at*** 246. This third step in the analysis provided an opportunity for Duncan, the complaining party, to prove that the legitimate reasons given for the employer's failure to hire were a pretext for discrimination. To meet this third tier burden, Duncan could present either direct or indirect proof of the pretextual nature of MDR's reasons:

> [H]e may succeed in this 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.

Burdine ***at*** 256.

The Montana Supreme Court has characterized this third tier burden as requiring proof, by a preponderance of evidence, "that the reasons for adverse action offered by the defendant were not true, but, rather, a pretext for discrimination." *Ray v. Mont. Tech.*, ¶31, 2007 MT 21, 335 Mont. 367, 152 P.3d 122. The entirety of the evidence did not convince the Hearing Officer that either reason motivating MDR to create and apply its "capping" procedure was unworthy of credence.

MDR had also asserted that it was required to "cap" experience to comply with the terms of its CBA. MDR's failure to prove the truth of this justification could be a basis for distrusting its proof of the two nondiscriminatory legitimate business reasons it did prove. Legitimate reasons asserted but unproved (particularly if those reasons are abandoned part way through the process) can be a basis for finding pretext. *Holland v. Washington Homes, Inc.* (4th Cir. 2007), 487 F.3d 208, 217, n. 7; *Hernandez v. Hughes Missile Systems Co.* (9th Cir, 2004), 362 F.3d 564, 569; *Thurman v. Yellow Freight Sys., Inc.* (6th Cir. 1996), 90 F.3d 1160, 1167. The shifting justification permits the inference of pretext, but does not require it.

In the third tier of *McDonnell Douglas*, Duncan's burden to show pretext "now merges with the ultimate burden of persuading the court that [Duncan] has been the victim of . . . discrimination." *Johnson* ***at*** 213, (***citing*** *Burdine*). Duncan always had to carry that ultimate burden to persuade the fact-finder that MDR did illegally discriminate against him. *MRL v. Byard*, (1993), 260 Mont. 331, 860 P.2d 121, 129; *Crockett* ***at*** 818. MDR's failure to prove its third justification did not tip the scales so that, with all of the other evidence of record, the Hearing Officer decided that it was more likely than not that the two legitimate reasons MDR did show were either untrue or pretexts.

V. Conclusions of Law

11. The Department has jurisdiction over this case. §49-2-509(7) MCA.

12. The Montana Department of Revenue did not illegally discriminate in employment because of age against Paul Duncan as alleged in his complaint. Mont. Code Ann. § 49-2-303.

VI. Order

1. Judgment issues in favor of the Montana Department of Revenue and against Paul Duncan on his charges that MDR discriminated against him in employment because of age.

2. The Human Rights Act complaint of Paul Duncan against MDR is dismissed.

Dated: January 20, 2010

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Paul Duncan, charging party, and C. A. Daw, , attorney for Montana Department of Revenue:

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).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission, c/o Katherine Kountz
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 6 COPIES 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 Hearings Bureau, 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 Shawndelle Kurka, (406) 444-3870 immediately to arrange for transcription of the record.

DUNCAN.HOD.TSP