

September 14, 2015

Clarice Beck  
Human Rights Bureau  
Employment Relations Division  
Montana Dept. of Labor and Industry  
PO Box 1728  
Helena, MT 59624

**RE: Joshua Clark v. Missoula County, et al.**

Dear Clarice Beck,

**DAMAGES**

Clark offers to settle his claims and withdraw the enclosed filed complaint from the Human Rights Bureau for the sum of \$750,000.00. We base this demand on the following.

The Human Rights Bureau may award damages to Clark in any reasonable measure to rectify harm he suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P.W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); accord, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).

A charging party who has proved a human rights violation has a presumptive entitlement to an award of back pay. *Dolan*, supra. Back pay awards should redress the full economic injury the charging party suffered to date because of the unlawful conduct. *Rasimas v. Mich. Dpt. Ment. Health*, 714 F.2d 614, 626, (6th Cir. 1983). Back pay is computed from the date of the discriminatory act until the date of the final judgment. *EEOC v. Monarch Tool Co.*, 737 F.2d 1444, 1451-53 (6th Cir. 1980).

The charging party may also recover for losses in future earnings, if the evidence establishes that future losses are likely to result from the discriminatory acts. *Martinell*, op. cit. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a "rightful place" in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); see also, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2 628 (1993). Prejudgment interest on lost income is also a proper part of the damages award. *P.W. Berry*, op. cit., 779 P.2d at 523; *Foss v. J.B. Junk*, HR No. SE84-2345 (1987).

If Clark had not been forced out of the office, he planned to retire after five more years. In that time, accounting for annual increases of 2.5%, he would have earned \$383,581. See Table below.

LOST SALARY		
Year One	2015	\$73,000.00
Year Two	2016	\$74,695.00
Year Three	2017	\$76,695.00
Year Four	2018	\$78,613.00
Year Five	2019	\$80,578.00
		<b>\$383,581.00</b>

In *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836, the hearing examiner awarded the employee back pay, although the employee had also received unemployment compensation benefits for the same time period. The Court stated that “between the employer, whose actions caused the discharge, and the employee, who most likely suffered other noncompensable losses, the burden should be placed on the employer.” *Vortex Fishing*, ¶ 28. Likewise here, Clark will receive retirement for the next five years, “that benefit should accrue to him as the employee who was subjected to illegal discrimination, not the County, which perpetrated the illegal discriminatory act.” *McDonald v. Dep’t of Envtl. Quality*, 2009 MT 209, ¶ 97, 351 Mont. 243, 214 P.3d 749.

Clark was able to obtain part-time, fill in work as a security guard in the Federal building. His hours are limited and sporadic. For example he had no work the last two weeks, but may get up to 30 hours next week. He makes \$14/hour and started at \$8.05/hour. His company has contributed \$209.58 to a 401K. He has also been doing some labor work for an electrician on an “as need” basis. He makes \$20/hour for the electrician. Since retiring from the Sheriff’s office his total wages have totaled \$2,454.86 including his 401k.

In addition, early retirement has resulted in reduced pension payments. Had Clark retired after 2019, he would have been 50 years old at the time. If he lives as long as his father, he will receive pension payments for 25 years. His pension payments would have been \$12,000 greater per year - not accounting for annual increases - if he retired after 2019. Thus, his reduced pension payments amount to \$300,000.

Clark also lost benefits due to his forced retirement. He received benefits paid by the County that totaled \$19,054.80 per year. This amount may be outdated since it is what the County paid for Josh Clark in 2013. (See Benefit Status page attached.) Total amount paid by employer totals \$23,449.33. We subtracted Worker’s Comp since that would no longer apply. Clark has been damaged in the amount of \$95,274.00 for the 5 years he would have retained these benefits in the form of health insurance, had he not been forced to retire.

Clark also lost vacation, sick time and holiday pay that were in addition to his salary. At the time he retired he received 192 hours vacation per year, 96 hours of sick time per year, 132 hours paid holiday. That totals 420 hours pay at \$34.91/hour= \$14,662.20. Over 5 years this amount is \$73,311.00. Clark totaled \$766.57 in job expenses that were reimbursed plus mileage in the last year.

Clark also suffered emotional distress damages and was being treated for these damages by a physician. Emotional distress recovery is appropriate upon proof that Clark suffered emotional distress as a result of the proven illegal discrimination. *Campbell v. Choteau Bar and Steak House*, HRC#8901003828 (3/9/93). The standard of proof for emotional distress

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recovery in Human Rights Act cases does not require proof establishing that the distress is serious or severe. *Vortex Fishing Systems*, ¶¶ 31–34.

Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson*, op. cit. at 1193. “The severity of the harm should govern the amount, not the availability, of recovery.” *Chatman v. Slagle*, 107 F.3d 380, 385 (6th Cir. 1997), quoted in *Vortex Fishing Systems* at 841. This broader right of recovery under the Human Rights Act arises because the protected interests are not necessarily accorded the same protection by any branch of common law torts. *Bolden v. Southeastern Pennsylvania Trans. Auth.*, 21 F.3d 29, 34 (3rd Cir. 1994) (quoting *Carey*, op. cit. at note 44, at 258); quoted in *Vortex Fishing Systems* at 841.

In *Flanigan v. Prudential Federal Savings and Loan*, 221 Mont. 419, 720 P.2d 257 (1986), the Supreme Court affirmed an award of \$100,000.00 to a wrongfully fired employee for her emotional distress. Sheriff McDermott and Undersheriff Johnson both received \$60,000, even though neither one was subjected to a constructive discharge. There is every reason to believe that Clark will be awarded \$100,000.00 for his emotional distress.

Attorney fees are currently at \$24,000.00 for this matter.

Clark’s reasonably certain damages come to \$974,477.71 plus interest.

Clark would like to avoid a lengthy and tiresome effort of continued litigation. Therefore, Clark will compromise his claim and withdraw the Human Rights complaint for the sum of \$750,000.00. This offer is made to help everyone avoid the burden of a hearing and further litigation. An amicable resolution will obviously better serve all parties.

Sincerely,  
**RHOADES & SEIFERT, P.L.L.C.**

Nicole L. Siefert  
Quentin M. Rhoades

QMR/NLS/rar  
Encl. as stated  
c: County Attorney