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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1099-2021:

TUCKER LEWIS, Charging Party, vs. USA DeBUSK, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

On July 27, 2020, Charging Party Tucker Lewis (Lewis) filed a Charge of Discrimination with the Montana Department of Labor and Industry's Human Rights Bureau (HRB) alleging USA DeBusk (DeBusk) discriminated against him on the basis of an alleged disability after it discharged him from his employment following a seizure.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on September 15, 2021, in Billings, Montana. Attorney Eric Holm represented Lewis. Attorneys Jeffrey Weldon and Kyle Moen represented DeBusk. At the hearing, Lewis, Brian Black, and Michael Bell testified under oath. The parties stipulated to Joint Exhibits 1-11. Respondent's Exhibits 101-110 were admitted over Lewis' objection.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received.

On March 11, 2022, this matter was reassigned to Hearing Officer Jeffrey Doud following Hearing Officer Holien's departure from the Office of Administrative Hearings. On April 8, 2020, Hearing Officer Doud convened a conference with the parties to discuss whether either party objected to Hearing Officer Doud's assignment to this matter pursuant to Mont. Code Ann. § 2-4-622. Following the conference, both parties notified the Hearing Officer that they did not object to him rendering a decision in this matter.

Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

I. ISSUE

Whether DeBusk discriminated against Lewis on the basis of a disability, in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA, when it terminated his employment following a seizure and subsequent driving restriction.

II. FINDINGS OF FACT

1. DeBusk is a Texas limited liability company, operating and doing business in Yellowstone County, Montana. It is an industrial cleaning company that provides cleaning, vacuuming, hydro blasting, and other services. Hrg. Tr. 151.

2. DeBusk's Montana operation employs approximately 7-12 individuals. Hrg. Tr. 181-182.

3. In 2018, Lewis was hired by DeBusk as a technician. *Hrg. Tr.* 14:5-9.

4. Prior to being hired by DeBusk, Lewis had suffered a stroke in 2012. Hrg. Tr. 19:1-21:23.

5. After approximately 8 months of working as a technician, Lewis' duties transitioned to those of a septic truck driver. Hrg. Tr. 14:5-9.

6. As a septic truck driver, Lewis worked alone. He would drive around vacuuming out septic pits and then drive to Billings to dispose of the waste. Hrg. Tr. 16:19-24.

7. Once Lewis transitioned to a septic truck driver, he did not perform any duties of the other technicians, and the other technicians did not perform any duties as a septic truck driver. Hrg. Tr. 17:7-9.

8. The septic truck driver position required Lewis to drive, whereas when he was a technician he barely drove. Hrg. Tr. 17:13-19.

9. On April 30, 2020, Lewis suffered a seizure while driving home from work for the day. Lewis later learned that his seizure was a result of his stroke. *Hrg. Tr.* 24:8-20.

10. Mike Bell received phone calls from two of his employees stating that Lewis was stopped by the Metra, slumped over in his vehicle. Hrg. Tr. 186. Lewis' window had to be broken in order to put his vehicle in park and transport Lewis in an ambulance. Hrg. Tr. 186.

11. Lewis awoke in the hospital approximately three hours after his seizure. Hrg. Tr. 24-25. He informed his supervisor, Roel Rios, that same evening that he had a seizure. Hrg. Tr. 28. Lewis' seizure occurred on a Thursday, and Lewis' pre-determined schedule placed him off work the following Friday, Saturday, and Sunday. Hrg. Tr. 27.

12. Shortly thereafter, Lewis called Mike Bell to explain he was going to the doctor to further evaluate his condition. Hrg. Tr. 186-187. Mike Bell encouraged Lewis to visit the doctor and said, "All we need is a doctor release that you are good to go and you can come back in and keep doing what you're doing." Hrg. Tr. 187.

13. On May 1, 2020, Lewis sent a text message to Mike Bell, stating, "Just calling to let you know I have an appointment with the neurologist on Monday at 10 a.m. My re[l]ease paperwork since I can't drive until I get the all-clear from them." Mike Bell did not respond. *Ex. 8*.

14. Lewis provided DeBusk with a May 4, 2020, letter from his treating neurologist, Jeffrey Mosser, MD, that stated, "Mr. Lewis was seen in consultation today. He remains unable to drive or return to work pending the results of a [sic] EEG test." Ex. 1; Hrg. Tr. 30-32.

15. On May 13, 2020, Dr. Mosser provided another note to Lewis which stated that he could return to work and perform all his normal work duties, except for driving, until July 30, 2020. Ex. 2.

16. Lewis spoke with Mike Bell and requested a temporary reassignment to a light duty position until he could drive again. Hrg. Tr. 188. Mike Bell stated there were no light duty positions but said he would reach out to Black in HR to see what needed to be done. Hrg. Tr. 188.

17. During the first week of May 2020, Mike Bell called Black to advise that Bell had an employee with a medical condition who was unable to work due to restrictions. Mike Bell told Black he was aware of the incident with Lewis having a seizure and possessed the doctor's note indicating the restrictions. Hrg. Tr. 153.

18. Mike Bell and Black had a lengthy conversation regarding what positions were available that Lewis could perform. There was no light duty work

available. The work as a field technician would have required DeBusk to bump another employee from their position. They looked at having him work at another location outside of Billings, but, again, they determined that it would require DeBusk to bump someone from their job. Hrg. Tr. 167:4-24.

19. Since it could not offer him an accommodation that would allow him to work, Black determined that Lewis was eligible for leave under the Family and Medical Leave Act ("FMLA"). Hrg. Tr. 154:18-155:2.

20. To Black, FMLA is a job-protection law, under which an employee's job will be held available for 12 weeks. Hrg. Tr. 154, 157. Black understood that after an employee returns to work after 12 weeks of FMLA leave, his or her job or a reasonably similar job will remain available for that individual to resume work. Black explained the same thing to Mike Bell, and Mike Bell understood that, after FMLA leave, the employee would be returned to the same position and "pick up exactly where he left off." Hrg. Tr. 207.

21. On May 15, 2020, Lewis and Mike Bell met with Black on the phone. DeBusk offered Lewis FMLA leave. It was DeBusk's impression that Lewis was going to have his doctor complete the FMLA paperwork. Hrg. Tr. 156-57, 190. Mike Bell anticipated that Lewis would be on FMLA leave until July 30, 2020. Hrg. Tr. 207.

22. During that meeting, Lewis asked again if he could perform any light duty positions, and Mike Bell told him there was no light duty work. Hrg. Tr. 191.

23. At the May 15, 2020, meeting, Lewis was provided with a letter discussing DeBusk's FMLA policy which stated:

> It has come to our attention that you have an injury/illness that requires a leave from USA DeBusk LLC (Company). This letter outlines your options with respect to your employment with the company. You need to make some decisions, so please review this information carefully.
>
> The company will automatically pay you your accumulated vacation and sick time in the next regular paycheck. If your leave extends beyond accumulated vacation and sick time, you may be entitled under the Family and Medical Leave Act (FMLA) to a leave of absence from the company for up to twelve (12) weeks.
>
> Under the FMLA, an employee may be entitled to up to twelve weeks of unpaid, job protected leave for qualifying events related to the need for serious medical care once they have worked for the company for a year.

> In order to qualify for FMLA leave, you must have your health provider complete the enclosed paperwork, certifying your need for a medical leave, and return it to us as soon as possible. Once we receive the certification, you will be granted a FMLA leave, beginning on the first day you were absent from work and continuing until the date your doctor has indicated you can return to work, up to a maximum of 12 weeks. As noted above, you may be paid for part of this leave if you have accumulated vacation and sick time.
>
> If, at the end of the time specified by your doctor, you need additional time, please let us know. You will also need to have your physician submit a new certification, specifying when you will be able to return to work.
>
> If you return to work at the end of your approved FMLA leave, the company will return you to your current position or a reasonably equivalent position. You will be required to have a return to work physical; if, as a result of your illness, you will require any accommodations due to your illness or recovery, we will discuss those matters with you when you return.

Ex. 3.

24. Lewis stated he would think about DeBusk's FMLA leave offer. Hrg. Tr. 122.

25. When Lewis researched FMLA more, he discovered that it was unpaid leave and he would not be able to obtain unemployment benefits if he was on FMLA leave. Hrg. Tr. 122.

26. Lewis told DeBusk he was not going to take FMLA leave. Hrg. Tr. 123. Lewis spoke with Black about unemployment benefits. Hrg. Tr. 161-162. Lewis expressed that he wanted to file for unemployment benefits, and Black told Lewis he thought the employee had to be fit for duty to be eligible for unemployment, so that could be a potential issue for him getting unemployment benefits. Hrg. Tr. 161. Ultimately, Black told Lewis he thought Lewis should go ahead and file for unemployment. Hrg. Tr. 161, 173-174.

27. In approximately mid-May 2020, Lewis filed for unemployment benefits. Hrg. Tr. 39. He received approximately three weeks of unemployment benefits, after which his claims were denied. Hrg. Tr. 39-40.

28. At 3:46 p.m. on May 27, 2020, Lewis texted Respondent's Human Resources Representative, April Bell, "Hey I havnt [sic] been paid my vacation time yet. Do you [know] what's going on?" April Bell responded, "You have to bring that paperwork first. Because that is the requirement to be eligible for the FMLA." Lewis responded with a photo of Black's May 15, 2020, letter and stated in his text, "That's not what the letter from Brian Black says. Will pay me automatically my accrued vacation time. If the time off extends past that then FMLA." Ex. 9.

29. Mike Bell then called Lewis to discuss. Mike Bell had misunderstood the vacation payout issue and believed the vacation was not payable until the FMLA documentation was received. Once this was clarified, Mike Bell approved the payout of the remainder of Lewis' vacation time. Hrg. 195-196.

30. At 4:21 p.m. on May 27, 2020, Mike Bell texted Lewis, "Hey they are processing your vacation. When you come in tomorrow bring items that were issued to you in [sic]. We will keep them here at the office and reissue them to you when you return to work." Ex. 8. Mike Bell testified that, at this time, he still anticipated that Lewis would return to work after his restrictions lifted on July 30, 2020. He maintained Lewis' uniform, badge, and other items, anticipating Lewis would return. Hrg. Tr. 204-205. Mike Bell told Lewis in person that he would get the uniforms back after he returned to work. Hrg. Tr. 52.

31. On May 29, 2020, DeBusk completed a "Time Off Request Form," which stated that Lewis was requesting 40 hours of vacation on that date. The reason was, "Leaving for potential FMLA waiting for form to be filled out by doctor." The Request Form listed that Lewis had 80 available vacation hours and that 40 hours would be taken, leaving a balance of 40 hours. The Request was checked as "Approved" and was signed by Lewis and a manager. Ex. 4.

32. DeBusk paid Lewis for these 40 hours of vacation time used. Hrg. Tr. 44-45.

33. On June 4, 2020, Black emailed Lewis with an attached letter regarding the FMLA paperwork. The email body states:

> As stated in our previous communications, in order to be approved for FMLA, you must return the completed FMLA certification form to the company as soon as possible. If we don [sic] not receive the completed form by June 12, 2020, we will terminate your employment with USA DeBusk.

Ex. 5.

34. Black's letter attached to the email similarly stated:

> USA DeBusk LLC provided you with a letter dated May 15, 2020 explaining your rights under the Family [and] Medical Leave Act (FMLA) and requested that you have your doctor complete the certification that was attached to the letter and submit the form back to the company. In addition, there were follow up conversations with you, me and Mike Bell also requesting you to have the certification form completed and sent back to the company.
>
> As of the date of this letter, the company has not received your completed FMLA paperwork. If the company does not receive the completed paperwork from your doctor by June 12, 2020, the company will terminate your employment.

Ex. 5.

35. Lewis did not respond to Black's June 4, 2020 email. Hrg. Tr. 83:23-84:6.

36. Black testified that, at this time, DeBusk had not received Lewis' FMLA paperwork, Lewis was "unable to perform in his job duties based on the restrictions," and "we felt like we had no other alternative but to terminate his employment." Hrg. Tr. 165.

37. On June 12, 2020, DeBusk completed another "Time Off Request Form," which stated that Lewis was requesting 40 hours of vacation on that date. The reason was, "vacation payout." The Request Form listed that Lewis had 40 available hours and that 40 hours would be taken, leaving a vacation balance of zero hours. The Request was checked as "Approved" and signed by a manager. Ex. 6.

38. DeBusk paid Lewis for these 40 hours of vacation time used. Ex. 6; Hrg. Tr. 49-50.

39. By June 15, 2020, Lewis had not submitted any FMLA paperwork, and DeBusk considered that Lewis had simply been on "unpaid medical leave for 45 days." Hrg. Tr. 170.

40. On June 15, 2020, DeBusk terminated Lewis by letter from Human Resources Representative Shonda Jones, which stated:

> USA DeBusk LLC sent you a letter date [sic] June 4, 2020, requesting you to submit your Family [and] Medical Leave Act (FMLA) Certification that was sent you in a letter May 15, 2020 explaining your rights under the FMLA.
>
> In our letter of June 4, 2020, we stated that if we did not receive the required certification paperwork completed by your doctor by June 12, 2020, we would terminate your employment. As of the date of this letter, we have not received your required certification paperwork, therefore, effective June 15, 2020 your employment with USA DeBusk LLC is terminated.

Ex. 7.

41. Jones' letter was directed by Black. Hrg. Tr. 166.

42. Black explained the termination decision as that "we have a process. . . . and if an employee is not able to work because of a medical condition, you know, and we'll look at terminating their employment, or if we need to offer them an accommodation, like extended leave being the Family [and] Medical Leave Act. Hrg. Tr. 166.

43. Lewis was ultimately cleared to return to driving once his driving restriction expired on July 30, 2020. Hrg. Tr. 53, 58.

44. Lewis had only one other seizure in August, 2020, but was apparently not placed on any further driving restrictions by his doctor. Hrg. Tr. 89:14-16.

45. Lewis did not have any other driving restriction after July 30, 2020. Hrg. Tr. 87:17-20.

46. Lewis was fully able to drive, would have been able to do his former position, and had no restrictions on his activities after July 30, 2020.

III. DISCUSSION[1]

The Montana Human Rights Act (MHRA) prohibits discrimination against employees on the basis of a physical or mental disability. Mont. Code Ann. § 49-2-

[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.

303(1)(a). To recover under the MHRA, Lewis is first required to prove that he belongs to a protected class. *Reeves v. Dairy Queen*, 1998 MT 13, ¶¶ 10-19, 287 Mont. 196, 953 P.2d 703. To qualify as a member of a protected class under the MHRA on the basis of a physical or mental disability, Lewis must show that he has "(i) a physical or mental impairment that substantially limits one or more of a person's major life activities; (ii) a record of such an impairment; or (iii) a condition regarded as such an impairment." Mont. Code Ann. § 49-2-101(19)(a). The determination of whether a person is disabled must be made on a case-by-case basis. *Reeves*, ¶¶ 23-28. Montana courts rely on applicable federal law in addition to its own in construing Montana's discrimination laws. *BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 9, 365 Mont. 359, 281 P.3d 225.

Under the first subsection of the definition of physical or mental impairment, Lewis must prove that a physical or mental impairment "substantially limits one or more of Lewis' major life activities." Mont. Code Ann. § 49-2-101(19)(a)(i). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, writing, and mobility." *McDonald v. Dept. of Env. Quality*, 2009 MT 209, ¶ 39, 351 Mont. 243, 214 P.3d 749; Admin. R. Mont. 2.21.1427(2). Work is identified as a major life activity. *McDonald*, ¶ 39 (citing Admin. R. Mont. 2.21.1427(2); 29 C.F.R. § 1630.2(i)). To qualify as substantially limited in the major life activity of work, a person must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." *Butterfield v. Sidney Pub. Schs.*, 2001 MT 177, ¶ 21, 306 Mont. 179, 32 P.3d 1243; 29 C.F.R. at § 1630.2(j)(ii). The term "substantially limits," lists three factors to consider in determining whether an individual is substantially limited in a major life activity: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (citing 29 C.F.R. § 1630.2(j)).

A person with a physical or mental disability is qualified to hold an employment position "if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical or mental disability." Admin. R. Mont. 24.9.606(2). Accordingly, an employer has a duty to provide a reasonable accommodation to a person with a physical or mental disability if, with such accommodation, the person could perform the job's essential functions. *Pannoni v. Board of Trustees*, 2004 MT 130, ¶ 27, 321 Mont. 311, 90 P.3d 438. This duty to make reasonable accommodations is an essential part of Montana's antidiscrimination statutes. *Hafner v. Conoco, Inc.*, 1999 MT 68, ¶ 36, 293 Mont.

542, 977 P.2d 330. An accommodation that would require an undue hardship is not a reasonable accommodation. Mont. Code Ann. § 49-2-101(19)(b).

Conversely, if a person is unable to perform the essential job functions, even with a reasonable accommodation, he or she is not a qualified person. The claimant carries the burden of proving that he or she can perform the essential job functions for a position in order to establish he or she is a qualified person. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 328-29, 912 P.2d 787, 791-92.

Should the plaintiff carry his initial burden, the burden then shifts to the defendant to proffer a legitimate, non-discriminatory reason for its action. If satisfied, the burden shifts once again to the plaintiff to rebut the justification given by the defendant by demonstrating that the justification given was merely a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Lewis' claim will be analyzed under this burden shifting approach.

A. Lewis Failed to Establish That He Had a Disability

Lewis failed to establish he met the first prong of his case under the MHRA because he has failed to establish, by a preponderance of the evidence, that his seizure condition constituted a disability. Lewis failed to establish that he suffered from a disability for two primary reasons: 1) Lewis' temporary seizure condition was not of a sufficient duration or intensity to constitute a disability; and 2) Lewis' impairment did not substantially limit his major life activity of work.

1. <u>Lewis' temporary seizure condition was not of a sufficient duration or intensity to constitute a disability</u>

Lewis' temporary seizure condition does not constitute a disability because it was short-term with little to no long-term residual effects. As stated above, the three factors used when determining whether an impairment substantially limits a claimant's major life activity are: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Sanders*, 91 F.3d at 1354 (citing 29 C.F.R. § 1630.2(j)). The appendix to the regulations states, "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza." 29 C.F.R. Part 1630 App., § 1630.2(j). Utilizing this authority, Lewis' condition does not constitute a disability because it

satisfies the three factors used in determining whether an impairment constitutes a disability.

Generally, courts have held that temporary conditions with minimal residual effects, such as Lewis', cannot be the basis for sustaining a claim under the ADA. See e.g. *Sanders*, 91 F.3d 1351 (holding that a temporary psychological impairment, from December 19, 1992 to April 5, 1993, with no residual effects after April 5, 1993, was not of sufficient duration to fall within the protections of the ADA as a disability); *Blanton v. Winston Printing Co.*, 868 F.Supp. 804, 808 (M.D.N.C. 1994) (holding that a temporary injury with minimal residual effects cannot be a basis for an ADA claim); *Rakestraw v. Carpenter Co.*, 898 F.Supp. 386, 390 (N.D. Miss.1995) (same); *Johnson v. Foulds, Inc.*, 1996 WL 41482 (N.D. Ill. 1996) (holding that temporary mental depression does not meet the requirements of a disability). Based upon the holdings of these cases, Lewis' temporary seizure condition does not satisfy the definition of disability either.

It is undisputed that Lewis' seizures lasted from April to August, 2020, which is the duration between his first and last seizure. Lewis testified, emphatically, that he has had no seizures since August 2020 and that he could perform the duties of his prior position with no problems. He testified that he had driven continuously once his restriction expired on July 30, 2020 with no further restrictions being ordered by his health care providers. Given the relatively short duration of his episodes, it is clear that this was a temporary condition, which has had minimal residual effects on Lewis.

Applying the appendix to the federal regulations 29 C.F.R. Part 1630 App., § 1630.2(j), as persuasive authority, Lewis' condition was a temporary, non-chronic impairment of short duration, with no long term or permanent impact. Since Lewis' condition was considerably less severe than those conditions examined in the aforementioned cases, and because those claimants' impairments were held to not constitute a disability, the Hearing Officer finds that Lewis' short-term, temporary condition with little to no long-term effects does not constitute a disability. Absent a disability, Lewis cannot maintain a claim of discrimination against DeBusk under the MHRA as a disability is an essential element to establishing any claim thereunder.

2. Lewis' Impairment Did Not Substantially Limit His Major Life Activity of Work

Even if Lewis' temporary seizure condition was sufficient in severity and duration to presumably constitute a disability, Lewis still failed to prove that his impairment substantially limited one or more of his major life activities as required under the MHRA.

As previously stated, a physical or mental impairment is one that "substantially limits one or more of a claimant's major life activities." Mont. Code Ann. § 49-2-101(19)(a)(i). A claimant is "substantially limited" only if the claimant is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." *Butterfield*, ¶ 21; 29 C.F.R. at § 1630.2(j)(ii). Courts require a claimant to specify the major life activity in which he claims to be substantially limited. See e.g., *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1216 (10th Cir. 2007); *Sinkler v. Midwest Prop. Mgmt. Ltd. P'ship*, 209 F.3d 678, 683 (7th Cir. 2000). In this case, through his testimony, Lewis identified work as the major life activity that he alleges was substantially limited due to his seizure condition. Thus, the proper inquiry is whether his seizure condition substantially limited his ability to work.

It is important to note that when a claimant is alleging that his or her impairment substantially limits their major life activity of work, the inquiry is not limited to whether the claimant can perform the aspect of the job or occupation that they held when the adverse employment decision was made. Rather, the appropriate inquiry is whether the claimant is substantially limited in working in a broad range or class of occupations. The inability to perform a single, particular job does not constitute a substantial limitation. . . ." 29 C.F.R. § 1630.2(j)(3)(i); see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) ("[t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills . . . are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs."). Thus, in order for Lewis to prevail, he must show that he was precluded from not just his job at DeBusk, but a broad range or class of jobs for which he was qualified. Lewis did not do this.

It is undisputed that Lewis' only restriction from his seizure condition was driving. Per Dr. Mosser's May 13, 2020 note, Lewis was released to perform all other aspects of his job. While driving may have been necessary to perform Lewis' job with DeBusk, he has not shown that driving was necessary to perform a "class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." In fact, Lewis' own testimony defeated any such allegation.

At hearing, Lewis testified that he specifically asked for a temporary transition to light duty work within DeBusk. Further, he implied that he was capable of performing the work of the other field technicians when he elicited evidence

pertaining to the other field technicians' ability to perform their jobs even though they could not drive. Finally, Lewis admitted that he was able to secure employment with another employer, doing significantly different work than he was performing at DeBusk, after his discharge. This evidence tends to show that Lewis could satisfactorily perform a broad range or class of jobs within or outside of DeBusk's operations. Since Lewis failed to put on any evidence to show that he was substantially limited from performing a broad range or class of jobs that he was qualified for, Lewis failed to prove that his major life activity of work was substantially limited by his seizure condition, and he, therefore, failed to show that his impairment constituted a disability.

This conclusion is consistent with case law analyzing this exact issue. For instance, in *Estate of Welch v. Holcim, Inc.*, 2014 MT 1, 373 Mont. 181, 316 P.3d 823, the Montana Supreme Court found that a claimant was not substantially limited in his major life activity of work because his impairment only precluded him from working the job he was discharged from, and not a class or broad range of jobs. Similarly, in *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182 (1st Cir. 2011), the Court held that an epileptic with, among other things, a lifelong driving restriction, failed to show that he was substantially limited in working a broad range of jobs. In *Cash v. Smith*, 231 F.3d 1301 (11th Cir. 2000), the Court found that a claimant's seizure condition did not substantially limit her ability to work because she failed to show that it disqualified her from a broad range of jobs. Finally, in *Deas v. River West, LP*, 152 F.3d 471 (5th Cir. 1998), the Court held that a claimant who was found to be precluded from working as an addiction counselor due to a seizure condition was not substantially limited in a broad range of jobs, but rather in her chosen or preferred occupation which did not meet the applicable definition.

Since Lewis has failed to show, by a preponderance of the evidence, that his seizure condition substantially limited his ability to perform a broad range or class of jobs, Lewis cannot maintain a claim of discrimination against DeBusk under the MHRA as a claimant is required to prove that he or she suffered from a disability is a prerequisite to establishing any claim thereunder.

B. Lewis is Not a Qualified Individual

Even if Lewis' condition did satisfy the definition of a disability, he still failed to carry his burden of proving by a preponderance of the evidence that he is an otherwise qualified individual. Lewis is not an otherwise qualified individual because he could not perform an essential function of his job and rejected the only reasonable accommodation that was available to DeBusk.

Determining whether an individual is "qualified" entails a two-step inquiry. The first step is to determine whether the person with the disability or impairment possesses the requisite background, work experience, skill, training, good judgement, and other job-related requirements." The second step is to determine whether the person with the disability or impairment, who is "otherwise qualified," requires an accommodation to perform an essential function. The disabled individual is "otherwise qualified" if he is qualified for a position but, because of an impairment, he needs an accommodation to perform an essential function. *McDonald*, ¶ 40 (citing Mont. Code Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.606(2); 29 C.F.R. app. § 1630.9). "'Essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position." 42 U.S.C. § 12926(f). The identification of essential job functions is a "highly fact-specific inquiry." *Cripe v. City of San Jose*, 261 F.3d 877, 888, fn. 12 (9th Cir. 2001).

In determining whether a task or duty is an essential function, the ADA provides that "consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). A job function may be considered essential for any of several reasons including, but not limited to, the following: 1) the function may be essential because the reason the position exists is to perform that function; (2) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and /or (3) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise of ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2).

Evidence of whether a particular function is essential includes but is not limited to: 1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents of the job; and/or the current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3).

Such evidence, however, is not conclusory: an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description. See *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 863-64 (9th Cir. 2009).

As for the first step of the qualified individual inquiry, Lewis argued that driving was not an essential function of his job because it was not listed in his job description as a technician. However, the substantial credible evidence in the record defeats this argument. The record establishes that Lewis' duties changed significantly once he started as a septic truck driver. Lewis testified that during the first approximate 8 months on the job, he worked as a technician performing tasks that were within his job description. However, after 8 months, Lewis was asked to perform the duties of the septic truck driver position, and solely performed the functions of that position throughout the remainder of his tenure at DeBusk. Since the substantial credible evidence in the record establishes that Lewis transitioned over to the septic truck driver position, and performed those functions for the remainder of his tenure at DeBusk, it is the functions of the septic truck driver position that control the analysis in this matter.

It is beyond dispute that an essential function of Lewis' job as a septic truck driver was driving. He was required to drive the septic truck to each site, pump out the waste, and then drive to Billings to dispose of the waste at another facility. It is undisputed that Lewis could not perform this essential function under the three-month driving restriction imposed by his medical provider. However, Lewis is still considered a qualified individual under the first prong of the analysis because he could perform the essential functions of the job when he was not under a temporary medical restriction.

However, under the second step of the "qualified individual" analysis, the question is whether the claimant is "otherwise qualified" meaning that there was a reasonable accommodation that could have allowed the claimant to perform this essential function of his job. Montana law requires employers to reasonably accommodate their employees if the employees are disabled or are regarded as such, unless the accommodation would impose an undue hardship on the employer or endanger the health and safety of any person. Mont. Code Ann. § 49-2-101(19)(b).

The essence of the concept of reasonable accommodation demands that in certain instances employers must make special adjustments to their policies for individuals with disabilities and the presumption is that such an accommodation is required unless the employer can demonstrate that the accommodation would impose an undue hardship. See e.g. *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999) (citations omitted).

An undue hardship is defined to require consideration of the following under Admin. R. Mont. 24.9.606(5):

a) the nature and expense of the accommodation needed;
b) the overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility, and other impacts of the accommodation on the operation of the facility;
c) the overall financial resources of the business, the overall size of the business of the employer with respect to the number of employees, and the number and type and location of the facilities of the employer; and
d) the type of operation or operations of the employer, including composition, structure, and functions of the work force of the employer, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer.

Admin. R. Mont. 24.9.606(5)(a)-(d).

Here, there were no reasonable accommodations that DeBusk could have instituted that would have allowed Lewis to perform his work during his driving restriction. DeBusk did not have any light duty positions available. Moreover, there were no other positions within DeBusk's Billings operation that were vacant that Lewis could have performed, and DeBusk had no positions available at any sites outside of Billings either. In this regard, DeBusk was not obligated to bump another employee from his or her position to accommodate Lewis. The EEOC's official guidance at EEOC CVG 2003 "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA" expressly states that while assignment to a vacant position could be a reasonable accommodation, "[t]he employer does not have to bump an employee from a job in order to create a vacancy, nor does it have to create a new position." *Id.*; see also *Gile v. United Airlines*, 95 F.3d 492, 499 (7th Cir. 1996) (holding that an employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee).

Thus, the only other reasonable accommodation that DeBusk could have offered Lewis was medical leave. A leave of absence for medical treatment may be a reasonable accommodation. See 29 C.F.R. 1630 app. § 1630.2(o). The Ninth Circuit has held that where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified. See *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). Lewis argues that DeBusk discriminated against him because it failed to offer him a medical leave of absence throughout the duration of his driving restriction. However, the record establishes that DeBusk offered him leave and Lewis explicitly rejected DeBusk's offer of FMLA leave.

It is undisputed that DeBusk offered Lewis the option of taking FMLA leave. FMLA would have provided Lewis with 12 weeks of leave and protected job status while he was medically prohibited from driving. It is also undisputed that Lewis rejected this offer upon learning that it was unpaid and would disqualify him from receiving unemployment benefits. Lewis argues that DeBusk should have offered him a regular medical leave of absence as an accommodation, so that he could have collected unemployment insurance benefits.

Lewis' argument is puzzling because he faults DeBusk for not offering him a leave of absence when that is exactly what it did. Furthermore, a regular medical leave of absence or an FMLA leave of absence is a distinction without a difference as Lewis would not have been eligible for unemployment insurance benefits either way. Leaves of absence, except for those involving a work-related injury, are disqualifying events for purpose of unemployment insurance. *See* Mont. Code Ann. § 39-51-2112. In fact, the leave offered by DeBusk was more protective of Lewis' interests as it would have guaranteed Lewis' position upon his return. Since Lewis would not have been eligible for unemployment insurance benefits, and because Lewis rejected the essentially same leave he claims DeBusk should have provided, it cannot be said that DeBusk failed to accommodate him. Therefore, even assuming Lewis had a disability, and assuming he was qualified to perform his position, he did not prove the second element of the *McDonald Douglas* burden analysis by a preponderance of the evidence because DeBusk did not fail to accommodate him.

Furthermore, persuasive authority holds that it is not a violation of the Family and Medical Leave Act for an employer to discharge an employee that refuses to accept FMLA leave. 29 C.F.R. § 825.312(b) provides that "if an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of the FMLA leave until an employee submits the certificate. *If the employee never produces the certification, the leave is not FMLA leave*. (internal citations omitted) (emphasis added). Where an employee's FMLA leave is delayed because the employee refuses to provide the requested certification, the subsequent absences are not excused. *Ridings v. Riverside Medical Center*, 537 F.3d 755, 770 (7th Cir. 2008). While these provisions apply to the FMLA, the provisions are again, persuasive authority that Lewis was not a qualified individual because he did not avail himself of the reasonable accommodation that was offered.

C. Failure to Engage in the Interactive Process

Lewis also makes a tacit allegation that DeBusk did not engage in the interactive process; however, the substantial credible evidence in the record establishes that it did engage in the interactive process in a manner that satisfies the

requirements under the MHRA. Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. *McDonald*, ¶ 80 (citing *Barnett v. U.S. Air*, 228 F.3d 1105, 1111-14 (9th Cir.2000) (en banc), *judgment vacated on other grounds*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002); 29 C.F.R. § 1630.2(o)(3), app. § 1630.9). The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. *Barnett*, 228 F.3d. at 1114-15. Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. *Barnett*, 228 F.3d. at 1116.

Here, the record establishes that DeBusk appropriately engaged in the interactive process. Lewis requested a reassignment to a light duty position. DeBusk considered that request, but DeBusk had no light duty positions available. DeBusk also considered whether it could accommodate Lewis by moving him to another technician position either within its Billings operation or outside of Billings, but determined that such an accommodation was not reasonable because it would have required DeBusk to create a new job or strip an existing job of its principle duties. DeBusk then offered Lewis to go on FMLA leave as an accommodation, which Lewis rejected. This evidence proves that DeBusk engaged in the interactive process sufficient to satisfy the requirements under the ADA.

Though DeBusk did not consider any other type of leave for Lewis, there is no merit to Lewis' allegation that this constitutes evidence of DeBusk's failure to engage in the interactive process. DeBusk offered Lewis with job-protected FMLA leave as an accommodation. Lewis' rejection of DeBusk's FMLA leave offer was due to his understanding that it would have made him ineligible for unemployment benefits. However, even if DeBusk had offered him standard medical leave, Lewis still would have been ineligible for unemployment benefits. As such, since the leave offered by DeBusk was more protective than the leave that Lewis wanted, and because it would not have resulted in any difference, it cannot be said that DeBusk failed to engage in the interactive process in this case.

IV. CONCLUSIONS OF LAW

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

2. DeBusk did not illegally discriminate against Lewis.

3. Lewis failed to prove, by the preponderance of the evidence, that he has a disability, was a qualified individual, or that DeBusk failed to accommodate him under the MHRA.

4. Since Lewis failed to carry his burden of proof, he is not entitled to any damages in this matter.

5. For purposes of Mont. Code Ann. § 49-2-505(8), DeBusk is the prevailing party in this matter.

DATED this 9th day of May, 2022.

/s/ JEFFREY M DOUD
Jeffrey M. Doud, Hearing Officer
Office of Administrative Hearings

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Tucker Lewis, Charging Party, and his attorney, Eric Holm; and USA DeBusk, Respondent, and its attorneys, Jeffrey A. Weldon and Kyle A. Moen:

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 & 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 original transcript is in the contested case file.